

Introduction to Law

Law is a set of enforceable rules governing relationships among individuals and between individuals and their society

Characteristics of Law

1. Set of rules: Law is a set of rules. These rules have their origin in customs, Acts of Parliament, court cases or some other acceptable source.
2. Guides human conduct: These rules are there to regulate human in the society. Persons in the society follow them for their own safety and betterment.
3. Applicable to a community: These rules apply to a specific community, being either a sovereign state, ethnic community or a business community.
4. Dynamic: The law changes over a period of time. This means that law is not static, it keeps changing with time according to the needs of the people.
5. Enforcement: The law must be enforced. It must have an obligatory force such that when it is enforced it binds all subjects. The enforcers are the executive agencies of the government e.g. police.
6. Codification: The law of Kenya is in writing except customary law.

Purpose of Law

1. To regulate the conduct or behaviour of persons. The law provides how one should conduct himself and behave in the society
2. To provide justice to the members of society.
3. To maintain the political and economic stability
4. To protect the fundamental rights and freedoms of the individuals.
5. To establish the procedures and regulations regarding the dealings among the individuals.
6. To maintain peace and order in the country.

Differences between a crime and a civil wrong.

1. A crime is a public wrong against the state whereas a civil wrong is a private wrong against the individual.
2. The parties in a criminal wrong are the prosecution and the accused the parties in a civil wrong are the plaintiff and the defendant
3. In a criminal wrong, cases cannot be withdrawn without the consent of the prosecution and the court whereas in civil wrong cases can be withdrawn with the consent of the parties.
4. In a criminal wrong the prosecution must prove its case against the accused beyond reasonable doubt whereas in a civil wrong the plaintiff needs to prove their case on a balance of probability.
5. Punishment in criminal wrong is usually imprisonment or a fine whereas in a civil wrong the remedy is in form of damages that is monetary compensation
6. The burden of proof in criminal wrong lies with the prosecution while in a civil wrong the burden of proof lies with the plaintiff

Advantages of law

1. Law brings uniformity and consistency in the administration of justice.

2. As the law is known to the citizens, it enables them to regulate their conduct in accordance with it.
3. As the rules are fixed, it helps the judges in applying the law uniformly in administering justice according to law.
4. Law ensures impartiality and equality because justice is exercised according to the fixed principles of law.
5. The rules of law represent the collective wisdom of the society therefore in following them there are little chances of going wrong.
6. It brings consistency in the administration of justice and systematic development of law
7. The law ensures peaceful co-existence of men and women
8. Law serves as a measure of control in any given society.
9. It is an instrument man uses in his attempt to achieve justice in the society.
10. Law maintains order and tranquillity in society.

Disadvantages of law

1. Rigidity- The same rules are applied to all cases of similar and sometimes causes hardship and injustice.
2. Law tends to become conservative. It does not keep pace with the changed conditions
3. Law becomes greatly formal. Greater importance is attached to the form than to the substance.
4. Law may bring many evils and cause injustice. Since the enactment of the Children's Act of 2001 prohibiting corporal punishment in schools strikes and unruly behaviour and has escalated.
5. Law is very complex. It no longer remains easy to understand

Advantages of codification

1. Certainty: By codification law becomes certain. It no longer remains vague and uncertain
2. Simplicity: Codification makes law simple and accessible to everybody. This enables students to know their rights and duties and thus greatly helps in the administration of justice.
3. Logical arrangement: In code law is logically arranged in coherent form. There is little chance of conflict with or inconsistency arising among the different provision of law.
4. Stability: Codification makes the law stable. Stability is very essential for law so that people may have confidence in it.
5. Unity: Codification is an instrument of forging unity among the people. Codified laws have uniform and wider application.
6. Planned development: Planned development in the country is only possible unify codification. By codification there comes uniformity and the desired development is speedily achieved.

Disadvantages of codification

1. Rigidity: Codification causes rigidity in the law. Law must keep pace with the time and must adapt itself to new conditions. Codified law lessens the scope of change.

2. Incompleteness: The codes are generally incomplete. It is not possible to anticipate all the problems with the that may arise in the future through a code.
3. Hardships: The code generally gives uniform laws applicable to all within the country. The same laws are applied to all people regardless of their customs this causes hardship.
4. Defective codes: Certain defects are bound to remain in a code. They cannot be removed except by legislative amendment. This causes great delay and inconvenience.

Distinguish between law and morality

1. The rules of law may be enforced by an action in courts while morality does not attract the sanction of the courts for its enforcement.
2. Rules of law are defined by law while rules of morality to the are defined by morality itself
3. The morals are concerned with the individual whereas law concentrates mainly on the society and lays down rules concerning the relationship of individuals with each other and with the state.
4. Morals look at the intrinsic value of conduct whereas law is concerned with the conduct of the individual.
5. Morals are an end in themselves, they should be followed because they are good in themselves whereas law is for the purpose of convenience and its chief aim is to help the smooth running of the society.
6. The observance of morals is a matter of individual conscience whereas law brings into the picture the complete machinery of the state to which the individual submits and is bound to follow its rule.
7. Morals are of universal value whereas law is relative that is to time and place and therefore varies from society to society.
8. Laws and morals differ in their application. Morals are applied taking into consideration the individual cases whereas the application of law is uniform.

