

Part III. Drafting within the Frameworks of Constitution and International Instruments

Chapter V: Structure of Laws

Section I. Conceptual Framework

5.1.1 Legal Materials

First and foremost, the term legislation refers to laws enacted by a law-making body. It is also used in a sense of making laws or as the process of making law. The law-making body itself is referred to legislature, whereas legislator actually pertains to individual member constituting the legislature. The word legislative is used as adjective and should always come before a noun. Legislation, in its first sense, refers to, therefore, laws made, enacted or promulgated by a legislature. The word promulgated emphasizes enacting law through publication and carries with it the connotation of royal or divine prerogative; as prerogative is distinguished from power or authority, for prerogative is “[a]n *exclusive or peculiar privilege. The special power, privilege immunity, right [and]/or advantage vested in an official person, either as generally or in respect to the things of his office, or in an official body as a court or legislature.*”¹

Under the present Ethiopian Legal System, legislation pertains to all proclamations enacted by the HPR and Regulations issued by the Council of Ministers. State laws made by the respective bodies are, likewise, legislations. Laws enacted by Federal or State executive organs, even before being endorsed by the respective legislatures, are laws pursuant to Emergence Power envisaged by Article 93 of the Constitution.

Legal materials also consist of laws properly enacted not yet repealed (not even tacitly), customary rules, moral etc. incorporated directly, indirectly or by reference in or by legislations.

¹ Henry Campbell Black, Blacks Law Dictionary , sixth Ed., (West Group, Bolton Massachusetts, 1990)

The other indispensable requirement for any *law* to become law is that it must be upheld by the principle of “Rule of Law”, and as is enunciated by Article 71(2) of the FDRE Constitution, should be published in the Federal *Negarit Gazette*, as that had been made a requirement for validity.

Structure of legislations, conceptually, relates primarily to legal system. Law itself is and presupposes a particular way of organizing what a socio-legal system considers to be its legal system; which quite often is called *sources of law*. Source of law, by itself, is an ambiguous reference as in one of its senses it connotes conceptual institutions from which the law is derived from such as *moral, custom, fad and fiction* and the like.² In its second sense, it refers to those laws which are used by the judges in cases of resolution. It is in this second sense that legal material is used in *this* text and as such legal materials are identified with reference to the word *law*, wherever and whenever this word is used by Courts. Laws identified thus are traditionally distributed under various labels such as contract, tort, crime, property, .. and so on and so forth, and new categories keep emerging such as Intellectual Property Law, Human Rights and Humanitarian Laws and the like. Reflection on the nature of this material, in whichever way it may have been presented, shows that these categories are not of uniform texture. One may still find different ways of classifying the texture. The one that will be adopted here is categorization on the basis of the functions performed by different kinds of provisions or parts of legislation.

With a view to *organize* and *strengthen* the recently issued Council of Constitutional Inquiry Proclamation No. 250/2001, which, among other things, defines law as constituting “*the Proclamations and Regulations issued by the Federal Government or the States as well as international agreements which Ethiopia has endorsed and accepted;..*”, all and anyone of these start from single or series of provisions which one may designate as “Rule”.

Roscoe Pound is credited for bringing home the vital connection between and among laws of different hierarchy and governing varied aspect of life. His method, as modified by one of the developers, are:

² R.W.M. DIAS, *Jurisprudence*, 5th Ed., (ADITYA Books Private Limited, New Delhi, 1994), pp. 60-62.

1. rules are percepts, which attach definite consequences to definite factual situations, and as such, pointing to directions and delimiting the scope of application, as preambles, head titles, etc...
2. standards are rules that prescribe the limits of permissible conduct.
3. principles are authoritative points of departure for purpose of legal reasoning, wherever interpretation is required.
4. concepts are categories to which classes of situations can be referred to and on the bases of which a set of rules, standards or principles become applicable.
5. doctrines are the union of rules, standards, principles and concepts applicable in respect of particular situations; or on the bases of which a logical scheme of reasoning can be followed; on the bases of which the rational institution can be built; or pursuant to which reasonable resolution of disputed cases can be attained.

A rule may, therefore, constitute one single Article, or one composed of Sub-Articles or a series of Articles³ connected by a certain system (logic). Let us take this as the smallest building block of structure of law: legislation, .. legal system.

5.1.2 Building Blocks: Rules, Concepts and Doctrines⁴

“Rule” connotes a standard by which to judge conduct, or on which to base one’s own conduct. All the kinds of legal material that have been discussed share this rule-quality directly or indirectly. A duty is always a pattern of behavior that serves as a general standard with reference to which deviance is condemned as being wrong, not just incorrect. For this purpose or as means of achieving legal ends, certain ‘*standard*’ procedures are found set for effective exercise of certain powers; the requirements stipulated in definitions are the basis on which those concerned profess when using terms; locations of jural relations similarly require such person to proceed on the basis that claims, duties, etc... vested in certain parties and not others. The ‘*rule-ness*’ of principles, doctrines is self-evident.

