

DBM 2104: Business Law

TOPIC 1: ELEMENTS OF LEGAL SYSTEM

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TOPIC ONE

Elements of the legal system

1. Elements of the legal system

1.1 Nature, purpose and classification of law

1.1.0 What is Law: Some historical perspective

1.1.1 Meaning of law

1.1.2 Nature of law

1.1.3 Purpose of law

1.1.4 Classification of law

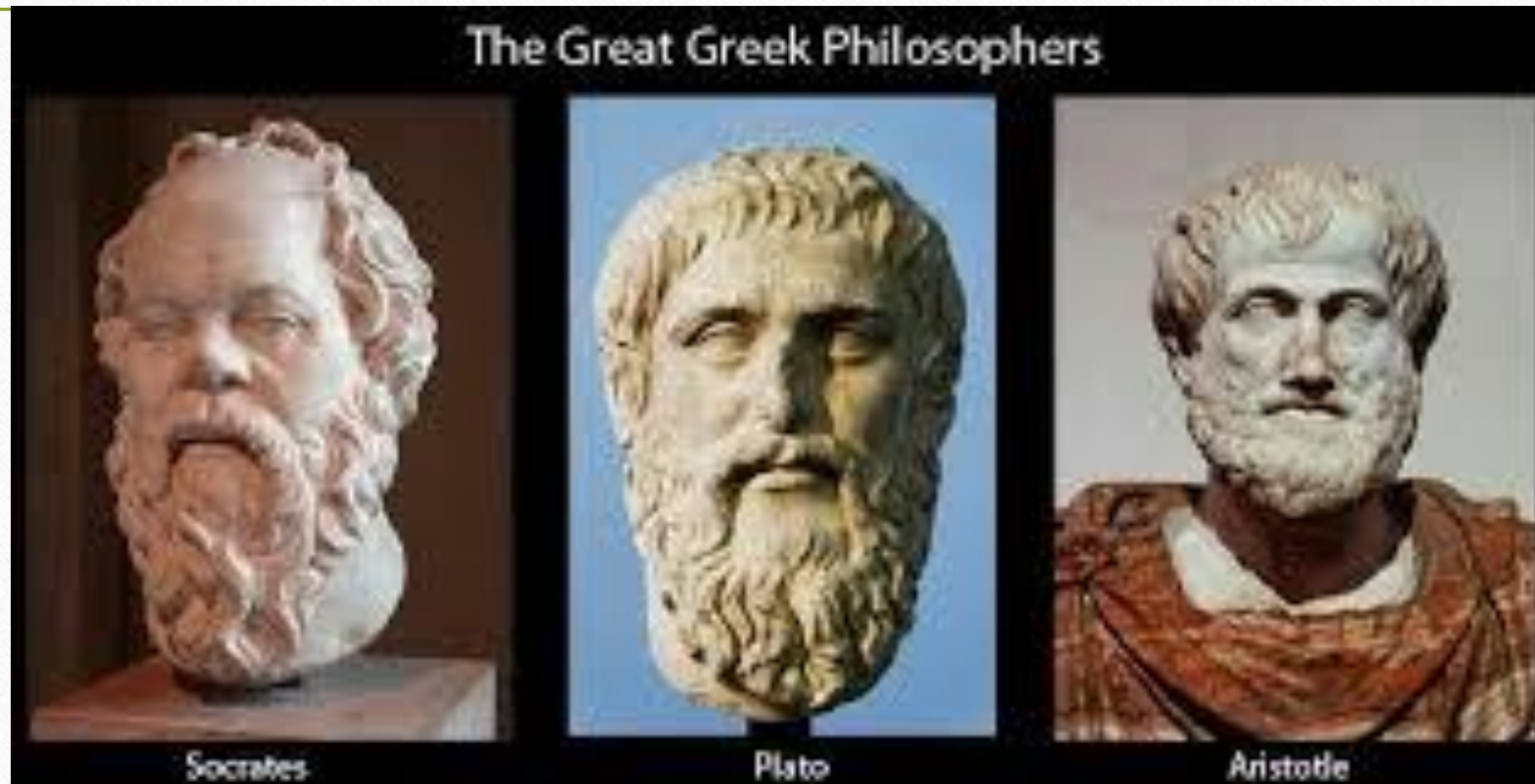
1.1.5 Law and morality

1.1.6 What is a legal system?

1.1.0 What is law?

- What is law?
- What can we observe of where we are?
- What then is law?

