

**LEGAL TRANSPLANTATION IN KENYA: A CASE STUDY ON A  
TRANSPANTED ACT OF PALIAMENT POST 2010 CONSTITUTION**

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## **DECLARATION**

I, LAVENDER MBUTA NDUNGA AD101789, declare that the data presented on this study comprises of research done by myself and has not been submitted for any previous degree or qualification from this university or any other institution of learning. I confirm that this work is my own except where otherwise stated by reference and acknowledgment. I therefore confirm that due credit has been given within this study where reference has been made to the work of others.

Signature:

Date:

**Supervisor**

Signature:

Date:

## **DEDICATION**

This thesis is dedicated to God Almighty whose grace and mercy has seen me through my life at the university and completion of this program.

It is also my genuine gratefulness and warmest regard that I dedicate this thesis to my father Mr. Gibson Ndunga Kitavi and my mother Mrs. Mary Malia Ndunga who have encouraged me, walked with me and taught me persistence, consistency and that above all hard work pays.

## **ACKNOWLEDGEMENTS**

The success and final outcome of this project is as a result of the help of my very able supervisor Dr. Francis Khayundi. His constructive criticism, guidance and assistance have led me to exert more effort on this research as well as learn more on the topic. Thank you, Sir!

My deepest gratitude also goes towards Mrs. Florence Shako for the encouragement and unwavering support at the onset of this research. Your words of encouragement gave me the confidence to take on such a topic. Thankyou!

## **LIST OF LEGAL INSTRUMENTS**

### **KENYA**

Constitution of Kenya 2010.

Community land Act 27 of 2016 laws of Kenya.

Act 43 of 1960 Laws of Kenya.

Judicature Act, Cap 3 Laws of Kenya.

### **UNITED KINGDOM**

Community Land Act 1975 Laws of UK.

### **INDIA**

Indian Contract Act of 1872.

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## CHAPTER ONE INTRODUCTION

### 1.1 INTRODUCTION

The transfer of laws and legal systems commonly known as legal transplantation has taken place in Kenya for over half a century. The phenomenon was spearheaded by the fact that colonization was taking place and the systems being applied were those of the British. Presence of the transplanted laws and legal systems is present from the onset as seen in the Judicature Act whereby common law is a recognized source of law. Many jurisdictions are subject to legal transplantation as seen from the existence of two main types of laws in the world, civil and common law.

To begin with, this study will be looking at the word transplantation from its original home, the scientific home in order to understand its jurisprudential underpinning. According to the Cambridge dictionary, to transplant is ‘to move something or someone from one place to another’. Organs in the scientific world are transferred from one patient (mainly known as the donor) to another patient (donee). The transplant is thereafter deemed successful only when the organ is received and is able to work in tandem with all other organs that were in that body ab initio. To be understood is the concept that the transplanted organ is to adapt to its new surrounding and not vice versa.

Described as ‘.....vivid imagery taken from the world of anatomy and surgery, the ‘legal transplant’ metaphor has been successful in conveying a wide-spread perception of law as quasi-organic matter, as well as a general idea about the complex and sensitive nature of any attempt to make laws and legal institutions that have evolved in one particular legal and institutional environment, work outside their natural ‘habitat’.<sup>1</sup> Legal transplantation has been the corner stone of legislating statutes in different parts of the world. As stated earlier, due to the colonization of countries, many colonized nations choose to take up their masters laws, slightly alter them and claim them as their own. An example is the adoption of common law into the common wealth nations. This shall be expounded on further.

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<sup>1</sup>Antonina Bakardjieva Engelbrekt ‘*Legal and Economics Discourses on Legal Transplants: Lost in Translation?*’ page 112 <https://pdfs.semanticscholar.org/4668/1780ec4dcad585c3ff56262b48e241cdc89f.pdf> (last accessed August 10,2019).



Concentrating more on legal transplantation in Kenya, this research will decipher the process of transplantation also known as adoption, the impact, whether positive or negative that the transfer of laws has had on it as a state and its people and, the pros and cons brought about by it. This research will further answer the question on whether there is need to either reform, drop or continue with the transplantation process. The main purpose of this research being to give a better understanding of the origin of the laws that govern Kenya and possibly explain the issues that have arose with regards to the transferred systems and laws. To note is that this is a sui generis topic that has not been explored with the only writing about it being those of ancient scholars who only if I might add just scratched the surface.

## 1.2 BACKGROUND

Legal transplantations is a concept developed of off ‘laws coming from a somewhat higher and healthier legal system with a purpose of enriching a system of law that is deemed to be obsolete or defective’.<sup>2</sup> It is motivated by the fact that the laws to be transplanted come from a system that is considered somewhat superior.<sup>3</sup> Kenya’s legal transplantation process was as a ‘result of colonial domination and not the original transplantation process’.<sup>4</sup> Fullerton in her article goes on to highlight the fact that in many areas, the transplantation has not been allowed to develop organically but is more so imposed.

With the settlement of the British in the protectorate, ‘British settlers imported laws and systems of governance from Britain that had been codified in India’.<sup>5</sup> In detail this study shall delve into how conflict arose from this due to disregard of the existing native laws. ‘Transplanted legal systems that are not rooted in the norms and traditions of natives, represent little to no interests of

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<sup>2</sup> Emilian Ciongaru, ‘*Negative Effects of Incorrect Legal Transplantation of European Union Legislation*’, (2013) <<http://www.sciencedirect.com/science/article/pii/S1877042813027882/pdf?md5=16f769b0407095f74e89635a1bc392fa&pid=1-s2.0-S1877042813027882-main.pdf>> last accessed March 3, 2019 page 186-191.

<sup>3</sup> Maria Paula Reyes Gaitan, ‘*The Challenges of Legal Transplants in a Globalized Context: A Case Study on ‘working’ Examples*’ (2014) page 13 <[https://www.academia.edu/9550076/The\\_challenges\\_of\\_legal\\_transplants\\_in\\_a\\_globalized\\_context\\_A\\_case\\_study\\_on\\_working\\_examples](https://www.academia.edu/9550076/The_challenges_of_legal_transplants_in_a_globalized_context_A_case_study_on_working_examples)> last accessed September 27, 2019.

<sup>4</sup> Sandra Fullerton Joireman ‘*The Evolution of Common Law: Legal Development in Kenya and India*’ (2007) <<https://www.tandfonline.com/doi/full/10.1080/14662040600831636?scroll=top&needAccess=true>> last accessed March 4, 2019.

<sup>5</sup> <<https://www.judiciary.go.ke/about-us/our-history/>> (last accessed March 4, 2019).

the natives'.<sup>6</sup>This in turn creates a problem as the natives fail to go by the rules and regulations created as they will not only see them as contrary to their norms but unlawful.

Allan Watson, a legal historian, was among the first to delve into this controversial topic in his writing titled, '*Legal transplants: An approach to comparative law*' in the 1970s. The book initially did not receive a good response but in recent times has attracted countless reviews. Khan –Freund is another author that sought to respond to Watson on the issue of legal transplantation differing with him as shall be seen later on in this study.

'Many developing nations implemented and adopted the legal transplantation which was not only geographical but also institutional into their supreme laws'.<sup>7</sup> A clear depiction of this is seen in our country's (Kenya) laws starting with the recognition of international laws in article 2(6) of the Constitution of Kenya as well as the recognition of common law and the doctrines of equity in section 3 of the Judicature Act 16 of 1967. The Kenyan statute regulating contracts is English based as per section 2 of CAP 23 and Indian Act of 1872 as per section 4 of the same Act. This can be seen as a problem especially since the natives had a way of enforcing contacts and without these new laws that had little to no regards of their traditions and cultures. The common law transplanted during the colonial era was 'rigid and applied to control the natives in one way or another'.<sup>8</sup>

Post independent Kenya adopted the common law system from the British and has used and recognized it as their own. Some are a direct copy paste for example the law that govern contracts while others have been changed a little to suit the nature of that which it governs. Problems have without a doubt arisen as a result of the transplanted laws. Joireman argues that the nature of the bar which had few Africans was one of the problems that emanated from the legal transplantation system. This, she further states was beneficial to the colonial masters who were still in the business of being in control of the legal system. Looking at all this then begs the question as to why there has not been better legislation with regards to matters that are unique to our country and its legal

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<sup>6</sup> Sandra Fullerton Joireman '*The Evolution of Common Law: Legal Development in Kenya and India*' (2007) <https://www.tandfonline.com/doi/full/10.1080/14662040600831636?scroll=top&needAccess=true> (2007) last accessed March 4, 2019 page 14.

<sup>7</sup> Emilian Ciongaru '*Negative Effects of Incorrect Legal Transplantation of European Union Legislation*', (2-13) <<http://www.sciencedirect.com/science/article/pii/S1877042813027882/pdf?md5=16f769b0407095f74e89635a1bc392fa&pid=1-s2.0-S1877042813027882-main.pdf>>last accessed March 3, 2019 page 186 -191.

<sup>8</sup> Ibid (n 6) page 14.

systems. Are our legislators just lazy? Are the resources for implementation insufficient? Or do we just enjoy conflict of laws.

### 1.3 STATEMENT OF THE PROBLEM

The law governs people within a state or a particular geographic location. The people are then bound to be the first recipients of the effects of legal transplantation. Every person subscribes to a particular way of life. When legal transplantation occurs it is bound to in one way or another collide with the set laws of the people it governs. In Kenya, the transplantation of the common law from the British has been seen to be in collision with the African customary laws that have been the source of law and order for countless centuries. The transplanted legal system ‘must be acceptable to the general and legal culture to which it is inserted’.<sup>9</sup> On the part of the state, the transplantation may and in most cases overlap with national legislation.<sup>10</sup> This research will seek to look into whether or not the subjects of the laws that are transplanted are really put into consideration during the whole process. It is of the same view as Sociological jurists who believe in “The study of law in its social setting”.<sup>11</sup> They go on to propagate the idea that it “involves a close analysis of the structure, functions, effects and values of a legal system and that it necessitates an investigation of persons, institutions, rules, procedures and doctrines, so that hypotheses and principles might be formulated”.<sup>12</sup>

Furthermore , this study will seek to delve into the times and the places affected by the transplanted laws , paying attention to the effects it has had in Kenya .Starting off the time line will be a summary of the pre-colonial and post-colonial era up to the implementation of the 2010 Constitution. This just being a means of setting the foundation to the question of when and where. Why the process was adopted and why it is still in use will then be the icing on the cake that will

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<sup>9</sup> Lous F.Del Duca and Alain A. Levasseur ‘*Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System*’ on *The American Journal of Comparative Law* Vol. 58 , <<https://www.jstor.org/stable/20744530>> last accessed March 3, 2019 page 1 .

