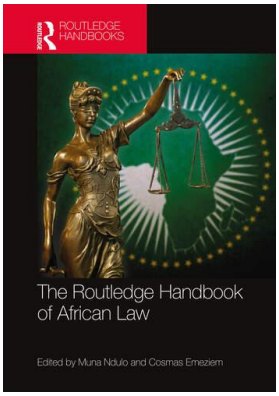

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Common law in Kenya

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5
COMMON LAW IN KENYA

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Introduction

The phrase "common law," when used to describe a legal order, refers to a typology of legal system associated with the English one (Center for Law, Society and Justice, 2020). Mostly, though, the term is synonymous with "judge-made law."[1] The common law system, which develops and applies judge-made law as a formal source of law, remains one of the major legal traditions in the world, and it is often contrasted with civil law, which is associated with continental Europe and Latin America (Glendon, Carozza, and Picker 1985). Based on interactions occasioned by transnational borrowing of legal norms and practices though, it has been suggested that there is a third legal system, known as "the mixed legal system."[2] There are suggestions that Kenya is not a pure common law system but a mixed one. However, without denying the existence of methods and norms from the civil law jurisdictions, it is likely that the Kenya is just another illustration that the common law system is distinctively adaptive, and hence, able to assimilate even attributes of other legal systems and endure in a different, dynamic, and ever-changing legal order. In this respect, and as it shall be shown, common law methods continue to be used even in the very application of influences from outside the English norms and traditions.

This chapter accordingly discusses the evolution of Kenya's common law system, including the common law after, and in spite of, the Constitution of 2010. Concerns had been raised about the feasibility of successful common law in Kenya, and it was felt that it was not destined to last for long (Wabwile 2002, 23). That has not happened, however, as seen from a study of Kenya's legal system. Even with the adoption of a new Constitution, common law continues to be developed, and its methods are deployed in the very interpretation of the Constitution that redirects the ensuing post-2010 common law, at times, from what was considered to be the "common law position." This chapter first describes common law's nature and the salient features. Second, it exposits the entry of common law in Kenya and its historical development since the pre-independence period until around 2010. The chapter then addresses, in its main section, the development and application of common law following the promulgation of what has been described as a transformative Constitution and how the legal system and the judge-made norms have reacted to the new legal order. The main section is concerned with the changes that have been associated with the 2010 Constitution, including how common law

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methods have continued to be used. The conclusion is preceded by a small segment on the place of other "non-common law norms" and how their place should be understood.

Common law's nature and practices

As a legal system, common law embodies a tradition—what is denoted here as the common law methods—committed to the application of the doctrine of *precedent*, which entails that similar cases should be decided in a similar way (see Evans 1987). This tradition is in turn mechanized through a structure of courts set up in a hierarchical manner (Pollock 1903). The decisions of superior courts are considered to be binding on courts lower to them, and even though a court would be bound by its decisions, it can depart from its own decisions in certain circumstances (Hall 1972; Whitman 2000). A lower court can in turn distinguish a decision and, therefore, fail to apply it if its facts are distinct or if that decision was made *per incuriam*.[3]

At the center of the common law system is the procedure of application, and in so doing, the creation of a body of law. Because common law is created with concrete circumstances in mind, one of its attributes is adaptability (Joireman 2006). Postema (2004, 589) posited that English common law "held practice as a form of law." Thus, it is able to change to respond to new situations and to changes within the environment where it is developed and applied. Its source being in case law, and the fact that it develops from the practical application of law to real situations, makes it a form of "living law," able to address circumstances not in the contemplation of positive law. Legislative enactment as positive law is not made at times with tangible circumstances in mind, and the common law system mitigates against the effects of lacuna in the law by vesting in the judges the authority to create law, and in so doing, predict how similar circumstances would be handled in the future should they arise. Judicial pronouncements on cases that come before judges thus qualify as law and, other than applying the law, the work of a judge includes to prospect or expound on it, which is what is denoted in this chapter as development of law. Benjamin Cardozo highlights this activity as follows:

> No system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins. He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it for others.
>
> *Cardoza 1921, 20–1*

Other than hierarchical court system, this system is supported by a practice and infrastructure of law reporting. To Wabwile (2002, 23), "the Law Report is the exact counterpart of the promulgation of legislation in a civil law country." In England, where the common law system was extracted, there has indeed been a sustained practice of documentation of judicial pronouncements. In medieval reporting, predating the Tudor period, this documentation was referred to as "year books," while those that came after that period are known as "law reports". Some parchment records, "ran continuously from (at least) 1194 until the reign of Queen Victoria" (Bryan 2009, 45).[4] Until 1865, the responsibility of collating and editing decisions in England was mainly by individuals—more so, judges or barristers—and it is in their name that the reports were mostly attributed. Prior to the 16th century, the authorship of the yearbooks is said to have been anonymous (Bryan 2009,46). Edmund Plowden, a barrister, Lord Coke,

and Sir James Burrow are among persons who edited law reports until around 1865, when the Incorporated Council for Law Reporting (ICLR) was established (Bryan 2009). Since its incorporation, the ICLR has consistently published the law reports, a practice that has been widely copied in countries that share in the tradition. Presently, the judicial decisions in England are also published in electronic form. Accordingly, every country that considers itself a common law country has established a system of law reporting.[5]

