

# Sources of kenyan law essay sample

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The term sources of law literally means where rules of law are found. This chapter describes the origins of the rules and principles which constitute the law applicable in a country at a given time. In other words the materials from which rules of law are developed. KEY DEFINITIONS

Bill: – a draft law or legislation

Delegated legislation: – law made by parliament indirectly

Ultra vires: – Latin term which means “ beyond the powers” Common law: – a branch of the law of England which was developed from customs, usages and practices of the English people Stare decisis; – Latin term which means “ the decision stands” Precedent: – An earlier decision of a court

This chapter has shown its importance in the industry first by way of hierarchy of laws. It is this particular hierarchy that is used when there is a conflict of laws in courts. Cases like the S. M Otieno case can hold proof to this. The law making process described is also the same procedure used in parliament when making laws. SOURCES OF LAW

The phrase source of law literally means where rules of law are found.

However, the phrase has been used in a variety of senses. It has been used to describe; i. The origins of the rules and principles which constitute the law applicable in a country at a given time. ii. The source of force or validity of the various rules or principles applicable as law in a country. iii. The materials from which rules of law developed.

iv. The factors which influence the development of the rules of law.

Hence the phrase sources of law have been used to describe the legal, formal, historical and material sources of law. The various sources of law of Kenya are identified by:-

1. Judicature Act
2. Constitution
3. Hindu marriage and Divorce Act
4. Hindu Succession Act
5. Kadhis Court Act.

Sources identified by the Judicature Act.

1. The Constitution
2. Legislation (Act of Parliament) (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 Act<sup>1</sup> and The Succession Act<sup>2</sup>. -Hindu law

DIAGRAMMATIC REPRESENTATION OF THE SOURCES OF LAW OF KENYA.

Sources of law of Kenya may be classified as:-

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

PRINCIPAL SOURCES

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These are source of law applicable throughout Kenya, they regulate all persons in Kenya. **SUBSIDIARY SOURCES**

These are sources of law which regulate certain categories of people in Kenya

in relation to certain matters e. g. Islamic law

Hindu Law

African customary law

### 1. THE CONSTITUTION

This is a body of the basis 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 2 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 2 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. An 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 3. Fundamental rights and freedoms: The Constitution of Kenya guarantees the fundamental rights and freedoms of the individual. Chapter IV 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
2. Right to personal liberty
3. Right to property
4. Right to protection of law

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

1. ALL OTHER WRITTEN LAWS (STATUTE 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<sup>3</sup>.

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

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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. THE LAW MAKING PROCESS

Under Sec 30 of the Constitution, the legislative power of the republic is vested in the parliament of Kenya which consists of the president and the National Assembly. Under Sec 31 of the Constitution, the National Assembly consists of: a) Elected members

b) Nominated members

c) Ex-officio members

Under Sec 46 (1) of the Constitution, the legislative power of parliament is exercisable by passing Bills in the National Assembly. BILLS

A bill is draft law. It is a statute in draft. Bills may be classified as:- a)

Government and Private members bills

b) Public and Private bills

a) Government Bill

This is a Bill mooted by the government which introduces to the National Assembly National Assembly for debate and enactment to law. All government bills are drafted by the office of the Attorney General. Most bills are government.

b) Private Members Bill

This is a Bill mooted by a member of parliament in his capacity as such

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which he introduces to the National Assembly for debate and passage to law  
e. g. The Hire Purchase Bill, 1968. c) Public Bill.

This is a bill that seeks to introduce or amend law applicable throughout  
Kenya. It may be government or private members d) Private Bill

This is a Bill that seeks to introduce or amend law applicable in some parts  
of Kenya or it regulates a specific group of persons. The bill may be  
government or private members.

