



COLLEGE OF INSURANCE
Driven by distinction

LEGAL ASPECTS OF INSURANCE – CHAPTER ONE

INTRODUCTION TO LAW



INTRODUCTION



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- **Almost everything that we do in life is governed by some set of rules.**
- **There are rules for religious institutions, sports, social clubs, learning institutions, work place environments and other business transactions.**



Cont'd

- **law is part of everyone's life, a living part, a controlling part, a determining part, a giving part and that it concerns people.**



Meaning of law

A body of rules that regulate and control the behavior of people in society.



A collection of rules binding on specific persons, made and authored by certain institutions and enforced by the machinery of government.

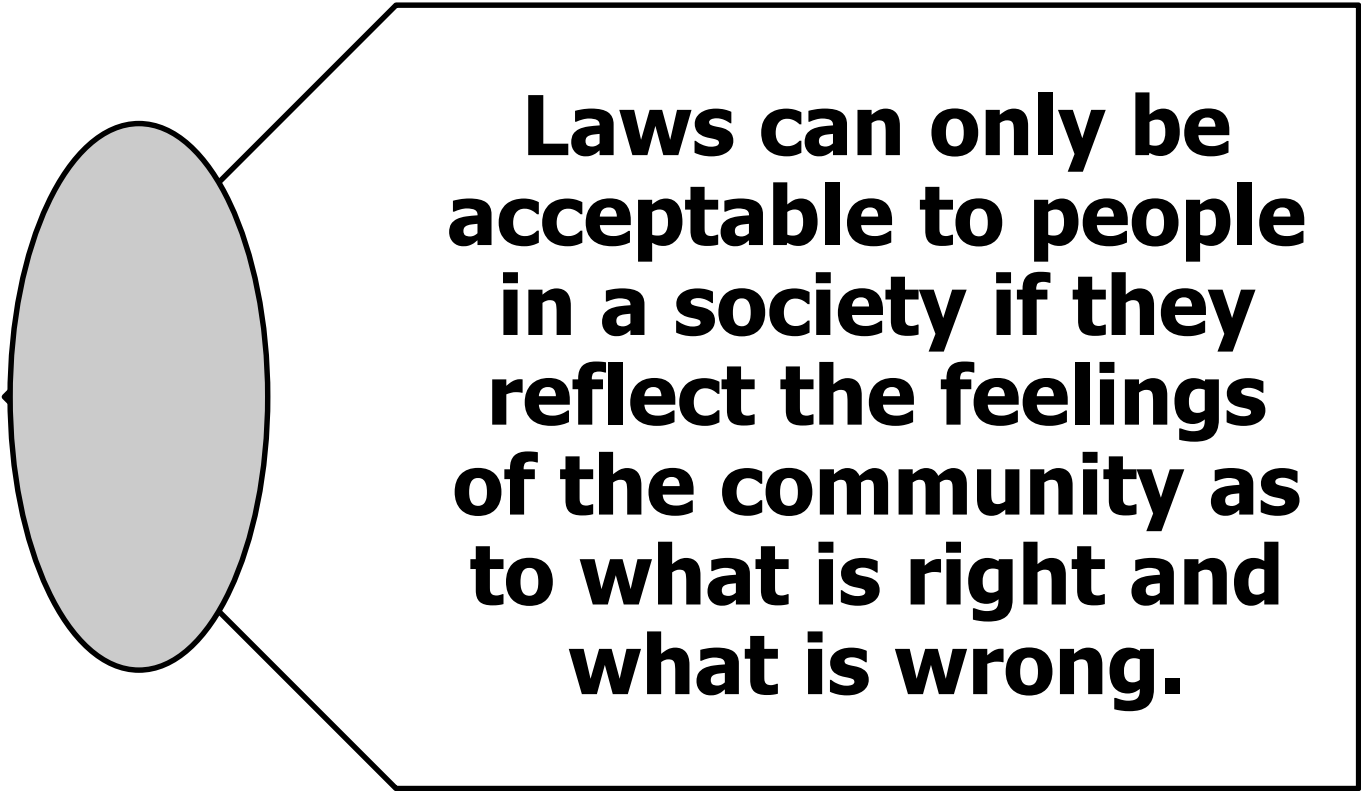


ORIGIN OF LAW

- Bible – Ten commandments
- 3000 BC-Egypt – traditions and belief in social equality



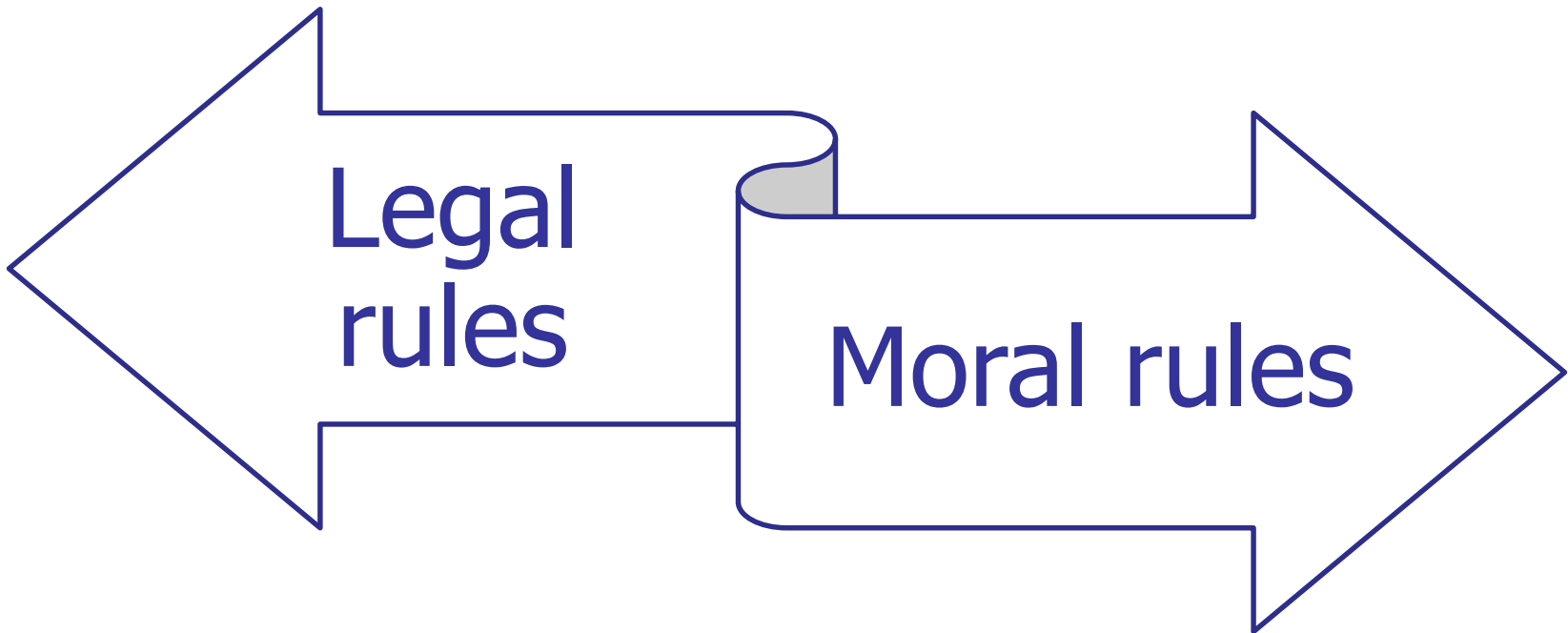
Basis of law



Laws can only be acceptable to people in a society if they reflect the feelings of the community as to what is right and what is wrong.