Other than the practice of law reporting, adversarial rather than the inquisitorial presentation structures are used to articulate disputes before the courts.[6] The latter often "features the inquisitorial procedures" and is associated with the civil law system (Meyer 1993)—associated because a legal system cannot lack traces of the attributes of another system; a legal system cannot claim to be purely adversarial or inquisitorial (Sherry and Tidmarsh 2007, 16). Joireman (2006, 192) remarked, concerning the systems such as in Britain and America, "parties to a dispute are pitted against one another in a … contest with the expectation that competition between the two sides will reveal the truth." In these set-ups, the role of the judge is to act as a neutral, impartial arbiter who listens to both sides and makes a decision (Joireman 2006). Parties are vested largely with the responsibility of framing the dispute; there is hefty reliance of oral evidence and submissions, with rules guiding admissibility of evidence and the role of both the parties and the judge (Joireman 2006). Almost exactly the opposite is what is pursued in civil law jurisdictions.

Therefore, when Kenya is described as a common law system, it means—or rather it is presumed—that it has a legal system that closely imitates the English legal system in the sense that decisions of its superior courts are binding on lower courts (which are established in a hierarchical manner), that the justice system is essentially adversarial, and also, that much of the law that is applied in courts is contained in judicial decisions that are formally reported. The section that follows explains how Kenya came to be a common law country in the first place, followed by the highlighting of legal developments in Kenya that have been occasioned by adoption of the 2010 Constitution.

Development of common law in Kenya

In terms of its origin, common law's filiation is often traced to the period after the Norman Conquest of England in 1066. Historical accounts note that following the expansion of the royal justice system, the norms, which that system upheld, came to be referred to as "common law." These were essential customary norms that were the "same" or similar throughout the country, rather than varying with local customs. This law, which first developed as a "process of applying feudal law," later graduated into a hallmark of the English legal systems and became distinct, both as a body of law—judge-made law—and as a legal system.

Judge-made law and the system associated with it found its way in Kenya through the colonial experience, especially following declaration of Kenya as a protectorate around 1890 (Joireman 2006, 199). The main legal systems in the world—civil law and common law—were first imposed but later embraced as the legal systems for African countries following the colonial encounter. In the case of common law countries, their legal systems were drawn from and imitated the English legal system. Kenya is a common law country, because its legal system was imported from Britain. That is also the case with other former British colonies in Africa, including Nigeria, South Africa, Zambia, Uganda, Sierra Leone, Ghana, and Zimbabwe, to list a few.

In the Kenyan context, the common law system courts had been established earlier than 1890. In particular, a subordinate court had been set up in Zanzibar around 1844, under

the jurisdiction of the High Court of Bombay, which was an older British colony (Joireman 2006, 199–200). The practices and procedures that were applicable in India, which had in turn imitated those in Britain, were also adopted by the early courts (Joireman 2006, 200). English law was previously applicable to British subjects, and even though customary law was used with respect to Natives, English common law became open for application to Natives, too. Initially, a Native could only be subject to English common law or could only access common law courts if there was a dispute between a Native and a British subject. With the opening of the legal system following independence, it was felt that the Native had been elevated to the status of the whites, and the decision to retain the common law system and its courts was seen as affording Africans what was initially white privilege (Ghai and McAuslan 1970). This, together with the vested interests that sought to ensure continuity in the legal order in a bid to protect the British government and its subjects, made the continued use of common law, and especially, the common law system the least disruptive and feasible option (Wabwile 2002, 21).

At independence, the structures to sustain the application of common law and context—the fact that most jurists were Asians, educated in the common law tradition—permitted continued application of common law. In terms of structures, the Independence Constitution established a "Supreme Court" as "a superior court of record" (Government of Kenya 1963, §171). Below the Supreme Court, it set up other courts, essentially, the magistrate's courts, court-martial, and courts that were to administer Sharia law (Government of Kenya 1963, §§178 and 179). Subject to parliamentary approval, the Constitution vested appellate powers in the East African Court of Appeal to hear and determine appeals from the Supreme Court (Government of Kenya 1963, §176). Room was reserved for Parliament to establish an appellate court for Kenya. The Judicial Committee of the Privy Council was conferred with final appellate jurisdiction over matters arising from the appellate courts (Government of Kenya 1963, §181). A hierarchy of courts was thus created through which the doctrine of precedent could be applied.

In 1967, few years after independence, Kenya enacted the Judicature Act, a legislation that is considered to set out the formal sources of law (Government of Kenya [1967] 2012). This law, which is still in force, qualified the amount of English laws that should be legitimately applied, including English common law. It lists several laws English law sources, including what is referred to as Statutes of General Application,[7] and requires that what should be applied is "the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897" (Government of Kenya [1967] 2012, §3). There is a rider to this, though, which is that: "[p]rovided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary" (Government of Kenya [1967] 2012, §3).

An inference to be drawn from this stipulation is that Kenyan courts are not bound by English common law, even that which was applicable before 1897, as such sources continue to be law subject to or in the absence of written law and, in any case, only to the extent that the "circumstances permit" (Government of Kenya [1967] 2012, §3). The Judicature Act, however, does not seem to contemplate the existence of "Kenya's common law." Regardless, it is generally accepted that there is such a thing as Kenyan common law, which results from interpretation and application of English common law or other norms to circumstances in Kenya. It could be argued accordingly that the capping of reception of English law date to pre-1897 was intended to afford an opportunity for Kenyan judges to develop Kenya's peculiar common law.