1.1.0 What is law: Some historical perspective



1.1.0.1 Law: Greek philosophy

- **Socrates** (469–399 B.C.E.): Whenever the conditions are fulfilled, Socrates upholds his principle: **the law should be obeyed as such, not as being just.**
- **Plato** (427-9?–347 B.C.E.) – law is a product of Reason?
- Plato's pupil, **Aristotle**: *“Law is an embodiment of Reason, whether in the individual or the community”*

1.1.0.2 Law: Romans

Cicero: 3 January 106 BC – 7 December 43 BC) was a **Roman statesman, lawyer, scholar, philosopher, and academic skeptic**, who tried to uphold optimate principles during the political crises that led to the establishment of the Roman Empire.

"True law is right reason; is agreement with nature; it is of **universal application, unchanging and everlasting**. It summons to duty by its **commands** and averts from wrongdoing by its **prohibitions**."

1.1.0.3 Law: Schools of thought

- Natural law theory – reason
- Marxist law theory – tool of oppression
- Positivist law theory - law is a matter of what has been ordered, decided, practiced, tolerated ...
- Realism law theory – laws come from court decisions

1.1.0.4 Law: Marxist law theory

Marx believed that throughout history, human societies have consisted of two classes: those who have the power to create the rules under which everyone must live, and those who have neither the resources nor the political clout to have a say in just what those rules will be.

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1.1.0.5 Law to Thurman Arnold?

Thurman Wesley Arnold (June 2, 1891 – November 7, 1969) was an American lawyer

‘obviously, law can never be defined with equal obviousness

....



1.1.1 Meaning of law

Law is a noun

- The Principles and regulations established in a community by some authority and applicable to its people, whether in the form of legislation or of custom and policies recognized and enforced by judicial decision.
- Any written or positive rule or collection of rules prescribed under the authority of the state or nation, as by the people in its constitution. Compare bylaw, statutory law.
- The controlling influence of such rules; the condition of society brought about by their observance: maintaining *law and order*.
- a system or collection of such rules.

1.1.1 Meaning of law

- Laws **provide** a framework and rules to help resolve disputes between **individuals**.
- Laws **create** a system where **individuals can bring their disputes** before an **impartial fact-finder**, such as a judge or jury.
- **General jurisprudence**, as this philosophical inquiry about the nature of law is called, is **meant to be universal**.
- It assumes that **law possesses certain features**, and it possesses them by its very nature, or essence, as law, whenever and wherever it happens to exist

1.1.2 The nature of law

Origins of Law as a Social Phenomenon

- Scholars have, over the years, struggled with the issue of the **origins of law** and many theories have been propounded in an attempt to explain this.
- These theories can be classified into two broad categories:
 - a) **Idealist arguments**
 - b) **Materialist arguments**

1.1.2 The nature of law

a) Idealist arguments:

- Law originates from the dictates of a **supernatural being**
- That law is provided to humanity by nature as a set of **immutable principles** from which individual rules of law are then drawn
- That humanity generates law on the basis of some **ideal sense of universal justice**
- Proponents of this view fall within the wider category of **Natural Law theory**.
- Plato, argued that law existed as a **natural and ideal phenomenon** and it **could only be known and applied by humanity through reason**.
- Cicero, opined that the **ultimate law was “heavenly law”** which is the expression of God’s mind.
- All human law **has to be compatible with the heavenly law** for it to be valid and for this reason, human law should be derived from heavenly law.

1.1.2 The nature of law

b) Materialist arguments

- According to these, **law has a purely social origin** as it arises out of the specific activities and relationships entered into by people in society.
- The arguments therefore **recognize social activity as the producer of legal phenomena**.
- Proponents of this view fall within the wider **Utilitarian and Marxist legal theories**.
- According to the **utilitarian John Locke** for example, law arose after the advent of a **politically organised society**.
- Before this, man was in a state **of nature enjoying absolute freedom except for the vagaries of nature**.
- As **society developed, political power arose**.

1.1.2 The nature of law

b) Materialist arguments.

- Law is therefore a **mere expression of this power**.
- It arises out of **social activities and is therefore not innate**.
- The **Marxist-Leninist theory also falls within this category**. The theory posits that law is not a natural phenomenon since it arose after the **breakdown of primitive social formation**.
- This process gave rise to **antagonistic class relationships which threatened to tear the society apart if new** forms of regulating social behaviour were not developed.
- In response, **law was developed as a tool for avoiding and negotiating conflicts** between the various classes.

