



DIPLOMA IN SOCIAL WORK AND COMMUNITY DEVELOPMENT

LEGAL ASPECTS(LAW)



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PURCHASE FULL NOTES

LAW IN SOCIAL DEVELOPMENT

MAIN AREAS OF STUDY

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- Classification of law
- Sources of Kenya law
- Organization of the judiciary in Kenya

THE LAW OF TORT

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- Tort and contract
- Vicarious liability
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- Meaning and scope
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REFERENCES

INTRODUCTION TO LAW

Definition of law

The word law has not had a universal definition. This is because it has been used in a variety of senses to mean moral laws, laws of social, physical and physical sciences and the laws of the state. Out of these it is the laws of the state that are important for our study.

Generally law means rules of conduct that are given by the authorities and applied on subjects for the purposes of achieving justice' in society. According to Salmond, law means a body of principles recognized and applied by the state in the administration of justice. Holland defines laws as a general rule of external human action enforced by a sovereign political authority.

Woodrow Wilson defines law as that portion of the established thought and habit of mankind which has gained distinct and formal recognition in the shape of uniform laws supported by the authority and power of Government.

Characteristics of law

From the above-definitions, the following characteristics of law may be established.

1. Set or body of rules. -

Law is composed of a set or body of rules. These rules may originate from customs of the people, acts of Parliament, Court cases, or some other acceptable sources. They may be rules which prohibit certain types of behaviour or which require people to compensate others whom they may have injured in some way.

2. Applicable to community.

The set or body of rules applies to a specific community e.g. a sovereign state, business community or even an institution. These rules may differ from community to community.

3. Guidance of human conduct.

The set or bodies of rules are intended to govern or guide human conduct or behavior in a society. Therefore rules which fail the test of guidance are either amended or removed altogether.

4. Change of law.

Because the society is dynamic, law must also change according to the changing circumstances of the society. Therefore law has the character of changing from time to time. e.g. what was good law at independence may not be good law in Kenya today.

5. Enforcement of law

Law must be enforced otherwise its objectives may not be achieved. Enforcement is effected by law enforcement agencies e.g. the police and courts of law.

Purpose of law

The purposes of law are summarized as follows:

- i. To establish social economic justice by creating a balance, through legislation, in the social economic structure
- ii. To achieve a welfare state by enacting or making social welfare loss
- iii. To make human association possible and conducive for the welfare of the state and its people.
- iv. To regulate the conduct or behavior of persons in society generally.
- v. To protect the fundamental right and freedom of individuals
- vi. To ensure peace order and security amongst individuals.
- vii. To provide justice to members of the society generally.
- viii. To establish procedures and regulations regarding dealings amongst individuals

CLASSIFICATION OF LAW

- 1) Public and Private Law
- 2) Civil and criminal Law
- 3) Procedural and substantive Law
- 4) Principal and international Law

1. Public And Private Law

Public **law** means the law that governs the relation between the state and its citizens. It is that branch of the law in which the state has an interest. It consists of constitutional law, administrative law and criminal law. Constitutional law regulates the relations between different organs of the state i.e. the executive the judiciary and the legislature.

Administrative law is concerned with how the executive arm of the government functions. Criminal law deals with wrongs committed, against the state

Private law; means the law concern with rights and duties of persons towards persons, it is that law which regulates the conduct of persons in their capacity as individuals. It is also called civil law and includes the laws of contract, property, succession, trusts, and torts.

2. Civil and criminal law

Civil law means the law which regulates the relations of individuals amongst themselves and it falls under private law..Criminal law deals with wrongs committed against the state and it falls under, public law. Following are the points of distinction between civil lay and criminal law.

Parties- in a criminal case the parties to the dispute are called the state (prosecution) and the accused whereas in civil case the parties are known as the plaintiff and the defendant

Court and procedure - criminal cases are handled in criminal courts guided by procedural law called the criminal procedure rules. On the other hand civil cases are dealt with in civil court with the help of the civil procedure rules.