In support of the foregoing claim, it is noteworthy that, despite virtually all lawyers and judges in Kenya during the colonial and early postcolonial periods being trained in the English common law tradition and familiar with English common law, there was judicial suspicion

toward English common law and a reluctance to apply it on the part of some judges in Kenya in the post-independence epoch. This skepticism toward English law is reflected in a few decisions, particularly, made immediately before and after independence. In *Raya Binti v. Hamed Bin Suleiman*, a decision around 1962, Justice Horsfall cautioned that it was wrong to apply the principles of equity that had been devised to suit a Christian English society in that case, which concerned a personal relationship in East Africa.[8] In yet another decision, in the case *New Great Insurance Company of India v. Cross*, a case that was decided around 1966, the judge remarked, "I consider that decisions in the other English cases are bad law and should not be followed in East Africa."[9]

Given the structures put into place to facilitate the creation and application of common law and the resolve on the part of judges to develop Kenyan's jurisprudence, there has been thus far a significant amount of what can be described as Kenya's common law created. Justice Hancox alluded to this development in an unreported case of *Mariga v. Musila* as follows:

> Kenya is, and has for several years been, developing its own common law, paralleled, one might say, to that of England, in areas not covered by its written laws. As part of this process these courts frequently pay attention to English decisions, and regard them as high persuasive authority … But it must nonetheless not be lost sight of that it is the Kenya common law that is being developed and that there is no compulsion to apply present English decisions.[10]

Kenya's common law is not necessarily in disharmony with English common law. In the areas of contract and tort law, for instance, there is hardly any different positions taken in the evaluation of liability by English and Kenyan courts, even today. In this regard, Kenya's Law of Contract Act does make explicit reference to English common law as follows:

> Save as may be provided by any written law for the time being in force, the common law of England relating to contract, as modified by the doctrines of equity, by the Acts of Parliament of the United Kingdom applicable by virtue of subsection (2) of this section and by the Acts of Parliament of the United Kingdom specified in the Schedule to this Act, to the extent and subject to the modifications mentioned in the said Schedule, shall extend and apply to Kenya.
>
> *Government of Kenya [2002] 2012, §2(1)*

Kenyan courts also continue to take cognizance of procedural law—evidence, civil, and criminal procedure—and principles emanating from English common law, which have been mostly codified into Kenyan statutes. The Law of Evidence Act codifies a host of English law principles, such those relating to admissibility of evidence or hearsay, just as in the *Criminal Procedure Code* and the *Civil Procedure Code*.[11] Even in the area of land law, and despite the incursion of African customary claims on land, English common law principles—including trusts and equity—still play a significant role in determination of land rights and claims arising from them.[12] Until recently also, before Kenya enacted the Contempt of Court Act, recourse was always made to the procedures laid out in English law in a bid to punish those who disobey court orders.[13]

As previously observed here, the common law system is supported by a tradition of law reporting. The development and application of the doctrine of precedent in Kenya has, however, been seriously impeded by the absence of substantive state investment in law reporting, until recently (Wabwile 2002, 21). Before 1994, there was no reliable institutional framework to collate and report decisions of superior courts. The Kenya Law Reports, which is the official

state law report today, was started around 1897, but between that period and the present time, there are replete gaps. Between the years 1905 and 1922 there does not seem to exist evidence of publication of law reports. Between 1922 and 1956, only about 21 volumes of law reports were published. Between 1956 and 1976, there was also no consistency in publishing of law reports (Kenya Law n.d.). Between 1982 and 1992, a private body took up the role of making law reports, which came to be known as the Hancox Reports, under the editorship of Chief Justice A. R. W. Hancox (Kenya Law n.d.). Since Kenya attained its independence in 1963, it was not until 1994 that Parliament established the National Council for Law Reporting, as a state department with state budget to facilitate law reporting.[14] Even so, Kenya law reports were not published until 2003 (Wabwile 2002, 21). Presently though, this difficulty has been overcome due to the creation of electronic Kenya Law Reports—eKLR.[15] Virtually all decisions from various high courts are uploaded by the National Council for Law Reporting and are available online with no access fees.

Common law after the Constitution of 2010

Organization of courts

The Constitution of Kenya of 2010 did not impose radical changes, either to the structure of government or to the legal system associated with the pre-2010 legal order. It maintained a hierarchy of courts, with the Supreme Court being at the pinnacle (Government of Kenya 2010). Below the Supreme Court is the Court of Appeal and under that is the High Court, which is at the same level as the Employment and Labor Relations Court and the Land and Environment Court (Government of Kenya 2010). Under the High Court and the other two courts with equal status, are magistrate courts, including *Kadhi* courts, local tribunals, and court martial. This order essentially reflects the system in place before 2010, in which courts were hierarchically established and decisions of the superior courts bound inferior ones.

