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The Evolution of the Common Law: Legal Development in Kenya and India

Sandra F. Joireman


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Abstract  Recent cross-national studies of the institutional prerequisites of economic growth have identified common law systems as superior to those of civil law. The assumption is that all common law systems share a similarity of structure and law which creates an environment facilitating investment and contract enforcement. Yet, due to its evolutionary nature, common law is not everywhere the same, nor is the historical development of the common law similar in all countries. This paper makes this point by examining the political development of common law in India and Kenya, in order to compare their legal institutions and histories. Both of these countries adopted common law through its transplantation in the context of colonial domination rather than organically. The paper concludes that the two countries, though sharing the common law, had very different colonial experiences of legal development. Moreover, once Kenya and India achieved independence, political circumstances affected institutional development and the application of law in each country.

Key Words:  Common Law, Legal Development, Colonisation, Rule of Law, Kenya, India

Introduction

The development of a modern legal system and the implementation of the common law have long been noted as a benefit of British colonisation. The expansion of the British Empire during the 18th and 19th centuries led to the transplantation of the common law throughout the world. Yet, how similar were the common law systems that subsequently developed? Did the transplantation of common law everywhere yield the positive benefits that recent scholarship has asserted to be the consequences of a common law system: more secure property rights; an improved investment climate; and better rule of law (Poe and Tate, 1994, Levine et al., 2000, La Porta et al., 1997, La Porta et al., 1998, Joireman, 2001, Mahoney, 2001, Morriss and Meiners, 2000)?

In every democratic country law is dynamic and the process of legal development is interesting and worthy of investigation. However, there is also a more pressing reason beyond intellectual curiosity to examine legal development. The efficiency of legal systems can be critical in identifying which countries receive foreign investment and which countries do not. A ‘fast, fair and affordable’ legal system is desirable for international development because it facilitates contract enforcement, trade and international investment (World Bank, 2004). Moreover, it is clear that strong legal institutions also assure a better human rights record and deepen democracy within
countries (Carrothers, 1998, Coliver, 2000). An effective legal system also has positive social benefits, as courts that are widely viewed as fair and are affordable to the general population can prevent the violent resolution of conflicts.

This paper will examine the evolution of the common law in both Kenya and India with the goal of identifying how common law functions and develops when it is transplanted by force through colonisation. The forcible transplantation of law as a tool of domination is a less than desirable form of legal development. Transplanted legal systems are not rooted in the norms and values of the people and therefore face a greater challenge in effectively representing the interests and regulating the activities of the population as a whole (Yandle, 1991). Yet, almost everywhere common law has been imposed as an administrative tool of empire rather than developing organically.

Why compare legal development in two countries that do not share more in common in terms of population, government or language? The answer is that in doing so we are able to focus on the critical details of the law, specifically: if and how it evolves over time; what circumstances best enable that evolution; and whether the evolutionary trajectory of the common law is similar across countries. This comparison enables observers to then assess the extant claim of the similarity of common law systems.

In the following pages the distinguishing characteristics of the common law are introduced with an emphasis on the flexibility and adaptability of the precedent-based system. The paper examines the cases of India and Kenya, with India coming first, as it did in colonisation, and Kenya second. The last section of the paper compares the two cases and draws some conclusions as to the similarity of common law across countries and the potential impediments to its transplantation. While the common law might begin with similar characteristics, we expect that time and the particular circumstances of each country, from the role of customary and religious law, to the degree of ethnic diversity, would lead the common law to adapt and become unique in each setting.

**Common Law Adaptability**

Common law was first developed in England as a process of applying continental feudal law; a process that developed over time into a hallmark of English life and into something quite distinct from the application of law on the continent. Common
law was and is a particular process of investigation and decision-making. English common law developed to protect the property of individuals and limit the power of the state to expropriate resources. From the time of the Magna Charta in 1215, the common law was supported by the aristocracy as a hedge against encroachment on land and liberty by the state. The common law was developed as a procedure that if properly followed, would result in a judgment for the plaintiff or defendant. The process, rather than the application of a code or law, is intended to lead to justice. This process was developed in the relatively homogeneous context of England where the oral tradition and the elevated, respected role of the judiciary were elements of the political culture.

Common law scholars and practitioners argue that one of the strengths of common law is its evolutionary nature (Rubin and Bailey, 1994, Eisenberg, 1988, Hayek, 1973, Morriss and Meiners, 2000). Because the common law system relies on case law it can evolve over time in response to changes in the political environment. Presumably, this would make the common law particularly advantageous for transplantation into other contexts as the body of case law could develop in a way that responds to the needs of the society in which it is applied. Civil law, the continental European system, is based on legal codes that are interpreted by judges.