Basis of law





Legal rules vs. moral rules



Legal rules are backed by sanctions with consequences for non compliance as opposed to moral rules

Some moral wrongs may also be legal wrongs e.g. incest, theft, rape among others.



Relevance of morality in insurance practice



Moral hazards

- Fraudulent claims
- Non disclosure of material facts



Enforcing the law



**Whose responsibility
– Courts and police**

**Enforcement
process**

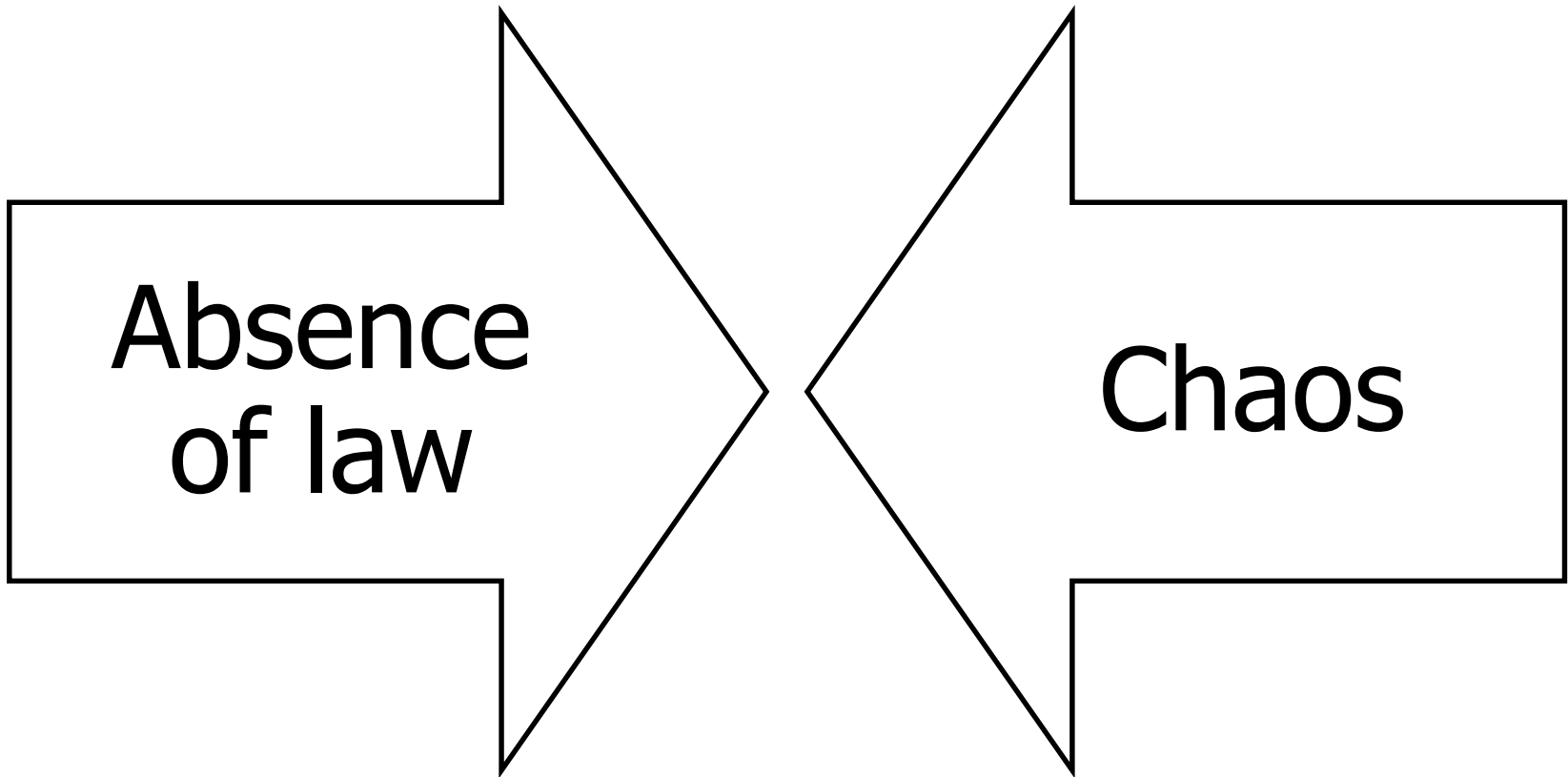
Legal systems to enforce



Legal systems in developed societies have created systems for bringing wrongdoers to justice, established courts to hear disputes and try offenders, and designed mechanisms to enforce the judgments of the courts.



Purpose of law in society



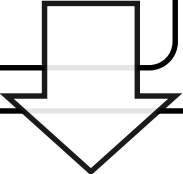


Purpose of law in society

The law is a tool used to regulate the economy and ensure that life generally is orderly and civilized.



Laws have therefore been the glue that has kept society together. Without laws, chaos will reign



Laws regulating business affairs help to ensure that people keep their promises.



Cont'd



Safeguard our personal property and lives.

The law must provide a way to resolve disputes in a peaceful way.

The need for law to ensure a safe society in which individuals' rights are respected



Purpose of law summary

- **Regulating the conduct and behavior of people in society**
- **Providing justice, promoting fairness and equality**
- **Governing affairs among nations**
- **Protecting fundamental human liberties and rights enshrined in the constitution**



Cont'd

- **Establishes procedures to be followed in conducting certain matters**
- **Maintaining peace, order and stability in society**
- **A tool used in resolving disputes which are unavoidable in any society**



CLASSIFICATION OF LAW

- **Public and private law**
- **International and municipal law**
- **Civil and criminal law**
- **Procedural and substantive law**



Public law - Three Concerns



Legal structure of state



Relationship between
one state and another



Relationship between
the state and its citizens



Branches of public law



Criminal law



Constitutional law



Administrative law



Criminal law – Various Acts

- Crime – act that prejudices the rights of the community
- Examples – theft, murder, rape
- Case prosecuted by state – R v. accused
- Guilty – punishment – forms of punish.
- Std of proof; beyond reasonable doubt