#### LAW MAKING PROCEDURE

The procedure of law-making in Kenya is contained in the Constitution and  
the National Assembly Standing Orders. A bill passes through various stages  
before enactment to law. 1. Publication of Bill in the Kenya Gazette

All bills must be published in the Kenya Gazette to inform the public and M.  
P's of the intended law. As a general rule, a Bill must be published at least 14  
days before introduction to the National Assembly. However, the National  
Assembly is empowered to reduce the number of days<sup>4</sup>. 2. Readings

##### a) 1st Reading

The Bill is read out to members for the 1st time. No debate takes place. This  
reading is a mere formality. b) 2nd Reading

The Bill is read out to members for the 2nd time. This is the debating stage.  
All members are given the opportunity to make contributions. Amendments  
or alterations may be proposed. After exhaustive debate, the Bill proceeds to  
the committee stage. c) Committee / Committal Stage

The bill is committed either to a select committee of members or to the  
entire National Assembly as a committee for a critical analysis. At this stage,  
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the bill is analysed word for word. In the case of a select committee, it makes a report for submission in the National Assembly d) Report / Reporting Stage

The chairman of the Select Committee tenders its report before the National Assembly. If the report is adopted, the bill proceeds to the third reading e)

### 3rd Reading

The bill is read out to members for the third time. Generally no debate takes place. The Bill is voted on by members of the National Assembly and if supported by the required majority, it proceeds to for presidential assent

### 3. President's Assent

All Bills passed by the National Assembly must be presented to the president for his assent. The president must within 21 days of presentation of the bill signify to the speaker of the National Assembly his assent or refusal. If the president refused to give his assent, he must within 14 days thereof deliver to the speaker, a memorandum on the specific provisions which in his opinion should be reconsidered including his recommendations for amendment. The National Assembly must reconsider the bill taking into account the president's recommendations and must either: 1. Approve the recommendations with or without any amendments and re-submit the bill to the president for assent OR 2. Ignore the president's recommendations and repass the Bill in its original state. If the resolution to repass the Bill as such supported by not less than 65% of all the members of the National Assembly excluding the ex-officio members, the president must signify his assent within 14 days of the resolution. 4 )Publication of Law in the Kenya Gazette

A law passed by the National Assembly must be published in the Kenya Gazette before coming into operation. A statute or Act of parliament comes into operation either on the date of publication in the Kenya Gazette or on such other dates as may be signified by the minister by a notice in the Kenya Gazette. However, Parliament is empowered to make law with retrospective effects All statutes enacted by the parliament of Kenya must contain the words “ Enacted by the parliament of Kenya.” Advantages of Statutes Law

1. Democratic: Parliamentary law making is the most democratic legislative process. This is because parliaments the world over consists 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 indiscriminating 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 civil education
5. All Bills ought to be supported by not less than 65% of all members 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. 3. 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, their application is restricted in that they can only be relied upon:

- i. In the absence of an Act of parliament of Kenya.

- ii. If consistent with the provisions of the Constitution.

- iii. If the Statute was applicable in England on or before the 12/8/1897
- iv. If the circumstances of Kenya and its inhabitants permit. Examples include:

1. Infants Relief Act, 1874

2. Married Women Property Act 1882

3. 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 the Constitution vests 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 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 become 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 Law-making 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 lost 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 Law-making time is lost. 2. Speed: Law-making by government Ministers, Professional bodies and other is faster and therefore responsible to urgent needs. 3. Flexibility: The procedure of Law-making by delegates e. g. Government Ministers is not 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 posed by delegated legislation is not that it exists but that its 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. CONTROL OF DELEGATED LEGISLATION

Both parliament and courts of law have attempted to control delegated legislation, however neither can effectively do so. A) PARLIAMENTARY OR LEGISLATIVE CONTROL.

Parliament has put in place various mechanisms in its attempt to control or contain delegated legislation:- a. Parliament delegates law making power to specific persons and bodies e. g. government ministries, local authorities, professional bodies, chief justice e. t. c b. The Enabling or Parent Act prescribes the scope and procedure of Law-making. The delegates can only make law as defined by the scope and must comply with the procedures prescribed. c. The Enabling or Parent Act may require the draft rules to be circulated to interested parties for comments e. g. By-law. d. The Enabling or Parent Act may provide that the delegated legislation made be laid before the concerned minister for approval e. g. By-laws made by local authorities.

