

BUSINESS LAW

CHAPTER ONE

NATURE, PURPOSE AND KINDS OF LAW

After studying this chapter, you should be able to:

- Define law and its various terminologies
- Distinguish between law and morality based on various aspects
- Explain the role of law in the society
- Explain the relationship between law and ethics
- Distinguish between different classification of the law such as civil law and Criminal law based on various aspects

INTRODUCTION & DEFINITION OF LAW

Many of us spend the greater part of our lives without occasion to consider just what it is that is contained in the law and, what exactly do we expect from the legal system of the country. In fact, we may argue that the need to understand the need for law springs from the necessity to clarify, first and foremost, just what is law? This basically is a question about law, not a question of law.

Occasionally it also comes to our attention, when our property or person is offended, that some behaviour should be regulated or at least that some protection is necessary and that this may be provided by the law.

“Life is like a play,” says *Shakespeare*. But the more complex the play, the more likely are disputes to arise. So no really good play can progress without rules. Life is more complicated than any sport you can ever imagine of – There are more players, bigger field, almost unlimited activities played round the clock. So, it’s an inevitable fact that in life, we need rules, laws and regulations for every situation.

In our contemporary world, it’s impossible to even imagine life without law. Some eminent jurists like Rousseau, Montesquieu, and Locke have, after detailed study and analysis concluded such a state of existence to have been short, brutish and nasty. Thus there arose need for law to govern human existence.

According to various schools of thought, law is important for the following purposes and functions inter-alia; law has been held to be instrumental in the maintenance of law and order in the country, it performs police functions. Plato opines that ‘mankind must either give themselves a law and regulate their lives by it or live no better than the wildest of the wild beasts.’

Hobbes says that ‘law was brought into the world for nothing but to limit natural liberty of particular men in such a manner as they might not hurt but assist one another and join together against a common enemy.’

2. Courts of appeal are bound by their own previous decisions.
3. As a matter of judicial policy, the court of appeal as the final court in East Africa should, while regarding its previous decisions should be free in both criminal and civil cases to depart from them wherever it appeared right to do so.

However a judge may refrain from a binding precedent in certain circumstances namely:-

1. Distinguishing: This is the practise of showing that the two cases have different material facts or relate to different legal issues. In such a case, the earlier decision is not a precedent.
2. Change in circumstances: If the earlier decision has been overtaken by changes so that it does not reflect the prevailing circumstances.
3. *Per-incurium*: this literally to mean ignorance or forgetfulness of law. A judge may refuse to apply an earlier decision in a subsequent case if it is evident that that decision was arrived at in ignorance or forgetfulness of law.
4. Improper conviction: In *Kadhi Vs. R (1956)* it was held that a judge was free to refrain from an earlier decision if its application perpetuated an improper or erroneous conviction in criminal case.
5. Overruled by statute: A judge is not bound to apply a binding precedent if it has been overruled by an Act of Parliament, as the prevailing law is statutory.
6. Where the *ratio-decidendi* relied upon is too wide or obscure.
7. If the *ratio-decidendi* relied upon is in conflict with fundamental principle of law.
8. If the decision relied upon is one of the many conflicting decisions of a court of co-ordinate jurisdiction.

Advantages of Case law.

- Leads to **consistency** in application and development of the principles of each branch of law.
- Enables lawyers to focus with reasonable certainty what the attitude of court is likely to be in a given set of facts. These enable them to advise their clients **reliably**.
- The system is essentially **practical** because the courts are perpetually dealing with actual situations.
- It is a **flexible** system; it can provide an answer to new legal problems.
- The recording of cases enables good level of **certainty** and **precision**.
- It's more **dynamic** and keeps pace with changing needs of the society since case law deals with daily practical problems.

Disadvantages of Case law.

- May **restrict** discretion of the judges.
- Sometimes, it is **difficult to distinguish** what exactly would be the *ration decidendi* in a particular case.
- Due to large number of cases, there is increasing **bulk** and **complexity** in each branch of law.

AFRICAN CUSTOMARY LAW.

Customary law is generally understood to be rules of law derived from the customs and usages of different communities. A custom is a habit, norm or usages by a given community that has lasted over time and has its roots in wisdom, need and character of a particular community.

9. **Not to make secret profits from agency:** An agent occupies a fiduciary position. He must not make any profit beyond the agreed commission or remuneration except with prior consent of his principal.
10. **Not to set up adverse title:** He must not set up his own title or the title of a third party (unless he proves a better title in that person) to the goods, which he receives from the principal as an agent. If he does so, he will be guilty for conversion.
11. **Not to put himself in a position where interest and duty conflict:** He is under a duty to act in the interest of the principal. He must not put himself in a position where his duty to the principal and his personal interest conflict unless he has made full disclosure of his interest to his principal specifying its nature and obtaining his assent.
12. **Not to delegate authority:** As a general rule, an agent must not depute another person to do what he has himself undertaken to do. This is underscored by the maxim '*delegatus non potest delegare*' i.e. a delegate shall not further delegate.

RIGHTS OF AGENT

1. Right of retainer

He has to retain out of any sums received on account of principal, all moneys due to himself in respect of his remuneration and advances made or expenses properly incurred by him in conducting such business.

2. Right to receive remuneration

He is entitled to his agreed remuneration or where there is no agreement to a reasonable remuneration. In the absence of any special contract the right to claim remuneration arises only when the agent has done what he had undertaken to do.

3. Right of lien

An agent is entitled to retain goods, papers and other properties be they movable or immovable property in his possession due to the amount owed to him by the principal for services, disbursement, or commission owed to him. This is particular lien confined to claims arising in connection with the goods or property for which the right is claimed. But by special contract, an agent may have a general lien extending to all claims arising out of agency.

4. Right of indemnification

The agent has a right to be indemnified against the consequences of all lawful acts done by him in exercise of the authority conferred upon him. This right however, does not extend to acts known to the agent to be unlawful.

5. Right of compensation

The agent has the right to be compensated for injuries sustained by him by neglect or want of skill on the part of the principal.