<sup>10</sup>Emilian Ciongaru, *Negative Effects of Incorrect Legal Transplantation of European Union Legislation*, (2013)<<http://www.sciencedirect.com/science/article/pii/S1877042813027882/pdf?md5=16f769b0407095f74e89635a1bc392fa&pid=1-s2.0-S1877042813027882-main.pdf> >last accessed March 3, 2019 page 186 -191.

<sup>11</sup>L.B Curzon , *Lecture notes on Jurisprudence* (2<sup>nd</sup> edition) pg. 149.

<sup>12</sup> *Ibid* 149.

bring all the questions and answers together in order to make it all, make sense. Looking at both sides of the spectrum just so as to see each point being put across.

#### **1.4 JUSTIFICATION**

The rationale behind this research will be to look into ‘the validity of customary laws from advanced legal systems’,<sup>13</sup> understand the origin of laws and what justification is given by different legislative bodies as to their application of laws from other jurisdictions in their systems. This will also help understand the country’s legal framework. This study will be relevant in that it will trace the origin of the different laws applied in Kenya, the alterations made and the reasons behind them. Furthermore, this study will be able to highlight the problems as well as the solutions that have emanated from the transplantation.

The issue leading to this research being the fact that many people who are subjects to these transplanted laws cannot relate to them and further claim the disregard of their customs and traditions. Many have also questioned why the transplanted laws take the top positions in the hierarchy of laws of Kenya. This is evident in the Judicature Act section 3. This study touches on matters many fear to talk about. It brings into question the need to legislate Kenya’s own laws that are in line with the cultures. A clear understanding of the contextual nature in which the laws are implemented. It will challenge the current system and start thinking as well as suggest the idea of legislating our own laws, perhaps from scratch. This will precede the idea of prioritizing our own laws.

#### **1.5 ASSUMPTIONS**

Below are some of the assumptions that will be used in this research:

1. Legal transplantation is the cause of the downsides in Kenya’s legal system.
2. Customary laws are better developed and contextual to Kenya’s customs and traditions.
3. Legal transplantation will introduce neo- colonialism.

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<sup>13</sup> Muradu Abdo and Gebresyesus Abegaz ‘*Legal Transplantation*’ (2012) <<https://www.abysiniaw.com/about-us/item/450-legal-transplantation>> last accessed March 11, 2019.

## **1.6 LIMITATIONS TO THE STUDY**

This research will be subject to a few limitations that include but are not limited to;

### **1. Pragmatism**

The practicability that is implementing our own laws 50 years after colonization and centuries of using the same laws will be put in question.

### **2. Time constraints**

This research is to be completed in a span of about six months. This might be an issue especially since I plan on conducting interviews and getting different views from legislative bodies as well as the legislature itself.

### **3. Research data**

From the research already done, it is quite clear that this topic is one that has caused a lot of issues judging from the publication of *Legal transplants: An approach to comparative law* by Allan Watson and Walton. John W. Cairns in a commentary is quoted saying ‘the delay in the publication of the legal transplants book was due to disinterest by publishers as well as discouragement from a colleague’.<sup>14</sup> The data on this topic is therefore not as much research aside from a few commentaries on Watsons work.

### **4. Opposition**

Lack of resources, a lot of time and effort is bound to be the basis of the opposition this research will face. Opposition from legislators, those who are supporters of English law and those who for one reason or another loathe customary laws. Regardless, of the above restrictions, this research will investigate addressing concerns of both sides as while still taking a stand the above subject.

## **1.7 LITERATURE REVIEW**

This research will therefore review the literature works that have come about as a result of the ongoing legal debate on transplantation of laws and legal systems all over the world. The works that will be reviewed will be used to show both sides of the coin. This is to say that both benefits and the downfalls of legal transplantation will be analyzed, agreed with and critiqued by different

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<sup>14</sup> John W. C , ‘*Watson, Walton, and the History of Legal Transplants*’ vol.41 (2013) < <https://georgia-international-journal.scholasticahq.com/article/3549.pdf> > last accessed September 27, 2019 page 638.

scholars as well as this research. Starting from the founding father of the term Legal transplantation Allan Watson's work, this study will narrow down its research and contextualize it to the Kenyan system giving examples of its success' and failures.

Allan Watson is known to have been one of the major historians spearheading literature work on the topic on legal transplantation.<sup>15</sup> Allan Watson set the tone and pace for the many literature works that have followed on the same. Khan –Freund in his response to Watson's book on legal transplants has pointed out that 'the use of foreign legal systems as a means of producing change rather than responding to it was one of the problems of legal transplantation. This I tend to fully agree with and will expound on later. It will be seen that the laws and systems transferred by the British to Kenya were more of an imposition especially with the disregard of the ways of life of the natives and their laws.

Allan Watson's comment in an article on 'society and legal change' is quoted and, he is seen to be developing his ideas on longevity of legal rules.<sup>16</sup> He states that, 'Every time a change is deliberately made a choice has been exercised. Often the retention of a legal rule is also the result of choice'<sup>17</sup>. This statement fore- running the fact that many who are subject to transplanted laws are in those situations because they choose to. Montesquieu is further quoted, "The political and civil laws of each nation ... should be so closely tailored to the people for whom they are made, that it would be pure chance (*un grand hazard*) if the laws of one nation could meet the needs of another."<sup>18</sup>

Legal transplantation is an important way that enriches our legal culture in terms of political development. It has brought about development, at the same time division amongst people due to

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<sup>15</sup> Allan W , 'Legal Transplants and European Private Law'(2006) < [http://awf.ius.bg.ac.rs/legal\\_transplants.pdf](http://awf.ius.bg.ac.rs/legal_transplants.pdf) > last accessed September 27,2019.

<sup>16</sup> John W. C , 'Watson, Walton, and the History of Legal Transplants' vol.41 (2013)< <https://georgia-international-journal.scholasticahq.com/article/3549.pdf> > last accessed September 27, 2019.

<sup>17</sup>Ibid page 160.

<sup>18</sup> Antonina Bakardjieva Engelbrekt 'Legal and Economics Discourses on Legal Transplants: Lost in Translation?' <https://pdfs.semanticscholar.org/4668/1780ec4dcad585c3ff56262b48e241cdc89f.pdf> page 112( last accessed August 10,2019.

differing opinions.<sup>19</sup> But hey! You can't please everyone right? Some have to win for others to lose. Pragmatism! Legal transplantation is one of the issues that most people, especially legislative drafters frowned upon as they always butted heads with most writers and historians who were against the whole process. Some scholars are quoted by Perju in an article, arguing that it is impossible to transplant laws because laws are embedded in culture and culture cannot be transplanted.<sup>20</sup> This being the basis of what shall be deciphered in this research as to why most transplants are perfect on paper but not in execution.

Jean Morin and Edward Gold draw a clear distinction in their work on legal transplantation when they draw a clear distinction between the transplantation process with coordinated and uncoordinated legal convergence. In the article, they term transplantation as 'adoption of a legal system by one state from a foreign state, coordinated convergence as a process that involve law makers from two different systems who work towards creating an agreeable common third position on their laws, while uncoordinated convergence being when the states adopt parallel but independent legal systems with somewhat identical rules'.<sup>21</sup> This distinction aiding in explaining things such as the presence of the commonwealth association of legislative counsel (CALC). This body is legislative drafters is served with the mandate of legal convergence and not legal transplantation. Understanding this then gets rid of all confusion that would otherwise be said to arise from the two which are seen to be quite similar yet so different.

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<sup>19</sup> Jianzhong D 'Several Problems in Legal Transplantation' Vol.2, No.3 (2009)<https://pdfs.semanticscholar.org/e6ff/8e9a8c51d7a721cf3abdca411d3f15b99582.pdf> last accessed September 27, 2019 page 107.

<sup>20</sup> Vlad F.P, 'Constitutional Transplants, Borrowing and Migrations' <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1365&context=lsfp> (2012) last accessed September 27, 2019 page 2.

<sup>21</sup> Jean F. M & Edward R G 'An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries'(2014)58<[https://www.researchgate.net/publication/259203702\\_An\\_Integrated\\_Model\\_of\\_Legal\\_Transplantation\\_The\\_Diffusion\\_of\\_Intellectual\\_Property\\_Law\\_in\\_Developing\\_Countries](https://www.researchgate.net/publication/259203702_An_Integrated_Model_of_Legal_Transplantation_The_Diffusion_of_Intellectual_Property_Law_in_Developing_Countries)> last accessed September 27,2019,page 782.

“Transplants are usually perceived as unilateral changes of a legal order by which one jurisdiction imports legal norms from another jurisdiction”.<sup>22</sup> ‘The study of legal transplants in comparative law aims to understand how the complex dynamic of cross-jurisdictional legal transfers brings legal systems into contact and eventually causes them to change’.<sup>23</sup>As earlier stated, the study of legal transplants looks at the effect borrowed law has on its new subjects and also answering the very important question of which one between culture and the law is supposed to adapt to the other. The terminology ‘borrowing’ has been used by many to explain legal transplantation. Its use is meant to ease the complexity that comes with explaining the word transplantation and to create a somewhat façade of the ‘exchange of laws being voluntary’<sup>24</sup>as the word would infer.

Writers have created what they term as a transplantation index.<sup>25</sup> This index shows how well off countries or rather dominative/powerful states like the United States coerce the much weaker or developing states to adopt their laws. This laws as shall be do not conform to the interests of the country. This then forming a basis of what will follow as the critic of the whole transplantation process that is argued as not beneficial at all to the recipient state and rendering the whole process useless. The mirror theory of law as understood by Montesquieu and Hegel as one that embedded the theory that a ‘legal system should be a direct reflection of the community’<sup>26</sup> this already showing what would be an eventual cause of the downfall of the whole transplantation process. Transplanted laws are supposed to ‘arise from the already existing culture and cultural views and are not meant to change with the laws’<sup>27</sup>. The writer goes on to say that if the transplantation is

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<sup>22</sup> Nuno G & Anthony O, ‘A Strategic Interpretation of Legal Transplants’ (2006)  
<<https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1423&context=facscholar>> last accessed September 27, 2019 page 344.

<sup>23</sup> Vlad F.P, ‘Constitutional Transplants, Borrowing and Migrations’  
<https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1365&context=lsfp> (2012) last accessed September 27, 2019 page 2.

<sup>24</sup> Ibid ,page 6.