Similarities between law and morality

1. Laws and morals have a common origin for example to kill a man is against law and morality
2. Laws conform to morals. If the law lags behind popular standards it falls into disrepute. Morals are therefore the test of law.
3. Morals are the end of the law. Law is to secure justice and justice is based on morals.
4. Laws and morals act and react upon and mould each other. Morals have infiltrated into the fabric of the law, judicial interpretations are guided by moral considerations.
5. It is not the legal sanction alone that ensures the obedience of the law but morals also help in its obedience. A person who is morally upright find it easy to obey the law

Sources of Law in Kenya

The term source of law refers to the means by which law comes into existence .it literally means where rules of law are found. However, the phrase has been used in variety of senses. It has been used to describe,

- i) The origins of the rules and principles which constitutes the law applicable in a country at a given time.
- ii) The source of force or validity of the various rules or principles applicable as law in a country.
- iii) The material from which rules of law developed.
- iv) The factor which influence the development of the rules of law

Hence the phrase sources of law have been used to describe the legal, formal, historical and material sources of law.

The various sources of law of Kenya are identified by,

- 1) Judicature act
- 2) Constitution
- 3) Hindu marriage and divorce act
- 4) Hindu succession act
- 5) Kadhis court act.

Sources identified by the judicature act

- 1. The constitution
- 2. Legislation (act of parliament) (statues)
- 3. Delegated legislation
- 4. Statutes of general application
- 5. Common law
- 6. Equity
- 7. Case law or (judge made law)
- 8. Africa customary law

Sources identified by the constitution and the Kadhis court act.

Islamic law

Sources identified by the Hindu marriage and divorce act and the succession act

Hindu law

Sources of law of Kenya may be classified as:-

- 1) Written and unwritten sources
- 2) Principal and subsidiary sources

Principal sources

These are source of law applicable throughout Kenya; they regulate all persons in Kenya

Subsidiary sources

These are sources of law which regulate certain categories of people in Kenya in relation to certain matters e.g

- ☐ Islamic law
- ☐ Hindu law
- ☐ African customary law

The constitution

A constitution is a public document, which regulates the relations between the state and its citizens as well as the relations between the organs of the state.

This is body of the basic rules and principles by which a society has resolved to govern itself or regulate its affairs. It contains the agreed contents of the political system. A constitution sets out the basic stature of the government

The constitution of Kenya is a source of law from which all other laws derive their validity.

Any law which conflicts or is inconsistent with constitution is void.

Any law which is inconsistent can be passed if only the constitution is first amended by the votes of not less than 65% of all the members of the national assembly and supported by presidential assent. President

ISSUES ADDRESSED IN THE CONSTITUTION OF KENYA

The constitution of Kenya 2010 covers the following matters:

1. That the people of Kenya are the sovereign i.e all powers are derived from the people
2. The supremacy of the constitution
3. The republic. That Kenya is an independent state with an organized government.
4. Bill of rights. It contains the fundamental rights and freedoms
5. Citizenship,i.e how one acquires and loses citizenship
6. Leadership and integrity under chapter six of the constitution i.e how morals play a central role in leadership.
7. Representation of the people
8. Separation of powers i.e how the three organs of the state operate under different heads. This includes; the legislature, executive, and judiciary.
9. Devolved governments. There is a central and county government.
10. Matters of public finance
11. Amendment of constitution.

Supremacy of the constitution

- ☐ Supremacy of the constitution is provided for under article 2.
- ☐ All other sources of law derive their validity from the constitution and are therefore required to be consistent with all provision of the constitution
- ☐ Any source of law if inconsistent with the constitution is null and void to the extent of its inconsistency
- ☐ Any act or omission in contravention of the constitution is invalid
- ☐ The constitution is the supreme law of the republic and binds all persons and all state organ at both levels of government
- ☐ No person may claim or exercise state authority except as authorized under the constitution.
- ☐ The validity or legality of the constitution is not subject to challenge by or before any court or other state organ
- ☐ The constitution is also supreme since it outlines the governing structure of a country and define the various organ of the government

- It gives the function of the various arm of the government and clearly indicates the separation of powers
- The constitution establishes highest office in the land i.e office of the president and grants the occupant power as head of state and government
- The constitution provides the fundamental rules and freedom of individual and guarantees the protection.
- It provides procedure of its amendment within itself.

Legislation

Legislation is the process of law making through parliament or any other body specially constituted for the purpose. Legislation can be direct or indirect. Direct legislation is a law making process by parliament. Law made by parliament is known as a statute or an act of parliament. Indirect legislation is where an individual makes law through powers derived from the statute or act, known as an enabling act. This is referred to as delegated legislation e.g by laws made by local authority in Kenya; parliament is a supreme law making body of the country as stipulated in the constitution. The law making process begins by bills being passed by the national assembly

Bills

A bill is a draft of a proposed act of parliament. When a bill has been passed by the national assembly then it is presented to the president for his assent. Once the assent is given, it becomes law and is now called an act of parliament or statute.

Types of bills.

Bills may be classified into

- a. Public bills
- b. Private bills
- c. Private member's bills

Public bills: public bills deal with matters of public policy and their provision affect the general public. these bills are introduced by the minister concerned.

Private bills: they are those which are intended to affect or benefit some particular person, association or cooperate body.

Private member's bill: private member's bills are introduced by a private member of

parliament. Such a member must move a motion seeking leave of the house to introduce the bill. The member is responsible of drafting his own bill.

The passing of a bill into law

The bill passes through the following stages to become law

I. First reading

II. Second reading

III. Committee stage

IV. Reporting stage

V. Third reading

VI. President's assents