³ Look at for instance Articles 937, 938, 939, and 940. These are four Articles with their own Sub-Articles, excepting the last; and yet they are connected: dishersion -.1. express, special provisions regarding decent, tacit dishersion, prohibition of certain provisions, which can be considered as a single Article, these being Sub-Articles, and the Sub-Articles being the Sub-Sub Articles thereof, respective. .

⁴ Id., pp. 47-48.

Here, three questions arise:

- 1) How did the words *rule* and *law* come to be associated with *standard*?
- 2) What does “acceptance of standards” mean?
- 3) How does law presuppose as a legal system?

As regards to the association of *rule* and *Law* with *standard*, fascinating development lies in the history of Roman Law.

- 1) The story in broad outline is that ‘*lex*’ (i.e. “Law”) meant declared law (derived from ‘*lego*’ - I declare.) as opposed to ‘*jus*’, which was Customary Law, that crystallized out of decisions. In the course of time, ‘*leges*’ became expressions of popular will through enactment by the assemblies and their function was prescriptive like modern legislation and ceased being declaratory of ‘*jus*’.
- 2) The term *regular* (i.e. “Rule”) came in to use via the Grammarians for whom it connoted *guide* or *standard*. One of the most distinguished jurists of the early Participate – Labeo – a Grammarian turned lawyer, pioneered the use of regular for certain legal axioms which had prescriptive function. The association of regular with ‘*lex*’ evolved some time during the second Century A.D. via imperial decrees, which had taken over the role of ‘*lex*’. During this period “Rule Books”, or *Regulars*, named after the jurist who had been commissioned to prepare them, were issued under imperial authority to subordinate officials as manuals for their guidance. These *Regulars* thus had the force of ‘*lex*’.
- 3) The *Regula*, which had been worked-out privately by certain of the great jurists during the Second and Third Centuries AD, the classical period of Roman Law, were later officially invested with the force of ‘*lex*’ by the Law of Citation in the 4th AD. Finally, Justinian’s Digest, which codified much of the writings of the classical jurists, was itself promulgated as a ‘*lex*’ by the emperor. It is significant that the finale of this monumental work, its concluding Title, Book 50, consists entirely of a collection of *Regula*. The association of *rule*, *law* and *standard* was thus gradually completed and has formed the basis of legal thinking ever since.

Having seen this, one should recognized that first and for most there are facilitating legal materials as distinguished from legal materials proper. It is to this latter category we refer to as “rules” and “standards”.

Rules and standards may embody categories of relations: (1). Jural relations whose each element has to be understood in terms of its correlative concept, and (2). other legal materials.

5.1.3 Component Parts of Law (Functionally)

A. Enacting Jural Relations

The first category (jural relations) consists of the following:

1. “Claims (rights)”, prescribing how people ought or ought not behave with regards to others vis-à-vis “duty”;
2. “Liberty (privileges)”, to act or not to act vis-à-vis “no claim” (or “no right”);
3. “Power”, to alter existing legal situations vis-à-vis “liberty”;
4. “Immunities” having existing legal situations be altered vis-à-vis “disability”;

In terms of *correlativeness*, *oppositeness*, *contradictoriness*, jural relations are interrelated and categorized in the following manner.⁵

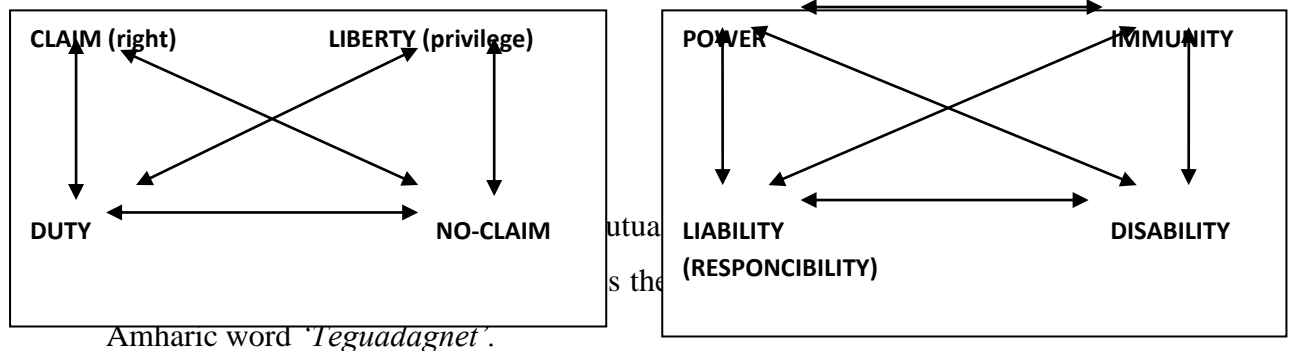
	Right	Privilege	Power	Immunity
Jural Correlatives {				
	Duty	No-right	Liability	Disability
	Right	Privilege	Power	Immunity
Jural Opposites {				
	No-right	Duty	Disability	Liability