1.1.2 Nature of law

There is no specific consensus as to the true nature of law. However, there are **certain elements about law that have received general consensus**. These are:

1. **A body of rules** governing social behaviour
2. **Imposes sanctions** to ensure compliance with its demands
3. **Generally in imperative form**- it does not leave the subject with the discretion as to whether to comply with its dictates or not except in the form of alternatives
4. **Largely (not always) in written form**; even where oral tradition prevails, final proof rests on some formalised pronouncement which is recorded in the form of governing principles
5. **Made either directly or indirectly** by some specialised body with the authority to do so

1.1.2 Nature of law

6. **A system of rules** which: forbid certain activities (e.g. theft, murder);
- or impose some conditions under which the activities may be carried out e.g. licensing);
 - or enable certain activities to be carried out with some form of legal backing and protection (known as power-conferring rules e.g. the law of contract.)
7. **Has a normative character-** law arises social rules which govern life in the society.
- A rule is a general norm guiding conduct or action in a given type of situation.
 - Prescribes what activity may, should or should not be carried out in a specified way.
 - Normative in character as compared to factual.
 - An “ought” statement” while a factual statement states what actually happens in fact an “is statement”.
 - All rules whether legal, moral or customary are normative since they prescribe standards of behaviour which people ought to conform to

1.1.3 The purpose of law

- Laws **protect our general safety, and ensure our rights as citizens against abuses by other people, by organizations, and by the government itself.**
- **We have laws to help provide for our general safety.** These exist at the local, state and national levels, and include things like: Laws about food safety etc.
- **“Law” is a system of rules designed to regulate behavior** in both public and private society.
- **Social and/or governmental institutions** create and enforce these rules.
- Humans have been making laws **for thousands of years.**
- Early examples include ancient **Egyptian law, Babylonian law, ancient Chinese law, and Old Testament law.**
- **There are many categories of law**, including **criminal law, civil law**, and so on. Why does law matter at all? Here are ten reasons why:

1.1.3 The purpose of law

#1 Laws set the standard for acceptable (and unacceptable) behaviors

- At its most basic, the law is about **mitigating conflict**. Some things – like murder and theft- are obvious and have been included in laws stretching back to ancient times.

#2 Laws provide access to justice

- If it's against the law to punch someone in the face, someone who gets punched can do something about it other than simply swinging back.
- In a perfect world, justice is equal. It doesn't matter who got punched or who did the punching. What matters is that the law against punching was broken. Everyone in a society – and not just a privileged few – must have equal access to justice through the law.

1.1.3 The purpose of law

#3 Laws keep everyone safe

- Laws don't only respond to injustices and harm. They work to prevent them. Food safety laws are a prime example. In the past, the food industry was horrendously unregulated.

#4 Laws protect the most vulnerable in society

- Many laws are specifically designed to protect certain groups of people. See COK 2010_ Chapter 4 The Bill of Rights (or Art. 19 to 59) with 53, Children, 54 PWD, 55_Youth, 56_Minorities & Marginalized, 57_Older Members of Society. See also Art. 27_ Equality and Freedom from Discrimination

1.1.3 The purpose of law

#5 The process of creating laws encourages civil and political engagement

- As societies change, laws must change, too. Advancements in technology are a prime example of why. In recent times, the distribution of sexually explicit images or videos of individuals without their consent has become a major issue.

#6 Laws offers people a variety of career options

- As a career, law is varied and versatile. Because there are so many different areas of law, there are hundreds of job options. Lawyers can specialize in everything from contracts to immigration to criminal law. A person can also become a professor of law, while there are also jobs for paralegals, consultants, and researchers. The legal system is big, so there is room for all kinds of skills and expertise.

1.1.3 The purpose of law

#7 Laws are important to maintain peace

- If destructive behaviors are allowed to flourish without remedy, people will suffer and become dissatisfied with their government.
- If justice is applied unequally, this also fans the flames of conflict.
- For the sake of peace, societies need to strengthen their rule of law and ensure that it's fair

#8 Laws are important for social progress

- legal systems should adapt and evolve with the times.
- If laws remained stagnant, so would societies.
- Throughout history, law has been employed as a tool for social change.
- It was laws that made slavery, segregation, and apartheid illegal.
- Laws prevent people from getting fired from their jobs because of who they marry or because of a disability.

1.1.3 The purpose of law

#9 Laws make human rights a reality

- Supreme Court Justice Sonia Sotomayor once said, “I firmly believe in the rule of law as the foundation for all our basic rights.”
- Basic rights are the human rights that everyone is entitled to.
- This includes the right to life, the right to marry, the right to be free from discrimination, and more.
- These are listed in the Universal Declaration of Human Rights, but that document is not legally binding.

