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Understanding how the Kenyan Legal System Works

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Introduction

The Kenyan legal system is a complex and dynamic framework that has evolved over centuries, shaped by the country's history, diverse cultures, and unique socio-political landscape. At its core lies the progressive 2010 Constitution, which not only redefined government structures but also elevated principles of justice, the rule of law, and respect for fundamental rights. This transformation made Kenya's legal landscape more accessible, equitable, and attuned to the needs of its people.

Understanding how the Kenyan legal system works is essential for a wide range of readers. For citizens, it provides the means to assert and protect their rights. For legal professionals, it is the foundation upon which advocacy and public service are built. For investors, business owners, and those engaging with Kenya as observers or participants, knowledge of the legal framework is crucial for meaningful involvement and compliance with the law.

This book is designed to offer a comprehensive and accessible guide to the key features of Kenyan law. From exploring the sources of law—such as the Constitution, statutes, and common law traditions—to examining the organization of the courts and the functions of the executive and legislature, the text aims to give readers a clear understanding of the Kenyan legal order. Further chapters address specialized areas including criminal and civil law, family and property rights, commercial law, and the advancements in law reform taking place in Kenya.

Special attention is given to recent legal developments, particularly the effects of the 2010 Constitution, which heralded a new era of accountability, public participation, and focus on human rights. It also considers mechanisms for alternative dispute resolution, the accessibility of justice, and the ways in which Kenyan law intersects with global legal standards and practices.

Ultimately, 'Understanding how the Kenyan Legal System Works' is intended to act not only as a reference guide but also as an invitation to engage more deeply with the law—a subject that touches every aspect of civil society. Whether your interest is academic, professional, or personal, this book will provide the essential foundations needed for informed navigation of Kenya's legal landscape.

CHAPTER ONE: The Evolution of the Kenyan Legal System

To understand the Kenyan legal system as it exists today, one must embark on a journey back through time, tracing the intricate threads that have woven together its complex fabric. The system is not a sudden creation but rather a product of centuries of interaction, adaptation, and sometimes, imposition. Its roots run deep into the customary laws that governed diverse communities long before external influences arrived, and its branches now reach towards the modern principles enshrined in the supreme law.

Before the arrival of colonial powers, the various communities inhabiting the territory that is now Kenya each possessed their own distinct systems of social organization, governance, and dispute resolution. These systems were primarily based on unwritten customary laws, passed down through generations and enforced by elders, councils, or other traditional authorities. While differing in specifics from one ethnic group to another – reflecting variations in social structures, economic activities, and belief systems – these customary laws generally shared a common characteristic: they were deeply intertwined with the cultural norms and values of the community, emphasizing conciliation, restoration of harmony, and communal well-being.

Disputes, whether involving land, marriage, property, or even inter-personal conflict, were typically handled through elaborate, often public, processes aimed at achieving a resolution that everyone could live with. The focus was less on abstract legal principles and more on practical outcomes that repaired social bonds. Sanctions varied, ranging from fines and restitution to social ostracism or, in more serious cases, measures decided by community consensus. This pre-colonial era represented a phase where law was organic, localized, and intimately connected to the social structure of the people it served.

The late 19th century marked a dramatic turning point with the advent of British colonial rule. As the Imperial British East Africa Company and later the British Crown established control over the territory, they brought with them a fundamentally different legal system – that of England. The introduction of English law was not merely an academic exercise; it was an integral part of establishing administrative control, facilitating economic exploitation, and imposing a new social and political order. This period saw the superimposition of a foreign legal framework onto existing indigenous structures, creating a fascinating, and at times clashing, duality.

The British administration needed a legal basis to govern, enforce their authority, and

regulate the activities of settlers and traders. Legislation was introduced to establish courts, define crimes, regulate land ownership (often to the detriment of indigenous communities), and manage the burgeoning colonial economy. Acts of the British Parliament and local ordinances enacted by the colonial government became the new written laws of the land.

Crucially, however, the British did not entirely abolish customary law. Recognising its deep-seated nature and the impracticality of enforcing English law uniformly across a vast and diverse territory with limited resources, they adopted a policy of indirect rule in some areas, which allowed for the continued application of customary law in certain matters, particularly those related to personal status, marriage, divorce, and limited civil disputes among Africans. This created a bifurcated legal system: one layer based on imported English law and statutes, administered through colonial courts, and another layer based on customary law, often administered through traditional authorities or native courts established under colonial oversight.