<sup>25</sup> Morin and Gold, *An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries* (2014) page 781-792.

<sup>26</sup> Vlad F.P, ‘Constitutional Transplants, Borrowing and Migrations’  
<https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1365&context=lsfp> (2012) last accessed September 27, 2019 page 11.

<sup>27</sup> Nathalie M ‘The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation’ Vol, 28 Issue 1 (2005)  
<<https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1076&context=iclr>>  
last accessed September 27,2019 page 2.



not relatable to the cultures it renders it ineffective and the laws end up being misunderstood, distrusted and underutilized.

One of Watson's critics Legrand, is of the opinion that 'there is nothing like a successful legal transplant as it requires a transfer of a whole culture'<sup>28</sup> of a people. Culture is a sui generis characteristic of a people that cannot be the same. He goes on to state that the effect of a law in its original home cannot be the same as its effect in the borrowing institution.<sup>29</sup> This then explains the point of contention that has led to the debate between scholars who have each taken their stand on transplantation as after weighing the pros and cons of the process. Allan Watson further, argues that a transplanted law is different in its new hosts.<sup>30</sup> Presence of common law and its recognition in Kenya's Judicature Act as well as the country's supreme law, the 2010 Constitution is present day evidence of legal transplantation in Kenya.

In the wake of all these criticisms, a different perspective on legal transplantation is brought forth. Legal transplantation could be used to remedy shortcomings and deficiencies in different legal systems.<sup>31</sup> The article however does acknowledge the barriers that would hinder adoption of laws as both cultural and political barriers. Watson in defending his legal transplant theory, talks of the deficiencies of the laws of certain places only catering to who he terms as the 'legal elite' and the need to look into other jurisdictions as one that brings forth development. Additionally, as an advantage he is seen to talk of the recognition of international laws as one that helps jurisdictions look beyond for legal reforms. For a transplantation to be successful it must be accessible to the 'legal elite', must be perceived as legitimate by the receiving society, and must not be contrary to their way of life.<sup>32</sup>

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<sup>28</sup> Jean F. M & Edward R G 'An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries' (2014) 58 <[https://www.researchgate.net/publication/259203702\\_An\\_Integrated\\_Model\\_of\\_Legal\\_Transplantation\\_The\\_Diffusion\\_of\\_Intellectual\\_Property\\_Law\\_in\\_Developing\\_Countries](https://www.researchgate.net/publication/259203702_An_Integrated_Model_of_Legal_Transplantation_The_Diffusion_of_Intellectual_Property_Law_in_Developing_Countries)> last accessed September 27, 2019, page 782.

<sup>29</sup> George R G, 'Entanglement in Legal History: Conceptual Approaches', *Legal Transplants Between Time and Space* (2014) page 130.

<sup>30</sup> Allan W, 'Legal Transplants and European Private Law' (2006) < [http://awf.ius.bg.ac.rs/legal\\_transplants.pdf](http://awf.ius.bg.ac.rs/legal_transplants.pdf) > last accessed September 27, 2019.

<sup>31</sup> Sean Whittaker, 'The Right of Access to Environmental Information and Legal Transplant Theory: Lessons from London and Beijing' (2017) <[https://cora.ucc.ie/bitstream/handle/10468/5721/Whittaker\\_TEL.pdf?sequence=1&isAllowed=y](https://cora.ucc.ie/bitstream/handle/10468/5721/Whittaker_TEL.pdf?sequence=1&isAllowed=y)> last accessed April 8, 2019.

<sup>32</sup> Ibid.

Legal transplantation has been argued to occur in two ways, (1) law makers look beyond national laws in search of solutions to problems, (2) coercion as a method of transplantation between powerful states and developing countries and, (3) contractualization which involves states negotiating tradeoffs where one state promotes its legal rules in exchange for some sort of compensation or a payoff of some sort a quid pro quo situation.<sup>33</sup> From both the critics and the supporters of Watson's legal transplant theory, one thing is for sure, adopted laws have to be in one way or another in conformity with the morals of a particular society and that the law and legal system must be the one to adopt to the culture and not the other way round. So far in Kenya there is no known literature that talks about the issue of legal transplantation.

## **1.8 THEORETICAL FRAMEWORK**

### **1.8.1 Monism/dualism theory**

Monism and dualism are theories that have been used to decipher the ongoing debate on national and international law. 'Monism postulates that national and international law form one single Legal order, or at least a number of interlocking orders which should be presumed to be coherent and consistent'<sup>34</sup>. Monism holds that international law and domestic law form part of a universal legal system<sup>35</sup>. Kelsen is quoted saying that monism creates a hierarchical relationship between domestic and international law where the latter takes the higher place in the hierarchy. Hegel's concept of monism is that state law shall reign supreme over international law.<sup>36</sup> Dualism on the other hand looks at both international and national laws as independent of each other. A dualist state, has the validity of the international law being determined by the national law authorizing its use.<sup>37</sup> In a dualist system, the validity of international law is based on authorization by the domestic law.<sup>38</sup>

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<sup>33</sup> Morin and Gold, *An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries* (2014) 58, page 781-792.

<sup>34</sup> James Crawford, 'Brownlie's, *Principles of Public International Law*' 2012, Oxford University Press page 48.

<sup>35</sup> <<http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0168.xml>> last accessed April 22, 2019.

<sup>36</sup> Paul Gragl, *Legal Monism: Law, Philosophy and Politics* page 22.

<sup>37</sup> <<http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0168.xml>> last accessed April 22, 2019.

<sup>38</sup> Ibid.

Kenya can be said to be a dualist state as it applies both national and international law as independent. At the same time it does hold its national laws at the top of the hierarchy as the grund norm and declares any law inconsistent with it unconstitutional.<sup>39</sup> The validity of the international laws applicable is outlined in the same article of the Constitution. It is therefore my opinion that Kenya is somewhat of a hybrid between the two as it contains characteristics of both.

This study shall explore the monism and dualism legal theories due to the adopted international laws that have been made part of national law through monism and those adopted and recognized as mere international law through dualism.

### **1.8.2 Comparative law Theory**

Comparative legal theory, was the first legal theory to be used by Watson to write on legal transplantation. Comparative law is the Act of comparing law of one country to another, most frequently, the basis for comparison is foreign law juxtaposed against the measure of one's own law.<sup>40</sup> The insights gathered are used to illuminate ones legal culture through the different perspectives that create a deeper understanding of our legal order.<sup>41</sup> It is the most prevalent theory used when it comes to transfer of laws between different systems. It aides decipher the contrast as well as the similarities in the different systems.

Comparative legal theory basically entails looking at the similarities and differences in different legal systems. As depicted earlier, most critics of the legal transplantation are due to the difference in culture. Most critics being of the view that legal transplantation is always bound to fail due to the fact that for a law to be successful, it has to emanate from the cultures of the people. Vivian Curran in the, '*The Method and the Role of Comparative Law*' article, advises that for a legal transplantation to be successful, we need to free ourselves from what she terms as a 'cognitive lock in' that entails freeing ourselves from our cultural biases. Comparative legal theory, will be used in this study for purposes of distinguishing and looking at the sui generis features of each legal system and in our case, the English system and the Kenyan traditional systems.

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<sup>39</sup> Constitution of Kenya 2010 ,Article 2.

<sup>40</sup> Edward J.Eberle , '*The Method and the Role of Comparative Law*' Vol.8 page 452 <[https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1088&context=law\\_globalstudies](https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1088&context=law_globalstudies)> last accessed September 26, 2019.

<sup>41</sup> Ibid.

## **1.9 RESEARCH OBJECTIVES**

Below are but a few of the objectives that this study seeks to achieve.

1. Outline the idea of legal transplantation and how it came about including what drove it.
2. Explain clearly what legal transplantation consists of, It is just the laws or are systems also transplanted?
3. Outline clearly, the impact both positive and negative it has had on its subjects since its inception.
4. Show its success and failure it has had.
5. A look at what the transfer of laws seeks to achieve and whether or not it has in any way.
6. Come to a pragmatic conclusion on whether or not to reform the idea or drop it all together.

## **1.10 RESEARCH QUESTIONS**

This research therefore seeks to answer the following questions

1. What is legal transplantation and who does it affect?
2. Why has its use grown gradually over the years?
3. Who takes part in the process?

## **1.11 RESEARCH METHODOLOGY**

In order to get answers regarding this research, this research will use both primary and secondary forms of research. As a primary source, Original works, scholarly articles, case studies and dissertations will be used. Secondary sources as shall be outlined in the bibliography below will include; Cases, online journals, Books, journals, commentaries, websites, histories and newspaper articles.

## **1.12 CHAPTER BREAKDOWN**

### **Chapter one**

The first chapter of this research will basically be an introduction of the topic 'legal transplantation'. As an introduction, this chapter will start by describing the meaning of transplantation from its scientific background to its jurisprudential underpinning. It will include

the background of the transfer of laws, its history and a summary of its introduction to the context that is Kenya.

### **Chapter two**

After a swift introduction into the topic legal transplantation, this study will go ahead and explore the factors that led to the rapid growth of the transfer of laws. In this chapter this study shall look at the critics of legal transplantation and the catalysts that were / are involved in this process. There after their will be a swift introduction of the context that is Kenya.

### **Chapter three**

This particular chapter will contextualize the whole topic on legal transplantation to the country Kenya. In this part of the study, the research will be narrowed down to one piece of legislation, the Community Land Act ,27 of 2016.Looking at the similarities is has with the Community Land Act 1975 , Chapter 77 , laws of England, this chapter will seek to show the extent to which transplantation has taken place .

### **Chapter four**

Therefore, based on all the above, chapter four will be a conclusion of the research well as include the on the recommendations on the way forward based on the research. This chapter will give a clear idea of whether or not it is in support of the transplantation process and therefore recommend reforms or whether we as a nation should drop the process, refine it or come up with our laws from scratch.

## CHAPTER TWO

### FACTORS THAT HAVE LED TO LEGAL TRANSPLANTATION IN KENYA

#### 2.1 INTRODUCTION

This chapter will explore the history of the legal system over the years from independence and thereafter proceed to link Kenya's legal history to the transplantation of legal systems and methods. Thereafter, this research will go on to explore the different factors that have led and made possible the process of transplanting laws into Kenya. Looking at the different ways in which legal transplantation has taken place, this chapter will delve into how it came to be, those involved and the thought process behind the concept.