English common law has been coupled with an adversarial system of justice. An adversarial system, such as that which is in use in both the United States and Britain, is one in which the parties to a dispute are pitted against one another in a relatively brief, oral contest with the expectation that competition between the two sides will reveal the truth. The plaintiff, the defendant and lawyers representing them are gathered together to present their case before a jury and a judge, who is expected to be an impartial arbiter of justice. Perhaps due to the emphasis on process, the common law system gives us the idea of legal precedent. Statutes may be used in common law systems as well, but judicial precedent, or the reliance on previous decisions to guide the present decision, dominates the justification of legal decisions. Paul H. Rubin argues that this makes for more efficient and more decentralised legal decisions and systems (Rubin, 1977, Rubin, 1994). Decentralisation of decision-making is yet another argument for the adaptability of the common law.
The expectation under common law systems is that as a society changes, the law will change to correspond with it through the distinguishing of precedents, while still providing a set of rules which people can expect to have to adhere to in both their business and personal interactions. This expectation is generally met in developed countries. However in countries that have fewer resources the evolutionary nature of the common law should not be assumed. For example, in Kenya the record of legal decisions has not been kept in any sort of organised fashion. Thus, the body of precedent is not widely known, particularly in civil law matters (Waiganjo, 2002). To discuss law evolving in such a situation is meaningless as legal evolution is dependent, at a minimum, on a clear record of decisions.

In the next section of the paper we examine how the common law was transplanted into colonised countries. Though the transplantation of the common law was not everywhere the same, there is a particular model of legal development that occurred with colonization that included two critical junctures in establishing a particular path of legal development. These critical junctures were the particular configuration of customary and colonial laws and rights at the initiation of colonisation and the decision as to which rules and rights would be maintained at independence.

Colonial Conquest and the Transplantation of a Legal System

Colonisation did not simply impose institutions where none had previously existed. Nowhere was there an institutional *tabula rasa*, particularly in the area of dispute resolution. Customary law and traditional institutions regulating payment for damages and death were in place in most colonised territories and did not disappear with the arrival of the metropole. Instead, at least two bodies of law, customary and colonial, coexisted for a time with that of the metropole taking precedence. In some situations there was also an additional body of law, religious law such as *sharia* or Hindu law, which governed at least the personal matters of individuals and in some situations commercial interactions as well.

Prior to colonisation there were bodies of rules governing the interactions of individuals. Initial colonial contact created a critical juncture at which the colonial power decided how to recognize and/or limit traditional rules. Yet we must be careful
to note that the colonising power always had an explicit agenda to rule rather than to preserve or protect those bodies of law, traditional or religious, that it found in place.

There are two lines of argument regarding the role of customary law in the wake of colonisation. The traditional school of thought, advanced by the imperial powers, suggested that customary and religious law continued in traditional form, alongside but subordinate to the law of the metropole. An alternative and more historically accurate view is that customary law was developed in the context of colonisation by local elites empowered by the colonisers, developed in a fashion to both suit the needs of the colonising power and to promote the interests of the elite. Martin Chanock argues that in the areas of both land and labour law in Africa ‘customary’ law was created to serve the interests of those recognized as leaders (older men) by the colonial power (Chanock, 1985, Chanock, 1991). Thus it would be incorrect to view customary law as pre-existing colonization in the form that it became institutionalised by the colonising powers. Instead, customary law can be viewed as both opportunistic and constructed by political circumstances.

Colonisation not only preserved multiple and distinct bodies of law, but promoted their application to different populations within the same country. A British citizen in any colony of the British Empire could expect to be subject to British law with a reliance on British legal precedents as defined by British case law. Such was not the case for indigenous or so-called ‘native’ populations. They were subject to customary law or to British law if involved in a conflict with a British citizen. British or common law recognised individual rights, yet customary law focused only on group rights, so much so that individual property rights in land, for example, were not recognised for indigenous people in British African colonies. Similarly, in French colonies there were different rights for different groups of people. French subjects could attain the status of citizenship through education, but few were able to do this. Those who were not citizens operated under a different legal code than French citizens.

At independence, colonised states faced a second critical juncture. For the first time states had a choice as to which type of law they would adopt and to whom it would apply. Newly independent states could decide to continue to recognise customary law or to apply one body of law to all the citizenry of the country. In the Indian case
customary law continued in the area of personal status. Sharia law was allowed to regulate the personal affairs of Muslims in terms of marriage, divorce and inheritance and much of the specifically Hindu law was codified. In Kenya and other African states some sort of customary or religious law was allowed to continue outside the area of personal status. For instance, customary law continued to govern property rights in many African states leading to a demarcation of some lands as communally owned and some as individually held. In Kenya, India and every other former colony there was a choice to follow the Western legal system that had been used by the colonisers. This can be understood as a result of the training of indigenous lawyers in the law of the metropole during the colonial era. Countries chose to follow the law of the metropole because it was familiar and there were at least some trained and practicing legal professionals in the country with experience in that form of law.