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This is political control and is largely ineffective. e. Under section 27 (i) of the Interpretation and General Provisions Act<sup>5</sup>, unless otherwise provided, delegated legislation must be published in the Kenya Gazette before coming into force. f. Under Section. 34 (i) of the Interpretation and General Provisions Act, unless otherwise provided, delegated legislation must be laid before parliament for approval and parliament is empowered to pass a resolution declaring the Law null and void where upon it becomes inoperative. Legislative control of delegated legislation is by and large ineffective by reason of the operation and inherent weakness of parliament.

## B) JUDICIAL CONTROL

This is control of delegated legislation by courts of law. Courts of Law attempt to control delegated legislation through the doctrine of ultra vires (beyond the powers). A court of law declares delegated legislation ultra vires thereby rendering it null and void. Delegated legislation may be declared substantively or procedurally ultra vires. A) SUBSTANTIVE ULTRA VIRES

A court of law on application by a party declares delegated legislation substantively ultra vires if satisfied that: a. The delegate exceeded the powers prescribed by the Enabling of Parent Act. b. The delegate exercised his powers for a purpose other than for which the power was given. This is abuse of power. c. The delegate acted unreasonably. What amounts to an unreasonable act is for the court to decide on the basis of the facts before it.

## B) PROCEDURAL ULTRA VIRES

A court of law may declare delegated legislation procedurally ultra vires on application if satisfied that the Law-making procedure prescribed by the



Enabling or Parent Act was not complied with by the delegate in the law-making process.

Delegated legislation made in contravention of the procedure prescribed by parliament has a procedural defect. In *Mwangi and Maina v. R.* (1950) the appellants were convicted and sentenced by the Resident magistrate's court in Nairobi for overcharging a haircut contrary to the defense (control of Prices) Regulations 1945. Under these regulations, the Price controller was empowered to fix the price of certain services including a haircut. He had fixed the price at 50 cents but the appellants had charging 1 shilling. On appeal, the appellants argued that the regulation fixing the price at 50 cents not been published in the Kenya Gazette as required by the law. As this had not been done, the court declared the rules procedurally ultra vires thereby setting aside the conviction and sentence of the appellants. Judicial control of delegated legislation is ineffective for two reasons: 1. Courts are in their nature passive. A court of law will only act when a case is brought before it. 2. The party seeking judicial redress must discharge the burden of proof.

#### 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 from 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 complaint 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 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 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. EQUITY

It may be described as that branch of the law of England which was developed by the various Lord Chancellor's courts to supplement the common Law. It was developed to mitigate the harshness of the common Law. The development of equity is traceable to the early petitions to the king by persons dissatisfied with the common Law. At first, the king heard the petitions and decided the dispute between the parties on the basis of what he thought was fair. He was overwhelmed by the petitions whereupon he established the office of the Lord Chancellor who would now hear the

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petitions. More offices of the Lord Chancellor were established due to the number of petitions.

The Lord Chancellor decided all petitions on the basis of the principle of fairness. Administration of justice was fast and the writ system was not applicable. However, the decisions handed down by the Lord Chancellor were not legally binding as the Lord Chancellor was not legally trained. It was not until the beginning of the 16th century that the Lord Chancellors offices were held by legally trained persons and the decisions they made had the force of Law. These decisions are what are referred to as the Doctrines of Equity.

The Lord Chancellors offices had now become courts. The administration of justice by Equity courts was flexible and not tied to the doctrine of stare desicis. The courts had move remedies to offer and had no technicalities of procedure. The Lord Chancellor Courts were guided by the principle of fairness. There were no other guiding principles and as a consequence many inconsistent decisions were made hence “ Equity varied with the length of the foot of the chancellor”. To enhance consistency in decision making, the Lord Chancellors courts:- a) Developed a set of guiding principles. These were the so called Maxims of Equity. b) Adopted the doctrine of stare desicis.

Equity consists of rules developed by the Lord Chancellor Courts based on the principle of fairness.

#### CONTRIBUTION OF EQUITY

Equity developed to supplement, not to supplant the common Law. It developed as a modification to the common Law; hence it is described as “ a

gloss on the common Law”. Equity has an ordinary, legal and a technical meaning.