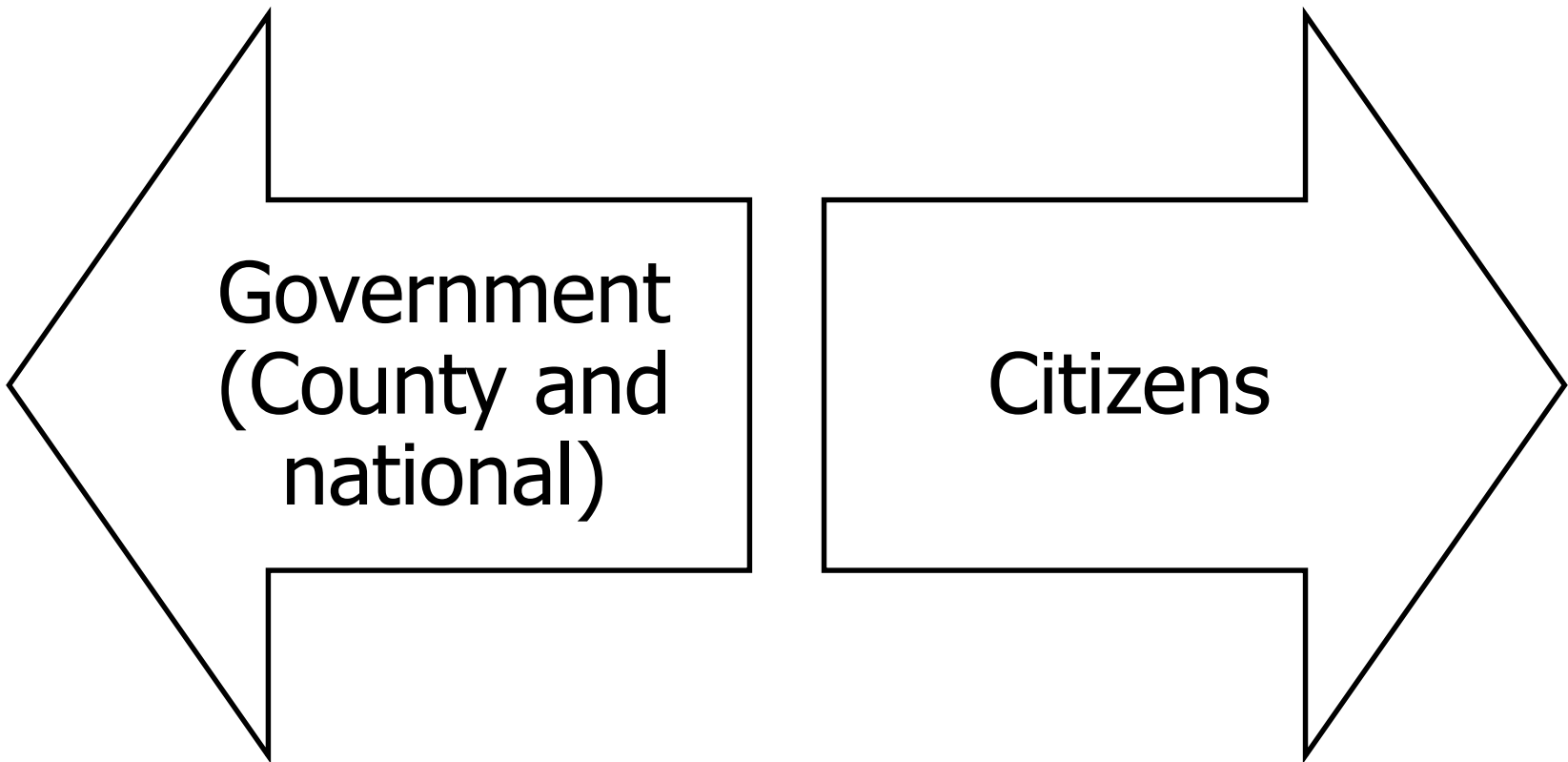


Constitutional law

- Kenya Constitution 2010
- Creates main organs of government
- Provides for international treaties to part of the law of Kenya



Administrative law





Private law

Private law is commonly known as **civil law. It is concerned with violation of private rights belonging to an individual in his/her capacity as an individual.**



Features

- **Relationship between individual persons**
- **Plaintiff and defendant**
- **Compensation**
- **Standard of proof – balance of probabilities**
- **Forms of compensation**



Branches of private law

- Contract
- Tort
- Succession
- Trust
- Family
- Property

International law and municipal law



International law

- **Private and public international law**
- **Private international law – where there is a foreign element**
- **Public international law – treaties and conventions**

Municipal law

- **Also known as domestic law**
- **It the law of the state**
- **Private and public**



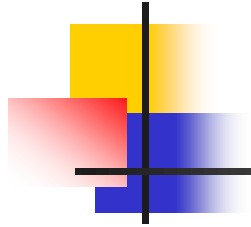
Procedural v. Substantive law

Procedural

- **rules in detail to guide courts in regulating the manner in which proceedings**
- **creates and controls the process of enforcing rights and duties**
- **Evidence Act Chapter 80, the Civil Procedure Act Chapter 21**

Substantive

- **creates and controls rights and duties of legal persons.**
- **lays down the actual rules of law**
- **defines civil and criminal wrongs and provides remedies for them.**
- **Examples of substantive law include the law relating to torts, contracts and crimes.**



SOURCES OF LAW



Source - Meaning

- **A place from which things originate – Dictionary**
- **A source of law means the origin of the rule, which constitutes a law, or legal principle.**



JUDICATURE ACT

- The constitution
- Acts of parliament/legislation
- Subsidiary legislation
- Common law and doctrines of equity
- Customary law
- Islamic law
- Judicial precedents



The Kenya Constitution 2010

- **Sets out fundamental principles or established precedents on how a state is to be governed.**
- **Creates the 3 arms of govt**
- **Supreme law**
- **Principles that govern courts**
- **Can be amended allowed – Ar. 159**
- **Written and unwritten**



Legislation/Acts of parliament

**This is law that has
been created in a
formal way and set
down in writing.**



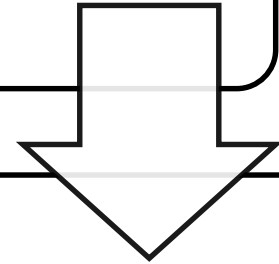
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- Primary mandate is parliament – National assembly and senate
- Parliament delegates the mandate to county assemblies and government ministries
- Presidential orders



Cont'd

Law made by parliament –
primary, direct



By other bodies –
indirect, subsidiary,
secondary or delegated



Law making process



Provided for under
the Constitution



Process

- Publication of the bill in the Kenya Gazette
- First reading
- Second reading
- Committee stage
- Reporting stage
- Third reading
- Presidential assent
- Publication of the law in the Kenya Gazette
- Commencement of the law



Subsidiary legislation

**County assemblies –
by laws**

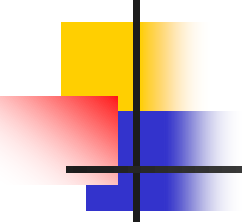
**Govt ministries –
rules, regulations,
guidelines**



Requirement

Indirect legislation on the other hand is binding only if it is intra vires i.e. within the powers given.