#10 Laws are not always good for society

- Laws are not always beneficial to society or they’re only beneficial to a select group.
- Governments often use laws to increase their power and punish critics.
- Laws can also be problematic when they fail to address the root causes of a problem and even end up making it worse.
- Fines, which are meant to encourage people to follow laws, can add up to the point of putting people in debt and criminalizing poverty.
- The war on drugs is another key example of how laws can hurt people.
- Instead of treating drug addiction as a public health issue, laws have turned it into a criminal one.
- In these cases, laws end up violating human rights instead of protecting them.

1.1.4 Classification of law

Public and Private Law: Public laws are laws intended for general application, e.g., those apply to the nation as a whole or a class of individuals.

- Private laws are enacted for the benefit of a particular individual or small group, such as claims against the government or individual immigration or naturalization matters

Civil Law and Criminal Law: Civil law deals with the disputes between individuals, organizations, or between the two, in which compensation is awarded to the victim.

- Criminal law is the body of law that deals with crime and the legal punishment of criminal offenses

Substantive and Procedural Law: Substantive law establishes the rights and obligations that govern people and organizations; it includes all laws of general and specific applicability.

- Procedural law establishes the legal rules by which substantive law is created, applied and enforced, particularly in a court of law.

1.1.4 Classification of law

Municipal and International Law:

- Municipal law governs the domestic aspects of government and deals with issues between individuals, and between individuals and the administrative apparatus
- International law focuses primarily upon the relations between states.

Written and Unwritten Law:

- Written laws are laws which have been enacted in the constitution or in legislation.
- Unwritten laws are laws which are not contained in any statutes and can be found in case decisions..

Common Law and Equity.

- Common law typically refers to laws based on precedence and the rulings of judges who hear a case in a courtroom.
- Equity, on the other hand, refers to laws that are similarly established by court rulings but deal with judgment and justice through equitable decisions.

1.1.4 Classification of law

➤ Public

➤ Substantive

➤ Civil

➤ Unfair

➤ Unwritten

➤ National

➤ Private

➤ Procedural

➤ Criminal

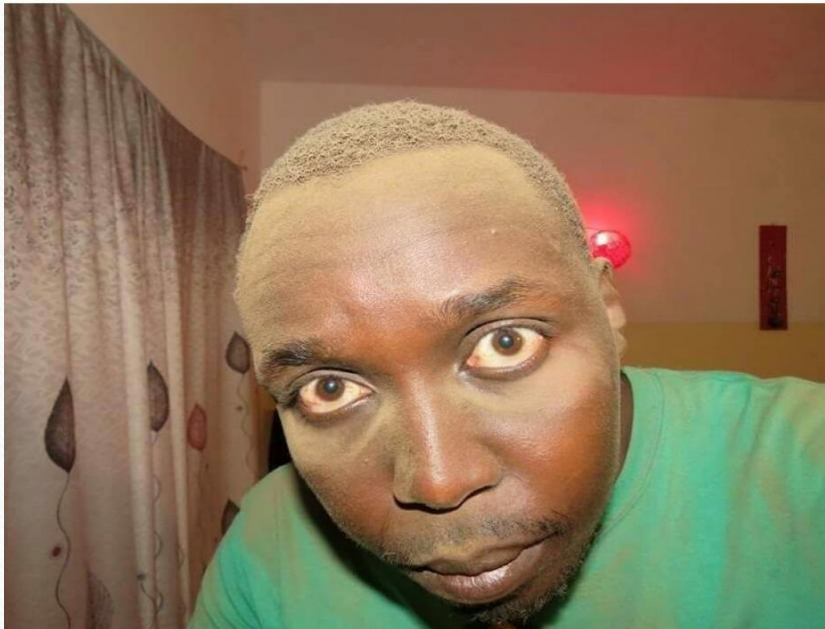
➤ Fair

➤ Written

➤ International

1.1.5 Law and morality

Ukitoka job KCB Thika



The three are suspected of digging a 30-metre tunnel into the Kenya Commercial Bank, Thika branch, and making away with Sh52 million with no shots fired.

Morality is?