In the ordinary sense, equity means fairness, justice, morality, fair play, equality etc. We are talking about doing good, doing what is morally right. In a legal sense, equity is the branch of the law which, before the Judicature Act of 1873 came into force, was applied and administered by the Court of Chancery. A litigant asserting some equitable right or remedy must show that his claim has “ an ancestry founded in history and in the practice and precedents of the court administering equity jurisdiction”. In the technical sense equity refers to a body of rules and some authors have defined equity as that which is not the common law.

They distinguish equity from the common law. It is regarded as a body of rules that is an appendage to the general rules of law. The contribution of Equity may be classified as exclusive, concurrent and ancillary. Equity developed the so called “ Maxims of equity”. These maxims of equity are statements which embody rules of equity. They are only guidelines. They are not applied strictly in every case. But they help us to understand what the rules of equity are. No logical sequence and they often overlap. You can have two maxims that actually say the same thing. You can have one maxim of equity which is the exact opposite of another maxim. 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 looks upon as done that which ought to be done

6. Equity imputes an intent to fulfill 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 jura subveniunt*)

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. Lenthall* (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

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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 fulfillment of this obligation, that other act will prima facie<sup>6</sup> be regarded as fulfillment 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. Although the maxim has lost much of its importance, it is responsible for the general rule that an English court has jurisdiction in equitable matters, even though the property in dispute may be situated abroad, if the defendant is present in this country. This was so held in Penn v. Baltimore where the Defendant was ordered to perform a contract relating to land in America. However there must be some equitable right arising out of contract, trust or fraud. 8. EQUITY WILL NOT ASSIST A VOLUNTEER

Equity favours a purchaser for value without notice. A volunteer is a person who has not paid consideration. The exception to the application of this maxim is in Trust. In *Jones v. Lock* (1865) it was stated that the court is prevented from assisting a volunteer regardless of how undesirable the outcome might appear. Equity will therefore not grant specific performance for a gratuitous promise. 9. EQUITY WILL NOT SUFFER A WRONG TO BE WITHOUT A REMEDY

“*Ibis jus ibi remedium*”: This means that if there is a wrong, there is a remedy for it. He who seeks solace in the arms of equity will not go away broken hearted. No wrong should be allowed to go unredressed if it is capable of being redressed by equity. However, not all moral wrongs can be redressed by equity. The maxim must be taken as referring to rights which are suitable for judicial enforcement, but were not enforced at common law owing to some technical defect. 10. EQUITY DOES NOT ACT IN VAIN:

The court of equity is shy and does not want to be embarrassed by granting remedies that cannot be enforced or issuing orders that cannot be obeyed by the Plaintiff. 11. DELAY DEFEATS EQUITY OR EQUITY AIDS THE VIGILANT AND NOT THE INDOLENT: (*Vigilantibus, non dormientibus, jura subveniunt*) A court of equity has always refused its aid to stale demands i. e. where a party has slept on his right and acquiesced for a great length of time.

Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence. Where these are wanting, the Court is passive, and does nothing. Delay which is sufficient to prevent a party from obtaining an equitable remedy is technically called “*laches*”. This maxim, however, has no application to cases to which the Statutes of Limitation<sup>7</sup> apply either

expressly or, perhaps, by analogy. There are thus three cases to consider- (a)Equitable claims to which the statute applies expressly; (b)Equitable claims to which the statute is applied by analogy; and (c)Equitable claims to which no statute applies and which are therefore covered by the ordinary rules of laches. 12. EQUITY FOLLOWS THE LAW

The Court of Chancery never claimed to override the courts of common law. “ Where a rule, either of the common or the statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law and can as little justify a departure from it. It is only when there is some important circumstance disregarded by the common law rules that equity interferes. “ Equity follows the law, but neither slavishly nor always.” If Common law and Equity conflict, Equity prevails.

Both Common law and Equity are recognized as sources of law of Kenya by section 3 (1) (c ) of the Judicature Act. However, only the substance of common Law and the doctrines of equity are recognized. Their application by Kenyan Courts is further qualified. A court of law can only rely on Common law or equity as a source of Law: 1. In the absence of an Act of parliament. 2. If it is consistent with written law including the Constitution. 3. If it was applicable in England on 12/08/1897. 4. If the circumstances of Kenya and its inhabitants permits. 5. Subject to such qualifications as those circumstances may render necessary.