Claims, liberties, powers and immunities are haphazardly used so as to signify rights. For purposes of clarity and consistency in drafting, the following scheme of arrangement has been found useful by the developers.

An important preliminary point is that a jural relation between two parties should be considered only between them, even though the conduct of one may create another jural relation between him and someone else.

⁵ Id., pp. 24-25.

This can be expressed through a diagram as follows:



- b) **oppositeness** is taken as to mean a position confronting another or placing in contrast, or anti-thesis; in the sense of the Amharic word ‘*Teqaraninet*’.
- c) **contradictoriness** is taken as to mean as we lawyers quite often refer to “*contradiction in terms*”, or concepts, ..., which cannot go together –*oxymoron*– like an innocent murder; in the sense of the Amharic word ‘*Tetsararinet*’.

When operating with this scheme, the following formulae would therefore be imperative;⁶

Jural Correlatives (look at vertical arrows and read both ways):

[a] ‘... in one person, X, implies the presence of its correlative, ..., in another person, Y’. Thus, claim in X implies the presence of duty in Y (but in so far as duties may exist) without correlative claims; the converse proposition is not always true).

[b] Again, liberty in X implies the presence of no-claim in Y, and vice versa.

Jural Opposites, including what one might here call jural negations (diagonal arrows and read both ways):

[a] ‘... in one person, X, implies the absence of its opposite, ..., in himself’. Thus, claim in X implies the absence of no-claim in himself, and vice versa;

[b] Duty in X implies the absence of liberty in himself and vice versa.

Jural Contradictories (look at horizontal arrows and read both ways):

[a] ‘... in one person, X implies the absence of its contradictory, ..., in another person, Y’. Thus, claim in X implies the absence of liberty in Y, and vice versa.

⁶ Ibid.

[b] *In the case of duties which correlative claims, a duty in X (absence of liberty) implies the absence of no-claim in Y and vice versa.*⁷

As explained above, these four are concerned with legal relationships between persons and are referred to as “jural relations”. The remaining can be characterized as “facilitating legal materials”. So, any instrument, such as for instance a Proclamation, can be divided into two parts. One consisting of all provisions, which are normally characterized as *enacting provisions*, would often be provisions of jural relations. The second group consists of other variety of materials that can be designated as facilitating legal materials, which consist of Preambles, Title, definitions, which prescribe the legal and contextual use of words, phrases and clauses and the like. As regards Preambles, titles, etc., explanations will be given later on.

B. Enacting non Jural-relations

The second category mentioned above as “other legal materials” (enacting non Jural-relations) consists of the following:⁸

1. “Means of achieving legal ends”, are those rules and standards (provisions) which prescribes how certain ends are to be achieved.
2. “Principles”, “concepts” and “doctrines” are rules and standards (provisions) which are respectively:⁹
 - a) authoritative points of departure for legal reasoning in cases not covered by rules and standards.
 - b) classes of transaction and situations, which can be referred to and on the basis of which a set of rule, standard or principle become applicable.
 - c) the union of rules, principles and concepts, which ought to be applied so that the reasoning may proceed on the basis of the scheme (doctrine) and its logical implications.

⁷ Id., pp. 23-43. Known as Hohfeld, who, an American Jurist, developed this scheme with incisive logic to make the distinction between this seemingly homonym and antonym. (See propositions, *infra*. Under this Chapter.)

⁸ Id., pp. 44-46.

⁹ Id., p. 434

4. “Location of legal relationships” are rules and standards (provisions) which determine the incidence of jural relations; i.e. on whom the right or duty actually applies.¹⁰

The concept of *rule* had been examined by Professor Hart whose explanation rests on the distinction between what he calls the *external* and *internal* points of view. The former is the point of view of an outside observer, who simply describes behaviour as he sees it; like *people do in fact behave in such a way* manner. The latter is the point of view of a person, who treats the behaviour as a prescriptive pattern of how he and others ought to behave. In other words, the latter *internalizes* it.