Transfer of legal systems has grown gradually over the years and has spread like wild fire all over the world. The system has been the most used and common form of legislation since the colonial era. Many would say that this form of legislation has proven to be efficient, effective and does not consume a lot of time. This, they argue is the reason for its immense success. The legal system is brought into a state and made one with its existing laws. What most fail to observe is the effect the transfer system has in the new home. Scholars with different opinions on the subject have been seen to agree on one thing, the law was made under different circumstances (culture and tradition) and is to apply to particular persons. They have proceeded to note that transplantation involves its imposition on a totally different kind of people who subscribe to a different way of life. 'It is banal to notice that the same legal rule operates differently in two countries: it operates to different effect even within one'.<sup>42</sup>

#### 2.2 THEORIES OF LEGAL TRANSPLANTATION

Scholars like Allan Watson and his critics such as Pierre Legrand, Montesquieu, Marc Ancel and Charles Maehling have been seen to use different theories to explain what according to them led to the success or failure of legal transplantation. Their reasoning based on what they not only experienced but believe to be a major player in the process of transplantation all over the world.

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<sup>42</sup> Allan W , '*Legal Transplants and European Private Law*'(2006) < [http://awf.ius.bg.ac.rs/legal\\_transplants.pdf](http://awf.ius.bg.ac.rs/legal_transplants.pdf) > last accessed September 27,2019.

Watson in his writings had as his main aim the idea to explore the relationship between legal systems<sup>43</sup>using the comparative law theory.<sup>44</sup> Law suits within a culture and this means that it not only drives it is influenced by the culture.<sup>45</sup>Watson highlights the states responsibility for the coming into being of its own laws, their application and efficiency. He further holds that, before transplanted, there is need to compare the laws. This he explains should be done by examining and accounting for the similarities and differences in systems that have a historical relationship<sup>46</sup>.Kahn Freund is seen as saying that one who seeks to borrow laws needs to reflect on the nature of the society that it seeks to borrow from.<sup>47</sup>He further mentioned the risk of rejection when it came to transplanting laws and that is why, according to him, the whole process of comparing the laws was essential<sup>48</sup> for a successful legal transplant.

Marc Ancel a distinguished French judge and a comparative lawyer while supporting Watsons take on legal transplanted, noted that the transfer of legal systems was actually popular in the ancient times as it had become in what was the modern world then.<sup>49</sup> Marc viewed Watsons work as one that in one way or another raised the possibility of a unified legal system. Charles Maechling on the other hand cautiously approving Allan’s work, looked at the comparative approach. He noted that in looking at the different legal systems, it all depended with what view one construed comparative law.<sup>50</sup> Both scholars however, agreed on the fact that Watsons work could have been broader and that there was a “greater wealth of historical example, and somewhat deeper

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<sup>43</sup> John W. C , ‘*Watson, Walton, and the History of Legal Transplants*’ vol.41 (2013)< <https://georgia-international-journal.scholasticahq.com/article/3549.pdf> > last accessed September 27, 2019 page 640.

<sup>44</sup> ( Comparative law – comparison of various laws) , Ralf Michaels , ‘Oxford Handbook of European Private Law,’ Oxford University press [https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3014&context=faculty\\_scholarship](https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3014&context=faculty_scholarship) ( last accessed August 20, 2019).

<sup>45</sup> Edward J.Eberle , ‘*The Method and Role of Comparative Law*,’ Washington University Global studies review Vol.8, No.3 of 2009 page 452[https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1088&context=law\\_globalstudies](https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1088&context=law_globalstudies)> last accessed September 26, 2019.

<sup>46</sup> Allan W , ‘*Legal Transplants and European Private Law*’(2006) < [http://awf.ius.bg.ac.rs/legal\\_transplants.pdf](http://awf.ius.bg.ac.rs/legal_transplants.pdf) > last accessed September 27,2019.

<sup>47</sup>John W. C , ‘*Watson, Walton, and the History of Legal Transplants*’ Vol.41 (2013)< <https://georgia-international-journal.scholasticahq.com/article/3549.pdf> > last accessed September 27, 2019 page 645-646.

<sup>48</sup> Ibid page 646.

<sup>49</sup> Ibid page 640.

<sup>50</sup> Ibid page 641.

elaboration of the social, political and economic context that must inevitably underlie his conclusions”.<sup>51</sup>

### **2.2.1 Comparative law theory**

Comparative law theory is the most common theory that has been used to decipher this issue of legal transplantation. It involves looking at two different legal systems that one seeks to regulate using one set of laws. That is looking at the societal functions that have been in existence since time immemorial and the laws that are being sought to regulate. A stronger similarity between the two promises not only a successful legal transplantation process but one that can be seen to progress and grow with time. This theory offers comparison of a country’s own law and that of another and the perceptions and intuition it brings out in the latter country.<sup>52</sup> Comparative theory aims to understand the different rules and patterns of order that drive a give society.<sup>53</sup>

### **2.3 HISTORY OF KENYAS LEGAL SYSYTEM**

Long before colonization, the country was governed by its own unique legal systems. These legal systems were based on the traditions, customs and cultures of all the ethnic groups that existed in the country at the time. Somehow, all the traditions worked well with each other and rarely conflicted. The law then was however not structured and not codified. Colonization brought with it legal systems from other parts of the world. Kenya was now being governed by Indian as well as British laws. The laws had been specifically been brought into the country to help in administration of the colony.

Kenya’s judicial system has its roots in the East African order in council of 1872 and crown regulations.<sup>54</sup>The British legal system being used in Kenya, comprised of European only judges and went on for six decades before the country gained independence.<sup>55</sup>Colonial authorities however did allow elders from the different tribes to take part in dispute settlement in their

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<sup>51</sup> Ibid ( quoted from Charles Maecling , book review on Legal Transplants (1<sup>st</sup> edition).

<sup>52</sup> Edward J.Eberle ,’*The Method and Role of Comparative Law*’, Washington University Global studies review Vol.8, No.3 of 2009 page 456 [https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1088&context=law\\_globalstudies](https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1088&context=law_globalstudies)> last accessed September 26, 2019.

<sup>53</sup> Ibid page 457.

<sup>54</sup> <<https://www.judiciary.go.ke/about-us/our-history/>>last accessed August 20, 2019

<sup>55</sup> [Ibid.](#)



communities in the specific ethnic groups.<sup>56</sup> Appeals however, lay with the district and provincial officers. The system therefore remained segregated up until 1962 when African courts were moved from provincial administration to the already established judiciary.<sup>57</sup> In 1963, Kenya gained independence and had its first independent Constitution. The independence Constitution gazetted on 10<sup>th</sup> August 1963 began by acknowledging the queen of England.<sup>58</sup> This then being a clear depiction of the adoption of the British legal system that had been adopted. The Kenyan legal system was at this point predominantly British.

After independence, the country was being administered by African legal minds but with the use of the British systems. Twenty years down the line, the road to the now 2010 Kenyan Constitution began. As was popularly known, Wanjikus Journey began in the 1980s but began to be practically applied in 1991 with the repealing of section 2A of the then independence Constitution to make Kenya a multi-party state.<sup>59</sup> This process, other than opposition that came as a result of people being more accustomed to the transplanted laws, was difficult, long and tiresome but bore fruits when the 2010 Constitution was promulgated. The current Constitution however, still recognizes common law and international law as laws in Kenya as per its article 2(5) and 2(6).

## 2.4 COMMON LAW IN KENYA

Common law also known as Anglo-American law, is a body of law that is based upon judicial decisions and embodied in reports of decided cases that have been administered in English courts.<sup>60</sup> Common law as per Glaeser and Shleifer faced difficulty in Kenya as it was being used in a country whose legal system as well as the judiciary were underdeveloped.<sup>61</sup> Common law came about as a result of continuous application of feudal law.<sup>62</sup> It was supported by aristocracy and its

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<sup>56</sup> 'Our History', <<https://www.judiciary.go.ke/about-us/our-history/>> last accessed August 20, 2019.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Kenya Human Rights Commission, 'Wanjikus Journey: Tracing Kenya's Quest for a New Constitution and Reporting on the 2010 National Referendum' <<https://www.khrc.or.ke/publications/38-wanjiku-s-journey-tracing-kenya-s-quest-for-a-new-constitution-reporting-on-the-2010-referendum/file.html>> last accessed August 20, 2019.

<sup>60</sup> Mary A. Glendon, Andrew D.E. Lewis and Albert R. K, 'Common Law', <<https://www.britannica.com/topic/common-law>> last accessed August 12, 2019.

<sup>61</sup> Sandra F. Joireman, 'The Evolution of the Common Law :Legal Development in Kenya and India' vol.44, No.2 of July 2006) < <https://www.tandfonline.com/doi/abs/10.1080/14662040600831636?journalCode=fccp20> > last accessed August 20, 2019).

<sup>62</sup> Ibid.

main goal was a process that would eventually lead to justice.<sup>63</sup> Initially, Kenyan societies had a legal system in place. Colonial power by used of the common law system choose to limit the use of the traditional African systems.<sup>64</sup>

The Kenyan law system descended from the English common law system with the most prevalent one being presidency as is used in the Kenyan courts.<sup>65</sup>The common law emphasis on the process, gave us the idea of judicial precedent, which meant reliance of previous decisions to guide present decision making<sup>66</sup>Precedence is used in the Kenyan courts more so in judgements and persuasive decisions. The likes of Lord Denning have become a house hold name when it comes to the legal space in Kenya.

The application of common law in Kenya, came at a time when Kenya had already started applying Indian law and codes. English law was however being applied in a very rigid way ( in a criminal manner as opposed to a civil manner) until it was noted that such application would lead to the overthrowing of the British power in place.<sup>67</sup>Kenya sought to adopt the common law system post-independence in order to protect the interests that had come about.<sup>68</sup> The reason that the country sought to continue with the application of common law was due to the fact that the common law courts were no longer kept only for expatriates and also so that they could enjoy the property rights that were enshrined in common law.<sup>69</sup>

The common law system in Kenya however still had its pros and cons. The first problem was that the litigants in post-colonial Kenya were expatriates and white settlers. Moreover, the lawyers

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<sup>63</sup> Ibid.

<sup>64</sup> Sandra F. Joireman , ‘*The Evolution of the Common Law :Legal Development in Kenya and India*’ vol.44, No.2 of July 2006  
<[https://www.researchgate.net/publication/237009990\\_The\\_Evolution\\_of\\_the\\_Common\\_Law\\_Legal\\_Development\\_in\\_Kenya\\_and\\_India](https://www.researchgate.net/publication/237009990_The_Evolution_of_the_Common_Law_Legal_Development_in_Kenya_and_India)>last accessed August 12, 2019.