Once adopted, to what degree has the common law adapted to the situations in which it has been transplanted? The following cases illustrate two very divergent streams of common law transplantation and evolution. Through the differences in these two cases we can learn the variables that facilitate or impede the transplantation of the common law. India is an obvious choice for a case study because it was both the focal point of the British Empire and had a very early experience of British courts. By way of contrast, the Kenyan adaptation of the common law occurred much later and in the context of the scramble for African colonies during the mercantilist era of the late 1800s.
India

The year 1608 marked the first British contact with India as the young but powerful British East India Company (BEIC) established its first trading route with the subcontinent. The Company began trading at the port city of Surat, on the northwestern coast of the subcontinent, and set up trading posts along the Western and Eastern coasts of India. It became a ruling entity after it won the Battle of Plassey in 1757 against the Nawab of Bengal and established control of the Bengal. The Company was given authority by Parliament to administer the Indian territory, to buy land, tax and set up trading posts. In 1773, The Regulating Act put the company under the supervision of a British government employee, the Governor-General.

English common law was first introduced in India in 1727 with the establishment of courts at three settlements in Madras, Bombay and Bengal. The English courts were instituted to correct some of the ‘injustices’ of company rule (Unknown, c. 1780) and to adjudicate disputes among British subjects in these settlements. The Company controlled the administration of justice in the interior, but it did not resolve disputes using the common law - as the Company was still officially a ‘trading’ rather than a governing entity until 1757. Even after that point common law courts did not spread throughout the colony due to the fact that the common law was applied only to British citizens.

During the early years of the common law in India the institution clearly did not work with the effectiveness and adaptability that are considered to be its strengths. This was both a result of the inconsistency of its application (across areas and peoples) as well as the lack on interest on the part of the Company. Common law originally applied only to English citizens and those charged by English citizens in common law courts. An Indian could have a complaint lodged against himself in a court a thousand miles away simply because there were only three common law courts in the country. When this happened he was subject to the rigour of the common law, though he would not have been if an Indian charged him with an offence (Bannerjee, 1984: 20-25).

It is unclear whether the particular rigidity of the transplanted common law system was intentional or an inadvertent side effect of the importation of English judges
who did not understand the culture of India. One British observer commented on the 
lamentable state of the legal process in India prior to the turning of the 19th century.

Instead of framing a new Code of Laws for this new Institution, the 
English Laws are introduced to their full Extent, and with all 
Consequences; without any Reflection or Modification whatever, to 
accommodate them to the climate and Manners of Asia; without any 
Regard to religious institutions or local Habits, or to the Influence of 
other Laws handed down from the remotest Antiquity and fixed in the 
Hearts of the People: Without any Latitude allowed to the Magistrate to 
relax, compress or change their Application, according to the Exigency 
of these Circumstances, upon a more attentive Observation of them: But 
all are transplanted entire to the opposite Quarter of the Globe, to be 
administered by Judges educated under them, and wholly 
unacquainted with the Religion, Character, or Manners of the People 
over whom they were to preside (Unknown, c. 1780: 4).

Rather than the common law immediately beginning the process of adaptation during 
the Company period, there was an era in which the common law was transplanted and 
administered in a rigid form that did not lend itself to the evolutionary process so 
desirable in the common law. This was a result of its limited application and the lack of 
will on the part of the BEIC. The Company was not as concerned with developing 
deeply rooted judicial institutions as they were with keeping order. The first three 
established courts in India were created at the order of the British parliament to correct 
and control Company abuses.

Company rule continued in India until the Sepoy Rebellion of 1857. The 
Rebellion brought to the fore the `dangers arising from the entire exclusion of Indians 
from the legislation of the country’ (Bannerjee, 1984: 140). It also clarified to British 
parliamentarians that administration of the Indian subcontinent needed to be more 
formalized and directly controlled by the British government and civil service. In 1858 
India was therefore declared a crown colony.\(^{15}\) The switch from company administered 
territory to crown colony entailed a substantial shift in the administration of the colony 
in England, but little change on the sub-continent. India was from that point forward 
governed directly by Parliament with responsibility for Indian affairs entrusted to a 
cabinet minister, the Secretary of State for India. In India itself the Governor-General, 
also called the Viceroy, remained as the leading administrator. By this point the
Company was already in decline; it gradually lost both commercial and political control, finally having its commercial monopoly broken in 1813. By 1834 the Company was merely a managing agency of India for the British government. The BEIC ceased to exist as a legal entity in 1873.

The control of India under Company rule had been conceived as a trusteeship in which the British would hold the territory ‘in trust’ for the Indians until the time at which they were deemed prepared to take over their own governance. Thomas Munro, an assistant to the Governor-General of India in 1824 reported that the people of India:

Shall in some future age have abandoned most of their superstitions and prejudices and become sufficiently enlightened to frame a regular government for themselves, and to conduct and preserve it. Whenever a time shall arrive, it will probably be best for both countries that the British control over India should be gradually withdrawn (Coupland, 1944: 18).