Party Injured (victim)- In the case of criminal wrongs the injured party or victim is the state (public) which must take steps to prosecute the offender In the case of civil wrongs the injured party is the private individual (Plaintiff) and the state have no interest at all.

Attorney General Consent — in all criminal cases consent or permission of the DPP must be obtained before any prosecution can be commenced. No such consent is required in civil cases.

Standard of proof — in criminal proceedings the prosecution must prove its case against the accused "beyond reasonable doubt" Any benefit of doubt must be given in favour of the accused. In civil proceedings, the plaintiff is only required to proof its case against the defendant on a balance of probabilities': i.e. the evidence must show-that the plaintiff is likely to succeed in his case as compared with that of the defendant.

Compromise of eases —Criminal matter being a public wrong it cannot be compromised by the parties. It is only in very rare cases that the prosecution may withdraw its ease against the accused. On the other hand civil matter being a private wrong the parties are free to with draw and settle it out of court at an time provided judgment has not been delivered.

Punishments - under criminal law punishment may be in the form of payment of fine, imprisonment for a term, life imprisonment and even capital punishment. On the other hand under civil law, punishment is usually payment of fine to the plaintiff or any other civil remedy.

Purpose and fine - Generally the purpose of criminal law is to punish the accused and any fine imposed on the accused by the court is payable to the state as the victim. On the other hand the purpose of civil law is to compensate the injured party hence any fine imposed by the court on the defendant is payable to the plaintiff as the victim.

3. Procedural and substantive law.

Procedural law - means the body of legal rules which define or specify the steps to be taken or followed by a person who intends to do a lawful act. It lays down the rules of procedure governing proceedings in the high court and the court of appeal as well as other areas of law. It includes the civil and the criminal procedure rules, rules of procedure for registrations of companies, trade unions, societies etc.

Substantive law - deals with actual wrongs whether of civil or criminal nature by defining them, outlining their essential elements and providing remedies for each of them.

4. Municipal and International law

Municipal law - refers to the law existing within a particular state. It deals with laws regulating the conduct of persons within a particular country. Such municipal laws may be in the form of public or private laws, civil or criminal laws and substantive or procedural laws etc

International law is the branch of law which regulates the relations between different sovereign States. It is divided into two branches namely:

- a. Public international law
- b. Private international law

Public international law regulates the relations between various Nations of the world i.e. the international community. It is derived from customs treaties and conventions adopted by the states under the United Nations Organizations. Disputes between member states are settled by the International Court of Justice situated at The Hague in Netherlands, formerly Holland.

Private International Law — it is also known as conflict of laws. It is concerned with determining which national law governs a case in which there is a foreign element. In other

words it determines the national law to be applied in a case involving one citizen of one country and a citizen of another country.

SOURCES OF KENYAN LAW

The phrase source of Law refers to origin of law or where law is found. Such sources of law may be in the form of written or unwritten, internal or external sources. The written sources are those that are reduced into writing e.g. the constitution and Acts of Parliament. The unwritten sources include customary laws. Internal sources are those that are found within Kenya e.g. Customary Laws of Kenya. External sources are those found outside Kenya e.g. the common law of England and Doctrines of Equity.

Source of Law may also refer to the historical factors which led to the-development of rules of law. It may also refer to the social factors which led to the creation of law e.g. Culture, morality, religious beliefs, economic and political environment etc.

The sources of Kenyan Laws are outlined under Section 3 of the Judicature Act (Cap 8) as follows:

1. The Constitution of Kenya
2. Legislation (Acts of Parliament)
3. Delegated/Subsidiary Legislation
4. Common Law &. Doctrines of Equity
5. African Customary Laws
6. Islamic Laws
7. Judicial Precedents
8. Statutory Interpretations
9. Hindu Laws
10. Law Reports

THE CONSTITUTION OF KENYA 2010

A Constitution refers to rules and principles governing persons within a particular institution, The Kenyan constitution is a written constitution that governs the state and citizens, it defines the form of government, its organs, and how they relate with each other and the citizens in general.