#### CASE LAW / JUDGE – MADE LAW

This is law made by judges. Judges make law when they formulate  
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(enunciate) principles or propositions where none existed or in doubtful situations, which are relied upon as law in subsequent similar cases. Case law therefore consists of principles or propositions of law formulated by judges when deciding cases before them. An earlier decision of a court is referred to as a precedent if it contains a principle of law. The principle or proposition formulated by the judge is referred to as ratio decidendi which literally means ‘reason for decision.’ It is a principle or proposition of law based on the material facts of the case. It disposes off the case before the court. It is the binding part in a precedent or earlier decision.

It covers a group of factual situations with those of the instant case as the minimum. Obiter dicta: These are by the way statements of law or facts made by a judge in the course of judgment. They do not dispose off the case before the court. They have no binding force; however they may be relied upon by advocates in subsequent cases as persuasive authority in subsequent cases. These statements of obiter dicta strengthen or reinforce the decision of the court. E. g. the “ Neighbour Principle” in *Donoghue v. Stevenson* (1932)

Precedents may be classified in various ways:

1. Binding and persuasive precedents
2. Original and declaratory precedents
3. Distinguishing precedents

Original precedents

This is a principle or proposition of law as formulated by the court. It is the law-creating precedent. Declaratory Precedent

This is the application of an existing principle of law in a subsequent similar

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case. Binding precedent

This is an earlier decision which binds the court before which it is relied upon. E. g. a precedent of the Court of Appeal used in the High Court.

Persuasive Precedent

This is an earlier decision relied upon in a subsequent case to persuade court to decide the case in the same manner e. g. a High Court decision used in a Court of Appeal, or a decision handed down by a court in another country.

Distinguishing precedent

This is a subsequent decision of a court which effectively distinguishes the earlier precedents. It is a precedent in its own right. TO WHAT EXTENT IS

CASE LAW A SOURCE OF LAW

JUDICIAL PRECEDENT (STARE DECISIS)

Stare decisis literally means 'decision stands'. It is a system of administration of justice whereby previous decisions are relied upon in subsequent similar cases. It is to the effect that each court in the Judicial Hierarchy is bound by principles established by decisions of courts above it in the Hierarchy and courts of co-ordinate jurisdiction are bound by their own previous decisions if the two cases have similar material facts. Case law is only a source of law where the cases have similar legal points. The doctrine of judicial precedent applies both horizontally and vertically. Case law is recognized as a source of law of Kenya by Section 3 (1) (c) of the Judicature Act. Kenyan courts are required to rely on previous decisions of superior English courts subject to the qualifications in the Judicature Act.

In *Dodhia v. National and Grindlays Bank Co. Ltd*, the court of Appeal for Eastern Africa lay down the following principles on the applicability of case

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law or Judicial Precedent in East Africa; 1) Subordinate courts are bound by decisions of superior courts. 2) Subordinate courts of appeal are bound by their own previous decision. 3) As a matter of judicial policy, the Court of Appeal as the final court, should while regarding its own previous decisions as binding be free in both criminal and civil cases to depart from them whenever it appeared right to do so. The court was advocating some flexibility in the application of stare decisis by itself. However, in certain circumstances, a court may refrain from a binding precedent. In such circumstances, the earlier decision is ignored this is done in the following circumstances: a. Distinguishing; This is the art of showing that the earlier decision and the subsequent case relate to different material facts.

This enables a judge to ignore the precedent. b. Change in circumstances: A judge may refrain from an earlier decision of a brother judge if circumstances have changed so much so that its application would be ineffectual i. e the decision no longer reflects the prevailing circumstances. c. Per incuriam: It literally means ignorance or forgetfulness. An earlier decision may be departed from it if the judge demonstrates that it was arrived at in ignorance or forgetfulness of law, i. e the court did not consider all the law as it existed at the time. d. Over-rule by statutes: If a precedent has been over-ruled by an Act of Parliament. It ceases to have any legal effect as statute law prevails over case law.