This is just one example of what was a frequently articulated paradigm of rule. Later, Lord Macaulay defending the Charter Bill of 1833 to the House of Commons noted that through this trusteeship it was hoped that Indian political institutions would develop along the British model and at some point Indians would see the benefit of these institutions and retain them as their own.

The destinies of our Indian empire are covered in thick darkness... It may be that the public mind of India may expand under our system till it has outgrown that system; that by good government we may educate our subjects into a capacity for better government; that, having become instructed in European knowledge, they may in some future age demand European institutions. Whether such a day will ever come I know not. But never will I attempt to avert or retard it. Whenever it comes, it will be the proudest day in English history’ (Coupland, 1944: 20).

Transplanting British political institutions was one of the fundamental directives in administering India. Once the status of India as a colony was determined in 1858 a succession of law commissions met and developed procedural and legal codes that embodied the fundamental features of English common law. Macaulay, quoted above, was the chairman of the first law commission. When Company rule ended and official
colonial status began, the first evidence of the adaptation of the common law surfaced in the form of Indian advocates and pleaders present in the courts to consider issues of Islamic or Hindu law.\textsuperscript{15}

Legal decisions and statutes particular to India proliferated through the 1800s (Mantri, 1902). There are compiled books of Indian laws and procedures that totalled 500 pages by the beginning of the twentieth century. Moreover, by the same time there was also an active engagement of Indians in the legal profession either as \textit{vakils}, indigenous pleaders who were able to bring cases, or as lawyers who had been educated overseas and served in an official capacity as litigators or on the bench (Henderson, c. 1960). No positions were held solely for British officials. An Indian with qualifications could aspire to a position in the colonial civil service and by the early 1900s the process of ‘indianisation’ brought many Indians into the governing structures of the colony, including the judiciary.\textsuperscript{16}

India was undergoing many changes in the early 1900s as the independence movement began to gain momentum. Key players in the independence movement were lawyers trained in England and practicing in India, such as Nehru and Gandhi.\textsuperscript{17} The Indian National Congress led the pursuit of independence and transformed into a political party which controlled the government in India from independence until 1978.\textsuperscript{18}

At independence in 1947 the Indian government established a Constituent Assembly to write the constitution, which was ratified in 1950. The constitution enshrined the common law. There was never really any question that it would not do so, as by 1947 there was a long history of the application of the common law in India, not just by British colonial officials, but by Indians themselves in their official capacities as employees of the state. The legal structure established by the constitution of India is based on precedent, with the Supreme Court serving both as an appellate court and as the court of first instance for disputes between the states and the Union. During the colonial era both Hindu and Muslim law governed personal status issues such as divorce and inheritance. At independence much of the Hindu law was codified (Ramakrishnan, 2003). The Muslim law was not.\textsuperscript{19} Thus with independence, India
adopted the colonial judicial procedure and at the same time made legislative changes in the body of law that would make it even more ‘Indian’ and less ‘British’.

Post-colonial Indian Legal Development

There is no question that the common law has taken root in India and flourished in a way that demonstrates its most positive evolutionary qualities, reflecting the will of citizens and not just the ‘desires and ideals of the man of systems’ (Yandle, 1991: 229). Since independence, India has changed its judicial system, within the bounds of the common law, in ways that make the system quite different from common law practiced in England and America. One might argue that this is further proof of the evolutionary and adaptive nature of the common law. For instance, the jury system was eliminated in India in 1960. This radical change came largely as a result of the notorious Nanavati case in which a Parsi Navy commander murdered a Sindhi businessman who had a habit of seducing the wives of military officers. A jury acquitted Commander Nanavati because of public sympathy, in spite of overwhelming evidence against him and a confession. The verdict was repealed by a judge and Nanavati was found guilty on appeal. Government officials were so upset by the unreliability and biased nature of the jurors in this case that trial by jury was abolished (Sharma, 2004, Roy, 2002, Gressor, 2003). The abolition of the jury system is but one example of the ways in which the common law has become adapted to the Indian context. There has also been a proliferation of both legal decisions and legislation that has created a unique and dynamic legal system in India.

India provides an interesting and ultimately successful case study of the transplantation and adaptation of the common law. Common law was first imposed in the conquered areas of India in 1727. Two hundred and twenty three years later the common law became the foundation of the independent state. That two hundred and twenty three year period began with a body of law rigidly and inconsistently applied by English judges on a conquered people and ended with a body of law suited to its context. Moreover by the middle of the colonial period the common law was being used by Indian lawyers arguing cases for their Indian clients before Indian judges. Bannerjee notes that in 1836 ‘out of 1,12,380 [sic] civil suits in the “Lower Provinces”,
only 6,893 were tried by European judges and 1,05,487 [sic] by Indian officers’ (1984: 251). Given the number of Indians involved in the legal system from such an early date, it is no surprise that legal development in India maintained this trajectory of adaptation after independence.