The application of customary law under colonial rule was not without its complexities and distortions. Colonial administrators, often lacking a deep understanding of indigenous legal traditions, attempted to codify or interpret customary law through an English legal lens. This process sometimes led to misinterpretations, alterations, and the suppression of certain aspects of customary law that were deemed incompatible with colonial values or interests. Furthermore, the jurisdiction of customary law was limited and often subordinated to the received English law.

The reception of English law was formalised through legislation, notably the East Africa Order in Council, 1897, and later the Judicature Act. These instruments stipulated that the substance of the common law, the doctrines of equity, and statutes of general application in force in England on a specific date (initially August 12, 1897) would apply in the colony, subject to local circumstances and qualifications. This date, August 12, 1897, became a critical reference point, often humorously referred to as the "reception date," marking the moment a significant portion of English legal history was transplanted onto Kenyan soil.

This reception of English law was a pragmatic choice for the colonial power, providing a familiar and established legal framework for administration. It covered areas ranging from criminal law and contract to property and tort. The English court structure, with its hierarchy of magistrates' courts, high courts, and potentially appeals to the Privy Council in London, was also replicated, laying the foundation for the modern court system.

The colonial period witnessed the gradual development of local legislation alongside the received English law. Ordinances passed by the Legislative Council (LegCo) covered matters specific to the colony, such as taxation, land administration, and the regulation of various activities. These local statutes often adapted or modified

principles from English law to suit the specific conditions and objectives of the colonial administration. Over time, this body of local written law grew in significance.

As the 20th century progressed and calls for independence grew louder, the legal system continued to evolve, albeit under the overarching colonial framework. There were increasing numbers of Africans becoming legal practitioners, trained in the English legal tradition, who began to use the colonial legal system to challenge oppressive laws and advocate for political rights. The courts, while part of the colonial structure, sometimes became arenas for testing the boundaries of colonial authority and asserting fundamental principles.

The Mau Mau uprising and the subsequent state of emergency brought about significant legal changes, including the introduction of stringent security laws and the use of special courts. This period highlighted the extent to which the legal system could be employed to maintain political control, and it left a lasting impact on the country's legal and political consciousness. It also underscored the tension between the rule of law as an ideal and its practical application in a context of power imbalance and political struggle.

Upon gaining independence in 1963, Kenya inherited a legal system that was a hybrid of these different traditions. The new nation faced the challenge of adapting this inherited framework to the needs and aspirations of a sovereign African state. The independence constitution, while initially retaining many features of the colonial legal structure, provided the basis for developing a truly national legal system.

The immediate post-independence period saw a continuation of the reliance on received English law and existing statutes, but there was also a conscious effort to review and reform laws to reflect the new political reality and national goals. Legislation was enacted to replace colonial ordinances and to introduce laws specific to Kenya's development needs. The Law Reform Commission was established to systematically review and update the laws.

One of the key challenges was the relationship between customary law and the received law. While customary law continued to be applied, particularly in personal matters, its place within the formal legal hierarchy remained somewhat ambiguous and subordinate. There were debates about how to integrate customary law more effectively into the national legal system or whether to codify it, a complex undertaking given the diversity of customary traditions.

The post-independence era also saw the expansion of the legal profession and the judiciary, with increasing numbers of Kenyans taking up roles as lawyers, magistrates, and judges. This localization of legal expertise was crucial for the development of a legal system that was responsive to the needs of the population. Kenyan judges began to interpret and apply the law, including the inherited common law, in ways that were

relevant to the local context, gradually developing a body of domestic case law.

Significant legal milestones in the decades following independence included reforms in areas such as land law, criminal procedure, and the establishment of specialized courts and tribunals. However, the legal system, while evolving, still grappled with legacies of the colonial era, including issues of accessibility, the cost of justice, and public trust.

The journey of the Kenyan legal system from its diverse customary origins through the period of colonial imposition and the subsequent efforts at national adaptation set the stage for the profound transformations that would come later. This evolution demonstrates a continuous process of negotiation between tradition and modernity, local context and external influence, power and principle. It is a narrative of how a nation has sought to build a legal framework that can uphold justice, maintain order, and serve the aspirations of its people, a process that remains ongoing and dynamic. The experiences of the pre-colonial and colonial periods, with their blend of customary practices and imposed foreign laws, provided the foundation upon which the modern Kenyan legal system would ultimately be built, carrying forward certain traditions while shedding others and constantly seeking to refine its identity.

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