The doctrine of ultra vires

- 
-
- **It is unreasonable or uncertain;**
 - **Has a retroactive or retrospective effect;**
 - **They infringe fundamental rights such as the right of personal liberty; and**
 - **They are rules on levying taxes**

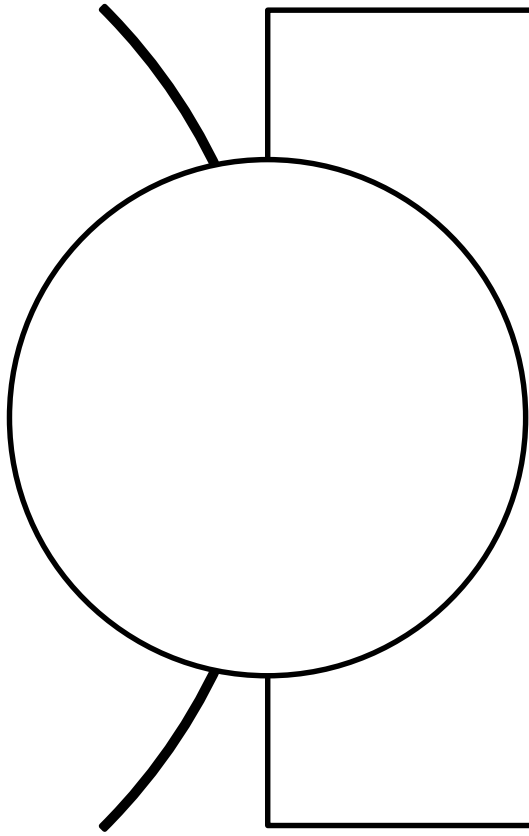


Why parliament delegates

- **Lack of time**
- **Urgent laws**
- **Lack of technical expertise**
- **Flexibility**



Statutory interpretation

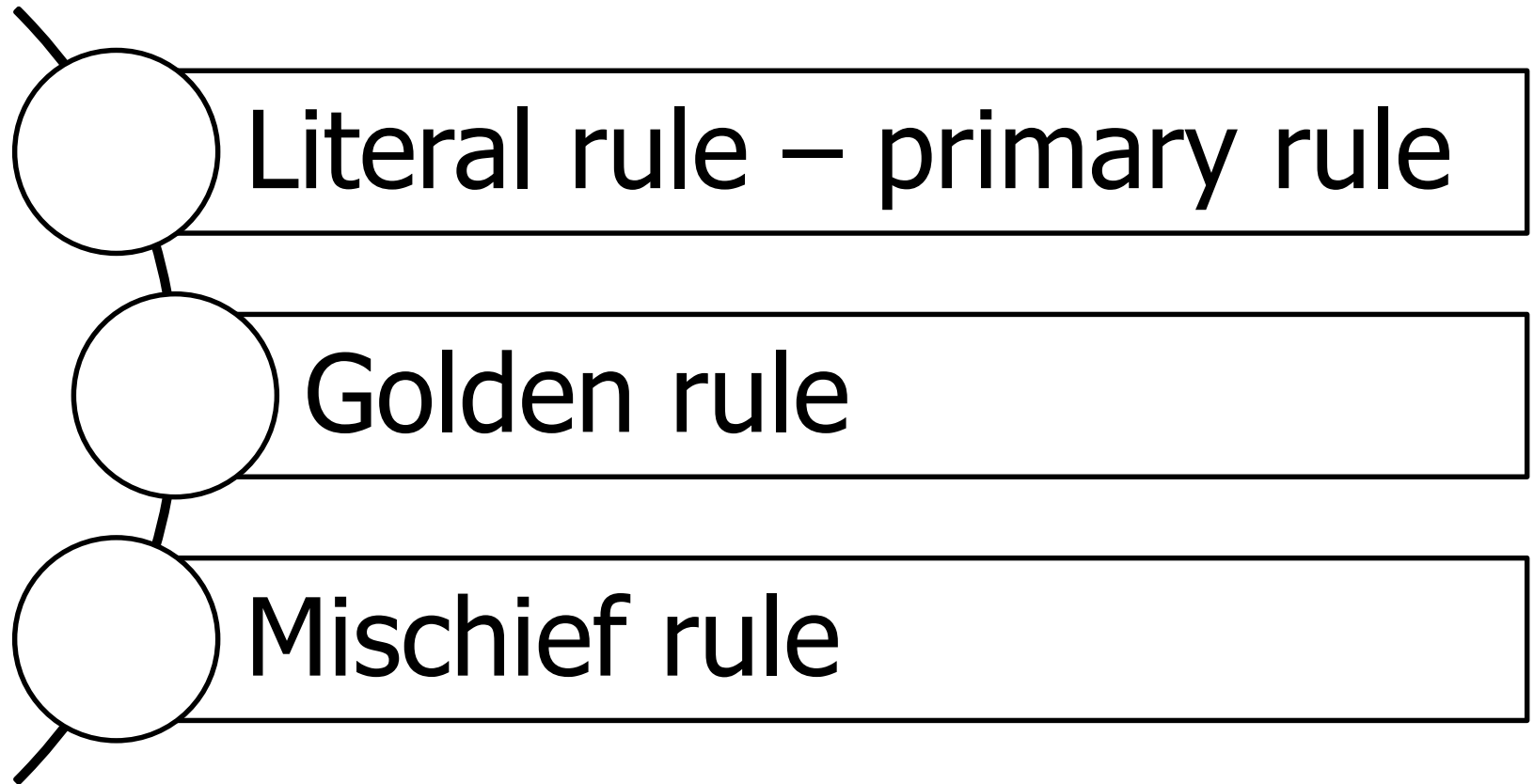


-This refers to the action of a court in trying to understand and explain the meaning of a piece of legislation.

-Disputes arise quite frequently about the meaning of words used in both primary and subsidiary legislation.