Kenya

In Kenya the first British contact and colonisation came substantially later than in India. This fact may explain some of the crucial differences between the two cases. The British first began to make inroads in East Africa through Zanzibar. By the late 19th century, the British were in competition with the Germans for control of Eastern Africa. In 1886 the Germans and the British reached an agreement that divided East Africa from below Mombassa and past Kilimanjaro to a point on the east edge of Lake Victoria. In 1890 the British East Africa Protectorate was officially established. Kenya was not declared to be a crown colony until some years later in 1920.

Whereas Indian colonisation began officially in 1858 and the establishment of common law courts occurred over a century before that, in Kenya the first common law courts were established in 1897. Common law had existed for a few decades prior to that time in Zanzibar. Zanzibari courts were established in 1884 under the jurisdiction of the District of Bombay with appeals going to the High Court of Bombay. The experience of the courts in Zanzibar established a pattern for the use of Indian law in East Africa that was carried through the colonial period. Kenya used Indian procedure and Indian codes during the years of colonial control. One example is the Indian Contract Act, which governed contractual arrangements in Kenya until 1960. The reliance on Indian laws and procedure created a legal environment conducive to the practice of private law by lawyers trained in India. Indeed, the majority of advocates practicing in Kenya during the colonial era were Asian (Ghai and McAuslan, 1970: 383).24

In the 1950s, just prior to independence, there is record of dissatisfaction on the part of colonial officials with the process of legal transplantation in the African colonies. The specific complaint was that in British colonies in Africa ‘English law and British justice have fallen into disrepute’ (Marshall, 1954 c.).25 This assessment emanated from
West African in particular, where there were several notable problems with the adaptation of the British law. Key among the difficulties was that British judges knew little of the local context and applied the law in a rigid way more suitable to criminal than civil proceedings. Hedley Marshall noted that the ‘Present rigidity can, in the ultimate analysis, only have the effect of destroying confidence in English law and overthrowing British Justice as we know it.’ (Marshall, 1954 c.). This is perhaps an extreme assessment, but one that demonstrates the difficulty of adjudicating disputes under the common law with British judges trained in Britain and unfamiliar with the culture.

The frustration with the implementation of common law was consistent with East African experiences as well. Common law did not become quickly rooted in the society, in part because it was restricted in its application to certain segments of society. Instead of being a process for the resolution of societal conflicts, the common law in East Africa was used to control native populations.

From the African point of view the English law introduced into East Africa was one of the main weapons for colonial domination, and in several important fields remained so for most of the colonial period, only changing when Africans began to gain political power. The role of the received law from the beginning of the colonial period in Kenya was to be a tool at the disposal of the dominant political and economic groups. (Ghai and McAuslan, 1970: 34)

Post-colonial Kenyan Political Context

At independence in 1963, Kenya embraced the common law system. Like India, by the time independence came there were vested interests in sustaining the same legal system that had been established in the colonial era. By that time at least a few Kenyans were serving in the bar and ready to assume positions as judges, although not near the percentage of legal practitioners as the Indian case. Yet, there were some critical changes that were made to the practice of law in Kenya at independence. In Kenya the courts and legal systems moved closer to English common law than they had been under British colonial rule. This was largely due to the fact that the common law was reserved for the use of the English and expatriates during the colonial era. Africans had
their legal disputes settled in native courts applying customary law. It was seen as one of the privileges of independence and citizenship that all Kenyans now had full access to common law courts. Moreover, the British colonial government had allowed special legal status to Muslims, minorities and people under customary law. At independence, a free Kenyan judiciary was less inclined to favour these distinctions with special rights, though customary and Islamic law were still recognised with regard to personal status and relating to some civil matters (Woodman, 1994, Ghai and McAuslan, 1970, Cohen, 1969). There was a sentiment of inclusiveness that the common law would no longer be restricted in its application to the privileged classes and that the citizens were all now Kenyans and not Muslims, Christians or animists each with their own set of laws.

The newly independent Kenyan state also embraced the protection of property rights for all Kenyans in the new constitution. Prior to that point that security had only been protected for the white settlers and it was only group or collective property rights that were recognised for Africans (Kamoche, 1981: 330). This situation is quite different from the Indian case, where property rights were similar for Indians and for the British and it was as possible for Indians to own land and wealth as for the British.

After the initial euphoria of independence wore off, the problems of the transplantation of the common law into the Kenyan context became evident. There were at least two areas of weakness in the legal system of Kenya at independence: the nature of the bar and the limited development of case law, particularly in civil matters. Both of these weaknesses were exploited by a government uncomfortable with dissent and interested in developing its ability to control both the society at large and potential sources of opposition.