Other than creating a hierarchical structure of courts, the Constitution has also made explicit mention and reference to "binding" aspect of decisions. It provides that "All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court" (Government of Kenya 2010, art. 163(7)). This provision has been a subject of extrapolation—on whether and what the circumstances are when the Supreme Court can depart from its decisions—in the case of *Jasbir Singh Rai and 3 others v. Tarlochan Singh Rai Estate of and 4 others.* In that case, the Supreme Court held:

> As a matter of consistent practice, the decisions of the higher Courts are to be maintained as precedent; and the foundation laid by such Courts is in principle, to be sustained. This, of course, leaves an opening for the special circumstances which may occasionally dictate a departure from previous decisions …
>
> In principle therefore, it follows that this Court, an apex Court, can indeed depart from its previous decision, for good cause, and after taking into account legal considerations of significant weight.[16]

The binding aspect of decisions of the Supreme Court is not confined to "ordinary" cases only. It also applies to advisory opinions. In *Re in the Matter of Interim Independent Electoral Commission*, the Supreme Court held that: "We, therefore, hold that an Advisory Opinion, in this context, is a 'decision' of the Court, within the terms of Article 163(7), and is thus binding on those who bring the issue before the Court, and upon lower Courts, in the same way as other decisions."[17]

There have also been some changes in the structure of the courts, and by implication, the binding nature of precedent. Insofar as organizing the structure of courts is concerned, the 2010 Constitution first altered the status of the court that previously handled employment disputes—the Industrial Court—which was hitherto, controversially, in the same status as subordinate courts.[18] This was done through the renaming of the "Industrial Court" to "Employment and Labour Relations Court" and conferring on it the same status as the High Court. Second, the 2010 Constitution created a Supreme Court in the place of the Court of Appeal as the apex court. The change associated with these organizational developments is such that, whereas the decisions of the High Court previously bound the Industrial Court, the decisions of the High Court now are not binding on the Employment and Labour Relations Court, as both are of the same status. Also, the Supreme Court now has the final say on interpretation of law, which was not the case in the previous dispensation. This has had very profound implications, considering that some of the decisions that had been made by the Court of Appeal both before and after the Constitution of Kenya 2010 have been overturned by the Supreme Court.[19]

The idea of hierarchy that is altered should be not just confirmed by the court dealing with employment matters with a status equal to the High Court. First, whereas the subordinate courts previously handled matters relating to land and ownership in the first instance, these cases should now be handled by a court with similar status as the High Court—though the Court of Appeal has taken a different position on the issue.[20] Nonetheless, because the Environment and Land Court is a superior court of record, the opportunities available for courts to develop the common law relating to land disputes can be understood to be vast now.

Second, and most radically, the Supreme Court has been given exclusive jurisdiction over presidential election matters, which initially could be filed in the High Court, but then could find their way to the Court of Appeal through the usual appellate process. This is not, however, a suggestion that decisions of the Supreme Court are not to be applied by other courts when addressing other disputes, say, gubernatorial ones. It is just that the tradition associated with a higher court's decision binding a lower court on the question of the validity of a presidential election has been, perhaps, brought to an end. Intriguingly, though, not all matters can be appealed to the Supreme Court and, thus, not all decisions of the present and former Court of Appeal are amenable to being overturned, assuming they were wrong in the first place. The Constitution confers upon the Supreme Court appellate jurisdiction only "as of right in any case involving the interpretation or application" of the Constriction or where either the Court of Appeal or the Supreme Court "certifies that a matter of general public importance is involved."[21] The bulk of what constitutes the common law is the law applicable in personal law matters, and in such areas of the law as contracts and torts. Mmatters arising under it can only be addressed by the Supreme Court if they have been certified as required by the jurisdictional rules of the Supreme Court. The practice has been that most matters are not certified, and the common law position remains what the Court of Appeal has decreed.[22] The section that follows describes how common law methods have continued to be used under Kenya's new constitutional dispensation.

Use of common law methods in constitutional interpretation and application

Though there has been some incorporation of inquisitorial methods in adjudication of disputes, particularly those relating to elections, there has also been a sustained use of common law methods in the interpretation and application of the Constitution of Kenya 2010 itself.

Practices arising out of actions such as "overruling" and "distinguishing," or principles such as "*obiter dictum*" and "*ratio decidendi*" or "*per incurium*," which are the methodological rubrics through which the principle of *stare decisis* is applied, are also consistently deployed by in Kenyan courts. Already, it has been observed that the Constitution makes reference to the binding nature of precedent, and thus decisions of the higher courts are treated as binding to lower courts.

The most prominent involvement in the use of common law methods in post-2010 Kenya is through the case of *Ekuru Aukot v. Independent Electoral & Boundaries Commission and 3 others*.[23] In that case, the electoral body, the Independent Electoral and Boundaries Commission (IEBC), had declined to gazette a party to the case who had participated in the first presidential election in August 2017, but which was nullified by the Supreme Court. The decision of the IEBC was based and informed by a previous decision, that of *Raila Odinga and 5 Others v. Independent Electoral and Boundaries Commission and 3 Others.*[24] In that previous case, though, the Supreme Court had dismissed the 2013 presidential petition, venturing into what was to happen, assuming it had allowed the petition. In so doing, it observed that a fresh election would be held between the two leading candidates. It is this finding of the Supreme Court that was used by the IEBC in declining to gazette the applicant who was third in the 2017 presidential election, which was nullified by the Supreme Court. The High Court, deploying common law methods, addressed the issue before it by considering whether the holding of the Supreme Court bound it or not, and, therefore, whether it could render itself differently on the matter, or consider the decision of the Supreme Court as being binding toward it. In order to confront the issue, it considered the principles of *ratio decidendi* and *obiter dictum*, as used in the application of precedent. The High Court framed the question in the following terms: "It is important to address the question whether or not the observations by the Supreme Court were *orbita dictum* or *ratio decidendi*."[25] The judge, in allowing the case, held:

> The invitation was for the court to give directions on a line of relief "*depending on finding on merits*" and it was not one of the issues for determination in the dispute before the court. The directions are not part of the final orders of the court … they cannot be said to be the *ratio decidendi* of the case …
>
> … the observation by the Supreme Court must be viewed as *obiter*, and not the *ratio decidendi* of the decision.[26]

The *Ekuru Aukot case* remains an outstanding case on the use of common law methods in the application and interpretation of the Constitution, but it is not the only one.[27]

Subjection of common law and its development to the Constitution

Though common law methods continue to be used in the interpretation and application of the Constitution, courts have insisted that the application of common law and its development must be in line with the dictates of the Constitution. In particular, declarations have been made that common law must be in line with the transformative nature of the Constitution, the implication being that some of the longstanding common law positions have to be departed from. In *Okiya Omtatah Okoiti v. Communication Authority of Kenya and 8 others*, the Communications Authority of Kenya raised an objection concerning the ripeness of a dispute, as the subject of consideration by the court was still under the discussion stage and the case was, according to it, premature and hypothetical. This objection was, according to the court, "advancing common

law principles" that "prevents a party from approaching a court prematurely at a time when he/she has not yet been subject to prejudice, or the real threat of prejudice."[28] The court, while dismissing the view, observed:

> But can this common law jurisprudence hold sway on the face of our transformative and progressive Constitution with an expanded Bill of Rights and enhanced standing to approach the court? A *stereotyped recourse* to the interpretive rules of the common law, statutes or foreign cases, can subvert requisite approaches to the interpretation of the Constitution …
>
> … Judges cannot afford to routinely cite common-law cases to deny or grant *locus standi* or determine *ripeness.*[29]

The *Okiya Omtata* case is just one of the many cases where the courts have departed from a common law position, and this has mostly been at the instance of what is dubbed as "constitutionalisation" (Okubasu 2016, 15).

On this front, some of the practices, which were initially found in common law, have now been set out in or explicitly addressed by the Constitution, either the same way as had been in common law or differently. A salient case in point is the practice of review of decisions of administrative bodies and inferior courts and of traditions, which were initially governed by common law principles, some of which were codified in the Law Reform Act or the Civil Procedure Rules.[30] That practice was referred to as "judicial review" in the Kenyan context under the pre-2010 regime. Article 47 of the Constitution, which imitates §33 of the Constitution of South Africa, now provides for the right to a fair administrative action that essentially entitles every person to expeditious, reasonable, and lawful decisions and to reasons for the decisions (Government of Kenya 2010). Some of the codified, longstanding common law principles, such as the requirement to seek leave of the court before commencing these kind of proceedings, have now been qualified by courts. Courts have acknowledged the import of this provision to the subject of judicial review as modeled after English law, noting that, whereas the basis for judicial review of administrative action was in common law then, it is now in the Constitution of Kenya 2010 (Government of Kenya 2010, para. 23). Previously, courts had strictly held that leave to institute these proceedings could only be granted if sought within six months, and that such leave having been granted, a substantive suit could only be entertained if it was filed within six months of the date of the grant of leave.[31]

Following the promulgation of the Constitution in 2010, courts have taken a different turn on the issue of leave, let alone the period within which such an application can be filed. In *James Gacheru Kariuki and 22 others v. Kiambu County Assembly and 3 others*, an objection was raised on the jurisdiction of the court to hear a challenge on an administrate action on the grounds that the case had been filed after the expiry of six months, which is what common law prescribed, as well as the Law Reform Act. Justice Ngugi, commenting on the change imposed by the Constitution, observed:

> Our Constitution of 2010 took a decidedly anti-formalist turn. Whereas our previous jurisprudence might have been enamoured of arcane formalist logic on process before one could be permitted to perfect a substantive claim, our 2010 Constitution self-consciously rejects such an approach to adjudicating substantive claims especially those involving public interest. In the case of judicial review, the Constitution of 2010 introduced two new important provisions.

> First, in Article 47, the Constitution expressly constitutionalizes administrative justice as a right and removes it from the clutches of Common Law.[32]

Development of common law, especially on matters of private law, has now also been redirected by the constitutional prescriptions flowing from the binding nature of the Bill of Rights, particularly to private persons and bodies. Contract, tort, family, and labor relations are areas that were previously addressed almost exclusively by dictates from English common law principles obtained in case law, codified as statutes, or some aspects of African customary law in the context of family.[33] Certain provisions of the Bill of Rights are now directed at these areas, or at least their hitherto controversial factions. For instance, prior to 2010, the English common law rules on employment, including, for instance, the one that permitted an employer to terminate the employment for any reason, or for none, had taken root. This position cannot now be held, and indeed, in *Mary Mutanu Mwendwa v. Ayuda Ninos De Africa-Kenya* (Anidan K), the court described the position in the Employment Act, though enacted by Parliament before 2010, but which implements art. 41 of the 2010 Constitution as evincing "a radical departure from the position which obtains under the common law."[34] Other illustrations of the influence of the 2010 Constitution on the common law position on employment matters abound.[35]