- Wrong and right
- Fluid/ dynamic/ variable ... area ... time period ... era
- Developed by society
- Can be incorporated in the law
- Foundation of ethics

Law

Morality

(Read Annex 1 Word Notes)

- Largely fixed
- Recognises a legal issue or tackles a legal problem
- Enforced by the government
- Process to come up, change or do away with it is known
- Interpreted by courts
- Sources of law are known

- Flexible
- Defines good & wrong
- The society observes and 'enforces' it
- Has a strong religious or traditional background
- It can be developed by a person, an event or community
- Influences the law

Law

Morality



1.1.5 Law and morality

- The world around us is a smorgasbord of **different beliefs, values, rules, and norms**, all of which lay down how one should behave in society.
- It is **imperative to create distinctions** between all of these to avoid confusion and ambiguity.
- **Two such conflicts** which are often talked about together **are law and morality**.

Laws are formal rules that govern how we behave as members of a society that specify what we must do and what we must not do.

- These are implemented by the state and judiciary to create a basic and enforceable standard of behaviour for the welfare of society.

Morality on the other hand refers to an informal framework of values, principles, beliefs, customs, and ways of living.

- Morals are not legally enforceable but there is societal pressure to abide by the same.

1.1.5 Law and morality

- **Law and morality are two normative systems** that control and regulate behaviors in a human community so as to allow harmonious and effective inter-subjectivity between individuals who recognize one another as bearers of rights
- **Law treats all people in the same manner and doesn't change from person to person but morality is a subjective concept.**
- Morality has influenced the creation of laws but morality existed in society since even before legal implications were discussed
- **Law refers to the set of rules and regulations enforced by the state to regulate the human behaviour in society whereas morality refers to the ethical code of conduct for a human being.**
- legal positivism suggests that **the boundary between law and morality is strict and exclusive.** That is, the question of what the law is and the question of what it ought to be are completely separable. Judges, therefore, cannot employ their own moral judgments to determine what the law is.

1.1.5 Law and morality

- **Natural law theory protects against unjust laws by maintaining a harmony of law with morality.** Morality is an indispensable component of justice. Immoral laws are unjust, and unjust laws inevitably become instruments of oppression and despotism. Laws must therefore act in harmony with moral precepts.
- Another difference between moral and legal rules is that **moral rules cannot be changed with the ease that legal rules can be.** Rules that are inculcated are not subject to alteration in the short run; it will often take at least a generation to accomplish that.
- **Summary.** Jurisprudence was enlivened in the second half of the 20th century by new debates about law and morality. Two of these involved **Herbert Hart**, the major figure in **British legal positivism**. Hart argued that the connection between law and morality was **not necessary but contingent**.

See attached Word Document on Law and Morality (Attachment 1)

1.1.6 What is a legal system?

- A legal system is a procedure or process for interpreting and enforcing the law.
- They are the principles or procedures for the classification of laws, matters or procedure relating to them.
- While there are hundreds of legal systems in the world, the three major legal systems of the world consist of **civil law, common law and religious law**.
- Other legal systems are: Jury system is a legal system for determining the facts at issue in a lawsuit

1.1.6.1 What is the Common Law?

- Also known as judicial precedent, judge-made law, or case law, is the body of law created by **judges and tribunals**.
- Unlike statutory law, the common law is **contained and developed within written opinions and judgments**.
- Common law is based on all previous legal rulings made by judges in a **common law court**.
- Examples of such rulings are common law **requirements for people to read contracts, doctor-patient confidentiality, copyright, and common law marriage**

1.6.1.1 What is the Common Law?

- As compared to civil law, the common law's purpose is **to produce consistent results by applying the same definition requirements**.
- In some cases, the precedent depends on the individual jurisdictions' case-by-case procedures.
- As a consequence, common law elements can vary from one district to another

1.6.1.2 Types of common law

General common law

- Laws created for situations and circumstances that do not have a precedent in existing common law.
- Contract law is an example of common law.
- Federal common law is referred to general common law and governs areas of dispute where state law is not applicable.

Interstitial common laws

- Are temporary laws that are created for interpretations of existing statutes.
- When Congress makes laws, it does not cover all situations or instances applicable to it.
- It is the task of the courts to “fill in the gap,” so to speak, in the interstices of the relevant legislation in order to make it whole.
- An example of this type of law is the choice to exclude wheelchairs from a “no wheeled vehicles on sidewalk” ordinance.

1.6.1.3 What is the Civil Law?

- **Civil law** systems, also called *continental* or *Romano-Germanic* legal systems, are found on all continents and cover about 60% of the world.
- They are based on concepts, categories, and rules derived from Roman law, with some influence of canon law, sometimes largely supplemented or modified by local custom or culture.
- The civil law tradition, though secularized over the centuries and placing more focus on **individual freedom, promotes cooperation** between human beings.
- In their technical, narrow sense, the **words civil law describe the law that pertains to persons, things, and relationships that develop among them**, excluding not only criminal law but also commercial law, labor law, etc.
- Codification took place in most civil law countries, with the French *Code civil* and the German BGB being the most influential civil codes.