During the colonial era, Kenya had lawyers and judges, but they were predominantly expatriates or white settlers. Ross (1992) argues this was a result of an explicit colonial policy to deny scholarships to East Africans for the study of law. The British experience in India had demonstrated to the British that indigenous lawyers trained in common law were a source of opposition to the colonial regime. In 1968, 5 years after independence, there were 292 advocates in Kenya: 11 Africans, 224 Asians and 57 Europeans (Ghai and McAuslan, 1970: 403). Granted, many Africans had been
moved into public legal functions as judges and magistrates, but the numbers of Africans in the bar was still extraordinarily low. Moreover, the lawyers association did not set itself up as independent from the state, but was complicit with the government (Ross, 1992, Ghai and McAuslan, 1970). Some of the reason for this might have been the fact that few members of the bar were black Kenyans and advocates were not viewed as defenders of the public rights against the government. This situation has changed in recent decades and the Law Society of Kenya has since taken an important role in trying to reign in abuses of government power and corruption (Gathii, 1999).

The second area of weakness was in the development of case law, particularly civil, as opposed to criminal or commercial, law. Kenya’s laws at the time of independence were insufficiently developed to empower rural economic development or even the resolution of longstanding conflicts. A good example of this problem exists in the area of land law. Kenya has long made use of its excellent climate for the production of agricultural products, primarily coffee and tea. This has meant that rural land has significant economic value. Ownership of that land has often been contested by a variety of interests laying claim to it from traditional lineages claiming title, to colonial owners and those interested in new development. Furthermore, as Kenya has grown and urbanization has occurred, urban land assets have also been a focal point of conflict. Here the stakes are even higher as the government competes with urban land developers, organised slum communities and individuals for control of urban land. One would expect in this case that there would be a highly developed system for negotiating access to land, inheritance rights and the contractual arrangements that would limit and control land access. This is not the case. Instead, property law remains much the same as it was at independence with only a few laws governing transactions and cases over both urban and rural land clogging the civil courts (Waiganjo, 2002). Why hasn’t the body of case law on civil matters developed more and become more adapted to the Kenyan environment? Why hasn’t the common law in Kenya evolved to fill this need in the body of civil law?

There are several potential answers to that question. One could argue that there is a lack of capacity on the part of the judges working in the area of civil law. They are certainly overburdened with cases. Some courts are scheduled to hear up to 30 matters
in a given day (Okiogo, 2002). These, however, are problems that could be solved were there the political will to do so. The lack of political will in some areas can be easily explained by the incentives of the central government. For example, efforts since independence to survey and title rural lands have run into bureaucratic obstacles and conflicts with customary law. So much so that the Registered Land Act led to a confusion in property rights, rather than clearing them up as it was intended to do (Coldham, 1979). Land that is untitled defaults to government ownership in Kenya and citizens have no ascriptive rights against the state. The government under Daniel Arap Moi was able to use this situation to grant land in Nairobi to political supporters. Moreover, due to the semi-authoritarian system in Kenya under Moi, the government did not effectively respond to the societal demand for surveying titling in urban areas. This is an example of one legal area in which the executive and legislature lacked the political will to change the system. However, there is another explanation as well. Judges in Kenya have been notoriously corrupt.

As the Ringera report notes, corruption among the Kenyan judiciary has permeated the highest levels (BBC News, 2004). Judges in Kenya have been resistant to attempts to document their decisions, leading to a situation in which there was no court reporting on civil matters for the years between 1981 and 2002. No judge who is open to bribes will support court reporting, because it will only draw attention to inconsistency in decisions. Yet, without proper court reporting it is virtually impossible for the common law to evolve on the basis of precedent.

The lack of political will and a corrupt judiciary are part of a greater problem in Kenya which has been the semi-authoritarian nature of the government in the years from independence to the present. Under Kenyatta and Moi, opposition was not tolerated and the window for any sort of political reform, particularly that demanded from below, was firmly shut. So the development and evolution of the common law did not take place in Kenya in the manner that we might otherwise expect.

**Drawing Conclusions**

While there is no doubt that comparisons between these two cases can be difficult because the settings were so dissimilar, these differences raise an important first
concluding point. That is, the variation between common law systems is vast, thus scholars need to take care when grouping legal families together in cross-national studies. Second, common law was not transplanted by the British in the same way in each of their colonies. Related to this second point is a third, at independence, British colonies were at very different places in terms of their adaptation of the common law procedures. Lastly, the type of government, democratic or authoritarian, that took over at independence had a significant impact on the development of law, both legislative and judge-made. All of these points will be discussed in detail below.

In neither Kenya nor India did the common law adapt quickly to the environment in which it was transplanted. However by 1920 Indian lawyers were pleading cases and the doors to the civil service were open in terms of both administrative and judicial positions for Indians. At the beginning of colonial rule in India there were complaints about the unwillingness on the part of English lawyers to adapt the law and begin to transform it in a way as to make it more applicable to the colony. The complaints made by British officials in 1780 regarding the rigidity of the common law and the problems of its application were echoed in 1954 by colonial administrators in Africa! This is a sobering similarity given the fact that in 1954 Kenya was six years from independence but in India the assessment occurred 167 years before independence. It is astounding the degree to which the body of case law in India was detailed, developed, used and adapted even by the early 1800s, well before the Conference of Berlin even established the boundaries of the colonies in Africa. It took about a hundred years for Indians to begin to participate in the administration of the legal system in numbers that were significant. In Kenya the first courts were established nearly a century after the first common law courts were established in India. Moreover, the process of indigenisation, which took some time to develop in India but successfully entrenched the common law in India prior to independence, had barely begun in Kenya by the time independence occurred. The fact that Indian law is used in Kenya during the colonial period is just one example of the divergent timelines in the transplantation of the common law to both countries.