<sup>65</sup>< <http://kenyalaw.org/kl/index.php?id=124> > last accessed August 12, 2019.

<sup>66</sup> Sandra F. Joireman , ‘*The Evolution of the Common Law :Legal Development in Kenya and India*’ vol.44, No.2 of July 2006  
<[https://www.researchgate.net/publication/237009990\\_The\\_Evolution\\_of\\_the\\_Common\\_Law\\_Legal\\_Development\\_in\\_Kenya\\_and\\_India](https://www.researchgate.net/publication/237009990_The_Evolution_of_the_Common_Law_Legal_Development_in_Kenya_and_India) > last accessed August 12, 2019.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

seemed to not be independent from the state<sup>70</sup> as they were still predominantly British. The other issue that came about was the limited ability to develop case law especially in civil matters.<sup>71</sup> Here the writer suggests that it was heightened by the lack of capacity of the judges working on civil law and the fact that same courts were overburdened with cases.<sup>72</sup>

The presence of the adopted legal system was not only in the laws but also in the process. The attire worn by judges up until 2011 was a similar to those that the judges in the English courts wore. The former chief justice, Dr. Willy Mutunga, tried to get rid of the attire but it is clear that it is still being used following the entry of the new president of the Supreme Court, Justice David Maraga.<sup>73</sup> Admission to the bar in Kenya, sees a lot of legal minds also adorn the wig that has over the years been used in English courts.

Aside from common law, the doctrines of equity also, form part of Kenyan law as per section 3(1)(c) of the Judicature Act Cap 8. Although, they only apply in so far as the circumstances in Kenya permit. The doctrines of equity form part of the English law that was adopted into Kenya. The common law system is so prevalent in Kenya to an extent where, as per the Cap 8, it is high in the hierarchy while traditional African customary law falls as a residual source of law.

## **2.5 FACTORS THAT HAVE LED TO LEGAL TRANSPLANTATION**

One of the reasons given for transplantation would be the need to have a uniform common law system. As has been seen in the past and in recent years, most countries opt to have the same system for the benefit of their countries when it comes to things such as trade, travel, investment and benefits that come with being recognized as being part of a particular union. Organizations such as the European Union, with common legal systems have made it incredibly easy for persons within the union to interact in more ways than one. This due to the fact that the applicability of similar laws makes it easier for transactions and interactions between the states. There was need for harmonization of the law within the framework of international agreements<sup>74</sup>. Kenya, through

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<sup>70</sup> Ibid.

<sup>71</sup> Ibid

<sup>72</sup> Ibid

<sup>73</sup> <<https://www.nation.co.ke/news/Kenyas-Supreme-Court-change-of-tradition-dress-code/1056-4075508-format-xhtml-mpmllez/index.html>>last accessed August 12, 2019.

<sup>74</sup> Jan M. Smits, 'Elgar Encyclopedia of Comparative Law' (edited ) page 434.

similar laws and policies, has benefited in that, the transplanted laws have made it easier for investors to come into the country and more so even heightened trade relations between Kenya and other jurisdictions. The similar laws have meant that the policies that apply to a state's own citizens applies to those of Kenya. This helps reduce on things such as taxes and help in incorporation of foreign businesses in Kenya.

### **2.5.1 Accessibility in terms of language**

This might have been one of the major factors that led to the transplantation of laws in Kenya. During the colonial era, the country as it was had 42 tribes all who had different dialects for communication. With the entry of the British in Kenya, more so the missionaries who came to spread the gospel and teach, the English language became prevalent in the land. After, it only made sense to adopt laws that were in the one language that everyone had been accustomed to after colonization.<sup>75</sup> It was easier, faster and more pragmatic considering the nation was young and was trying to get on its feet. The country becoming an anglophone country after colonization meant that it as nation that could interact in English on all arenas even the legal one. Furthermore, having to translate the law to 42 different dialects not only seemed far-fetched for a country that was trying to get on its feet but also meant that a lot of misinterpretation would occur depending on the context the law was being used.

### **2.5.2 Fruitful transplantation in other jurisdictions**

Kenya was one of the later states to gain independence ( December 12,1963)<sup>76</sup> of all the British colonies .Transfer of legal systems in the other colonies had already happened and seemed to be working well .The success of the other transplants, made Kenya open to the idea of adopting laws from the common law system. The success in other former British colonies signaled the same level of success in Kenya. Therefore, without much hesitation Kenya went ahead and adopted the laws for themselves as well as the legal system. The initial transplantation that occurred was done in a 'copy-paste' manner. This means, the law was adopted as was and applied in the same manner. No contextualization and very little regard to the customs of the country.

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<sup>75</sup> <<https://www.abysinnialaw.com/component/k2/item/450-legal-transplantation> >last accessed August 10, 2019 .

<sup>76</sup> <[http://www.kenyarep-jp.com/kenya/history\\_e.html](http://www.kenyarep-jp.com/kenya/history_e.html) >last accessed August 10, 2019 .

### **2.5.3 Migration and commercial intercourse**

It is expected that people will move from place to place either in search of greener pastures or for exploration purposes. Countries with similar legal systems have made this process simpler for their citizens. Kenyan law is based off of common law as is outlined in the Judicature Act. This therefore means that the countries that subscribe to the English common law, are able to do businesses easily in Kenya as they are governed by the same laws.<sup>77</sup> In a recent article, the United Kingdom was set to review visa regulations that would allow Kenyan students to extend their stay even after their studies<sup>78</sup>. This making it easier for such students as well as encourage more to go study abroad as well as work in both countries.

### **2.5.4 Elites attached to the legal system of the donor country**

If a person decides to do things in the same manner another one does, it only means that he or she hold the ways of life of the other person in high regard. They trust in their process and in most cases have seen its benefits. The decision to draw ideas found in other legal systems is often justified by the quality given to the foreign solution<sup>79</sup>. The idea that the United Kingdom have more , better and effective laws is one of the things that has propagated the adoption of their laws.<sup>80</sup> Not only is it a belief but on the ground their laws seem to have worked for them for a very long period of time and this has led to the trust in their laws and laws as well as their legal system. The United Kingdom was a very well off country that was seen to prosper in all avenues. At the time the scramble of Africa was happening, Britain was a country that was held in high regard especially with regards to their legal system. This is one of the reasons this study believes propagated the adoption of British legal system.

### **2.5.5 Colonization**

Colonization led to legal transplantation in that, the country adopted the laws that the British had been using in administration of the country during the colonial times. Colonization by the British meant that they were using their own laws and systems to administer the country. As a force of

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<sup>77</sup> <<https://www.abysiniaw.com/component/k2/item/450-legal-transplantation> >last accessed August 10, 2019.

<sup>78</sup> <<https://www.capitalfm.co.ke/news/2019/07/uk-to-review-visa-regulations-to-allow-kenyan-students-extend-their-stay-after-studies/> > last accessed August 12, 2019.

<sup>79</sup> Jan M. Smits, 'Elgar Encyclopedia of Comparative Law' (edited ) page 434.

<sup>80</sup> <<https://www.abysiniaw.com/component/k2/item/450-legal-transplantation>>last accessed August 10, 2019.

habit, the inhabitants of Kenya got used to that way of life . This was an easier way of transitioning from being a colony to an independent state.

### **2.5.6 Neocolonialism**

Neocolonialism has become very prevalent in recent times. Countries that receive any type of aid especially from well developed countries are usually coerced into adopting laws that the donor countries wish for them to adopt. Donor countries in most cases call for the observance of democratic standards and respect for human rights by governments on the receiving end<sup>81</sup>. The idea of neocolonialism serves as both an advantage and a disadvantage to the donee countries. The laws that call for respect of basic human rights serve the right purpose while those that entail countries adopting laws that are not in conformity with their societal values are seen as a disadvantage.<sup>82</sup>

### **2.5.7 Proximity and interdependence**

It is defined as the conditions that facilitate the reception of legal transplants.<sup>83</sup>The closeness and the dependency that the Kenyan legal system had developed towards common law made it not only obvious but also seemed to be the preferred way to facilitate growth of the Kenyan legal system. It only seemed logical for the country to transfer laws as the system was already accustomed to working on things in a particular way that it found favorable.

### **2.5.8 Pressure and opposing forces**

Pressure and opposing forces resulted from the ruling elite and persons in the legal profession. Baeta, however, makes it clear that the pressure being mounted was due to the interests the aforementioned group of people had. The pressure forces those who are charged with the mandate

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<sup>81</sup> Ibid.

<sup>82</sup> <<https://www.theguardian.com/world/2014/jun/28/obama-gay-rights-abroad-embassies-activism>> - the US imposed sanctions in Uganda when president Yoweri Museveni and his government passed a law that made gay sex punishable by death while US SECRETARY John Kerry compared such policies in South Africa to the anti- Semitic laws in Germany and apartheid I South Africa ( last accessed August 12, 2019) , and <<https://www.forbes.com/sites/mfonobongnsehe/2011/12/09/obama-fights-nigerian-anti-gay-bill-threatens-to-cut-off-aid/#704752434f7b>> – United states president , Barrack Obama threatened to cut off foreign aid in Nigeria a fight towards the Nigeria anti-gay bill . last accessed August 12, 2019 .

<sup>83</sup> Kviatek Beata, ‘ *Explaining Legal Transplants: Transplantation of EU law into Central Eastern Europe,*’ University of Groningen page 338 [https://www.rug.nl/research/portal/files/19622152/Title\\_and\\_contents.pdf](https://www.rug.nl/research/portal/files/19622152/Title_and_contents.pdf) (last accessed September 26, 2019).

to legislate to succumb to them lest they make laws that will either be disobeyed, deemed insufficient or unlawful. When the legislative body fails to give into the pressure, they create opposition on those who they expect to implement and interpret the law. This in turn results in them just agreeing to transplant laws.

### **2.5.9 Path dependence and institutional features**

The country was already used to doing things a certain way.<sup>84</sup> This was as a result of the many years that the country was under colonial rule. The institutions in place i.e. the courts had been in play for a very long time since the country came under colonial rule. It therefore only seemed logical for the legal system to be transplanted as the country had embraced the legal institutions that had been put in place.

### **2.5.10 Saving of time and costs**

When it comes to the whole legislative process, it is said to be easier to copy an existing rule rather than invent the whole wheel<sup>85</sup>. An added advantage comes in as most legal systems where laws are borrowed from are deemed to have practical experience which comes in at no extra expense<sup>86</sup>. An example is the Kenyan Law of Contract. It is a seven page document that only outlines the applicable law in Kenya as seen in section 2 of the Act.