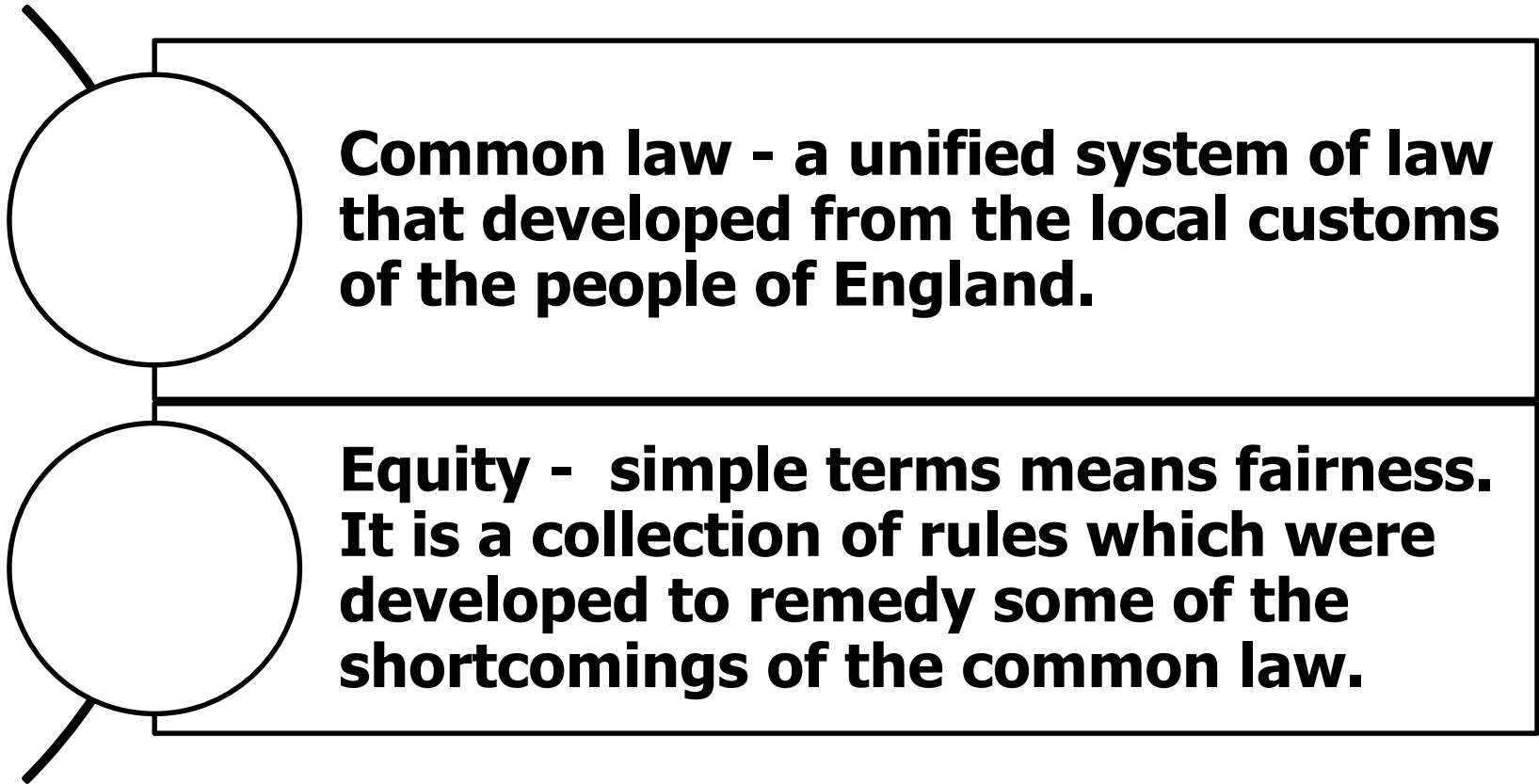


Rules/tools of interpretation





Common law and Doctrines of equity





Shortcomings of Common law

- **The system was inflexible and expensive**
- **There was only one remedy given**
- **Corruption**
- **Technical procedure**
- **Did not recognize part performance**



Contribution made by Equity

- Granted other remedies
- Introduced the writ of trust
- Part performance
- Introduced the principles of contribution and subrogation
- Recognized the doctrine of promissory estoppel



Principles of Equity

- **Equity shall not suffer a wrong to be without a remedy**
- **Equity follows the law**
- **Where there is equal equity, the law shall prevail (common law)**
- **Where there are two equities, the first in time prevails**
- **He who seeks equity must do equity**



Cont'd

- **He who comes to equity must come with clean hands**
- **Delay defeats equity**
- **Equality is equity (no one is superior before the law)**
- **Equity looks at the intent rather than the form**
- **Equity looks on that as done which ought to be done**



African Customary law - MC



This consists of the unwritten norms, traditions and practices of the different communities in Kenya



Conditions for customary to be allowed to apply

- Continuity
- Reasonable
- Certain
- Compulsion
- Not contrary to written law
- Not repugnant to Justice
- In civil law



Areas where customary law is applied

- Land held under customary law
- Marriage, divorce, maintenance or dowry
- Seduction or pregnancy of unmarried woman or girl
- Enticement of or adultery with married woman
- Status of women, widows and children
- Succession matters unless where there is a will



Islamic law

- The applicable rules emanate from the Quran.
- Its application is limited to the Kadhi's courts and parties to the dispute must be those professing the Muslim faith.
- Islamic law only applies to personal matters, marriage, divorce and inheritance.