The common law that governed private matters, such as family, has also been affected by the Constitution. In this vein, the constitutional directive that "parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage" has had far-reaching implications on areas of distribution of property, which were hitherto a subject of controversy arising from the developed common law position.[36] In particular, the Court of Appeal, in the case of *Kivuitu v. Kivuitu*, had found that the law presumed equal ownership of matrimonial property, taking into account the indirect contributions of the wife.[37] Later, the case of *Echaria v. Echaria*, in the Court of Appeal, held that "wife's non-monetary contribution cannot be taken into account when determining the total amount of contribution from the wife towards acquisition of the property."[38] The *Echaria* case was decided around 2007, at a time when there was no constitutional provision akin to art. 45 of the Constitution. After the promulgation of the Constitution, courts took a different turn on the issue. In *R P M v. P K M*,[39] one of the issues that court had to adjudicate on was whether a husband could be forced to pay maintenance to his wife and to shoulder their children's expenses, in spite of art. 45 of the Constitution. Though the court still granted the relief to the wife, it did observe: "Articles 45(3), 53(1) and 27 of the Constitution depart from the common law position where husbands were viewed as the primary providers of the family and therefore bore the task of maintaining their wives or former wives pending the divorce or even after divorce had been granted."[40]

The court in the end reinstated the *Kivuitu* case position, which had been substantially departed from through the *Echaria* case (Maina 2013). In another case of *Z.W.N. v. P.N.N*, the court summarized the departure from common law emanating from the *Echaria* decision in the following terms:

> This court notes and appreciates that the principle of law set by the court in *Echaria v. Echaria (supra)* stems from provisions of a legislation subordinate to constitutional provisions, meaning that the constitutional provisions enshrining the principle of equality when it comes to distribution of matrimonial property have primacy over the principle of law enunciated by the decision in *Echaria v. Echaria* (supra), which stems from and ordinary legislation.[41]

Use of other norms and methods

Though common law is a notorious source of law in Kenya, and in spite of the fact that its methods continue to be used by courts in adjudication of disputes including in the interpretation of the Constitution, it is not the only source of law, nor are its methods exclusively used by Kenyan courts.[42] Inquisitorial approaches have been adopted, particularly in the area of resolution of electoral disputes, more so on what is described as "scrutiny."[43] Pursuant to the election laws, a party is allowed to apply for scrutiny or recount of votes for the purposes of "establishing the validity of the votes cast."[44] This is normally a court-directed process, and it is undertaken under the supervision of a judicial officer.[45] In this set-up, Kenyan courts do not play the passive role of listening to arguments by the different parties; rather, they proactively engage in a sort of fact-finding mission, a pursuit associated with civil law traditions. Indeed, in the case of *Levi Simiyu Makali v. Koyi John Waluke and 2 others*, the High Court observed that "an election Court … has an inquisitorial jurisdiction in an election petition."[46] The adoption of civil law approaches is, however, resorted to with caution, at times using adversarial strategies, considering that courts have held that "evidence unveiled through the Court's exercise of its inquisitorial jurisdiction which is not founded in the Petition and the accompanying Affidavits … must not be used to determine the Petition."[47] Such statements are reflective of adversarial predispositions. This civil law approach is increasingly being spread to other forms of disputes, and indeed, in *Samuel Letodo v. Republic*,[48] a criminal case, the court observed that:

> The trial court should have invoked its inquisitorial powers under section 150 of the Criminal Procedure Code to call Neebe on its own motion as a court witness in view of the evidence …This inquisitorial approach is mitigated by the requirement that the advocate for the accused person is given a right to cross examine the person called by the court.[49]

Importantly, the 2010 Constitution tilts toward continental Europe in the design of public regulation and, indeed, there is significant borrowing from there. This is particularly the case in the areas of administrative law and, as already discussed, the previous approach used to review decisions of administrative bodies has been supplemented by what can be considered judicial review in the sense of *Madison v. Marbury*.[50] Noteworthy is that there is a strong system of judicial review, unlike in the case of England, the implication being that some of the English common law principles on review of powers are now treated with caution, if not ignored. It could be of importance to remark that, previously, it was difficult to pursue judicial review orders against the president because under English common law, prerogative orders could not be sought against the Crown, as they are issued in the name of the Crown (Wade and Forsyth 2009, 501). Under the new dispensation, the common law position has been abandoned, and suits aiming to review the powers of the president have been filed under the canopy of judicial review. In some of them, judgment has been handed down against the president.[51]

In addition to the adoption of continental Europe models, as well as some of its civil law practices, the Judicature Act, which sets out the formal sources of law, expands these sources beyond judge-made law. In particular, the Judicature Act requires that the jurisdiction that both superior and inferior courts have should also be exercised in accordance with the Constitution, Acts of Parliament, statutes of general application, equity, and most importantly, African customary law in some qualified instances. Also, the Constitution has established *Kadhi* courts to address personal law issues relating to Muslims, thereby importing Sharia law on certain personal matters affecting Muslims.[52] In addition to these norms, the Constitution has provided

that "the general rules of international law shall form part of the law of Kenya," which has also increased the corpus of law that is to be applied by Kenyan courts (Republic of Kenya 2010, Chapter One, §2(5)). The volume of law beyond judge-made law is therefore significant.