One might think, given the sophistication of the common law in India and the time that it has taken to adapt to the environment there, that the legal system would be
much better functioning as well. However, this does not seem to be the case in all respects. According to recent World Bank statistics in India it takes 365 days and 22 procedures to enforce a contract while in Kenya (partially as a result of newly formed commercial courts specifically designed to facilitate business) it takes 255 days and 25 procedures. Both countries are slow in adjudicating commercial disputes. We can compare them to New Zealand, another common law country in which contract enforcement takes on average 50 days and 19 procedures (World Bank, 2004). Thus the adaptation of the common law to the Indian context has not given India any advantage in terms of its efficiency. There are other issues apart from the efficiency of the legal system that are important in this context. India for a long time followed an intensely bureaucratic and protectionist economic program which led to numerous, cumbersome business regulations. However, where India has gained is in the protection of human rights and basic civil liberties. On this issue it was the strength of the bar association and the common law combined which gave individual citizens protection against the state. These rights were also facilitated by the fact that India was a functioning, albeit sometimes corrupt, democracy.

In Kenya on the other hand, the bar association was not a strong foil to the government and was not able to represent people in a struggle for basic human rights. Instead, those lawyers that took on the government found themselves in jail. It has only been recently that the Law Society of Kenya (LSK) has been able to play a role in strengthening the legal institutions and legal process in Kenya. Not surprisingly, this opening in the political space came just before a change in the government. Now the Kenyan government’s anti-corruption campaign is targeted at the judiciary, trying to cleanse from its ranks those judges who through their corruption are not just preventing the adequate administration of justice in Kenya but also, more peripherally, impeding the evolution of law.

Legal development in Kenya and in India has followed very divergent paths. The evolution of the common law was a process that needed centuries rather than decades to occur. From this, we can ascertain that while we can talk about institutional choices and the adaptive nature of the common law, evolution occurs over a very long
term and the rigidity of the common law in its initial days of transplantation may be just as problematic as rigid civil law statutes.

Lastly, it is clear that the presence of democracy in India facilitated the development of law, both legislatively and in terms of precedent. The absence of a deep democracy in Kenya impeded the ability of the judiciary and the legal profession to fulfil their roles in protecting citizens from the capriciousness of the state.\(^{33}\)

It has recently become somewhat vogue to categorise countries into legal families and then compare them cross-nationally (Joireman, 2004, La Porta et al., 1998, La Porta et al., 1997, LaPorta et al., 1999, Levine et al., 2000, Mahoney, 2001, Morriss and Meiners, 2000, Poe and Tate, 1994, Poirson, 1998). However, we must be cognisant of the fact that when we group countries into legal families, the body of law that exists may be radically different and we are capturing processes and cultures as well as law. We have to be careful in viewing this categorisation as more than the very broadest of brushes and not useful for the more delicate work of making policy prescriptions.

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Notes

1 Though to what degree democracy and capitalist development are related is still a disputed area of political science, see Jeffries, R. (1993). There is also a theoretical argument regarding the role of law in a society with Nicos Poulantzas (1973) and Antonio Gramsci (1971) arguing that law is inherently political, involving the hegemonic control of the state over the society sometimes through persuasion (Gramsci) and sometimes through domination in the articulation of law that favors the ruling classes and limits the role of the state. John Rawls also argues that justice is always more than just the impartial and regular administration of rules (1971).

The common law existed before 1215, but the Magna Charta marked the beginning of the use of common law as a restraint on the monarch.

The American practice of the common law has been singled out for criticism of its excessive litigation and the use of the courts to refine tort law to the point of creating a net welfare loss to society, see Posner, R. A. (1996) and Tullock, G. (1997). This is quite different from the application of the common law in the English context in which legal decisions are less likely to be overturned. Thus, even in developed countries, the practice of the common law is not everywhere the same.

Some civil law practitioners, observing the system from outside have referred to the process of adaptation as 'relatively crude and unorganized' (Merrymann 1985:3). Most common law systems also use codes to a lesser extent, an example would be the Uniform commercial Code in the United States, which is a codification of common law decisions regarding the sale of personal property.

Oral argument in common-law systems makes for good television. The same cannot be said of civilian systems in which the majority of the action takes place in a written format. In both systems, the investigation and fact-finding that precedes the trial can be quite drawn out. Posner (1996:75) argues that twenty minutes of oral argument on each side in a common law case should be sufficient to clarify any points in the dispute.