e. The earlier decision is inconsistent with a fundamental principle of law f. If the ratio decidendi of the previous decision is too wide or obscure. g. If the ratio decidendi relied upon is one of the many conflicting decisions of a court of co-ordinate jurisdiction. h. Improper Conviction: In *Kagwe v R.* (1950) it

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was held that a court could refrain from a binding precedent if its application was likely to perpetuate an incorrect, erroneous or improper conviction in a criminal case. **ADVANTAGES OF CASE LAW (IMPORTANCE OF STARE DECISIS)**

1. Certainty and predictability; Stare Decisis promotes certainty in law and renders a legal system predictable. In *Dodhia's Case 1970*, the Court of Appeal was emphatic that ' a system of law requires a considerable degree of certainty.' 2. Uniformity and consistency: Case law enhances uniformity in the administration of justice as like cases are decided alike. 3. Rich in detail: stare decisis is rich in detail in that many decisions which are precedents have been made by courts of law. 4. Practical: Principles or propositions of law are formulated by superior courts on the basis of prevailing circumstances hence the law manifests such circumstances. 5. Convenience: Case law is convenient in application in that judges in subsequent cases are not obliged to formulate the law but to apply the established principles. 6. Flexibility: It is contended that when judges in subsequent cases attempt to distinguish earlier decisions as to justify departing from them, this in itself renders the legal system flexible.

#### **DISADVANTAGES OF CASE LAW**

1. Rigidity: Strict application of stare decisis renders a legal system inflexible or rigid and this generally interferes with the development of law. 2. Bulk and complexity: Since stare decisis is based on judicial decisions and many decisions have been made, it tends to be bulky and there is no index as to which of these decisions are precedent. Extraction of the ratio decidendi is a complex task. 3. Piece – meal: Law-making by courts of law is neither systematic nor comprehensive in nature. It is incidental. Principles or

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propositions of law are made in bits and pieces. 4. Artificiality in law (over-subtlety): when judges in subsequent cases attempt to distinguish indistinguishable cases, they develop technical distractions or distinctions without a difference. This makes law artificial and renders the legal system uncertain. 5. Backwardlooking: Judges or courts are persuaded / urged to decide all cases before them in a manner similar to past decisions. It is contended that this practice interferes with the ability of a judge to determine cases uninfluenced by previous decisions. SUBSIDIARY SOURCES OF LAW

#### 1. ISLAMIC LAW

It is based on the Muslim Holy Book, the Quran and the teaching of Prophet Mohammed contained in his sayings known as Hadith. It is a subsidiary source of law of Kenya.

It is recognized as a source of law by Section 66(5) of the Constitution and Section 5 of the Kadhi's Court Act. It only applies in the determination of civil cases relating to marriage, divorce, succession or personal status in preceding in which all parties profess Muslim faith. In *Bakshuwen V Bakshuwen* (1949) the supreme court of appeal observed that: " the law applicable in the determination of questions of personal law between Muslims was Mohammedan Law as interpreted by judicial decisions."

In *Kristina d/o Hamisi-v- Omari Ntalala and another*, the parties were married under Christian law. Subsequently the husband changed his faith and married another woman under Islamic law. In a divorce petition, the 1st respondent argued that the second respondent was his wife under Islamic law. Question was whether Islamic Law was applicable in the divorce. It was <https://assignbuster.com/sources-of-kenyan-law-essay-sample/>

spelt that since the parties were married under Christian Law, Islamic law was not applicable and the divorce petition was granted. 2. HINDU LAW

It is based on the Hindu faith and philosophy. It is a subsidiary source of law of Kenya. It is recognized as a source of law by the Hindu Marriage and Divorce Act and the Hindu Succession Act. It only applies in the determination of civil cases relating to marriage, divorce, succession or personal status in proceedings in which all parties profess Hindu faith. 3.

### AFRICAN CUSTOMARY LAW

It is based on the customs usages and practices of the various ethnic groups in Kenya. A custom embodies a principle of utility or justice. Customs are by their nature local. Not every rule of local customs is relied upon by a court of law in the settlement of a dispute. For a custom to be relied upon as law, it must have certain characteristics: 1. Reasonableness; A good local custom must be reasonable i. e. it must be consistent with the principle of justice. Whether or not a custom is reasonable is a question of facts to be determined by the courts. 2. Conformity with statute law: A local custom must be consistent with parliament-made law. This is because parliament is the principle law-making body and has Constitutional power to disqualify the application of any rule of custom

. 3. Observation as of right: A good local custom is that which a society has observed openly and as of right i. e. not by force or by stealth nor at will. 4. Immemorial antiquity: A custom must have been observed since time immemorial. Time immemorial means that no living person can at least as to when the custom did not exist. Kenyan law recognizes African customary law

as a source of law. Section 3(2) of the Judicature Act, is the basic statutory provision regarding the application of African Customary Law in civil cases in which one or more of the parties is subject to it or affected by it, so far it is applicable and is not repugnant to justice and morality or inconsistent with any written law 1) Guide.

African Customary law can only be relied upon as a guide. Courts are not bound to rely on any rule of custom. It is the duty of the court to decide whether or not to rely on a particular rule of custom.

## 2) Civil Cases.

African customary law can only be relied upon by a court of law in the determination of civil cases. Section 2 of the Magistrates Court Act<sup>8</sup>, identifies the various types of disputes the determination of which may be based on African customary law. This section provides that the phrase ‘claim under customary law’ means: 1. Land held under customary tenure

2. Marriage, divorce, maintenance or dowry

3. Seduction or pregnancy of an unmarried woman or girl

4. Enticement of or adultery with a married woman.

5. Matters affecting personal status and in particular the status of women, widows, and children including custody, adoption, legitimacy etc. 6. Intestate succession and the administration of intestate estates not governed by written law. In *Kamanza Chimaya-v- Tsuma* (1981), the High Court held that the list of disputes outlined by section 2 of the Magistrates’ Court Act was exhaustive. 3) African Customary Law can only be relied upon by a court of

law if one or more of the parties to the proceedings is bound by it or affected

by it. In *Karuru v. Njeri*, the parties who belonged to the Kikuyu thenic group married under the customs of the group and had two children.

In a divorce case, each party sought custody of children. Karuru had not applied for the return of the bride price. However, the district magistrate's court awarded custody to Njeri. On appeal to the High Court, the court awarded custody to the appellant. In the words of Simpson J, 'the custom in question is however applicable to the present case and the parties are subject to it.' In *R v. Ruguru*, the defendant alleged that she was the plaintiff's wife under Embu customs. It was held that there was no marriage between them since whereas she was bound by the customs, the plaintiff was only affected by them.

#### 4. Repugnant to justice and morality.

African customary law can only be relied upon if it is not repugnant to justice and morality. The custom in question must be just and must not promote immorality in society. In *Karuru v. Njeri*, it was held that the custom in question was not repugnant to justice and morality. In the words of Simpson J; 'I am not prepared to hold that the custom is repugnant to justice and morality.' However, in *Maria Gisese d/o Angoi v. Marcella Nyomenda* (1981), the High Court sitting in Kisii held that the Gusii custom which permitted a woman to marry another in certain circumstances was repugnant to justice and morality.

#### 5. Consistency with written law

For a rule of custom to be relied upon in the settlement of a civil dispute, it must be consistent with written law as parliament is the supreme law-

making body. In *Karuru-v-Njeri*, Simpson J observed, ‘ I know of no written law with which it is inconsistent.’ 6. Proof

The party relying on a particular rule of custom must prove it in court by adducing evidence unless the custom is a matter of public notoriety in which case the court takes judicial notice of the custom without any evidence. It was so held in *Kamani-v-Gikanga*. The scope of application of African customary law as a source of law diminishes as the legal system develops.

#### INTERPRETATION OF STATUTES (construction of statutes)

Since statutes are drafted by experts who use legal terminologies and sentences which may be interpreted by different persons, it becomes necessary to construe or interpret statutes. Traditionally, statutory interpretation has been justified on the premises that it was necessary to ascertain and give effect to the intention of parliament. However, a more recent justification is that it is necessary to give meaning towards phrases and sentences used by parliament in a statute. Generally, statutory interpretation facilitates uniformity and consistency in the administration of justice or application of law. To interpret statutes, courts have evolved rules and presumptions. RULES / PRINCIPLES / CANNONS OF INTERPRETATION

##### 1. Literal Rule:

This is the primary rule of statutory interpretation. It is to the effect that where the words of statute are clear and exact, they should be given their literal or natural, dictionary or plain meaning and sentences should be accorded their ordinary grammatical meaning. However, technical terms and technical legal terms must be given their technical meanings. This rule was

explained in R.-v- City of London Court Judge. Under this rule, no word is added or removed from the statute. 2. Golden rule:

This rule is to some extent an exception to the literal rule. It is applied by courts to avoid arriving at an absurd or repugnant or unreasonable decision under the literal rule. Under this rule, a court is free to vary or modify the literal meaning of a word, phrase or sentence as to get rid of any absurdity. The rule was explained in Becke-v-Smith (1836) as well as in Grey-v-Pearson and was applied in R-v-Allen to interpret the provision of the Offences against the Person Act (1861). It was also applied in Independence Automatic Sales Co Ltd -v- Knowles and Foster to interpret the word 'book debt' used in Section 95 of the Companies Act of 1948. The court interpreted it to mean all debts of the company which ought to have been entered in the books in the ordinary course of business whether or not they were so entered. 3. Mischief Rule [Rule in Heydons Case (1584)].

This is the oldest rule of statutory interpretation. Under this rule, the court examines the statutes to ascertain the defect it was intended to remedy so as to interpret the statute in such a manner as to suppress the defect. The rule was explained by Lord Coke in Heydon's case (1584). According to the judge, four things must be discerned and discussed: 1. What was the common law before the making of the Act?

2. What was the mischief and defect for which the law did not provide? 3. What remedy has parliament resolved i. e. appointed to cure the disease? 4. What is the true reason for the remedy?

The judge shall give such construction as shall advance the remedy and suppress the mischief. The mischief rule was applied in *Smith v. Hughes* (1961) to interpret the provisions of the Street Offences Act 1959. Under the act, it was a criminal offense for a prostitute to ‘solicit men in a street or public place.’ In this case the accused had tapped on a balcony rail and hissed at men as they passed by below. The Court applied the mischief rule and found her guilty of soliciting as the purpose of the Act was to prevent solicitation irrespective of the venue. The mischief rule was also applied by the Court of Appeal for Eastern Africa in *New Great Company of India v. Gross and Another* (1966), to interpret the provisions of the Insurance (Motor Vehicles Third Party Risks) Act. 4. *Ejus dem generis* Rule

This rule is applied to interpret words of the same genus and species. It is to the effect that where general words follow particular words in the statute, the general words must be interpreted as being limited to the class of persons or things designated by the particular words. The rule was explained in *R. v. Edmundson* and was applied in *Evans v. Cross* to interpret the provisions of the Road Traffic Act (1930).

#### 5. *Noscitur a sociis*

This rule literally means that a word or phrase is known by its companions. It is to the effect that words of doubtful meanings derive their meaning and precision from the words and phrases with which they are associated. 6.

#### *Expressio unius est exclusio alterius*

This rule literally means that the expression of one thing excludes any other of the same class. This rule is to the effect that where a statute uses a

particular term without general terms the statutes application is restricted to the instances mentioned. 7. *Rendendo singula singullis*

This rule is to the effect that words or phrases variously used in a statute must be accorded the same meaning throughout the statute. 8. A statute must be interpreted as a whole

This rule is to the effect that all words, phrases and sentences must be given their due meaning unless meaningless. All conflicting clause must be reconciled unless irreconcilable. 9. Statutes in *pari materia*

The interpretation of one statute is used in the interpretation of another related (similar) statute. PRESUMPTIONS IN THE CONSTRUCTION OF STATUTES

In the construction of statutes or Acts of parliament, courts of law are guided by certain presumptions, some of which include: 1. The statute was not intended to change or modify the common law 2. The statute was not intended to interfere with individual vested rights. 3. The statute was not intended to affect the crown or residency. 4. The statute was not intended to apply retrospectively.

5. The statute was not intended to be inconsistent with international law. 6. The statute was not intended to have extra-territorial effect. 7. An accused person is innocent until proven guilty.