# CPA SECTION 1

# CCP SECTION 1

# CS SECTION 1

# COMMERCIAL LAW

# STUDY TEXT

## GENERAL OBJECTIVES

This paper is intended to equip the candidate with knowledge, skills and attitudes that will enable him/her to apply the principles and provisions of commercial law in various business environments

## LEARNING OUTCOMES

A candidate who passes this paper should be able to:

- Apply general principles Of commercial law in business
- Identify the various dispute resolution mechanisms
- Demonstrate knowledge of legal personality
- Describe the different types of property
- Apply the law of contract in various scenarios

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# CHAPTER 1

# NATURE PURPOSE AND CLASSIFICATION OF LAW

**Introduction**

By the end of this topic the learner should be in a position to answer the following questions from general detailed perspective.

- What do you understand by the term law?
- What are the distinct features of law that make it what it is?
- Explain using relevant examples, the various ways in which law in your country is classified?
- Explain the relation that exist between law, morality and ethics, citing various examples where need be?
- Explain the purpose of law in your country

While "the law" may appear to be abstract or far fetched from your daily activities, it is in reality within the framework of what you do. Think of returning something you just bought, filling tax returns, wondering what to do with the annoying neighbor who insists on holding loud gathering in his/her house or who keeps insisting on hanging stuff on your fence. Well mostly these activities require some level of legal know how.

This book aims at answering how to handle most of these scenarios and such equivalent in legal sense. What is law, where does it come from, what makes it binding, all these and more.

**MEANING OF LAW**

Law, simply put, refers to the set of rules which guide our conduct in the society and is enforceable by the state via public agencies.

Law in its general sense tends to be as a result of the necessary relations arising from the nature of things. In this sense all things have their laws. Humans, material world, superior beings and even animals all have their own laws. Simply put, the nature of these relationships tends to determine the nature of the laws.

But the intelligent world is far from being so well governed as the physical. This is because intelligent beings are of a finite nature, and consequently liable to error; and on the other, their nature requires them to be free agents. Hence they do not steadily conform to their primitive laws.

Law in general is human reason, inasmuch as it governs all the inhabitants of the earth: the political and civil laws of each nation ought to be only the particular cases in which human reason is applied.

According to the oxford dictionaries law can be defined as; The system of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the imposition of penalties

**NATURE OF LAW**

The different schools of thought that have arisen are all endeavors of jurisprudence: Natural law school Positivism, realism among others. It is these schools of thoughts that have steered debates in parliaments, courts of law and others.

- **Natural law** theory asserts that there are laws that are immanent in nature, to which enacted laws should correspond as closely as possible. This view is frequently summarized by the maxim: an unjust law is not a true law, in which 'unjust' is defined as contrary to natural law.

- **Legal positivism** is the view that the law is defined by the social rules or practices that identify certain norms as laws

- **Legal realism-** it holds that the law should be understood as being determined by the actual practices of courts, law offices, and police stations, rather than as the rules and doctrines set forth in statutes or learned treatises. It had some affinities with the sociology of law.

- **Legal interpretivism-** is the view that law is not entirely based on social facts, but includes the morally best justification for the institutional facts and practices that we intuitively regard as legal.

**Generally speaking law has the following characteristics**

1. It is a set of rules.
2. It regulates the human conduct
3. It is created and maintained by the state.
4. It has certain amount of stability, fixity and uniformity.
5. It is backed by coercive authority.
6. Its violation leads to punishment.
7. It is the expression of the will of the people and is generally written down to give it definiteness.
8. It is related to the concept of 'sovereignty' which is the most important element of state.

## FUNCTIONS/PURPOSES OF LAW

1. It promotes peaceful coexistence/ maintenance of law and order/ prevents anarchy
2. It is a standard setting and control mechanism. Law sets standards of behaviour and conduct in various areas such as manufacturing, construction, trade e.g. The law also acts as a control mechanism of the same behaviour
3. It protects rights and enforces duties by providing remedies whenever these rights or duties are not honoured.
4. Facilitating and effectuating private choice. It enables persons to make choices and gives them legal effect. This is best exemplified by the law of contracts, marriage and succession.
5. It resolves social conflicts. Since conflicts are inevitable, the rule of law facilitates their resolution by recognizing the conflicts and providing the necessary resolution mechanism.
6. It controls and structures public power. Rules of law govern various organs of
7. Government and confer upon them the powers exercisable by them. The law creates a limited Government. This promotes good governance, accountability and transparency. It facilitates justice in the society.

## CLASSIFICATION OF LAW

Law may be classified as:

1. Written and Unwritten.
2. Municipal (National) and International.
3. Public and Private.
4. Substantive and Procedural.
5. Criminal and Civil.