This is clearly a point of tension and some common law systems have been better at doing this than others. Posner (1996: 69-114) notes that English law is both clearer and less likely to be overturned than American law, in part because judges take the idea of *stare decisis* very seriously and do not presume to overturn previous decisions as often as American judges.

From 1981 to 2002 there was no law report issued in Kenya on civil decisions. Without an effort to record the decisions of judges it is impossible for the common law to evolve on the basis of *stare decisis*.

Although in some cases, such as the South Africa, there might have been a perception that indigenous groups were absent due to population movement or dispersal.

In the case of the African colonies this was sometimes British case law as further developed in India during the Indian colonial period. One could argue whether or not this body of law is correctly called British or Indian.

In India customary law was applied to personal matters and property rights were subject to British common law and protected even for Indians, though with less vigor and consistency.

For more information on different colonial patterns of legal administration see Joireman, S. F. (2001).

The Mutiny was interesting both from the standpoint of the precipitating political circumstances, described above, as for the tipping event that led to the violence. Discontent ignited into violence with rumors that the Enfield Rifle cartridges which were used by Sepoys were packed in animal fat. Since it was necessary to bite off the end of the cartridge before loading it into the rifle, the assertion that the cartridges were packed in animal fat was repulsive to both Hindus, who do not eat beef products, and Muslims, who do not eat pork products.

The Regulating Act of 1773, which put in place the first Governor-General, and Pitt's India Act of 1784, put political policy under British Government control through a regulatory board responsible to Parliament.

By 1793, there were Indian advocates or pleaders established in the common law courts in India in order to consult with the British legal professionals on issues of religious law (British Colonial Administration, 1834).

In 1916 Sir Alan Henderson, Kt., I.C.S., 1886-1963 recalls being at a trial of a terrorist in which the accused was represented by a ‘leading Indian barrister’ (c. 1960: 65).

Although Gandhi practiced law only briefly in India before leaving the country to represent Indians living in South Africa. It was in South Africa that Gandhi first developed his techniques of civil disobedience or *satyagraha*.

At which point Indira Gandhi, Nehru’s daughter, lost an election which brought an end to the state of emergency she had declared. The state of emergency effectively suspended the democratic institutions of India for 18 months.

No doubt, this was due to the political tensions at the time that led to the separation of the territory of the colony of India into the two independent states India and Pakistan based on religious differences. At independence India was conceived of as a secular state with a majority of Hindus and Pakistan was an Islamic state, although Islamic (never sharia) law was not instituted in Pakistan until 1993.
The idea of a jury of peers deciding on a court case is something that seemed alien to Indian culture when it was first introduced. George Campbell in 1852 noted that although Indians were comfortable with the panchayat system of peer arbitration in which each side chose their own representatives, it was nearly impossible to get people to voluntarily serve on a jury and jurors, once compelled to serve, would try to defer to the opinions of the judge (Bannerjee, 1984: 71).

Kawas Nanavati served three years in prison before he received a pardon. He and his wife and children then left for Canada and never returned to India.

Interestingly, some scholars have noted the importance of jury trials in distinguishing common law and civil law systems historically. Glaeser, E. L. and Shleifer, A. (2002). Since both Kenya and India rejected the use of jury trials within their common law systems, one wonders whether one could make the same point in the contemporary period.

Indeed, some would argue that the law was almost too developed as India has a proliferation of laws, some of which have become so outdated that they are no longer in use. By one estimate only 40% of India’s laws are in regular use (Redundant Laws, 2004).

Advocates here being the equivalent of lawyers in the US or having the fused responsibilities of the solicitor and barrister in the British system.

From correspondence between Sir Kenneth Roberts-Wray and Mr. Hedley Marshall found in Marshall, H. (1954 c.).

See Chanock (1991a) for a discussion of the construction of customary law under colonial rule.

Some Kenyan lawyers have also indicated frustration with particular elements of the criminal law, such as the mandatory death sentence that accompanies a charge of robbery with violence, but on the whole there seem to be fewer problems with the criminal law.

Glaeser and Shleifer argue that civil law systems are particularly vulnerable to exploitation by authoritarian states. The Kenyan case provides a caveat to their argument as it illustrates the difficulty that newly independent common law states had in serving as a foil to the state when neither the law nor the judiciary is well-developed. Glaeser, E. L. and Shleifer, A. (2002).

The Kenyan government under President Mwai Kibaki has purged the judicial system of half of its most senior judges – suspending them while corruption investigations take place.

There is currently an effort underway to right the wrongs of the Moi regime’s land allocation scheme in Kenya. See BBC News, (2005).


Freedom House civil liberties scores for India are significantly better than those of Kenya across time.

It is not entirely accurate to say that Kenya was not democratic rather, there was a limited democracy that allowed for electoral competition but limited the civil liberties available to citizens.
References:


