

6. The substance of Common law in force on the 12<sup>th</sup> August 1897
  7. Judicial precedents.
  8. The doctrine of Equity in force in England on the 12<sup>th</sup> August 1897.
  9. Procedures and Practice observed by courts of Justice in England on 12<sup>th</sup> August 1897.
  10. African customary law.
- Other recognized sources of law include:

- i. Hindu Law and;
- ii. Islamic Law.

These sources of law are explained below.

## **THE CONSTITUTION**

The constitution is the single formal document, which defines the composition and powers of different organs of the state or the institution and their relationship with each other and to private citizens.

*Lord James Bryce* defines the constitution as consisting of ‘Those rules of laws which determines the form of its government and the respective roles of its organs and the respective rights and duties of it towards a citizen and of a citizen towards the Government’.

A constitution may be written or unwritten. A written constitution is one which most of the important constitutional provisions are enacted in a formal document or series of documents. A written constitution is generally considered to be rigid i.e. can only be changed in some manner e.g. by requiring a specified majority.

*Section 3* of it establishes its unchallengeable position over any other written or unwritten law i.e. the supremacy of the constitution.

The constitution of Kenya established:

- The Executive; *Section 4 – 29*,
- The Legislature; *Section 30 – 59*,
- The Judiciary; *Section 60 – 69* and;
- The fundamental rights and freedoms of individuals; *Section 70 – 86*.

The constitution contains many more provisions concerning other issues in various other chapters.

### **Supremacy of the constitution.**

In countries where there exists a written constitution, it invariably enjoys a pre-eminent position within the legal order. The constitution is regarded as the law within which the frame-work of detailed rules and practice are to be laid out. The constitution takes precedence and supremacy over all other laws. The theory behind supremacy of the constitution is that it embodies a contract between the government and the governed. The constitution must therefore not be altered in the same manner as ordinary legislation.

**Definition:** When a person signifies his willingness to do or to abstain from doing anything with the view of obtaining the assent of the other to such act or abstinence, he is said to make a proposal. The person proposing is also called an **offeror** or a **promissor**. The existence or otherwise of an offer may sometimes be the source of an acute dispute between parties. These has often occurred in cases where a person did or said something which another understood to be an offer and consequently proceeded to 'accept. In the course of settling such disputes, the courts have explained that such 'offer' are apparent rather than real and that the thing done or statement made amounted to no more than an **invitation to treat** or a **declaration of intention**.

Following are examples invitation to treat:

- a. A registered company issues a prospectus pursuant to provisions of the companies Act, asking the public to subscribe for the company's shares. If a person applies for any shares in response to the prospectus, the application will be the offer. The issue of the prospectus was legally an invitation to treat, although it appeared to be an offer of the specified shares to the public for acceptance.
- b. A government ministry puts an advertisement in the newspaper for tenders for the supply of a specified quantity of goods during a certain period of time the advertisement constitutes an invitation to treat. A trader's response to the invitation will be the offer.
- c. A trader displays goods in his shop window with a price label on each of them. The display is another species of invitation to treat.

#### **Characteristics / Requirements / Legal rules regarding offer.**

- May be express or implied.
- Offer must give rise to a legal obligation.
- Terms of offer must be definite and certain i.e. should not be vague, uncertain or ambiguous
- An offer must be distinguished from an invitation to offer, or declaration of intention e.g. an advertisement.
- The offer must be communicated.
- An offer may prescribe the method of communication of acceptance thus becomes a conditional offer.
- An Offer must be made with a view of obtaining the consent of the other party to do so or abstain from doing the particular act.
- Offer should not impose an unnecessary obligation to communicate non-acceptance e.g. "If acceptance is not communicated by next Sunday, I shall presume that you have accepted"
- May be specified or general i.e. can be made to a particular person hence no other person regardless of his merit can be tolerated, or can even be general in that any person who meets the conditions can signify his assent.

#### **SPECIES OF OFFER:**

Following are other manner in which offer exists.

#### **CROSS OFFER.**

no fault on their part.

### **Limits of the rule.**

For this rule to apply the following conditions must be applied:

- i. Non-natural user: The defendant must have used his land in a way, which is not ordinarily natural.
- ii. Bringing into, or keeping or accumulating things on land for personal use.
- iii. That the things brought were capable of causing mischief if they escaped. These things need not be dangerous always.
- iv. Need for escape: There must be actual escape of the thing from the defendant's land and not a place outside it.
- v. That the plaintiff suffered loss or damage for such escape.

### **Defenses in rule in Ryland vs. Fletcher.**

- i. Acts of God: Act of God is a good defense to an action brought under the rule.
- ii. Plaintiffs' Fault: If the escape of the thing is due to the fault of the plaintiff, the defendant is not liable. This is because the plaintiff has himself brought about his own suffering.
- iii. Plaintiff's consent or benefit: That the accumulation or bringing of the thing was by consent of the plaintiff.
- iv. Statutory authority: That the thing was brought into the land by requirement of an Act of parliament.
- v. Contributory negligence: if the plaintiff was also to blame for the escape.
- vi. Wrongful act of third party: the defendant may take the defence of the wrongful acts of a third party though he may still be held liable in negligence if he failed to foresee and guard against the consequences to his works of that third party's act.
- vii. Artificial work maintained for the common benefit of plaintiff and defendant.

#### **2. Liability for Fire:**

The liability for fire due to negligence is actionable in tort. It is also a case of strict liability. Therefore, if a fire starts without negligence but it spreads due to negligence of a person, then that person will be liable for damages caused by the spread of the fire.

#### **3. Liability for Animals:**

This may arise in cases of negligence. An occupier of land is liable for damage done by his cattle if they trespass onto the land of his neighbors thus causing damage.

In the same way, person who keeps dangerous animals like leopards, dogs, lions, etc is liable strictly for any injury by such animals. He cannot claim that he was careful in keeping them. He remains liable even in the absence of negligence.