### Written law

This is codified law. These are rules that have been reduced to writing i.e. are contained in a formal document e.g. the Constitution of Kenya, Acts of Parliament, Delegated Legislation, International treaties etc.

### Unwritten law

These are rules of law that are not contained in any formal document.

The existence of such rules must be proved. E.g. African Customary law, Islamic law, Common law, Equity, Case law e.t.c

Written law prevails over unwritten law.

**Municipal/ national law**

This refers to rules of law that are applicable within a particular country or state. This is state law.

It regulates the relations between citizens inter se (amongst themselves) as well as between the citizens and the state.

It originates from parliament, customary and religious practices.

**International law**

This is a body of rules that generally regulates the relations between countries or states and other international persons e.g. United Nations.

It originates from international treaties or conventions, general principles and customary practices of states.

**Public law**

It consists of those fields or branches of law in which the state has a direct interest as the sovereign.

It is concerned with the Constitution and functions of the various organizations of government including local authorities, their relations with each other and the citizenry. Public law includes:

- Criminal Law
- Constitutional Law
- Administrative Law

Public Law asserts state sovereignty.

**Private law**

It consists of those branches of law in which the state has no direct interests as the state sovereign.

It is concerned with the legal relationships between persons in ordinary transaction e.g.

- Law of contract
- Law of property
- Law of succession
- Law of marriage
- Law of torts

**Substantive law**

It consists of the rules themselves as opposed to the procedure on how to apply them.

It defines the rights and duties of the parties and prescribes the remedies applicable.

Substantive law defines offences and prescribes the punishment, for example:

- The Law of torts
- The Law of succession
- The Law of contract
- The Law of marriage
- The Penal Code

**Procedural law**

This is adjectival law. It consists of the steps or guiding principles or rules of practice to be complied with in the administration of justice or in the application of substantive law. For example:

- The Civil Procedure Code
- The Criminal Procedure Code

**Criminal law**

This is the law of crimes. A **crime** is an act or mission committed or omitted in violation of public law e.g. murder, treason, theft, e.t.c. All crimes are created by parliament through statutes

A person who is alleged to have committed a crime is referred to as a **suspect.**

As a general rule, suspects are arrested by the state through the police at the instigation of the **complainant.** After the arrest, the suspect is charged in an independent and impartial court of law whereupon he becomes the **accused.**

Criminal cases are generally prosecuted by the state through the office of the Attorney General (AG) hence they are framed as R (the State) Vs Accused E.g. ***R v Kamenchu***

Under Section 77 (2) (a) of the Constitution, an accused person is presumed innocent until proven or pleads guilty.

If the accused pleads not guilty, it is the duty of the prosecution to prove its case against him by adducing evidence i.e. the burden of proof in criminal cases is borne by the prosecution.

The standard of proof is beyond any reasonable doubt i.e. the court must be convinced that the accused committed the offence as charged.

In the event of reasonable doubt, the accused is acquitted. If the prosecution proves its case i.e. discharges the burden of proof, then the accused is convicted and sentenced.

**The sentence may take the form of:-**

1. Imprisonment
2. Fine
3. Probation
4. Corporal punishment
5. Capital punishment
6. Community service
7. Conditional or unconditional discharge

Under Section 77 (4) of the Constitution, a person cannot be held guilty of an act or omission which was not a criminal offence on the date of omission or commission.

**Civil law**

It is concerned with the rights and duties of persons i.e. individuals and corporations. Branches of civil law include:-

- Law of contract
- Law of torts
- Law of property
- Law of marriage
- Law of succession

When a person's civil or private rights are violated, he is said to have a cause of action. Examples of causes of action:

- Breach of contract
- Defamation
- Assault
- Negligence
- Trespass to goods e.t.c

Causes of action are created by parliament through statutes as well as the common law and equity.

The violation of a person's civil rights precipitates a civil case or action. The person whose rights are allegedly violated sues the alleged wrongdoer hence civil cases are framed as ***Plaintiff v Defendant.***

It is the duty of the plaintiff to prove his allegations against the defendant. This means that the burden of proof is borne by the plaintiff. The standard of proof in civil cases is on a balance of probabilities or on a preponderance of probabilities i.e. the court must be satisfied that it is more probable than improbable than the plaintiff's allegations are true.