The Kenyan constitution is the supreme source of law. Its supremacy is established under Article 2 which provides that the constitution is the supreme law of the republic and binds all persons and all state organs at both levels of government.

The supremacy of the constitution as a source of law is also established under *Article 2 (4) which provides that any law, including customary law that is inconsistent with the constitution is void to the extent of the inconsistency.* This means that, all written and unwritten laws in Kenya must comply with the provisions of the constitution otherwise the constitution will prevail over them.

As the main source of law the constitution establishes the organs of the state, it establishes the executive with the president as its head and gives it privileges and immunities. It also establishes the judiciary, and details how judicial officers are appointed together with their rights and privileges.

It further establishes the Legislature with the prerogative of making laws for the country both at the national and county levels.

The constitution also guarantees the fundamental rights and freedoms of individuals and provides remedies for the protection of such rights and freedoms. It gives citizenship and indicates how it can be acquired or lost. It provides for finance and financial matters in relation to principles and framework of public finance and other public funds, revenue, budgets, spending and control of public money.

The constitution also establishes the public service and outlines its Values and principles to be observed by the Public Service Commission_ and the Teachers Service Commission in this respect. It also establishes national security organs e.g. the Kenya defense forces, national intelligence service and the national police service; it also details commissions and independent offices.

The constitution therefore is the ground upon which all the other forces of law are established. To this extent, the constitution is a source of Kenyan Laws.

LEGISLATION (ACTS OF PARLIAMENT)

Legislation refers to the process of making law. As a source of law, it means the laws enacted by parliament. It is the most important source of law in the present day because majority of laws originate from parliament. Through legislation, Parliament can make new laws and even amend or abolish existing laws. Parliament makes laws through bills passed by (the national assembly. A bill means a proposed law. Such a bill may be in the form of public or private bills. Public bills are those that relate to matters of general application i.e. the public. Private bills are concerned with specific individuals or issues of private concerns.

Procedure for enactment of a bill into law

Before a bill is presented to parliament for legislation, it must be gazette after which it undergoes the following parliamentary process:

The 'First Reading

This stage involves introduction of the bill in Parliament by reading its title. It is known as notice of motion. No debate on the bill takes place at this stage and it is approved by majority vote it is officially printed and circulated among members in preparation for debate during the second reading

The Second Reading

At this stage the mover of the bill is required to explain clearly its content and other issues of policy it is to affect. Members are then allowed to debate on the bill but each member can speak only once. The bill is then voted for and if it is approved, it passes to the next stage

The Committee Stage

At this stage, the bill may be dealt with by the committee of the whole house or it may be referred to a smaller select committee. The purpose of the committee is to examine the bill in details and give its recommendations, proposals or amendments as the case may be

The reporting stage

At this stage, the chairman of the committee presents the bill to the committee of the whole house together with its recommendations, proposals or amendments. In practice, full debate on the bill is completed at this stage and the bill only passes to the next stage it is approved by the whole house with or without the amendments proposed by the committee

The Third Reading

At this stage, the principles of the bill are not debated but minor drafting changes are permitted after which it is subjected to voting. It is approved by majority vote, it passes to the next final stage.

The President's Assent

Within 14 days after the President receives the bill from the Speaker, he may assent to the bill or refer the bill back to parliament for reconsideration. If the President assents to the bill or does not assent to it within 14 days of its reception, the bill shall be taken to have been assented to. Such a bill must be gazetted in the official Kenya gazette for it to become effective and operational

Advantages of Legislation

Democratic Legislation is democratic because it reflects the wishes of the people of Kenya through their elected representatives in Parliament. This is because the law presumes that legislators fully consult with the electorate before presenting their views in parliament during debate, on the bills.