1.6.1.3 What the civil law is

- A **comprehensive system** of rules and principles usually arranged in codes and easily accessible to citizens and jurists.
- A **well organized system** that favors cooperation, order, and predictability, based on a logical and dynamic taxonomy developed from Roman law and reflected in the structure of the codes.
- An **adaptable system**, with civil codes avoiding excessive detail and containing general clauses that permit adaptation to change.
- A **primarily legislative system**, yet leaving room for the judiciary to adjust rules to social change and new needs, by way of interpretation and creative jurisprudence.

1.6.1.4 Some salient features of the civil law:

- **Clear expression of rights and duties**, so that remedies are self-evident.
- **Simplicity and accessibility to the citizen**, at least in those jurisdictions where it is codified.
- **Advance disclosure of rules**, silence in the code to be filled based on equity, general principles, and the spirit of the law.
- Richly developed and to some extent transnational **academic doctrine** inspiring the legislature and the judiciary.

TOPIC TWO

Sources of law

2. Sources of law

2.0 Where is the law?

2.1 The Constitution

2.2 Legislation

2.3 Substance of common law and doctrines of equity

2.4 African customary law

2.5 Islamic law

2.6 Judicial precedent

2.7 General rules of international law and ratified treaties

2.0 Where is the law?

(Annex 5 Sources of Law in Kenya)

-
- The Constitution of Kenya 2010
 - Statutes
 - Subsidiary legislation
 - Case law / decided cases
 - International law
 - Equity
 - Common law
 - African customary & Hindu & Islamic law
 - *Literature & media – for lay people*

2.1 The Constitution of Kenya

What is a constitution?:

- A body of fundamental principles or established precedents according to which a state or other organization is acknowledged to be governed.
- Is the aggregate of fundamental principles or established precedents that constitute the legal basis of a polity, organisation or other type of entity and commonly determine how that entity is to be governed.

Types of constitution ...

- Written & unwritten
- Rigid & flexible
- Federal & unitary
- Parliamentary & presidential
- Monarchical & republican

Monarchy



2.1 The Constitution of Kenya 2010

Read Annex 4 Word

- Article 2:
 - Social contract theory
 - Supremacy
 - Consistency
 - Written laws
- International law

2.1 The Constitution of Kenya

2. (1) This Constitution is the **supreme law** of the Republic and binds all persons and all State organs at both levels of government.

(2) No person may claim or **exercise State authority except as authorised** under this Constitution.

(3) The validity or legality of this Constitution is **not subject to challenge** by or before any court or other State organ.

(4) Any law, including customary law, that is **inconsistent** with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

(5) The general rules of **international law** shall form part of the law of Kenya.

(6) Any **treaty or convention ratified by Kenya** shall form part of the law of Kenya under this Constitution.

2.1 The Constitution of Kenya 2010

Has 18 chapters; Has 6 Schedules

Chap 1. Sovereignty of People and Supremacy of this Constitution

Chap 2. The Republic

Chap 3. Citizenship

Chap 4. The Bill of Rights

Chap 5. Land and Environment

Chap 6. Leadership and integrity

Chap 7. Representation of the people

Chap 8. The Legislature

Chap 9. The Executive

Chap 10. Judiciary

Chap 11. Devolved Government

Chap 12. Public Finance

Chap 13. Public service

Chap 14. National Security

Chap 15. Commissions and Indept Bodies

Chap 16. Amendment of this Constitution

Chap 17 General provisions

Chap. 18 Transition and Consequential provision

1st Schedule -Counties

2nd Schedule- National Symbols

3rd Schedule- National Oaths and affirmation

4th Schedule – Distribution of functions between National and County govt.

5th Schedule – Legislation to be enacted by Parliament

6th Schedule – Transitional and consequential provision

2.1 The Constitution of Kenya

- Provides national languages, days and symbols (Chap 2, 2nd Schedule)
- Provides for rights & freedoms (Chap. 4)
- National & county government (CoK Chap 2, 7,8,9,10,11, 4th Schedule)
- Creates the three arms of the government, constitutional offices and bodies (Chap 8,9,10,11)

2.2 Legislations: statutes

Statute: a written law passed by a legislative body.