If the plaintiff proves his allegations by evidence, he wins the case and is awarded judgment which may take the form of:-

1. Damages (monetary compensation)
2. Injunction
3. Specific performance
4. Account
5. Tracing
6. Winding up a company
7. Appointment of receiver

**Differences between civil wrong and crime**

| | CIVIL WRONG | CRIME |
|---|---|---|
| Definition | offence against another individual | Offence against the state |
| Purpose | To deal with the disputes between individuals, organizations, or between the two, in which compensation is awarded to the victim. | To maintain the stability of the state and society by punishing offenders and deterring them and others from offending. |
| Standard of proof | Claimant must produce evidence beyond the balance of probabilities. | Beyond reasonable doubt |
| Parties involved | The plaintiff, the party that is suing<br>The defendant , the one being sued | Prosecution which represent the state and the accused |
| Burden of proof | Claimant must give proof however, the burden may shift to the defendant in situations of *Res Ipsa Loquitur* (The fact speaks for itself). | "Innocent until proven guilty": The prosecution must prove defendant guilty. |
| Type of punishment | Compensation (usually financial) for injuries or damages, or an injunction in nuisance. | A guilty defendant is subject to Custodial (imprisonment) or Noncustodial punishment (fines or community service). In exceptional cases, the death penalty. |

**The rule of law**

The concept of the Rule of Law is a framework developed by Dicey on the basis of the English Legal system. It is also described as the due process.

According to Dicey, rule of law comprises three distinct conceptions namely:

1. **Absolute supremacy or predominance of regular law:** this means that all acts of The State are governed by law. It means that a person can only be punished for disobedience of the law and nothing else.

2. **Equality before the law:** this means equal subjection of all persons before the law. It means that no person is exempted from obeying the law. All classes of persons are subjected to the same judicial process regardless of their age, sex, creed, gender or race.

3. **The law (Constitution) is a consequence and not the source of rights:** means that the law is a manifestation of the will of the people.

**Factors undermining rule of law**

- Excessive power of the Executive
- Non - independent Judiciary
- Corruption
- Selective prosecution
- Civil unrest
- Ignorance of the law

## PROFESSIONAL ETHICS AND THE LAW

Principles that have to be followed by a professional accountant include:

### a) Integrity

It refers to the character of the accountant. The accountant should be one who is of unquestionable morals, honest, trustworthy and forthright.

### b) Professional Independence

This refers to the ability of the accountant to do his work without following any instructions from the client or any other person for any reason.

The independence ensures that the accountant will be truthful and will carry out his duties in accordance with the dictates of the profession as opposed to personal whims.

### c) Confidentiality

This is the duty of secrecy. It is the duty not to divulge to third parties any information that has been received by the accountant in his capacity as such or to use such information in any way for any other purpose without the consent of the client or express authority of the law.

### d) Professional Competence

Means that for a person to render professional services as an accountant he must have attained the professional ability to do so i.e. he must inter alia have the necessary qualifications after having gone through a prescribed course of study.

A person who has fulfilled the requirements of the Accountants Act5 in relation to qualifications is deemed to be professionally competent.

## LAW AND MORALITY

Morality is the sense of judgment between right and wrong by reference to certain standards developed by society over time.

It defines standards of behavior widely accepted by a society and is binding on the conscience of the members of that society. An action that is considered to be opposed to morality will generally be frowned upon by that society. However, ***morality is not enforceable by courts of law.***

This is compared to rules of law, which are binding, enforceable and have sanctions in all cases. Wrongs in society are contraventions of law or morality or both. However, the law incorporates a significant proportion of morality. In such instances, where law and morality overlap, morality is enforced as a rule of law. Such morality becomes part of the law. E.g. Killing a person is immoral as well as a crime. So is theft.

However, certain wrongs in society contravene morality but not the law e.g. disrespects failure to provide for parents, failure to rescue a drowning person e.t.c.

**What then is the relation of morality to law?**

1. The existence of unjust laws (such as those enforcing slavery) proves that morality and law are not identical and do not coincide.
2. The existence of laws that serve to defend basic values such as laws against murder, rape, malicious defamation of character, fraud, bribery, etc. proves that the two can work together.
3. Laws govern conduct at least partly through fear of punishment. When morality, is internalized, when it has become habit-like or second nature, governs conduct without compulsion. The virtuous person does the appropriate thing because it is the fine or noble thing to do, not because not doing it will result in punishment.
4. As such, when enough people think that something is immoral they will work to have a law that will forbid it and punish those that do it. However if there is a law that says doing X is wrong and illegal and enough people no longer agree with that then those people will work to change that law.

## BUSINESS ETHICS AND CORPORATE SOCIAL RESPONSIBILITY

In the recent years, nation have been surprised by a number of major corporate scandals triggering widespread public skepticism, shock among other behaviors towards the executives

who run them. Such tend to range from inflating profits, obstruction of justice, manipulating the market, etc.