## **‘2. English law of contract to apply in Kenya**

(1) 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: Provided that no contract in writing shall be void or unenforceable by reason only that it is not under seal.

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<sup>84</sup> Ibid page 119.

<sup>85</sup> Jan M. Smits, ‘*Elgar Encyclopedia of Comparative Law*’ (edited ) page 434.

<sup>86</sup> Ibid.

(2) After the commencement, and subject to section 4, of this Act, the provisions of section 74 of the Kenya (Constitution) Order in Council, 1958, shall have effect, in relation to paragraph (2) of Article 4 of the Kenya Colony Order in Council, 1921, as if the Contract Act, 1872, of India had never been applied to Kenya'.<sup>87</sup>

This particular Act, is a clear depiction of the adoption of legal systems from the United Kingdom as well as from India.

### **2.5.11 Kenya's legislative process.**

The legislative process in Kenya is long, expensive and tedious. It can take several years for a law to go from being drafted, to getting to be a bill to becoming law. As will be seen later on in this study, to be a Kenyan legislator, you need not be well versed in the law. This therefore results in a lot of mistakes in law making - that make the process drag on for longer than expected. Political interference (due to the fact that legislators are mainly politicians) also corrupts the process making it last for way longer than it is supposed to. This I believe is why the process of transfer of laws is most favoured and most practiced in Kenya as it is a short process as compared to drafting from scratch and has minimal political interference.

## **2.6 CONCLUSION**

When one looks at the concept of legal transplantation *prima facie*, the facts seem very obvious and straight to the point. This is however not the case as it is a process that involves a lot just to get it from being a concept to the actual execution of the transfer. The process however does not end with just the transfer but continues until it is adopted in the new home and is in one way or another functional. To this end it has been seen that the concept of legal transplantation in Kenya was and still is one that has been welcomed with open arms. It is an idea that after adoption has continued to be refined with more than half of the Kenyan statutes having been adopted from the British laws and our legal system similar to theirs in more ways than one. It is now quite evident that the legal system is indeed its downfall but has proven to be more advantageous to the country than a disadvantage. In that regard, the laws adopted have and are still being used half a century after the British left Kenyan soil.

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<sup>87</sup> Act 43 of 1960 Laws of Kenya.



## **CHAPTER THREE**

### **A WORKING EXAMPLE OF TRANSPLANTED LAW: COMMUNITY LAND ACT KENYA, 27 OF 2016 AND THE COMMUNITY LAND ACT UK 1975**

#### **3.1 INTRODUCTION**

This chapter will contextualize this issue of legal transplantation in Kenya by the use of appropriate examples. By using a Kenyan statute legislated post 2010, this research will show the extent as to which transplantation in the Kenyan legal system is. The comparative legal theory will also be used. This chapter will show the link between the Kenyan laws and the laws of the United Kingdom. This in turn will also be used as a road map as to deciding whether Kenya is a monist or dualist state. Despite numerous critiques on the failure of legal transplantation in the 1970's<sup>88</sup> the transfer of legal systems and norms was still employed in many areas of the world including Kenya.

This chapter will focus on the Community Land Act 2016 that was transplanted into the Kenyan system. An evaluation of the Community Act 2016 will paint a clear picture of how similar the two laws are. A clear comparison will be done between the two countries. This will commence from the state of both countries when it comes to land matters prior to any interaction ( that is pre colonization ), their legislative processes and an evaluation of both Acts of parliament as is in the present day.

#### **3.2 PRE- LEGISLATION OF THE COMMUNITY LAND ACT**

##### **3.2.1 THE UK ACT**

Legislation of the United Kingdom Act of 1975 was the privatization of property. It had become so common that nearly half of the country was owned by very few individuals. With no proper legislation to cater to this, the main question became, who owned the global resources that are

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<sup>88</sup> Maria Paula Reyes Gaitan , *The Challenges of Legal Transplants in a Globalized Context: A Case Study on 'working' Examples* (2014)  
<[https://www.academia.edu/9550076/The\\_challenges\\_of\\_legal\\_transplants\\_in\\_a\\_globalized\\_context\\_A\\_case\\_study\\_on\\_working\\_examples](https://www.academia.edu/9550076/The_challenges_of_legal_transplants_in_a_globalized_context_A_case_study_on_working_examples)> last accessed September 27, 2019 page 30.

undeniable, “a common treasure for all”.<sup>89</sup> Land in England was given to the Lords by the crown. The Lords then in turn would rent out this land to the rest of the country. In a recent post by The Guardian, half of England is said to be owned by 1% of the country who happen to be mostly members of the aristocracy.<sup>90</sup> This was and still is the case in present England. As a result of the status quo, it became evident that indeed there was need to legislate an Act that would cater to land that belonged to the people and reduce on privatization of land.

### 3.2.2 PRE-LEGISLATION OF THE ACT IN KENYA

The idea of development of Land Law in Kenya began as a result of colonization. The British while colonizing the country, brought the idea of privatization of property that was being used in England. This happened in four stages; Acquisition, Imposition, Transformation and the modern phase.<sup>91</sup> The first stage involved the division of Africa in what is famously known as the Scramble of Africa by France, Germany and Britain.<sup>92</sup> Britain acquired land on behalf of the Queen of England and used the 1894 Indian Acquisition Act for this which resulted in Kenya becoming a British protectorate.<sup>93</sup> A Crown Land Ordinance was introduced in 1904 and it regulated the freehold and leasehold of land in Colonial Kenya.<sup>94</sup> The imposition phase saw the introduction of the Kenya Annexation Order in Council of 1921 and the Kenya Colony Order in Council of 1921 saw a lot of natives’ rights stepped away by the colonial government. <sup>95</sup> Two years later however, the Devonshire White Paper declared Kenya a country and recognized the rights of Africans and went further to state that their rights would prevail over those of the settlers especially when it came to land matters.<sup>96</sup>

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<sup>89</sup> A Short History of Enclosure in Britain : *The Tragedy of the Commons*’ <[https://www.academia.edu/6873388/A\\_Short\\_History\\_of\\_Enclosure\\_in\\_Britain](https://www.academia.edu/6873388/A_Short_History_of_Enclosure_in_Britain)> last accessed September 27, 2019 page 17.

<sup>90</sup> ‘Half of England Owned by less than 1% of the Population’, <<https://www.theguardian.com/money/2019/apr/17/who-owns-england-thousand-secret-landowners-author> > last accessed September 1, 2019.

<sup>91</sup> ‘A Historical Development of Land Law in Kenya,’ <<https://legalscholarsite.com/historical-development-land-law-kenya/>> last accessed August 30, 2019 .

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid .

The Transformation stage then saw the shift from communal land ownership to the British feudal system.<sup>97</sup> At independence, land was held under public, private or community tenure.<sup>98</sup> This thereafter led to the Land Act, the Land Registration Act and the National Land Commission Act of 2012. Amendments followed thereafter in 2016 with the introduction of the Community Land Act.<sup>99</sup> Land in both Kenya and the United Kingdom were prized possessions. While land in the UK was owned by the crown, land in Kenya was mainly owned by communities. The status quo in both countries was quite similar when it came to land matters. An in-depth look at the Community Land Act of both countries in this chapter will highlight the borrowed laws into the Kenyan system.

### 3.3 LEGISLATIVE PROCESS

#### 3.3.1 UNITED KINGDOM

Although England is a monarchy, it has a parliament that comprises of elected members of parliament. This arm of government is charged with the mandate to make laws. It therefore serves as the legislative arm of government. A proposed law in England is known as a Bill. Bills have to be agreed upon by both houses of parliament before they are taken to the Queen for the Royal Assent.<sup>100</sup> The bill is introduced and discussed during the first reading by the members of parliament. This stage is formal and no debate of the bill takes place.<sup>101</sup> A second reading follows thereafter and the bill is discussed in select committees in detail.<sup>102</sup> The report stage follows after and the main purpose of this particular stage is to discuss the amendments proposed by the committees.<sup>103</sup> A third reading follows thereafter and once passed, the bill proceeds to the House of Lords before it is taken to the Queen for assent.<sup>104</sup>

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<sup>97</sup> British feudal system involves a system where the person in power (in our case the Queen) of England has absolute ownership of land.

<sup>98</sup> 'A Historical Development of Land Law in Kenya,' <<https://legalscholarsite.com/historical-development-land-law-kenya/>> last accessed August 30, 2019 .

<sup>99</sup> Ibid.

<sup>100</sup> 'How are Laws Made in the UK?' <<http://projectbritain.com/government/laws.htm>> last accessed September 2, 2019.

<sup>101</sup> 'Legislative Process, Taking a Bill to Parliament,' <<https://www.gov.uk/guidance/legislative-process-taking-a-bill-through-parliament>> last accessed September 2, 2019 .

<sup>102</sup> 'How are Laws Made in the UK?' <<http://projectbritain.com/government/laws.htm>> last accessed September 2, 2019.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

### 3.3.2 KENYA

Legislation in Kenya is done by the legislative arm of the government.<sup>105</sup> The legislative arm of government comprises of mostly elected and nominated persons. One thing to note is that, although this arm of government is charged with making laws, majority of its composition is of persons who are not well versed with the law. This can be seen from the fact that knowledge in law and making of laws is not a requirement for any person to run for a legislative seat in Kenya.<sup>106</sup> An in-depth look at the process will show that special committees are involved in the process. One would argue that this will make up for the legal deficiency of the members of parliament but the fact still remains that either house has to approve of the bill before it is taken to the president for assent. This will be seen later on in this research to be among the things that contribute to inadequate laws which in turn require constant amendments from time to time.

This particular institution has its main mandate of seeing through any law from what is known as a bill (a proposed statute, not yet approved)<sup>107</sup> to an actual law before passing it on to the Judiciary<sup>108</sup> for interpretation and Executive<sup>109</sup> for implementation. Legislation can be done from scratch but most of the one that will be highlighted are those that have been transplanted from England. Even the transplanted laws pass through this process. A look at the legislative process will highlight the formalities used in making the said laws. The legislative process, as will be seen, is an all-inclusive process that involves even the public and takes a couple of months.

Any law in Kenya originates as a bill or a policy (a principle of action adopted or proposed by government, party, business or individual).<sup>110</sup> A bill can be proposed in parliament which serves

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<sup>105</sup> Chapter 8 of the 2010 Constitution.

<sup>106</sup> <<http://www.klrc.go.ke/index.php/constitution-of-kenya/123-chapter-eight-the-legislature/part-2-composition-and-membership-of-parliament/267-99-qualifications-and-disqualifications-for-election-as-member-of-parliament>> last accessed September 20, 2019.

