

SOURCES OF KENYA LAW

A source is a point at which something begins or comes from. It also can be a place or point where something emanates from.

Much of our law originated in English common law. We also have relied on the following other sources to meet the changing needs of our society;

- i) Constitution
- ii) Statutes / Legislation
- iii) Court decisions
- iv) Administrative Regulations
- v) African Customary law
- vi) Islamic law
- vii) Delegated legislation
- viii) Indian law
- x) Statutory interpretation
- xi) Equity

Common Law

Common law has a great influence in our legal system. Common law was developed in England during the Norman Conquest in 1066 A.D. Common law is the English system of law. It is a body of legal decisions made by English Court judges over a period of years.

English Court Judges made legally binding decisions based on local customs. However their decisions were oral and not written down. Each case produced a new oral law that served as a precedent. These precedents were brought to our country (Kenya) by the British colonial rule.

The following are some of the English precedents that still apply in our country:

- a) The English law reform Act of 1943
- b) The Law Reform (married women and Tortfeasors) Act of 1935
- c) The Disposal of uncollected Goods Act of 1952
- d) The Admiralty offences (colonia) Act of 1849
- e) The Evidence Act of 1851 (Sec. 7 and 11)

1. The Constitution

A constitution is an outline of basic principles that govern the nature, functions and limits of a group of people. It is the basic framework that determines the purpose of the group/country/state and the relationship between it and its members. It is the basis of a government's powers and authority. It is the law that carries out its purposes, the court decisions that interpret its concepts and the administrative regulations that enforce its principles.

The first Kenyan Constitution was enacted on 12th December 1963 whereas the constitution for the new dispensation was enacted in 2010. It is in a written form. It provides a comprehensive framework of rules through which a country can operate.

The constitution is therefore the single formal document which defines the composition and powers of different organs of the state.

Article 2 of our constitution provides that “it’s a constitution of the Republic of Kenya and shall have force of law throughout Kenya”. It is the Supreme Law.

“If any law is inconsistent with this constitution, this constitution shall prevail and the other law shall to the extent of the inconsistency be void. Our constitution is therefore a major and leading source of our laws”.

A constitution may be written or unwritten. A written constitution is one which most of the important provisions are enacted in a forms document.

Kenya’s current constitution promulgated on 27th August 2010 is a written constitution. It provides for a rigorous approach to amendments at Chapter 16. This is meant to guard against arbitrary and uncalled for amendments.

The current constitution has a total of 18 Chapters, 264 Articles and 6 Schedules. If a source of law in that it established the legislature (Chaps 8), the Executive (Chapt 9) the Judiciary (Chapter 10) and fundamental rights & freedom.

Lord James Bryce defines the constitution as constituting of those rules of laws which determines the form of its government and the respective roles of its organs and the respect rights and duties a citizen and a citizen towards the Government.

3. Amendment of Constitution

Sec. 47 of our Constitution empowers parliament to alter the constitution. However, this constitutional amendment requires a vote of 65% of all the members of parliament.

Amendments effected to the constitutions become part of the constitution and therefore read alongwith. We can conclude therefore that amendments that have been adapted over the years become a source of our laws.

2. Legislation

Law made by parliament is called **Legislation**. Our parliament has the powers to pass laws that are of national importance. Laws made by parliament consist of rules made either directly or indirectly.

Direct legislation is when the rules are contained in a statute. This becomes supreme legislation and is building on the courts which cannot question its validity.

Indirect legislation is when the rules are made by virtue of the powers contained in a statute. Such powers may come upon some competent body the power to make rules having the force of law.

E.g. The local government Act which confers the authority to make by-laws to the city Council of Nairobi.

Such laws are known as subordinate or delegated legislation and are binding. Legislative power is vested in parliament. Parliament consists of the president and the national Assembly. Sec. 46 of the constitution says that the legislative powers of parliament are exercised by bills passed by the national Assembly.

Legislation involves drafting of a bill which then is introduced in the national assembly. In the national assembly a bill goes through five stages before finally becoming law. These are:

- First Reading
- Second Reading
- Committee stage
- Reporting stage
- Third Reading
- President's assent.

First Reading – It involves the introduction of the Bill to parliament by the minister, Member of Parliament or the Attorney General. If the bill is approved at this stage then it is printed and circulated among members of parliament for debate.

Second Reading – the minister or Member of Parliament responsible for the bill will take the floor of the house and explain the bill to the assembly. Members are then allowed to debate and at the end of the debate, the Bill is voted for. If it gets support by majority of the members present, it passes to the next stage.

The Committee stage – Once the Bill is cleared at the second stage, it is subject either to the committee of the whole house or a small committee of the house. The committee will deliberate on the bill and consider it with toothpick.

The Reporting stage – The committee will after considering the bill take it back to the National Assembly. The chairman of the committee will report back to the house, the committee's findings and opinion. If there are amendments proposed, the whole house will debate on them and upon agreeing, the bill is sent to the next stage.

Third Reading – The bill is read for the third time but this time as shall have been amended. Only minor drafting changes are permitted.

The president's assent – A bill does not become law until and unless assented to by the president. Normally the president will give his assent but he can also refuse to assent. The president can refer the bill back to the National Assembly if in his opinion / judgement, it does not fare the best interest of the nation. If the bill is assented to, it becomes an Act of parliament and it shall be entered in the statute laws.

3 Court Decision (Case Law or Judicial Precedent)

Law in Kenya is also created through decisions handed down in court cases by judges. This law is referred to as case law. Courts are established to interpret the statute (Act of parliament). In the process of interpreting the statute, courts comes up with new decisions. Different judges interpret the law in different ways. In this way, they produce precedents that have the force of law. Other courts of similar or lower will follow these precedents in deciding similar cases in future.

While Parliament (Legislature) pass laws, courts pass laws equally by interpreting or modifying existing laws or making decisions that create new precedents. These precedents are as effective as laws passed by the legislature.

Illustration

Akura, a registered voter, was told that she could not vote in an election unless she first paid fees. She refused to do so and filed a suit. However, there was a state law that required the payment of the fee. The court ruled that the state law was unconstitutional and that Akura was entitled to vote without paying the fees.

In Kenya we have High Court and Court of Appeal decisions recorded and published by the Kenya Law Report. These decisions have formed part of our laws as judges of inferior courts follow decisions of the higher courts in cases involving similar facts.

It's important to note that, its not the entire judgement which is binding but reasons for the decision - Ratio decidendi

In his judgement a Judge may say things which are not strictly relevant to the final judgement. Such things or statements are remarks made by the way – “Obiter dicta”. Those remarks do not create any binding precedent.

When a judge applies an already existing principle to a case before him his, decision becomes a declaratory precedent. However, where there is no legal principle existing, the judge creates a new rule of law to govern the facts before him. The new rules will now act as a future precedent.

The general rule in our Court system is that every higher court binds lower courts. The highest court in Kenya is the Court of Appeal. Decision of the Court of Appeal binds all lower Courts. i.e. High Court and Magistrate Courts.

The court of Appeal does not bind itself. Below the court of Appeal is the High Court. Decision of the High Court binds Magistrate, and Kadhis' courts.

A High Court judge is bound by the decision of the Court of Appeal. However, he is not bound by the previous decisions of the High Court Judges.

Magistrate Courts do not create binding precedents. Binding precedents are created by the High Court and Court of Appeal. They are bound by the decisions of both the High Court and the Court of Appeal. Decisions of the Magistrate Court are not reported in the Kenya Law Reports.

English and Indian Superior Court decisions are followed in our courts as persuasive authorities.

Advantages of Case Law.

- i) Certainty
- ii) Possibility of growth
- iii) Rich in details

i) **Certainty** – Case law or decided cases are certain. Inferior courts will not take responsibility for their decisions as they shall have followed the Superior Courts decision to decide their cases of similar circumstances.

The maxim of stare decisis (Stand by decisions already made) has made case law consistent.

ii) **Possibility of growth** – Case law emanates from the circumstances of a case. Each case has its unique surrounding. Case law has kept growing and decisions changing from time to time. As our society changes, circumstances surrounding each case changes from time to time. This has seen a tremendous growth in case law in Kenya.

iii) **Rich in Detail** – Case law is rich in detail. It consists of elaborate notes of the judge/judges which add tremendous value to Judges, Magistrates, Advocates, students of law and other users.

Disadvantages

i) Rigidity

ii) Over-Subtlety

iii) Bulky and complexity

i) **Rigidity** – A decision of a superior court binds the inferior one. It therefore follows that a judge of an inferior court is restricted from using his own reasons to arrive at a different judgement.

However, a judge of an inferior court may refuse to follow the decisions of the superior court on grounds;

- That there exists material difference between the facts of superior court and the one before him.
- That the superior courts had omitted to consider the provision of some relevant Act.

ii) **Over –subtlety** – the concept of binding precedent has led judges sometimes to create artificial distinction in order to avoid following an earlier decision.

iii) **Bulky and complexity** – case laws are contained in voluminous law Reports dating back to middle Ages. It's cumbersome going through those volumes in search of a precedent. Some volumes are too heavy to carry.

4. African Customary Law

African Customary law emanates from habitual practices and traditions of Kenyan African people.

Sec. 3 (2) of the Kenya judiciary Act provides that the High Court and all subordinate courts shall be guided by African customary law in Civil Cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure without any delay.

It's important to note that customary law as illustrated above.

- i) Only applies in civil cases, which involves individual and not the state.
- ii) Does not apply in Criminal Cases
- iii) Only applies where it's not repugnant to natural justice and morality
- iv) Applies where it is not inconsistent with any written law in Kenya.

The Kenya Magistrates Court Act recognizes African Customary Law in the following words:

Sec 2 – A claim under customary law means a claim concerning any of the following:

- a) Land held under customary law.
- b) Marriage, divorce, maintenance and dowry
- c) Seduction or pregnancy of an unmarried woman or girl
- d) Enticement of or adultery with a married woman
- e) Matters affecting status e.g. women, widows and children, guardianship custody, adoption and legitimacy.
- f) Succession (testate and intestate) – administration of the estate

6. Islamic Law

Islamic law is derived from the Quran. It only applied in Kadhi's Courts. It affects persons professing Islamic faith. It applies to disputes relating to:

- Personal status
- Marriage
- Divorce
- Inheritance

It is a limited source of law in Kenya as it only applies in the Kadhis' Court.

7. Indian Law

We have borrowed from the Indian law some of its enactment to supplement in our system.

- e.g.
- Indian succession Act of 1865
 - Indian transfer of property Act of 1882

5. Delegated Legislation

Delegated legislation is also known as indirect legislation. It's the making of laws by other bodies apart from parliament. Legislation is an act of parliament of making laws. When parliament gives some of its powers to another body to make law, it knows as delegated legislation. Such laws made by other bodies other than parliament can be; rules, regulation, orders, by-laws.

A good example of institutions with delegated powers to legislate are:

- Ministries
- Institutions of higher learning
- Railways
- Public Corporations.

By-laws require the approval of the appropriate minister before enforcement by the courts. Rules and order are usually made by ministers. They must be permitted to parliament before being enforced.

By-laws **MUST** be intra acres (within the law) and must not be unreasonable. A court can declare statutory instruments, by-laws and rules void if they are found to be ultra acres the law. The power to make rules –by-laws and statutory instruments is given by parliament. Any such rule, by-law or statutory instrument which is beyond the powers contained in a statute is ultra acres .

Why MUST Parliament Delegate

- i) Lack of parliamentary time
- ii) Urgency
- iii) Technicality of subject matter
- iv) Flexibility

- i) **Lack of parliamentary time** – Parliament does not have sufficient time to legislate on all aspects of national issues. It therefore becomes necessary to give out some of its law – making powers, so that it can concentrate on other more pressing issues.
- ii) **Urgency** – The process of making laws in parliament slow as the bill has to go through five (5) stages before becoming law. Its also important to note that parliament is not always in session. It may not therefore be available at all times to meet emergency cases.
- iii) **Technicality of subject matter** – Parliament is a general body. It’s not a body of experts and therefore, it may not be in a position to handle certain technical issues. It therefore becomes necessary to refer such technical issue to relevant experts in a given body to deal.
- iv) **Flexibility** – Parliament is not flexible. It has no mechanism of repealing or amending without following the length procedure. However ministerial rule or regulation in question can be withdrawn or amended by the minister in a sitting.

7. Equity

Equity is derived from the Roman term “acqutas” which means equal or level. Maine has described Equity as “any body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil law by virtue of a superior sanctify inherent in those principles.

In the English sense, equity means the body of the rules formulated and administered by the court of chancery to supplement the rules and procedure of the common law.

Blackstone defines Equity as the soul and spirit of all law. Equity came to supplement common law and it was practice is the courts of chancery. The Chancellor was the presiding officer in chancery courts.

Equity was introduced to the English judicial system due to the weakness experienced in the common law courts.

Equity means natural justice, honesty, fairness and right. In equity one is expected to do what he expects other to do to him.

Aristotle defines equity as the correction of law which is defective on account of its generality. The key elements of the above definitions are therefore;

- i) Equity is founded on natural justice.
- ii) It is the body of rules and principles which exist side by side of the original civil law.
- iii) It does not supersede the existing law, but is a supplementary to such law.

In the words of Aristotle, equity is the correction of the law where it is defective on account of its generality. Equity came to safeguard and promote the interest of justice against the rigidity, defects or deficiencies of the existing law in the state .

In a nutshell, we can say that Equity is a set of rules formulated and administered by the courts of chancery before 1873 to supplement the rules of common law. Equity was merely a collection of rules which were formulated to remedy defects in common law.

Why Equity

- i) The common law provided no remedy for certain wrongs.
e.g. trust were not recognized under common law
- ii) The remedies provided in certain cases were not satisfactory.
e.g. in case of breach of contract, the only remedy available was damages.
Specific performance or injunctions were not recognized

The common law courts sometimes acted partially either under pressure influence or bribe of the other party.

Contributions of Equity

- i) If granted injunctions and would order specific performance where common law could award only damages.
- ii) If recognized trust and a beneficiary could compel a trustee to administer the trust property in accordance with the terms of the trust.
- iii) If recognized equitable doctrine of part – performance and mortgagors right of redemption of mortgaged property.

The principles and rules of equity are applied in all our court system today. Some of such principles (doctrines) are as follows:

1. Equity will not suffer a wrong to be without a remedy
2. Equity follows the law
3. He who seeks Equity must do Equity

4. He who comes to Equity must come with clean hands
5. Delay defeats Equity
6. Equity is Equity
7. Equity looks to the intent rather than to the form
8. Equity looks on that as done which ought to have been done.
9. Equity imputes an intention to fulfill obligation.
10. Equity acts in personam
11. Where the Equities are equal the first in time shall prevail
12. Where there is equal Equity, the law shall prevail.

8. Statutory Interpretation

Statutory legislation is done by parliament whereas statutory interpretation is done by the courts. At the time of deciding the case, a judge will give a true meaning to an Act of parliament. The interpretation made give rise to a new law.

In interpreting the law the courts applies the following three (3) rules namely; The literal rule, the golden rule and the mischief rule.

- i) **Literal Rule** implies that a literal meaning is given to the law as it is. This applies where the law is clear and exact.
- ii) **Golden Rule** implies that the judge will modify the ordinary meaning of the law. This applies where literal meaning leads to absurdity or inconsistency.
- iii) **Mischief Rule** implies that the court must examine a statute to be to discover a defect in the existing law. Court will look into the purpose for which the statute was passed. The word mischief means defect. The judge will do everything in his hands to eradicate the mischief /defect. This is done to protect and provide remedy to an innocent person.