In most business set ups, it would appear, when a behavior has a direct identifiable price, it is much easier to motivate corporate behavior. However;

1. Should corporate managers consider moral choices or should their focus be based on profit and loss
2. In a world of ever increasing complexity and interdependency, how does one go about determining what conduct is or is not ethical

**PROMINENT ETHICAL THEORIES**

Let us look at four ethical theories in relation to the above questions. The theories are; rights theory, justice theory, utilitarianism, and profit maximization. The rights theory is also referred to as ***deontological ethical theory*** since it focused on the actions and process and not just consequences. The other three which focus on the consequences of an action are ***teleological ethical theories.***

**Rights theory**

This is based on the view that certain human rights are fundamental and should be observed. This therefore means that its primary focus is on individuals in society. There are two primary category of rights theory 1) Kantianism 2) The modern rights theory

**Kantianism**

Immanuel Kant was a strict deontologist. He viewed humans a moral actors free to make choices. According to this philosopher morality of a given action was determined by applying categorical imperative, that is, judge an action by applying it universally. For instance if you are to steal then the question is, are you will to let everyone steal freely? Since this threatens your future security then you may conclude that stealing is wrong.

**Modern right theories**

One major problem with Kantianism is that it imposes duties to be absolute. This implies that lying or killing for instance would be perceived to be unethical. Modern theorist believes that there may be circumstances when action like lying and killing could be morally acceptable for instance self defense. One popular theory believes that you should abide by a moral rule unless a more important rule conflicts with it, that is, our moral compulsion is not to compromise a person’s right unless a greater right takes priority over it.

Due to this moral relativism, modern rights theorists have choices to make. They must determine what the fundamental rights are and how they are ranked in importance. Most courts tend to use this approach.

**Justice theory**

This is derived from John Rawls's book A Theory of Justice, which argued for just distribution of society's resources. This can be referred to as a fair allocation of society's benefits and burdens among all members of society.

Rawls argues that self-interested rational persons behind the veil of ignorance would choose two general principles of justice to structure society in the real world:

1. **Principle of equal liability-** each person has equal right to basic rights and liberties.
2. **Difference principle-** social inequities are only acceptable if they cannot be eliminated without making the worst-off class even worse off.

Under the justice theory, the decision makers' choices are to be guided by fairness and impartiality, however, the focus in on the outcome of the decision.

Consider a company that has two choices in terms of production, that is, produces locally or outsource, based on this theory the company can choose to outsource assuming the workers in the other country are badly off than the local workers.

**Utilitarianism**

This derived from the workings of Jeremy Bentham and John Stuart Mill. Under utilitarianism, an ethical decision is one that maximizes utility for society as a whole. Thus, in our individual decision we should always calculate their costs and benefits for every member of society. An action is ethical only if the benefits to society outweigh their costs. This means that at times decision makers have to sacrifice their own interest if doing so gives greater benefit to society.

**Profit maximization**

This is a teleological theory that is based on the laissez faire theory of capitalism championed by Adam Smith.

It proposes that managers should managers should maximize a business's long run profits within the limits of law. Unlike utilitarianism, in profit maximization the managers focus solely on those decisions result into more profits for the organization.

Critics view this to be entirely untrue since in the quest for more profit other issues such as employees' welfare could be ignored.

# 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) (Statutes)
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 Act1 and The Succession Act2**

Hindu law

**Sources of law of Kenya may be classified as:**

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

**THE CONSTITUTION**

This is a 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.

It sets out the basic structure of government. A Constitution may be written or unwritten.

***Constitutions may be classified in various ways:***

1. Written and Unwritten
2. Republican and Monarchical
3. Presidential and Parliamentary
4. Rigid and Flexible

The Kenyan Constitution is written. It was enacted by the English parliament in 1963 for purposes of granting Kenya independence. It has been amended many times.

Section 3 (1) (a) of the Judicature Act recognizes the Constitution as a source of law of Kenya. It is the fundamental law of the land and prevails over all other laws. It is the supreme law.

**Supremacy of the constitution**

The supremacy of the Constitution as source of law is manifested in various ways:

1. All other laws derive their validity from the Constitution
2. It proclaims its supremacy. Section 3 of the Constitution provides inter alia (among other things) "The Constitution is the Constitution of the Republic of Kenya and shall take the force of law throughout Kenya, if any other law is inconsistent with this Constitution, this Constitution will prevail and the other law shall to the extent of its inconsistency be void" The phrase "any other law" used in Section 3 of the Constitution was interpreted in **Okunda and Another v. R (1970)** to mean any other law be it international or national. In this case, the High Court was called upon to determine which law was superior between the Constitution of Kenya and the Official Secrets Act of the East African Community. The court was of the view that Section 3 places beyond doubt the pre eminent character of the Constitution.
3. **Organs of government:** The Constitution creates the principal and other organs of government. The Legislature, Executive and the Judiciary owe their existence to the Constitution. Additionally the Constitution creates other bodies and offices e.g.
    - The Electoral Commission (ECK was disbanded and replaced by the Interim Independent Electoral Commission of Kenya after the 2007 general election debacle). ☐
    - Judicial Service Commission ☐
    - Public Service Commission ☐
    - Offices of the AG, Auditor General and the Commissioner of Police are created by the Constitution ☐

4. **Amendment procedures:** The Constitution has a special amendment procedure. Under Section 47 (1) of the Constitution, parliament is empowered to alter the Constitution.