- ii. **Offers Solutions** Legislation offers parliament to find legal solutions to any problems the country may face. This is done by parliament by making of new laws or amending and even abolishing existing laws.
- iii. **Flexibility** Parliamentary laws are usually in the form of general principles and statements. Such general principles and statements can be applied in different situations in a flexible manner to solve different problems
- ii. **Dynamism** Parliamentary laws are dynamic because they can be changed at any time according to the changing circumstances of the society. This is done through reviews and amendments
- iii. **Awareness and debate** Parliamentary laws enable member's is the public to have-opportunity to debate on the proposed laws after their first publication in the official Kenya gazette. **This** also encourages public awareness of the laws even before they become binding and enforceable.

Disadvantages of Legislation

- i. Parliamentary laws are normally imposed on the people and- they usually represent the views of the executive or; those of the ruling party. This is because the ruling party with majority legislators is capable of passing any bill into law even if it is not popular with, the public
- ii. The practical reality is that parliamentary laws do not reflect the wishes of the voters but they represent the views of the individual legislators who occupy parliament at any given time. This is because legislators hardly seek the views of their voters on such matters.
- iii. Through legislation, the process of making law which may reflect the wishes of the people (public is likely to be very slow and long as many public meetings must be called before a consensus is reached on any proposed law.
- iv. iv Through legislation , bills which are technical in nature are normally passed into..law without sufficient debate because majority of legislators are not technically competent to handle all the issues involved.

- v. The legislation process in parliament is very slow and long hence it cannot help during emergency when immediate legislation or amendment is required.

2. **DELEGATED LEGISLATION**

Delegated Legislation is also known as subsidiary, indirect or subordinate legislation. **The** work of Legislation is primarily given to parliament by the Constitution. However when parliament transfers this functions to another person or body, it is known as delegated legislation.

Delegated legislation is the name given to the rules made by ministers or some other authorities to whom parliament has granted power to make laws on its behalf. The laws made by delegated legislation may be in the form of statutory instruments, rules and orders

These are normally made by ministers and they are required to be submitted to parliament for approval before they become operational. Examples include the following:

By-Laws

These are normally made by Local Authorities and they are required to be confirmed by the appropriate minister before they can be enforced.

It is important to note that the laws made by delegated legislation have the same legal effect and enforcement as those enacted by parliament hence delegated legislation as a source of Kenyan laws.

Delegated legislation may be abused by the persons exercising it therefore the following controls exist to ensure that no abuse takes place:

- i. Some rules made through delegated, legislations are required to be submitted to parliament before they are enforced. This ensures that Parliament controls delegated legislations.
 - ii. Where delegated legislation is given to a minister, the minister remains a member of parliament and can be "questioned by parliament on the powers
 - iii. Delegated legislation is effected through various statutes (Acts of Parliament) which provides for clear terms of reference. If the terms are not complied with as per the statute, the rules will be declared ultra vires (beyond powers) hence they are void
- i. Delegated legislation must also comply with the provisions of the constitution
 - iv. If they conflict with the constitution, the courts will declare them unconstitutional hence they become void.

Advantages of Delegated Legislation

- i. It reduces parliamentary workload and enables it to concentrate on more important matters of policy.
- ii. It is capable of dealing with technical bills which can be referred to professionals or experts.
- iii. It is flexible in its procedures unlike parliamentary proceedings which are rigid and technical
- iv. It can deal with new matters as they arise without necessarily taking the original statute back to parliament for amendments
- v. It is capable of dealing with emergency situations as its proceedings are faster than those of parliament

Disadvantages of Delegated Legislation

- i. It removes the work of making law from, the direct control of the peoples representatives in parliament and gives it to government employees or departments which can be easily compromised
- ii. It encourages parliament to pass laws in skeleton/sketchy form leaving matters of principles to be dealt with by delegated legislation.
- iii. Parliament does not have sufficient time to effectively supervise or discuss the merits of the rules made by delegated legislation
- iv. Delegated, legislation creates a large amount of law every year making it impossible for citizens to be aware of them
- v. Delegated powers are so wide and loosely defined thus making it difficult for parliament or the courts to control them.