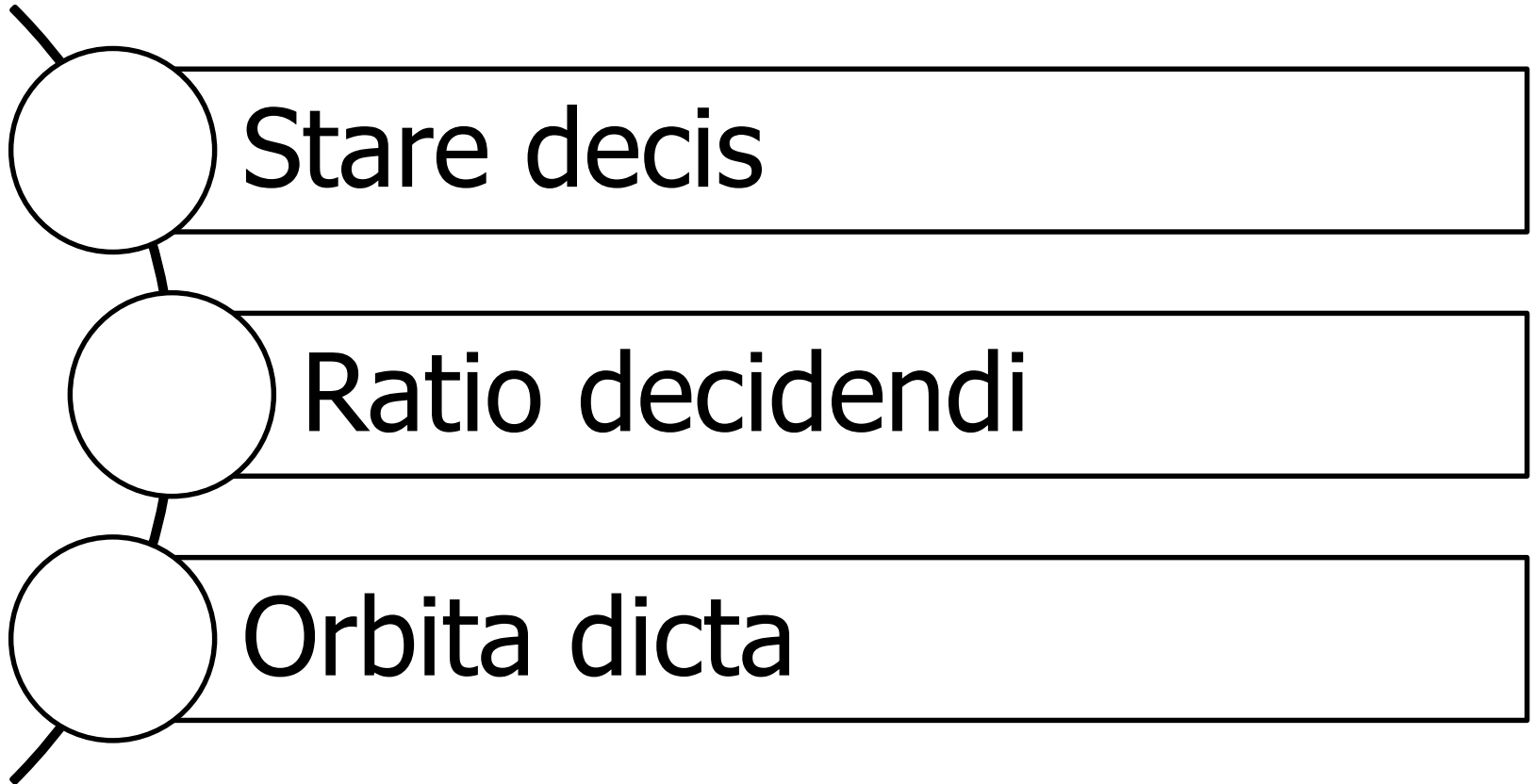


Judicial precedents/Case law

- A precedent is defined as a decision in a previous legal case where the facts were similar to the case before the court.
- It is a judgement of a court, normally recorded in law reports, used as an authority for reaching the same decision in subsequent cases.
- It is the legal principle which the judge relied on in determining the outcome of a case



Words used





Types of precedents

- Binding precedent
- Persuasive precedents
- Future precedents
- Declaratory precedents
- Distinguishing precedent
- Overruling precedent



Distinguishing

- The judge finds that facts of the case he is deciding are sufficiently different to draw a distinction between the present case and the previous precedent; not bound by the previous case



Overrule

To annul, to make void. This word is frequently used to signify that a case has been decided directly opposite to a former case; when this takes place, the first decided case is said to be overruled as a precedent, and cannot any longer be considered as of binding authority

To decide (by a court of appeals) that a prior decision on a legal issue was not correct, and is therefore no longer a valid precedent on that legal question



Reversing

- A court higher up in the hierarchy overturns the decision of a lower court on appeal in the same case
- The Court of Appeal may disagree with the legal ruling of the High Court; in this situation they reverse the decision of the High Court



Examples of persuasive precedents

- **decisions made in lower courts or courts of equal standing;**
- **decisions of courts outside the Kenyan judicial system;**
- **obiter dicta; and**
- **textbooks, learned treatises and the law of other jurisdictions.**



When a precedent may not be used

- If the facts are not similar of the two cases are not similar
- If it has been overruled
- If the judge has been able to distinguish
- If it is in the lower courts
- If the judgment was obtained through fraud

Advantages and disadvantages of judicial precedents



Advantages

- **Certainty**
- **Possibility of growth**
- **Rich in detail**
- **Flexibility**
- **Consistency & fairness**
- **Time saving**

Disadvantages

- **Rigid**
- **Slow in development/growth**
- **Bulk and complex**
- **Creation of artificial distinctions**
- **Obsecurity**



Structure of Courts in Kenya

JUDICIARY

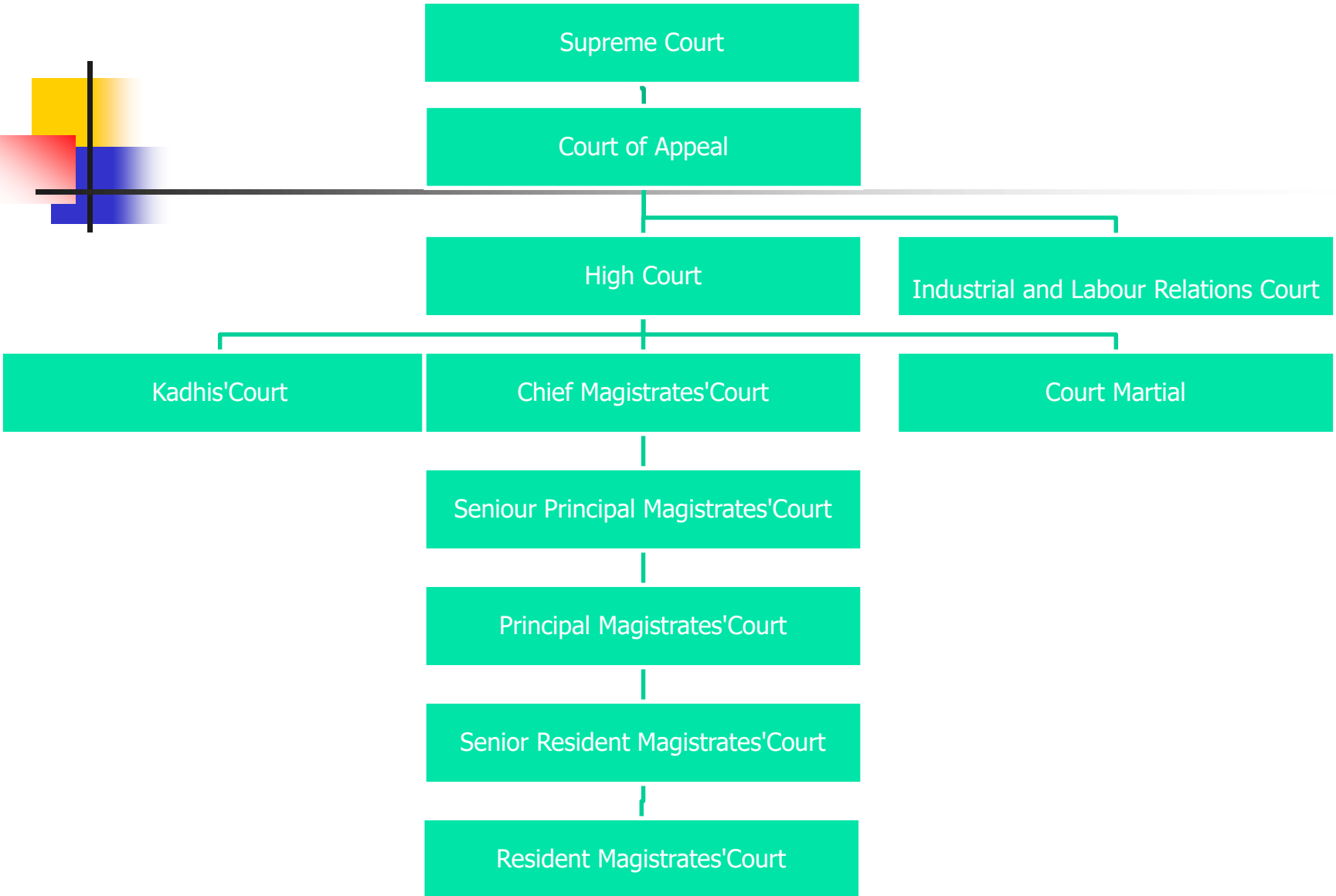
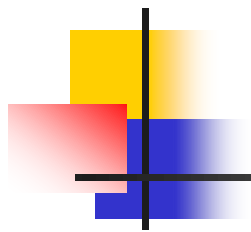
The judiciary consists of judges, magistrates and staff to assist them in their judicial work and in administration.