<sup>107</sup> <<http://www.duhaime.org/LegalDictionary/B/Bill.aspx>> last accessed August 21, 2019.

<sup>108</sup> Chapter 10 of the 2010 Constitution.

<sup>109</sup> Chapter 9 of the 2010 Constitution.

<sup>110</sup> Kenya Law Reform Commission, 'A Guide to the Legislative Process in Kenya' page 30 <http://www.klrc.go.ke/images/images/downloads/klrc-a-guide-to-the-legislative-process-in-kenya.pdf> (last accessed September 26, 2019).

(A policy is also defined as the general principles by which a government is guided in its management of public affairs ) Bryan A. Garner , Black's Law Dictionary 8<sup>th</sup> edition page 3674.

as the country's legislative organ through different ways. The bill can originate from; a parliamentary party then introduced by the leader of majority or minority, the executive through the leader of majority or minority or the chairperson of the committee, individual members of the national assembly introduced through his/her name as the person sponsoring the bill, a committee of the house through its chairperson, a member of the public<sup>111</sup> as per article 119<sup>112</sup> of the Kenyan Constitution by way of petition to the speaker or members of parliament.<sup>113</sup>

The bill must include; objects and reasons as to why it is needed, limitation of fundamental rights if any, who it addresses i.e. whether national or county governor and any financial implications (that is, if it will involve any use of public funds)<sup>114</sup>, strategies for implementation, review measures, conclusion and the way forward.<sup>115</sup> This therefore means that a bills salient features should include, but not be limited to; being beneficial, prospective, based on an issue at hand, solution based and most importantly go hand in hand with other Legislative Acts<sup>116</sup> and not be repugnant to the Constitution of Kenya.

Each time a bill is put up for vote it is known as a reading.<sup>117</sup> The legislative process involves three readings before a bill comes into force and becomes law. During the first reading, a bill is read as an introduction to parliament for the first time and then assigned to the relevant committee who the facilitate public participation through hearings and submission of memoranda.<sup>118</sup> The views of

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<sup>111</sup> Public participation is listed as one of the national values under Article 10 of the Constitution and under section 87 of the county government act as a basis of promoting devolution.

<sup>112</sup> Article 119 of the 2010 Constitution,

Right to petition Parliament.

119. (1) every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation.

(2) Parliament shall make provision for the procedure for the exercise of this right.

<sup>113</sup>Fact sheet No.2 'How Law is Made', <[https://www.google.com/search?ei=r6uNXeu9MsuKlwSw9rfADA&q=how+law+is+made+in+kenya+fact+sheet&oq=how+law+is+made+in+kenya+fact+&gs\\_l=psy-ab.3.0.33i16013.11976.13573..15655...0.2..0.287.1493.2-6.....0.....1..gws-wiz.....0i71j0i22i30j33i22i29i30j33i21.oyBJxGOz-10](https://www.google.com/search?ei=r6uNXeu9MsuKlwSw9rfADA&q=how+law+is+made+in+kenya+fact+sheet&oq=how+law+is+made+in+kenya+fact+&gs_l=psy-ab.3.0.33i16013.11976.13573..15655...0.2..0.287.1493.2-6.....0.....1..gws-wiz.....0i71j0i22i30j33i22i29i30j33i21.oyBJxGOz-10)>last accessed September 27,2019 page 1.

<sup>114</sup> Ibid page 2.

<sup>115</sup> Kenya Law Reform Commission, 'A Guide to the Legislative Process in Kenya' page 34 <http://www.klrc.go.ke/images/images/downloads/klrc-a-guide-to-the-legislative-process-in-kenya.pdf> (last accessed September 26, 2019).

<sup>116</sup> Ibid.

<sup>117</sup> <<http://www.duhaime.org/LegalDictionary/B/Bill.aspx> >last accessed August 21, 2019.

<sup>118</sup>Fact sheet No.2 'How Law is Made', <[https://www.google.com/search?ei=r6uNXeu9MsuKlwSw9rfADA&q=how+law+is+made+in+kenya+fact+sheet&oq=how+law+is+made+in+kenya+fact+&gs\\_l=psy-ab.3.0.33i16013.11976.13573..15655...0.2..0.287.1493.2-6.....0.....1..gws-wiz.....0i71j0i22i30j33i22i29i30j33i21.oyBJxGOz-10](https://www.google.com/search?ei=r6uNXeu9MsuKlwSw9rfADA&q=how+law+is+made+in+kenya+fact+sheet&oq=how+law+is+made+in+kenya+fact+&gs_l=psy-ab.3.0.33i16013.11976.13573..15655...0.2..0.287.1493.2-6.....0.....1..gws-wiz.....0i71j0i22i30j33i22i29i30j33i21.oyBJxGOz-10)>

the public are taken into consideration as the committee prepares a report and submits it to parliament ready for the second reading. At this stage, the bill is debated on by the members of parliament. They weigh the pros and cons of the bill while the committee at hand helps in the understanding of public opinions that they came across. The bill at this stage goes under a vote to proceed to the next stage.

The committee stage involves the whole house going through the bill clause by clause and changes are made<sup>119</sup> Mutatis, Mutandis. The report stage that follows allows for a report to be made based on the previous discussions and also gives an opportunity for reconsideration or changes to any clauses. This is known as Re-committal.<sup>120</sup> The third reading that follows is the last stage. No more amendments are made here and a final vote is taken before the bill is taken to the head of state for assent. The president may assent to the bill or refer it back to parliament with proposed changes. The house may adopt the changes and the bill is taken back for assent or may pass the bill without accommodation the head of states recommendations by a two thirds majority.<sup>121</sup>The process of making law in both Kenya and England is similar. The system in England, has been in existence since time immemorial. Kenya on the other hand had uncodified on written laws that were unique to each community. Kenya, during and after colonization adopted this particular process of law making as is in the United Kingdom.

### **3.4 UK's COMMUNITY LAND ACT 1975 & COMMUNITY LAND ACT KENYA 27 OF 2016**

#### **3.4.1 LEGISLATIVE PROCESS OF THE COMMUNITY LAND ACT KENYA.**

An in-depth look at the parliament proceedings during the discussions of this bill show that indeed there was some opposition that was mainly due to the fact that the bill was transplanted. As shall be seen below, some of the legislators expressed the same fear that many scholars have expressed when it comes to transplanting of laws and that is , one law formulated to one society's cultures being used to regulate another. During the readings, it was seen that although

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[6.....0....1..gws-wiz.....0i71j0i22i30j33i22i29i30j33i21.oyBJxGOz-10](https://www.gws-wiz.com/0i71j0i22i30j33i22i29i30j33i21.oyBJxGOz-10)>last accessed September 27,2019 page 1.  
page 4.

<sup>119</sup>Ibid page 5.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid page 6.

the law was not all that bad, some of the legislators were opposed to it as they deemed it inadequate.

Kenya's Community Land Act came into force on September 21, 2016. This Act was to give effect to article 63 of the 2010 Constitution.<sup>122</sup> The first reading of the bill was done on August 19, 2015<sup>123</sup> where it was introduced to the national assembly by Honorable Aden Dwale. During the second reading on March 1, 2016, Hon. Oluoch, Member for Kisumu west was seen to express his displeasure with the proposed bill. He is seen to acknowledge the goodness of the bill but recognizes that it is not only the good bits of the bill that were adopted, but so were the oppressive provisions.<sup>124</sup> "I am afraid if this Bill does not address the historical injustices caused by the Trust Land Act, it will fail to attain its objective".<sup>125</sup> This he said emphasizing the fact that the same bill that had been used to oppress Africans and displace them from their African homes, could not be the same one being used to right those wrongs.

Honorable Isaac Mwaura, during a continuation of the second reading was sure to highlight the fact that he was opposed to the bill because it was a transplanted bill that caused a clashing of cultures.<sup>126</sup> He went further to explain that this law was to govern persons whose land was inherited while it has been formulated to cater for a somewhat capitalist system.<sup>127</sup> This showed that indeed, the law being transplanted was not wholly Kenyan but one that was transplanted from the British system.

### **3.4.2 EVALUATION OF THE ACTS TO SHOW THE SIMILARITIES.**

Article 63 of the 2010 Constitution, describes what exactly meets the criteria of community land;

'Community land consists of—

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<sup>122</sup> 'A Brief Overview of the Community Land Act No.27 of 2016,' <<http://www.elexica.com/en/legal-topics/banking/12-a-brief-overview-of-the-community-land-act-4fr1ca>> last accessed September 2, 2019.

<sup>123</sup> <http://kenyalaw.org/kl/index.php?id=5189> last accessed September 23, 2019

<sup>124</sup> Hansard Report, Tuesday March 1, 2016 <<http://www.parliament.go.ke/the-national-assembly/house-business/hansard>> last accessed September 23, 2019 Page 41.

<sup>125</sup> Ibid page 42

<sup>126</sup> Hansard Report, Thursday March 3, 2016 <<http://www.parliament.go.ke/the-national-assembly/house-business/hansard>> page 49

<sup>127</sup> Ibid

- (a) Land lawfully registered in the name of group representatives under the provisions of any law;
- (b) land lawfully transferred to a specific community by any process of law;
- (c) any other land declared to be community land by an Act of Parliament; and
- (d) Land that is—
  - (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
  - (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or
  - (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2).<sup>128</sup>

Other than giving effect to the aforementioned article, the Act provides for recognition, protection and registration of community land rights, management and administration of the community land and the role of county governments when it comes to such land.<sup>129</sup>The Community Land Act 1975 laws of England, highlighted the role of the Act to, enable authorities and certain other authorities to acquire, manage and deal with land suitable for development and to make other provision for and in connection with the public ownership of the land, amend planning law and rules for assessing the value of land for compulsory acquisition and to make provision concerning unoccupied office spaces and to establish a Land Authority of Wales.<sup>130</sup>

A comparative analysis of these two Acts shows their similarity and helps drive the point of how the Community Act 1975 Laws of England was transplanted into Act 27 of 2016 Laws of Kenya 53 years after Kenya gained independence. Ownership of Community land in Kenya vests in the community. A community described as those who share a common ancestry, culture, mode of livelihood, socioeconomic or other similar common interest; geographical space; ecological space;

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<sup>128</sup> Article 63 of the 2010 Constitution of Kenya.

<sup>129</sup> ‘A Brief Overview of the Community Land Act No.27 of 2016,’ <<http://www.elexica.com/en/legal-topics/banking/12-a-brief-overview-of-the-community-land-act-4fr1ca>> last accessed September 2, 2019.