4. COMMON LAW OF ENGLAND

This the branch of the Law of England which was developed by the English courts on the basis of the common customs of the English people. It represents that part of English law which originated from the general customs of the English people and was developed over centuries into a comprehensive legal system.

Common law is unwritten law and to prove its existence, reference must be made to statutes, judgments of courts and other books of authority. Common law is a source of Kenyan laws only if it is found to be suitable to the circumstances of Kenya and its people. The Kenyan courts have powers to modify the rules of common law or to remove them all together.

5. DOCTRINES OF EQUITY

The word Equity means justice or fairness. As a source of law, it means the body of English law that was developed in the court of Chancery by the various Lord Chancellors to supplement and support the rules of common law.

Equity developed because of the defects existing in the common law. Such defects included the following

- i. **The writ system.** A writ means an order of the court. Under the common law, a person could not seek remedy in court before he is granted a writ authorizing him to sue in a particular case. Some wrongs did not have any available writs hence the victims could not get any remedy. In this respect, equity intervened and allowed the parties to seek remedies without obtaining any writs.
- ii. **Procedural technicalities.** The common law procedures were rigid and technical hence many people lost in otherwise good cases. Equity responded by developing simple procedures without extreme technicalities.
- iii. **Dilatory defences** The common law allowed dilatory defences which were intended to delay cases for long, e.g. whenever a defendant claimed sickness, the common law courts were required to adjourn automatically for a period of one year and one day, regardless of the nature of the sickness. Equity disallowed this and developed the principle of delayed defeats equity. Through this principle, cases were required to be heard and determined as quickly as possible.
- iv. **Inadequate remedies.** Under the common law, the only remedy recognized for civil wrongs was damages (monetary compensation). This remedy was not adequate in certain cases like breach of contract. In response, equity developed the other remedies of injunction and specific performance of contracts to supplement and support the common law remedy of damages.
- v. **Non recognition of trusts.** The common law did not recognize trust agreements hence a trustee could deal with the property held in trust in any manner without regard to the interests of the beneficiary. Equity stepped in and recognized trust agreements together with the remedy of accountability by the trustee to the beneficiary.

Some of the maxims or principles of equity developed by the Lord Chancellors in the Chancery courts are:

- a. He who comes to equity must come with clean hands
- b. He who seeks equity must do equity
- c. Equality is equity
- d. Delayed defeat equity
- e. Equity follows the law
- f. Equity will not suffer any wrong to be without a remedy

NB: It is important to note that the doctrines of Equity are, a source of Kenyan laws only if they are suitable to the circumstances of Kenya and its people.

ISLAMIC LAWS

Islamic Law means the law contained in the Holy Koran as well as the teachings of Prophet Mohammed as explained in its sayings called the Hadith.

Islamic Laws is a limited part of Kenyan laws and it is applied in Kenya through Section 5 of the Kadhis Court Act (Cap I 1). It is applied in Civil Cases only where all the parties to the dispute are Muslims and the dispute is of a personal nature e.g. Marriage, Divorce, and Separation, maintenance, dowry or inheritance. To this extent, Islamic Law is a source of Kenyan Laws.

A F R I C A N C U S T O M A R Y L A W S

A c u s t o m means a rule of behavior that has developed in a community without being deliberated invented, it is a right or duty which has come into existence through popular-consent of the people practicing it.

The customary law of Kenya means the law based on the customs of the ethnic groups which constitutes Kenya's indigenous population. For a custom to qualify as a source of Kenyan Law it must satisfy the following statutory requirements:

Civil Cases only Customs are applicable in respect of Civil Cases only and not criminal cases.

The civil cases to which it applies are restricted to the following matters:-

- a. Land held under Customary Law
- b. Marriage, divorce, maintenance or dowry
- c. Seduction of pregnancy of an unmarried woman or girl
- d. Enticement or adultery with a married woman
- e. Matters affecting the status of women, widows and children including adoptions, guardianship, legitimacy and custody.
- f. Intestate succession where no written law governs them.