Internalized patterns of behaviour are expressed, not just descriptively as the external observer would do, but in terms of *ought*; i.e. in such a condition, the point is not whether people do or do not conform, but *that they ought to do so*. Internalization moves from the realm of the “is” (or “*sein*” in German) – or what happens in fact – into that of the “ought” (or “*sollen*”).¹¹

As stated above, rules are, therefore, precepts; i.e. attaching definite consequences to definite factual situations. Standards, on the other hand, are prescriptions that limit permissible conduct. Hence, these two are complementary notions which should be used as a unit to become the building blocks of the first layer of law.

The characteristics of a rule, says professor Hart, lies in internalization; i.e. acceptance of a pattern of behaviour as a standard. He distinguishes *rule* from *habit* in that habits only involve shared behaviour, which is not enough for rules to be; nor do habits serve as standards.

Acceptance of a standard according to which people *ought to act* leads to discerning between rightful and wrongful acts; i.e. leads ultimately to avoiding, and furthermore condemning deviations as wrong deeds.

¹⁰ Id., p. 45 and p. 434.

¹¹ Id., pp. 48-59.

A further distinction might be drawn between internalization of the rule by citizens and by officials. Citizens accept a pattern of behaviour as a standard for themselves, but stop short of making it their own duty to pass an official judgment of the conduct of others on the subject. On the other hand, officials should do both, simultaneously; they should accept it as a guide for their own conduct as well as accept a concomitant duty to apply it when judging the conduct of others, officially.

Section II: Rules, Laws and Legal System¹²

Rule, classically, did not consist of “a Law”. This might be because “a Law” is only a particular way of organizing the “rule materials”. This might as well be because its formulation presupposes to some extent a concept of legal system. The concept of “a Law” presupposes “Legal System”.

Here, the point is a legal system shall be conceived as to being a *one* way or a two ways system; i.e. whether the legal system is an open or a closed system.

An *open* concept confines “the Law” to areas of specific regulation by authority. Areas not yet regulated are, then, outside “the Law”; which means that the concept of law remains open in these areas to be regulated in the future. On the other hand, a closed concept treats all areas as falling within “the Law” whether regulated positively or negatively in the sense that it is still “the Law” that allows or creates liberty.

The upshot of all this is that “Law” is part of the basic material, since in one way or another it reflects a legal system.

Bentham and Austin believed that law in the sense of legal system is only the sum-total of laws and that elucidation of “a law” is all that is necessary. Roscoe Pound classified the institution of law as follows:

“There are, first, rules, which are precepts attaching definite consequences to definite factual situations. Secondly, there are principles, which are authoritative points of departure for legal reasoning in case not covered by

¹² Id., pp. 59-60.

rules. Thirdly, there are conceptions, which are categories to which types or classes of transactions and situations can be referred and on the basis of which a set of rules, principles or standards becomes applicable. Fourthly, there are doctrines, which are the union of rules, principles conceptions with regard to particular situations or types of cases in logically interdependent schemes so that reasoning may proceed on the basis of scheme and its logical implications. Finally, there are standards prescribing the limits of permissible conduct, which are to be applied according to the circumstances of each case.”

5.2.1 Pattern of Interrelation¹³

A railway system, for example, is not just the sum-total of tracks and rolling stock stacked together; the system is the pattern of their linkage and distribution. In areas rich in coal and iron, of instance, and around major ports, the network of railways will tend to be thick and complex, but less so in areas of desert; and the lay-out will vary again in mountainous districts and over plains.

With regard to a legal system, it may be stated that the pattern of linkage imparts unity to all its components, which can be discerned through the concept of validity and through the institutional structure.

Validity refers to the law’s quality – quality of its proposition, whether its proposition is a valid proposition of law; if not, it is invalid. Validity, therefore, unifies legal material at its foundation; it is what makes it legal at all, thereby precluding it from non-legal material.

In reality, [t]he institutional structures of a [formidable] legal system pulls it together in a different way by assigning the various tasks to constituent institutions. Accordingly, there are law-making institutions.

Next, there are law-applying and law-enforcement institutions. Courts come into this category, and in addition to those that can make law, there are a number of subordinate courts and tribunals, all of which are defined. Likewise, the range of orders and punishments Courts

¹³ Id., p.61.

can decree is defined. Enforcement through the use of organized force is institutionalized through bodies such as the Police and other governmental bodies and offices.

Finally, “the Law” conceptualizes the existence of certain institutions through which the law itself is pulled together; i.e. institutions which deliberate on factual situations, and those which deliberate on legal consequences. Meaning, instead of each situation being governed separately by its own regulation, a principle derived from a single but broad concept, applicable to a class of regulations is applied. This is accomplished through unifying concepts, like, such as possession, ownership, etc ...