<sup>130</sup> Community Land Act 1975.



or ethnicity.<sup>131</sup> The UK Act on the other hand through its preamble seems to have its definition on community land as land that can be used for public good and development. The use of community land for promotion of public interest is also seen in section 29(1) (g) of Act 27 of 2016.

Land in the UK was given to the Lords by the crown on freehold basis who in turn leased it to subjects. Section 4 of Act 27 of 2016 adopted and recognized freehold and leasehold ownership and tenure system. The Land Authority under UK laws deals with matters regarding management of community land.<sup>132</sup> In Kenya, the same idea seen with the Act requiring registration of such Land as per the Land Registration Act 2012.<sup>133</sup> A unique feature in the Kenya Community land Act was the recognition of African Customary Law as a source of law under section 2 provided they were not inconsistent with written law or the Kenyan Constitution.

Under acquisition of community land, the UK Act covered this under section 15 and 16. Acquisition was only done if authorized by the secretary of state for the purpose of development. On the contrary, the Kenyan Act limits compulsory acquisition of such land by the state and places the interests of the community above that of the state.<sup>134</sup> On management, both Acts recognize county government as the major government body that deals with community land. Under the UK Act, this is found under section 16(1) and (2). From section 6 and 7 of the Act, the role of county government is outlined starting with holding unregistered community land on behalf of communities. Section 8 of the Act is an assessment of the said community land by the country government and registration done at county level as per section 11.

### **3.5 CONCLUSION**

This chapter has shown that legal transplantation, does not have to be a copy and paste narrative as has been the norm for decades. Aside from other transplanted laws, this chapter has shown that laws can be transplanted and contextualized. Transplanting of the Community Act 1975 into Kenya welcomed a new Era of contextualizing laws. Definition of community land by the two

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<sup>131</sup> 'A Brief Overview of the Community Land Act No.27 of 2016,' <<http://www.elexica.com/en/legal-topics/banking/12-a-brief-overview-of-the-community-land-act-4fr1ca>> last accessed September 2, 2019.

<sup>132</sup> Section 14, Community Land Act 1975.

<sup>133</sup> Ibid (n131).

<sup>134</sup> Ibid .

statutes was different due to the different cultures. Regardless, the law of the United Kingdom in relation to community land was transplanted to Kenya and made to fit its context. Not only did Kenya adopt the legislative process, it also adopted the Common Law system from the United Kingdom. Both Kenya and the United Kingdom have different cultures when it came to land. As has been seen in this chapter, this research has shown that what was termed as community land in Britain was mainly owned by the crown. The land that was deemed as community land was that which was held by the crown and whose main purpose was for public development.

Land in Kenya since time immemorial, was owned by different communities. Traditional African society used laws unique to them to govern their land. With the coming in of the British there was change in administration and introduction of a central government from which regulation emanated from. Community land was therefore known as the land that fit the criteria set forth in the Act. Regardless of the fact that foreign law was adopted to regulate community land in Kenya, the fact still remains that land in traditional African culture was and still remains to be one of the major sources of wealth and Identity in any given community. This chapter has therefore showed that regardless of the interaction between the British and the Kenyan community that led to the adoption of their Act to regulate what to us what community land, the Act still maintained Kenya's tradition when it came to community land.

## **CHAPTER FOUR**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **4.1 CONCLUSIONS**

This research began by exploring the idea of legal transplantation generally and narrowing it down to a jurisprudential underpinning in order to form a foundation for the research itself. The comparative legal theory being the main approach used to decipher the relationship between the legal systems that were involved in the process. The second chapter of this research then went ahead and had an in-depth look into the theory used by Allan Watson in propagation his idea on legal transplantation. The critiques from those who agreed as well as opposed his idea were looked at with each critique giving valid reasons as to their standing on the matter. Thereafter, the second chapter was concluded by a detailed look at the factors that led to the rapid growth of legal transplantation generally and in Kenya.

Chapter three then went on to contextualize legal transplants in Kenya by the use of the Community Land Act, 27 of 2016. This was to show the similarities between the two statutes regardless of the fact that they regulate two different countries. This chapter showed a clear depiction of how as opposed to Watsons theory, the law and society are intertwined and interrelated therefore coming to the conclusion that law has to emanate from the society it seeks to govern.

The last bit of this research will highlight the different recommendations as alternatives to the process of legal transplantation. It will focus on why the legal transplantation process should be done away with and what can take its place in the making as well as implementation of laws. The main incentive of this chapter being to showcase better, easier and effective ways to create law.

The conclusions that can be drawn from this research therefore are:

- i. The society of any given place and the laws governing it have to be in tandem for relatability and effective implementation of the laws. So far the success of the Community Land 2016 can be attributed to the fact that the society it governs relates to the Act.
- ii. Customs, cultures and traditions are the backbone of any society. At no given time will any idea that contravenes a society's tradition be able to stand in a particular place regardless of the legal theory used to propagate the concept. Many failed transplantations are due to the fact that they failed to observe the culture.

- iii. Reliance in transplantation of legal systems and laws has led to dependence of the donee countries towards the donor countries. Kenya, more than half a century later and a whole new constitutional dispensation later is still transplanting laws from the United Kingdom due to force of habit.
- iv. A country's legal system forms part of its identity which this research believes should be sui generis to each country.
- v. Kenya is a developing nation. Transplantation is inevitable therefore, strict guidelines should be put forth to show during what times and to what extent transplantation should occur.

## **4.2 RECOMMENDATIONS**

Following the above conclusions, the following recommendations are suggested in order to ensure reduction of transplanted laws in Kenya and in cases where transplantation is inevitable, strict measures are taken and laws are not just adopted blindly.

### **4.2.1 RELATABLE AND CONTEXTUALIZED LAWS**

Law is historically a product of civilization and has its roots deep in the people.<sup>135</sup> The legislative arm of government should make it a point to, in cases where transplantation is deemed necessary ensure that they are relatable. This can be done by making them fit the Kenyan context. Blind transplantation of laws will not only complicate the system at hand but will lead to matters such as misinterpretation of the laws and in most cases the laws will be worthless making them incapable of being used. What can be done to ensure a law is relatable is looking at the society in which it emerges from and comparing it to the Kenyan society. A relatable law is one that is bound to be accepted with open arms and implemented easily. In essence, a relatable law also paves way for the making of more policies and regulations to work alongside the new law.

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<sup>135</sup> Philip M. Nichols , 'The Viability of Transplanted Law: Kazakhstani Reception of a Transplanted Foreign Investment Code', <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1441&context=jil> last accessed September 27,2019 page 1239.

#### **4.2.2 ADHERANCE TO CULTURES, CUSTOMS AND TRADITIONS**

Albert Camus was quoted saying that, ‘Without culture and the relative freedom it implies, society even when perfect is but a jungle’. A jungle in its nature is ungovernable and can become chaotic. Adherence and respect of people’s cultures ensures that they in turn follow the rules set forth. Gandhi in his saying on how a nation’s culture resides in its people encourages a lot of public participation especially during transplantation of a law. Oliver Wendell Holmes is quoted as saying that, ““If the law is at odds with the values of society, the law falls into disrepute and loses the force it needs to ensure conformity with its precepts.”<sup>136</sup>

Kenya’s traditions are very different from any other countries. This therefore means that during a transfer of laws, there is bound to be several regulations that conflict with the Kenyan culture. An example would be how the Companies Act 2006 was inadequate as it conflicted with the Kenyan business community. This thereafter led to its numerous amendments. Respect and adherence to cultures makes it easy not only to contextualize but also for longevity purposes.

#### **4.2.3 REGULATION ON TRANSPLANTATION**

Not every day should a law be transplanted simply because the previous ones worked or the donor country is deemed superior? The transplantation process should be regulated to ensure that the transfer is being done right and is justifiable. Regulating a transplanted law ensures it is not repugnant to justice, morality and is not inconsistent with the 2010 Constitution of Kenya. Measures that can be taken into account to regulate include; a special Act of parliament to deal with the transplantation process, committees set up to look into the justifiability of the transplantation and a limit as to how much of a law from another state can be transplanted.

A regulated transplantation process will also ensure that too much transplantation does not take place to a point where the country becomes over reliable to the donor country when it comes to making laws. Some regulation on the process will also ensure that the country still maintains some independence and that in every act of parliament there is something unique that will tell the Kenya Act apart from the original transplanted one. Regulation will also ensure that things such as

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<sup>136</sup> Ibid .

neocolonialism are done away with as the laws made will be to the benefit of Kenya and its subjects.

#### **4.2.4 LEGALLY SMART LEGISLATORS**

The sad state of affairs that faces Kenya as a country is the fact that majority of those who make laws are not legally smart. Majority of them come into contact with the law making process when they step into parliament. As a requirement to be eligible for election, prospective members of parliament should at least complete a general course on Kenya's legal system and its functioning. This type of sensitization will ensure the legislative arm is at the forefront of legislating and transplanting laws that are of use to the country and its inhabitants.

#### **4.2.5 A REFINED LEGISLATIVE PROCESS**

The end does not justify the means. This doctrine, famously known as the fruit of the poisonous tree urges the use of proper means to get to something. It is a clear depiction of how a foul process, even with a beautiful result makes the result valueless. The Kenyan government should refine the legislative process by not only putting in strict regulations and timelines but by also ensuring that the process is free from corruption of any manner. This will ensure, the country is not coerced into taking in laws that it does not believe will uplift its legal system, respect its culture and work for the people.

Post 2010 Constitution saw the country adopt a bi-cameral parliament. The country should take advantage of this change to ensure the legislative process is twice as good. Inclusivity of both houses in legislation as well as transplantation would ensure that both national and county levels concerns are looked into as well as addressed in the new law. Other than just the legislative bodies, professional committees should be set up and included so as to not only give tier professional point of view but to also ensure that the new law is prospective in nature. This committees should be different as each would comprise of professionals of the area the law will seek to affect.

#### **4.2.6 AMENDMENT OF THE JUDICATURE ACT CAP 3 LAWS OF KENYA**

The Judicature Act, lists African Customary laws as residual laws<sup>137</sup>. This essentially means that African Customary law can only be used in cases where all other sources of law have been exhausted. If the African Customary laws are atleast moved up in the hierarchy of laws applicable in Kenya, the country will find itself in a situation where it has significantly reduced the number of unreliable laws used. This essentially will mean less legal transplants.

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<sup>137</sup> Section 3 Cap 8, Laws of Kenya.

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