Cont'd



**The Kenya
Constitution 2010
creates an
independent
judiciary consisting
of the courts of law
and tribunals.**





Supreme Court



Under the Kenya constitution, the Supreme Court is the highest court in Kenya. The Chief Justice is the President of the Supreme Court. This court also comprises the Deputy Chief Justice and five other judges.



Powers of the SC

- **Exclusive original jurisdiction to hear and determine disputes relating to election to the office of the president**
- **Appellate jurisdiction on appeals from the court of appeal**
- **Disputes on the interpretation of the constitution**
- **Matters of national importance**

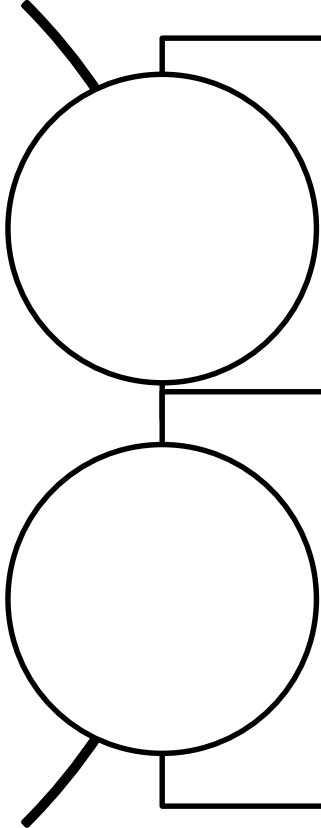


Court of Appeal

- The Court of Appeal is established under Article 164 (1) of the Constitution which provides for the establishment of the court of appeal
- The Constitution and the Court of Appeal (Organization and Administration) Act, 2015 set the minimum number of Court of Appeal Judges at 12 while the Judicature Act sets the maximum at 30.
- The court is headed by a President of the Court of Appeal who is elected by the Judges of the Court from among themselves.



CA



The court of appeal does not have original jurisdiction hence cannot hear a matter at first instance.

It has appellate jurisdiction in criminal, civil, constitutional and political matters. Appeals are normally heard by three (3) judges and decisions are by majority and are brought by way of petition.



Options CA has on hearing an appeal

- **Uphold the decision of the lower court**
- **Reverse the decision**
- **substitute another judgment**
- **Overrule the decision**
- **Order a new trial.**



Powers of HC

- **Disputes where fundamental Human Rights has been denied, violated, infringed or threatened;**
- **hearing appeals from a decision in lower courts and tribunals;**
- **Matters on interpretation of the Constitution and determination of the question whether any law is inconsistent with the constitution**



HC powers

- **determining any matter relating to constitutional powers of State organs**
- **hearing any question relating to conflict of laws**
- **jurisdiction over matters arising on the high seas, territorial waters or other navigable inland waters in Kenya**
- **supervisory jurisdiction**



HC

- **Divorce petitions**
- **Election petitions**
- **Defamation matters**



Criminal powers

- Appellate jurisdiction
- Acquittal applications
- Murder, treason
- Capital punishment



Orders given under supervisory powers

- **Writ of habeas corpus**
- **Certiorari**
- **Prohibition**
- **Mandamus**



Constitutional and statutory Requirements for Appointment For appointment to the position of judge of the High Court

- At least ten (10) years' experience as a superior Court Judge or professionally qualified Magistrate; or
- At least ten (10) years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or
- Held the qualification specified above for a period of amounting, in aggregate, to ten (10) years. (Experience gained in Kenya or in another Commonwealth common law jurisdiction will be considered)
- Have a high moral character, integrity and impartiality. The applicants must demonstrate a high degree of professional competence, communication skills, fairness, good temperament, making of good judgment in both legal and life experiences and commitment to public and community service.



Removal from office of HC Judge

- **inability to perform the functions of office arising from mental or physical incapacity;**
- **a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament;**
- **bankruptcy;**
- **incompetence;**
- **gross misconduct or misbehavior;**
- **Age**

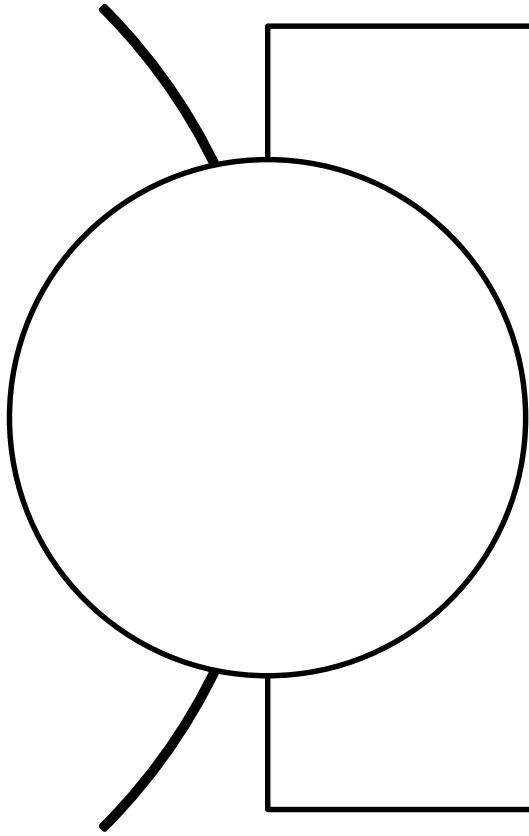


Kadhi's Court

- **The Kadhi's courts are established under Article 170 of the Constitution**
- **Their jurisdiction is limited to matters of personal status, marriage, divorce and inheritance.**
- **Parties to the dispute must be those who profess the Muslim faith and submit to the jurisdiction of these courts.**



Qualification of a Kadhi

- 
- Must profess the Muslim faith**
 - Must possess knowledge of Muslim Law applicable to any sect or sects of Muslims.**