Main source of legislation:

Parliament = Senate + National assembly

- Widely used
- Chapter 7 of the COK

2.2 Statutes

-
- The Contract Act
 - The Companies Act
 - The Hire Purchase Act
 - The Insurance Act
 - The Marriage Act
 - The Sale of Goods Act



Substantive Statutes

- The Civil Procedure Code
- The Criminal Procedure Code



Procedural Statutes

2.3 Subsidiary legislation

Delegated authority

- Order, notice, declaration, rules & regulations
- Lockdown
- Curfew
- Ban on flights
- Movement of the port

Statutes

- Created by parliament
 - Widely used
 - Comprehensive
 - Democratic
 - Reliable
-
- Expensive
 - Slow & tedious

Subsidiary legislation

- Public officer or body
 - Fast
 - Responsive/dynamic
 - Cheap
 - Expertise
-
- Dictatorial/abuse of power
 - 'Unregulated'
 - Minimal publicity

2.4 International law

Main source:

- Treaties/Conventions
- United Nations Charter (1945)
- Convention on the Rights of the Child (1989)

2.4 International law

The **International Court of Justice** (ICJ) is the principal judicial organ of the United Nations (UN). It was established in June 1945 by the Charter of the United Nations and began work in April 1946. The seat of the Court is at the Peace Palace in The Hague (Netherlands).

Statute of the International Court of Justice

Article 38 describes the four (4) sources:

- **International conventions**, whether general or particular, establishing rules expressly recognized by the contesting states;
- **International custom**, as evidence of a general practice accepted as law;
- The **General principles of law** recognized by civilized nations;
- subject to the provisions of Article 59, **Judicial Decisions and the Teachings of the most highly qualified publicists** of the various nations, as subsidiary means for the determination of rules of law.

2.4 International law

- Section 102 of the Restatement **identifies sources of international law**. Customary international law is listed first and international agreements second, thus reversing the order in which those sources are listed in article 38(1) of the Statute of the International Court of Justice.
 - in the form of **customary law**;
 - by **international agreement**; or
 - by **derivation from general principles common to the major legal systems of the world**.

2.5 Case law

- Emanate from court
- Significant judicial decisions that set precedent
- Judges

2.6 CIVIL LAW: TORT OF NEGLIGENCE

Read Annex 6

1. The system of law concerned with private relations between members of a community rather than criminal, military, or religious affairs. "the owners can prosecute the individuals under civil law for trespassing"
2. The system of law predominant on the European continent, historically influenced by that of ancient Rome

Tort of Negligence: It is a **breach of duty of care** owed to the plaintiff by the defendant which results to **damage or loss** on the plaintiff.

Donoghue V. Stevenson (1932)



FACTS

The events of the case took place in Paisley, Scotland in 1928. Ms. May Donoghue was given a bottle of ginger beer by a friend. The bottle was later discovered to contain a decomposing snail. Since the bottle was not made of clear glass, Donoghue had consumed most of its contents before she became aware of the snail. She later fell ill and a physician diagnosed her with gastroenteritis. Donoghue subsequently took legal action against Mr. David Stevenson, the manufacturer of the ginger beer. She lodged a writ in the Court of Sessions, Scotland's highest civil court, seeking £500 damages.

ELEMENTS

- Elements:
 - ✓ Legal duty of care must exist.
 - ✓ Breach of that legal duty.
 - ✓ Loss or injury.

ELEMENTS

Neighbour principle: Lord Atkin said of this principle: “You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought to have them in [mind] when I am [considering these] acts or omissions.”

Subsidiary sources

2.6 Judicial precedent: common law



Common law (Read Annex 2 Word Notes)

- Earliest form of law
- Kings & Queens of England
- Writ system - forms to lodge complaints