5.2.2 Purposes and Functioning¹⁴

The inclusion of the word system in the legal framework implies that the legal system consists of coordinated activities, as a system can never ever exist devoid patterned coordination. Coordination, in turn, implies that activities more often are not haphazard, which, but purpose that they are directed towards achieving different objectives i.e. they are directed towards achieving collective objectives that are in line with the common goal.

Generally speaking, the activity of any phenomenon continues to exist till a necessary period passes, during which time its propellant (*‘inertia’*) subdues. During that period of time, the way in which certain tasks are put into effect as well as the extent of their success or failure continue to invoke inquiry into their actual functioning. Similarly, the actual functioning of the various legal institutions during a period of adjustment invites attention.

To list the many tasks which a legal system sets out to achieve would be tedious. Broadly, it can be said that one of its crucial task is to provide a framework within which people conduct their affairs.

Thus, the legal framework, if properly and genuinely formulated and utilized, shapes many daily activities; e.g. buying and selling, giving credit, etc... can be shaped in a way that promises are surely enforced.

¹⁴ Id., p. 62.

1. Naturally, the most crucial, important task of the “the Law” is, indeed, to achieve justice in society. As one of the main purposes of any legal system it is difficult to see how this could be doubted, whatever the problems and difficulties that beset the meaning of ‘justice’ and the practicalities of its achievement.

Justice is integral to the concept of a legal system; the etymology of the word ‘law’ itself derives from what is *‘fitting and right’*.

2. Beside, “the Law” contributes to the conducts of citizen’s. Another more difficult task of the *legal system*, which should be mentioned here, is its function in shaping people’s perception; its contribution to citizen’s *cognition* of the proper social order.
3. Even where injustices are practiced, and no one doubts that these do occur, the authorities contrive to hide them behind a veil of justice, however thin; and it is when such practices become intolerable to the masses and the veil becomes threadbare and transparent that revolution tears the system apart in the hope of establishing a new and more just system in its place. This in away is also the attainment of justice.

The achievement of a minimum of justice is a condition *sine qua’non* of the continuity of a legal system. Taking Aristotle’s approach as our own crucible of testing what justice is, it can be characterized as universal and particular justices. The universal aspect of justice would be too broad for this text to encroach into. The particular character of justice was dichotomized by Aristotle in to two, i.e. distributive and corrective (remedial).

1. Distributive, here, pertains to allocation of resources, advantages, entitlements, etc ...
2. Corrective justice, as its name suggests, is remedial in nature; i.e. preventing the abuse of power as much as the abuse of liberty, and rendering just decisions with the view to compensate the victim and penalize the wrong doer.

The instruments of a legal system and a law are

1. in respect of distribution are those aspects of jural relations which fall in the upper horizontal line, i.e. claim (right), liberty (priviledge), power, and immunity.
2. Whereas the distributive aspect is achieved by those elements in the lower horizontal line, i.e. duties, no claim (no right), liability (subjection, responsibility), disability.

Any legal system should be constructed using these mentioned instruments, the final goal of which is attainment of justice with certainty. Also, it should go along with time, adjust to requirements of new conditions useful to modernity.

Taking note of the basic threads that are found in each and every pieces of legislation, if taken together (abstracted from each piece), would enable us erect (formulate a legal system). Thereafter, it would be proper to look into the basic structures of any typical, yet comprehensive legislation.

Questions

1. See Articles 842-847 of the C.C. (Succession). Are rules invoking the doctrine established by Roman Law in respect of inter state succession, which since then has developed without losing its basic essence? The doctrine or principle here is that nature that determines who the successor is.
 - a) Then, Articles 942-1059, what do they determine (i.e. jural relations *per se* or do they serve the functions of other legal materials?
 - b) How about Articles 1060-1113?
2. How does the above conceptual framework – i.e. from simple rule-provision to legal system help you to formulate structure for your draft and maintain your bill within the *corpus juri* of Ethiopia?
 - a) Understand claim/duty (“you ought”) correlative relations, as they make distinction between:
 - Claim on one hand and liberty, privileges;
 - b) Power/liability (“I can”) correlations:
 - in claim and power;
 - duty and liability;
 - liberty and power.
 - c) Immunity – Disability (“you can not”):
 - Claim and immunity;

➤ Liberty and immunity.

3. Kinds of

a) Liberties; b) Limits of liberties.

4. Rightful and wrongful powers.

5. Kinds of powers.

6. What are the merit and demerits of Hohfeld's scheme of analysis of jural relations?

(Read Annex, first.)