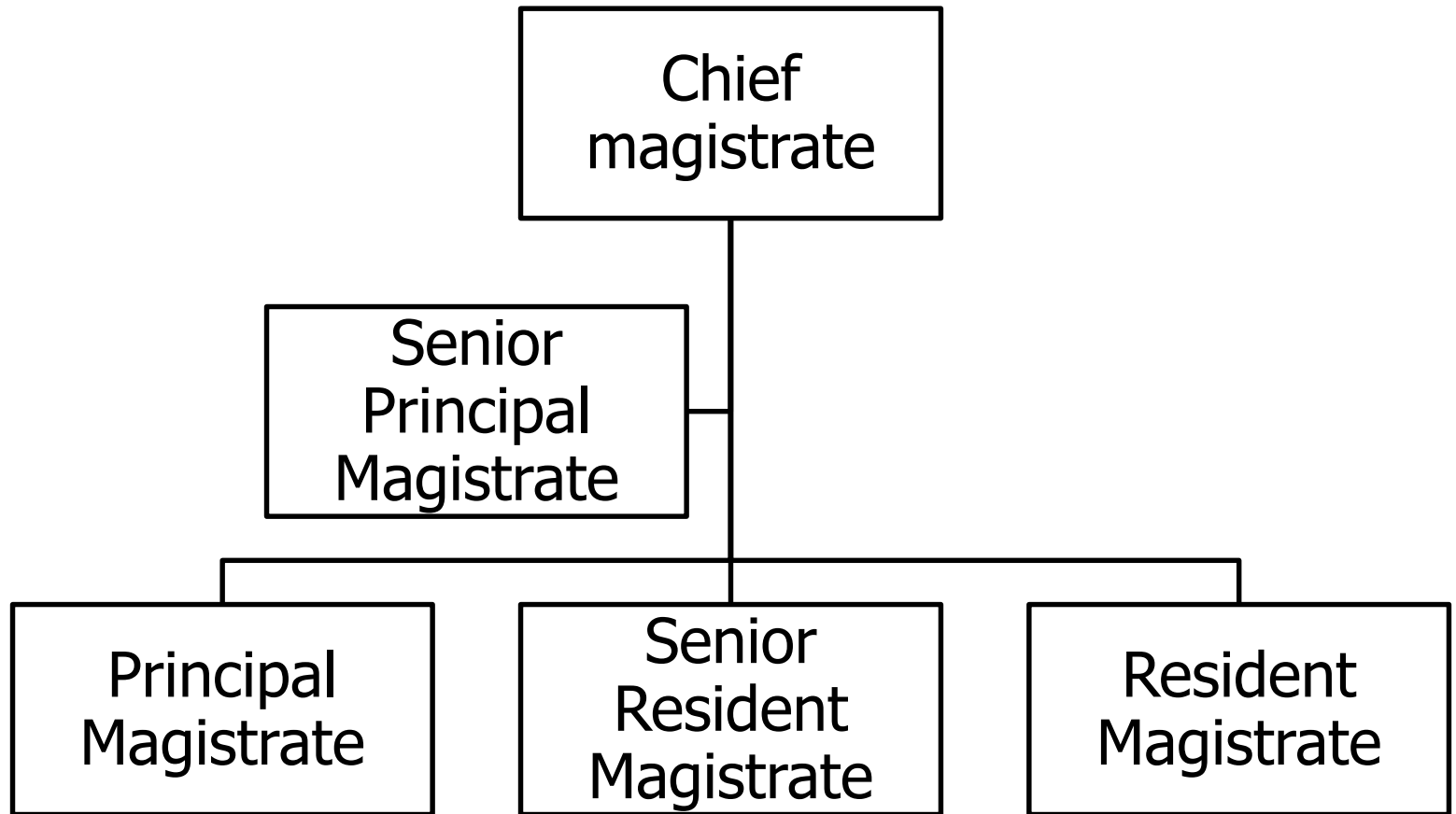


Magistrates Courts

- **These are established under article 169 (1) of the constitution**
- **The Magistrates Courts Act No. 26 of 2015 provides for the jurisdiction of these courts.**
- **A magistrate's court is subordinate to the High Court**



Levels of Magistrates' courts





MC

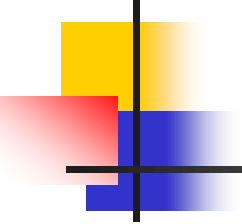


**The Magistrates
Courts can hear
cases all over
Kenya and are
empowered to
exercise original
jurisdiction at first
instance.**



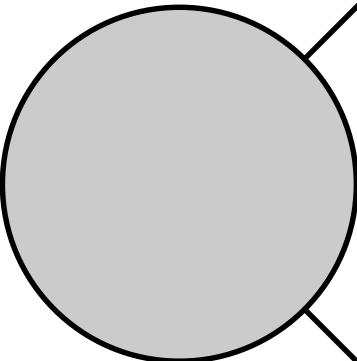
Powers of MC

- **Unlimited powers to hear matters relating to customary**
- **Their jurisdiction is limited in terms of the value of the subject matter in civil matters**

- 
-
- **20m shillings, where the court is presided over by a chief magistrate;**
 - **(b) 15m shillings, where the court is presided over by a senior principal magistrate;**
 - **(c) 10m shillings, where the court is presided over by a principal magistrate;**
 - **(d) 7m shillings, where the court is presided over by a senior resident magistrate; or**
 - **(e) 5m shillings, where the court is presided over by a resident magistrate.**



Powers of MC



Has the authority to hear all criminal cases except murder, treason and crimes under international criminal law.



Hears cases of manslaughter, robbery with violence, arson, rape and offences whose sentence is life imprisonment or death.



Cont'd

Has power to punish a person for contempt of court both in civil and criminal matters.



Limited powers in the following;

- **applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights;**
- **claims relating to employment and labour relations; and**
- **Land and environmental cases.**



Court Martial

- **The Court Martial is established under section 84 of the Armed Forces Act.**
- **The court has jurisdiction to hear cases of indiscipline within the armed forces.**
- **Jurisdiction is penal or disciplinary and designed to ensure discipline in the Armed Forces.**



Cont'd

- **Some of the cases that can be tried by the court include insubordination, cowardice, fraud, theft, aiding an enemy and neglect of duty.**
- **Appeals from the decisions of the courts martial lie with the High Court, which must grant leave before the appeal is heard.**



Industrial Court

- The Industrial court is created under Article 162 (2) of the Constitution of Kenya 2010 with the mandate of **settling employment and Industrial relations disputes.**
- This court is also given power to further, secure and maintain of good employment and labour relations in Kenya.
- The Industrial Court is a superior court of record with the **status of the High Court** and shall and exercise jurisdiction throughout Kenya.



Parties to disputes

- Employer and employee
- Employer and trade union
- Employer's org. and trade union org.
- Trade union and another trade union
- Employers' org. and trade union
- Trade union and members
- Enforcement of Collective Agreements



Orders that the Court may issue

- **Injunction**
- **Specific performance**
- **Declaratory order**
- **Damages**
- **Reinstatement order**



Tribunals

- **Article 169 of the Constitution establishes subordinate courts which includes tribunals.**
- **The tribunals derive their mandate from the specific Act of parliament which creates them.**
- **Tribunals in Kenya are institutions created to help courts in the administration of justice.**



Tribunals

- **The tribunals however, do not have penal jurisdiction.**
- **They are set up by law to adjudicate disputes that arise out of the statutes creating them.**



Insurance Act

- **Section 169 (2) of the Insurance Act Cap. 487 creates a tribunal consisting of a chairman, a vice-chairman and a minimum of two and a maximum of four other members appointed by the Minister.**
- **The main mandate of the tribunal is to hear appeals arising under the Act.**



Same powers of a resident magistrate

- **Summon witnesses**
- **take evidence upon oath or affirmation and to call for the production of books and other documents**
- **power to award the costs of any proceedings before it**
- **receive evidence by affidavit and administer interrogatories**



End of Session one