However a Bill seeking to alter the Constitution must be supported by not less than 65% of all the members of parliament excluding the ex-officio members during the 2nd and 3rd readings.

5. **Fundamental rights and freedoms**: The Constitution of Kenya guarantees the fundamental rights and freedoms of an individual. Chapter V of the Constitution is devoted to the rights and freedoms which are exercisable, subject to:-
    a) The rights and freedoms of others
    b) Public interest

**The rights Guaranteed by the Constitution**

1. Right to life - Section 71(1)
2. Right to personal liberty - Section 72 (1)
3. Right to property - Section 75 (1)
4. Right to protection of law - Section 77

**Freedoms Guaranteed by the Constitution**

1. Freedom of conscience e.g. freedom of thought and of religion
2. Freedom of assembly and association e.g. freedom to form trade unions
3. Freedom of expression
4. Freedom from arbitrary search of a person, his property or entry into his premises
5. Freedom from slavery and servitude
6. Freedom from torture, degrading, inhuman or other punishment
7. Freedom of movement
8. Freedom from discrimination or discriminatory laws

**LAW/ LEGISLATION/ACTS OF PARLIAMENT)**

This is law made by parliament directly in exercise of the legislative power conferred upon it by the Constitution. The product of parliament's legislative process is an Act of Parliament e.g. The Mining Act.

Sec 3(1) (b) of the Judicature Act recognizes legislation or statues law as a source of law of Kenya by the words "All other written laws". These words encompass:

1. Certain Acts of the UK Parliament applicable in Kenya.
2. Certain Acts of the Indian Parliament applicable in Kenya
3. Acts of the legislative council
4. Acts of the Parliament of Kenya.

Statute law legislation is a principal source of law applicable throughout Kenya. It must be consistent with the Constitution. It is the most important source of law.

**Advantages of Statutes Law**

1. **Democratic:** Parliamentary law making is the most democratic legislative process. This is because parliaments the world over consist of representatives of the people they consult regularly. Statute Law, therefore, is a manifestation of the will of the people.
2. **Resolution of legal problems:** Statute Law enables society to resolve legal problems as and when they arise by enacting new statutes or effecting amendments to existing Law.
3. **Dynamic:** Statute Law enables society to keep pace with changes in other fields e.g. political, social or economic. Parliament enacts statutes to create the necessary policies and the regulatory framework.
4. **Durability:** Statute Law consists of general principles applicable at different times in different circumstances. It has capacity to accommodate changes without requiring amendments.
5. **Consistency/Uniformity:** Statute Law applies indiscriminately i.e. it regulates the conduct of all in the same manner and any exceptions affect all.
6. **Adequate publication:** Compared to other sources of Law, statute Law is the most widely published in that it must be published in the Kenya Gazette as a bill and as a Law. Additionally, it attracts media attention.
7. It is a superior source of law in that only the Constitution prevails over it.

**Disadvantages of Statute Law**

1. **Imposition of Law:** Statute Law may be imposed on the people by the dominant classes in society. In such a case, the Law does not reflect the wishes of the citizens nor does it cater for their interests.
2. **Wishes of M.Ps:** Statute Law may at times manifest the wishes and aspirations of M.Ps as opposed to those of the citizenry.
3. **Formalities:** Parliamentary Law making is tied to the Constitution and the National Assembly standing orders. The Law making process is slow and therefore unresponsive to urgent needs.
4. **Bulk and technical Bills:** Since parliament is not made up of experts in all fields, bulky and technical Bills rarely receive sufficient treatment in the national assembly, their full implications are not appreciated at the debating stage.

**Functions of parliament**

1. Controls government spending
2. Critical function
3. Legislative functions

**How to make the law making process effective**

1. M.Ps should consult constituents on a regular basis.
2. Subdivision of large constituencies.
3. Establishment of offices in constituencies for M.Ps
4. Enhance civic education
5. All Bills ought to be supported by not less than 65% of all MPs so as to become Law.
6. Bills should be widely published e.g. the Kenya Gazette should be made available to larger segments of the society. Bills must be published in newspapers

## STATUTES OF GENERAL APPLICATION

Kenyan Law does not define the phrase "Statutes of General Application". However, the phrase is used to describe certain Statutes enacted by the UK parliament to regulate the inhabitants of UK generally.

These Statutes are recognized as a source of Law of Kenya by Section 3 (1) (c) of the Judicature Act. However, there application is restricted in that they can only be relied upon:

1. In the absence of an Act of parliament of Kenya.
2. If consistent with the provisions of the Constitution.
3. If the Statute was applicable in England on or before the 12/8/1897
4. If the circumstances of Kenya and its inhabitants permit.

Examples include:

a. Infants Relief Act, 1874
b. Married Women Property Act 1882
c. Factors Act, 1889

Statutes of general application that have been repealed in the UK are still applicable in Kenya unless repealed by the Kenyan parliament.

**DELEGATED LEGISLATION**

Although Section 30 of the Constitution rests the legislative power of the republic in parliament, parliament delegates its legislative power to other persons and bodies.

Delegated legislation is also referred to as subsidiary (subordinate legislation). It is Law made by parliament indirectly.

Delegated legislation consists of rules, orders, regulations, notices, proclamations e.t.c. made by subordinate but competent bodies e.g.

1. Local Authorities
2. Professional bodies such as ICPA(K)
3. Statutory boards
4. Government ministers

These bodies make the laws in exercise of delegated legislative power conferred upon them by parliament through an Enabling or Parent Act.

Delegated legislation takes various forms e.g.

1. Local Authorities make by-laws applicable within their administrative area
2. Government ministries, professional bodies and others make rules, orders, regulations, notices e.t.c.

**Characteristics of delegated legislation**

1. All delegated legislation is made under the express authority of an Act of Parliament.
2. Unless otherwise provided, delegated legislation must be published in the Kenya Gazette before coming into force.
3. Unless otherwise provided, delegated legislation must be laid before parliament for approval and parliament is empowered to declare the delegated legislation null and void by a resolution to that effect whereupon it becomes inoperative to that effect

**Why delegated legislation?**

Delegated legislation is described as a “necessary evil” or a Constitutional impropriety”. This is because it interferes with the doctrine of separation of powers which provides that the Lawmaking is a function of the legislature.

Parliament delegates Law-making powers to other persons and bodies for various reasons:

1. Parliament is not always in session

2. Parliament is not composed of experts in all fields
3. Inadequate parliamentary time
4. Parliamentary Law-making is slow and unresponsive to urgent needs. Additionally it lacks the requisite flexibility
5. Increase in social legislation

**Advantages of delegated legislation**

1. **Compensation of last parliamentary time**: Since members of parliament are not always in the National Assembly making Laws, the Law-making time lost is made good by the delegates to whom legislative power has been given hence no Lawmaking time is lost.
2. **Speed:** Law-making by government Ministers, Professional bodies and other organs is faster and therefore responsible to urgent needs.
3. **Flexibility:** The procedure of Law-making by delegates e.g. Government Ministers isnot tied to rigid provisions of the Constitution or other law. The Minister enjoys the requisite flexibility in the Law-making process. He is free to consult other persons.
4. **Technicality of subject matter:** Since parliament is not composed of experts in all fields that demand legislation, it is desirable if not inevitable to delegate Law-making powers to experts in the respective fields e.g. Government Ministries and local authorities.

**Disadvantages of delegated legislation**

1. **Less Democratic:** Compared to statute law, delegated legislation is less democratic in that it is not always made by representatives of the people affected by the law. E.g. rules drafted by technical staff in a government ministry.
2. **Difficult to control**: In the words of Professor William Wade in his book "Administrative Law" the greatest challenges posited by delegated legislation is not that it exists but that it's enormous growth has made it impossible for parliament to watch over it. Neither parliament nor courts of law can effectively control delegated legislation by reason of their inherent and operational weakness.
3. **Inadequate publicity:** Compared to statute law, delegated legislation attracts minimal publicity if any. This law is to a large extent unknown.
4. **Sub-delegation and abuse of power:** Delegates upon whom law making has been delegated by parliament often sub-delegate to other persons who make the law. Sub-delegation compounds the problem of control and many lead to abuse of power.
5. **Detailed and technical:** It is contended that in certain circumstances, delegated legislation made by experts is too technical and detailed for the ordinary person.

**Unwritten sources of law**

Unwritten sources of law apply subject to the written sources. Written sources prevail over unwritten sources in the event of any conflicts.
This is primarily because unwritten law is generally made by a supreme law-making body.
These sources include:

1. Common law
2. Equity
3. Case law
4. Islamic law
5. Hindu law
6. African Customary law.

**COMMON LAW**

It may be described as a branch of the law of England which was developed by the ancient common Law Courts from customs, usages and practice of the English people.

These courts relied on customs to decide cases before them thereby giving such customs the force of law. The court of Kings Bench, Court Exchequer and the court of common pleas are credited for having developed common law.

These courts standardized and universalized customs and applied them in dispute resolution.
At first, common law was a complete system of rules both criminal and civil.
The development of the common law is traceable to the Norman Conquest of the Iberian Peninsula. The Romans are credited for having laid the foundation for the development of the common law.

**Characteristics of common law**

1. Writ System.
2. Doctrine of stare decisis

**1. The writ system**
At common law, actions or cases were commenced by a writ. There were separate writs for separate complaints. Writs were obtained at the Royal office.

A Writ stated the nature of the compliant and commanded the police officer of the country in which the defendant resided to ensure that the he appeared in court on the mentioned date. Often,

police officers demanded bribes to compel the defendant to appear in court and would not compel an influential defendant.

The writ system did not recognize all possible complains and many would be plaintiffs could not access the courts.

It also lengthened the judicial process.

2. **doctrine of stare decisis**

Stare Decisis literally means “decision stands” or “stand by the decision.” This is a system of administration of justice whereby previous decisions are applied in subsequent similar cases. At common Law, a judge having once decided a case in a particular manner had to decide all subsequent similar cases similarly.

This made the common Law system rigid. Common Law consists of decisions handed down by courts of law on the basis of customs and usages and may be described as the English Customary Law.

**Problems/shortcomings of common law**

1. **Writ System:** Cases at common Law were commenced by a writ issued by the Royal office. There were separate writs for different complaints. However:

    a) This system did not recognize all possible complaints and many would be plaintiffs had no access to the courts
    b) The writ system encouraged corruption
    c) It lengthened the course of justice

2. **Rigidity/inflexibility:** The common Law courts applied the doctrine of Stare Decisis.This practice rendered the legal system rigid and hence unresponsive to changes.

3. **Procedural technicalities:** The Common Law procedure of administration of justice was highly technical. Common Law courts paid undue attention to minor points of procedure and many cases were often lost on procedural matters.

4. **Delays:** The administration of justice at common Law was characterized by delays. Defendants often relied on standard defenses to delay the course of justice. These defenses were referred to as **essoins** and included; Being out by floods, being unwell or

being away on a crusade. If sickness was pleaded, the case could be adjourned for 1 year and 1 day.

5. **Non-recognition of trusts:** Common Law did not recognize the trust relationship. This is an equitable relationship whereby a party referred to as a trustee, expressly, impliedly or constructively holds property on behalf of another known as beneficiary. At common Law beneficiaries had no remedies against errant trustees and trustees had no enforceable rights against beneficiaries.

6. **Inadequate remedies:** Common Law courts had only one remedy to offer namely monetary compensation or damages. They could not compel performance or restrain the same.

7. **Inadequate protection of borrowers:** At common Law, a borrower who failed to honour his contractual obligations within the contractual period of repayment would lose not only his security but the total amount paid.

**THE DOCTRINES OF EQUITY**

Equity is a set of rules formulated and administered by the court of chancery before 1873 to supplement the rules of common law. This court dealt only those cases where common law either provided no remedy or provided a remedy which was not adequate. Equity therefore is a body of principles constituting what is fair and right.

**Origins of equity**

Citizens dissatisfied with the decision of the judges of common law often made petitions to the kings in council. The petitions were decided by the king himself or by his council. Due to much work, the king later delegated his function to his lord chancellor (advisor to the king) a clergyman to decide the appeals applying the rules of natural justice and morality.

The petitions to the Lord Chancellor were made on the following grounds:-

1. The common law courts provided no remedy for certain wrongs e.g. trusts were not recognized.
2. The remedies provided in certain situations were not satisfactory e.g. in case of breach of contract, the only remedy available was damages, and specific performances injunctions were not recognized.

3. The common law courts sometimes acted under pressure or influence or bribes of the other party.The remedies granted by equity courts become known as equitable remedies.

**Principles of Equity**

During the early development of equity the early chancellors acted at their own discretion, but eventually they did follow the decisions of early chancellors. But the 8th century, some firm rules of equity were established which guided later chancellor in deciding disputes. These rules are known as equitable maxims – which are propositions or statement of equitable rules.

**The Maxims of Equity include:**

1. He who seeks equity must do equity
2. He who comes to equity must come with clean hands
3. Equity is equality (Equality is equity)
4. Equity looks to the intent or substance rather than the form
5. Equity regards as done that which ought to be done
6. Equity imputes an intent to fulfil an obligation
7. Equity acts in personam
8. Equity will not assist a volunteer (Equity favours a purchaser for value without notice)
9. Equity will not suffer a wrong to be without a remedy (Where there is a wrong there is a remedy for it) Ibi jus ibi remedium
10. Equity does not act in vain
11. Delay defeats equity
12. Equity aids the vigilant and not the indolent (Vigilantibus non dorminentibus jurasubveniunt)

The distinction between legal and equitable remedies remains relevant to students of business law; however, because these remedies differ to seek the proper remedy for a wrong one must know that remedies are available.

**1. He who seeks equity must do equity**

This maxim means that a person who is seeking the aid of a court of equity must be prepared to follow the court‟s directions, to abide by whatever conditions that the court gives for the relief. And this is most commonly applied in injunctions. The court will normally impose certain conditions for granting the injunction.

**2. He who comes to equity must come with clean hands**

This scenario was summed up in the case of Jones v. Lenthal (1669) as “He who has committed inequity shall not have equity”. There is a limit to this rule.

In some cases the court has the discretion whether to apply this maxim. Limit to the extent that maxim can be applied The limit is this: It is not all unclean hands that will deny a plaintiff his remedy. The conduct must be relevant to the relief being sought.
In Loughran v. Loughran (1934), Justice Brandeis said equity does not demand that its suitors shall have lead blameless lives. We are not concerned with issues of morality. If the breach is a trifle, a small matter, a minor breach, then that in itself should not deny the plaintiff the remedy. The first maxim deals with now/future, the second deals with conduct in the past.

**3. Equity is equality (equality is equity)**
In general, the maxim will be applied whenever property is to be distributed between rival claimants and there is no other basis for division.
For example, husband and wife who operate a joint bank account; each spouse may deposit or take out money. Upon divorce, the maxim applies. They share 50-50. The authority is that equity does not want to concern itself with the activities of a husband and wife - to go into the bedroom and make deep inquiries, hence equal division.
Another example relates to trusts. How do you divide the property? Say there are three beneficiaries. Then one of the beneficiaries passes away, i.e. one of the shares fails to vest. What should accrue to the surviving beneficiaries? Redistribute equally, applying the rule "Equity is equality".

**4. Equity looks to the substance or intent rather than the form**
This maxim makes a distinction between matters of substance and matters of form. Equity will give priority to substance (intention) as opposed to form, if there is a contradiction. This maxim is normally applied to trusts. There have been cases where the court has inferred a trust even where the word trust does not appear.

Another illustration is the remedy of rectification of contract, where equity looks to the intention, where intention matters.

This maxim lies at the root of the equitable doctrines governing mortgages, penalties and forfeitures. Equity regards the spirit and not the letter.

Courts of Equity make a distinction in all cases between that which is a matter of substance and that which is a matter of form; and if it finds that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat substance.

Thus if a party to a contract for the sale of land fails to complete on the day fixed for completion, at law he is in breach of his contract and will be liable for damages e.g. for delay.

Yet in equity it will usually suffice if he is ready to complete within a reasonable period thereafter, and thus the other party will not be able to avoid performance.

**5. Equity regards as done that which ought to be done**

This maxim has its most frequent application in the case of contracts. Equity treats a contract to do a thing as if the thing were already done, though only in favour of persons entitled to enforce the contract specifically and not in favour of volunteers.

Agreements for value are thus often treated as if they had been performed at the time when they ought to have been performed. For example a person who enters into possession of land under a specifically enforceable agreement for a lease is regarded in any court which has jurisdiction to enforce the agreement as if the lease had actually been granted to him.

In Walsh v. Lonsdale, the agreement for lease was as good as the agreement itself where a seven-year lease had been granted though no grant had been executed. An equitable lease is as good as a legal lease. Equity looked on the lease as legal the time it was informally created.

In Souza Figuerido v. Moorings Hotel it was held that an unregistered lease cannot create any interest, right or confer any estate which is valid against third parties. However, it operates as a contract inter-parties; it is valid between the parties and can be specifically enforced. The tenant in this case was therefore liable to pay rent in arrears.

**6. Equity imputes an intent to fulfill an obligation**

If a person is under an obligation to perform a particular act and he does some other act which is capable of being regarded as a fulfilment of this obligation, that other act will prima facie7 be regarded as fulfilment of the obligation.

**7. Equity acts in *personam***

This is a maxim which is descriptive of procedure in equity. It is the foundation of all equitable jurisdictions.

Courts of law enforced their judgments in Rem (against property of the person involved in the dispute), e.g. by writs but the originally equitable decrees were enforced by Chancery acting against the person of the defendant (i.e. by imprisonment) and not in Rem Later, equity invented the alternative method of sequestrating the defendant‟s property until he obeyed the decree.

These methods can still be used where necessary, but other and more convenient methods are often available today.

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