The existence of norms other than judge-made law does not alter the fact that even these norms are applied using common law techniques. As already discussed, common law has been embraced by the new legal order. The interpretation and application of the Constitution is also guided by common law methods. This endeavor is not confined to the Constitution, as these methods are also used even in the application of other norms, such as those in statute and customary law. Regarding Acts of Parliament for instance, common law rules on interpretation of statutes—such as the literal, golden, and mischief rules—and other guidelines, such as rules of language, also continue to be used to interpret Acts of Parliament.

Concluding remarks

When common law was grafted in former British colonies, doubts were cast on the viability of not only common law but the entire system itself. First, it was contended that the doctrine of precedent was introduced in general reception and practice in former British Africa without specific rules establishing "African High Courts" (Allott 1968).

Second, it was claimed that when common law was introduced in Kenya and most parts of Commonwealth Africa, it was not intended to regulate the relationship between Africans. Instead, "the reception and entrenchment of English Law at the onset of the colonial rule" was intended to "facilitate the British empire in the colony" (Wabwile 2002, 21). In the case of Kenya, the broader concern was that the exercise was not preceded by any study on the feasibility of common law as a sustainable and viable legal system in Kenya (Wabwile 2002). One would not have expected, therefore, common law to flourish in postcolonial Africa. Yet, it would seem that these fears have not materialized.

Far from the concerns that common law was illegitimately grafted into African legal systems and that it was, perhaps, not a viable system, this chapter has demonstrated that not even the far-reaching implications of the 2010 Constitution have dislodged common law and common law methods from the legal system. Instead, common law has merely been embraced by the new legal order. This has been achieved still through the use of common law methods, which continue to be intensely used, even in the application and interpretation of non-common law norms, particularly, in the Constitution itself.

Notes

1 For a description of legal systems, see Glendon, Carozza, and Picker (1985, 14).
2 For an understanding of the "mixed legal system," see Palmer (2001); Reid (2003).
3 For an understanding of the phrase *per incuriam*, see Goel (2016).
4 See, also, Center for Law, Society, and Justice (2020).
5 This includes Kenya Law Reports (eKLR).
6 See *Jones v. National Coal Board* [1957] 2 QB at 55, in which Lord Denning remarked that in a common law system, the function of a judge is "to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large."
7 These include: the Admiralty Offences (Colonial) Act 1849; the Evidence Act 1851, §§7 and 11; the Foreign Tribunals Evidence Act 1856; the Evidence by Commission Act 1859; the British Law Ascertainment Act 1859; the Admiralty Offences (Colonial) Act 1860; the Foreign Law Ascertainment Act 1861; the Conveyancing (Scotland) Act 1874, §51; and the Evidence by Commission Act 1885.
8 *Binti v. Hamed Bin Suleiman* [1962] EA 248.
9 *New Great Insurance Company of India v. Cross* [1966] EA 91.

10 *Mariga v. Musila* [1984] eKLR, http://kenyalaw.org/caselaw/cases/view/7900.
11 See Law of Evidence Act, Chapter 80 (http://kenyalaw.org/kl/fileadmin/pdfdownloads/CAP.80%20Evidence%20(Polishing).pdf), and Criminal Procedure Code, Chapter 75 (http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2075).
12 For example, the principles for grant of injunctions developed in English courts are applicable in Kenyan courts. In *Nguruman Ltd v. Shompole Group Ranch and Another* [2014] eKLR, however, the Court of Appeal clarified that "English authorities on the basis of which the *Musiara* case had been decided were merely persuasive and could not be used to overrule local decisions which had crystallized the position in law on the issue."
13 See *Ramadhan Salim v. Evans M. Maabi T/A Murhy Auctioneers and Another* [2016] eKLR.
14 The *National Council for Law Reporting Act*, Act No. 11 of 1994. http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2011%20of%201994.
15 http://kenyalaw.org/kl/.
16 *Jasbir Singh Rai and 3 others v. Tarlochan Singh Rai Estate of and 4 others*, [2013] eKLR, Petition No. 4 of 2012, paras. 40, 43. See http://kenyalaw.org/caselaw/cases/view/90132/.
17 Constitutional Application No. 2 of 2011, para. 60. See http://kenyalaw.org/caselaw/cases/view/77634/.
18 See, *Kenya Medical Research Institute v. Attorney General and 3 others* [2014] eKLR.
19 For instance, in *Evans Odhiambo Kidero and 4 others v. Ferdinand Ndungu Waititu and 4 others* [2014] eKLR, the decision of the Court of Appeal was overturned by the Supreme Court, like many other decisions.
20 *Law Society of Kenya Nairobi Branch v. Malindi Law Society and 6 others* [2017] eKLR.
21 Government of Kenya (2010), art. 163.
22 See the test set out in *Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone* [2013] eKLR.
23 *Ekuru Aukot v. Independent Electoral & Boundaries Commission and 3 others* [2017] eKLR.
24 *Raila Odinga and 5 Others v. Independent Electoral and Boundaries Commission and 3 Others*, Petitions Nos. 5, 4, and 3 of 2013 (consolidated), [2013] eKLR.
25 Petition 471 of 2017, para. 40. See http://kenyalaw.org/caselaw/cases/view/141808/.
26 Petition 471 of 2017, paras. 47, 53. See http://kenyalaw.org/caselaw/cases/view/141808/.
27 See also, *Captain J. N. Wafubwa v. General Julius Karangi and 2 others* [2014] eKLR.
28 *Okiya Omtatah Okoiti v. Communication Authority of Kenya and 8 others* [2018] eKLR, para. 38.
29 *Okiya Omtatah Okoiti v. Communication Authority of Kenya and 8 others* [2018] eKLR, paras. 40, 41.
30 See *Republic v. Sports Kenya and 2 others, Ex-Parte Caroline Mungai and 25 others* [2018] eKLR. In *Shah vs. Attorney General* (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543, the court explained itself thus: "*Mandamus* is essentially English in its origin and development and it is therefore logical that the court should look for an English definition." See Miscellaneous Civil Application 355 of 2016, para. 25, http://kenyalaw.org/caselaw/cases/view/131790.
31 See, e.g., *Michael Oyugi and 4 others v. Bundalangi Lands Disputes Tribunal and another* [2005] eKLR.
32 Judicial Review Application 2 of 2017, para. 28. See http://kenyalaw.org/caselaw/cases/view/137932/.
33 Examples are the defenses contained in the Kenya's law on libel and slander, the *Defamation Act*. See also, *Humphrey Makokha Nyongesa and another v. Communications Authority of Kenya and 2 others* [2018] eKLR, wherein the Court hinted at the application of these rules to contracts by noting, "This is not to say that judicial review cannot apply in employment contracts." See http://kenyalaw.org/caselaw/cases/view/147558/.
34 *Mary Mutanu Mwendwa v. Ayuda Ninos De Africa-Kenya* (Anidan K) [2013] eKLR. http://kenyalaw.org/caselaw/cases/view/91391.
35 See, *Prisca Kemboi and 2 others v. Kenya Post Office Savings Bank* [2014] eKLR (http://kenyalaw.org/caselaw/cases/view/101951/); *G M V v. Bank of Africa Kenya Limited* [2013] eKLR (http://kenyalaw.org/caselaw/cases/view/90648/).
36 Government of Kenya 2010, art. 45(3). See for instance, *K A S v. M M K* [2016] eKLR, http://kenyalaw.org/caselaw/cases/view/126535/.
37 *Kivuitu v. Kivuitu* (1991) 2 KAR 241.
38 *Echaria v. Echaria* (2007) 2EA 139. See http://kenyalaw.org/caselaw/cases/view/83227/.
39 *R P M v. P K M* [2015] eKLR.
40 See, also, the case of *SMR v. PHS* [2013] eKLR. See, also, http://kenyalaw.org/caselaw/cases/view/106903/.

41 *Z.W.N. v. P.N.N* [2012] eKLR, http://kenyalaw.org/caselaw/cases/view/83227/.
42 See the inferences from *Harun Meitamei Lempaka v. Lemanken Aramat and 2 others* [2013] eKLR.
43 Part VI of The Elections (Parliamentary and County Elections) Petition Rules, 2017 (Kenya Law 2017).
44 Kenya Law 2017, 31(1).
45 *Raila Amolo Odinga and another v. Independent Electoral and Boundaries Commission and 2 others* [2017] eKLR.
46 *Levi Simiyu Makali v. Koyi John Waluke and 2 others* [2018] eKLR, para. 36.
47 *Levi Simiyu Makali v. Koyi John Waluke and 2 others* [2018] eKLR, para. 36.
48 *Samuel Letodo v. Republic* [2016] eKLR.
49 *Samuel Letodo v. Republic* [2016] eKLR, para. 15. http://kenyalaw.org/caselaw/cases/view/128346.
50 *Marbury v. Madison*, 5 U.S. 137.
51 In *Republic v. President and 7 others Exparte Wilfrida Itolondo and 4 others* [2014] eKLR: That case concerned the removal of a university vice chancellor who was appointed by the president. Judge Odunga rendered thus on the question of whether judicial review orders would be issued against the president:

> In dealing with this issue the Respondents have relied on the English authorities. One must however remember that unlike in United Kingdom where there is no written Constitution, in Kenya we have a written Constitution … and under Articles 2(1) and (2) thereof all persons and all State organs at both levels of government are bound by the Constitution which is the supreme law of the Republic and no person may claim or exercise State authority except as authorised under the Constitution. Accordingly, In Kenya we have the supremacy of the Constitution as opposed to the Supremacy of Parliament. Therefore, where it is alleged that the President's action has contravened the Constitution, I do not see why the same cannot be questioned before this Court unless the action falls within the realm of a purely political question …
>
> The arguments by the Applicants that the President is immune to civil and criminal proceedings as provided for under Article 143 of the Constitution is in my view untenable in the current constitutional dispensation because the High Court in the exercise of its judicial review jurisdiction exercises neither a criminal jurisdiction nor a civil one since the power of the High Court to grant judicial review remedies is *sui generis.* (paras. 63, 65)

52 Constitution of Kenya, art. 2(4) and art. 170 (Republic of Kenya 2010).

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