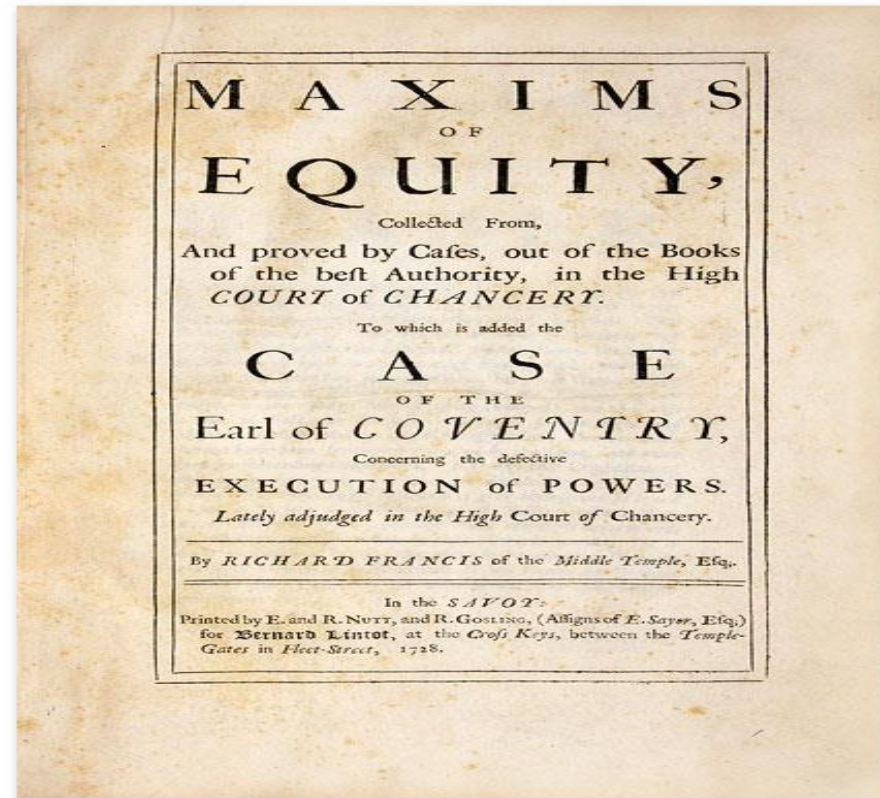
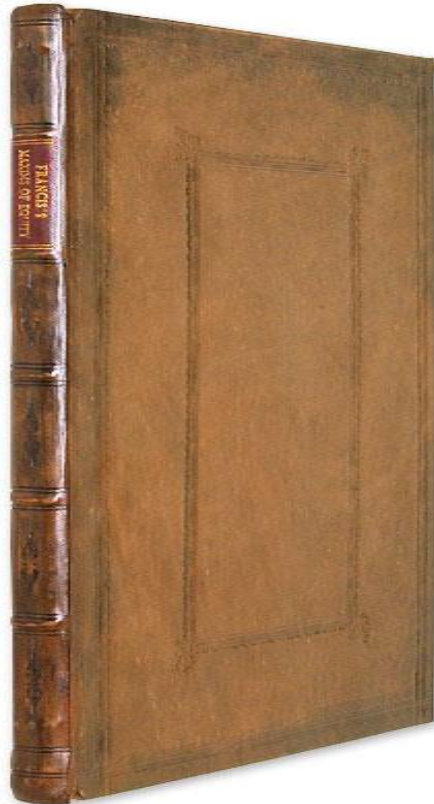
Disadvantages

- Rigidity
 - Slow
 - Corruption
 - Inadequate

2.7 Law of Equity

- Improved common law
 - Adequate wrongs & remedies e.g. Trust
 - Reduced harshness
 - Substance over form
 - Principles or Maxims of Equity

2.7 Maxims/Principles of Equity



2.7 Maxims/Principles of Equity

Summary 'Equity will not suffer a wrong to be without a remedy' and 'Equity acts on the person' (Read Annex 3 Word Notes)

1. Equity looks on that as done which ought to have been done
2. Equity will not suffer a wrong to be without a remedy
3. Equity is a sort of equality (Equality is equity)
4. One who seeks equity must do equity
5. Delay defeats Equity, or Equity aids the vigilant not the indolent
6. Equity imputes an intention to fulfil an obligation
7. Equity acts *in personam* (i.e. on persons rather than on objects)
8. Equity abhors a forfeiture
9. Equity does not require an idle gesture
10. He who comes into equity must come with clean hands
11. Equity delights to do justice and not by halves
12. Equity will take jurisdiction to avoid a multiplicity of suits
13. Equity follows the laws: *Aequitas sequitur legem*
14. Equity will not assist a volunteer
15. Equity will not complete an imperfect gift
16. Where equities are equal, the law will prevail
17. Equity will not allow a statute to be used as a cloak for fraud
18. Equity will not allow a trust to fail for want of a trustee
19. Equity regards the beneficiary as the true owner
20. Between equal equities the first in order of time shall prevail

2.8 Other sources of law

- African customary law
- Islamic law
- Hindu customs

Qualified use: Article 159 (3)

- Shall not contravene the Bill of rights
- Shall not be repugnant to justice or morality
- No inconsistency with the Constitution or written law

Q?

1. What do you understand the law to be?
2. Sources of law?
3. Offer classes of law you know of?