The Politics of Culture in Kenya since 2010: Implications for pluralism

Lotte Hughes, Steve Ouma Akoth and Celia Nyamweru

Introduction

This chapter will start by briefly describing the international context in which cultural rights have gained ascendancy in recent years, largely in human rights and cultural heritage instruments, by way of introduction to Kenyan specificities. It will go on to discuss cultural rights provisions in the 2010 Constitution of Kenya (CoK), and how they came to be included in this important document. The chapter will then describe some key developments around culture and pluralism since 2010, through select examples, largely drawn from new research on the ways in which Kenyans are engaging with culture (however that term may be defined)[1] and exercising cultural rights since the constitution was passed. Some of the questions we will engage with include: what impact have cultural rights provisions and the employment of culture in devolution processes and governance had on identity formation, attachment to ethnic 'homelands' and the hardening of boundaries, both territorial and cultural? How and why have *notions* of culture (see note 9) become ubiquitous, especially at county level? What developments have the potential to put Kenya on a trajectory towards a pluralistic society? Which special interest groups, such as elders and councils of elders, present particular challenges to the ideals of pluralism and diversity, and why?

First, it is important to acknowledge the wider context in which cultural rights have increasingly gained prominence and visibility in international human rights protocols, discourses and constitutions. Cultural rights are a sub-set of human rights but have long been regarded as being of a lower order. That has changed in recent years, partly as a result of lobbying by indigenous and minority rights groups which have successfully promoted the idea that culture is indivisible from their humanity, dignity and self-realisation, and lies at the very core of life itself. Moreover, the ways in which culture is treated in international instruments has shifted markedly from concerns about the protection of cultural heritage properties such as buildings and landscapes, and their 'universal value' to humanity as a whole, to recognition that culture has intrinsic value

[1] The authors, and the larger research team of which they are a part (see note 11), deliberately do not define 'culture'. We are interested in learning how Kenyans define it, and most importantly in seeing how they *use* it.

for specific groups of people. Ideas about what constitutes heritage have moved from the macro to the micro, 'from a canonical list of places and objects to community practices and social action' (Harrison 2010: 38). In global constitutional terms, provision for the right to culture was mentioned in just over a tenth of surveyed constitutions in 1946, but by 2006 was mentioned in nearly half of all constitutions (Deacon 2016: 7).

Simultaneously, over time culture and cultural rights (especially recognition of the importance of diversity) have come to be seen as crucial to national and international peace, social cohesion and development. This is exemplified for example in the UNESCO Universal Declaration on Cultural Diversity, which stated that 'respect for the diversity of cultures, tolerance, dialogue and cooperation, in a climate of mutual trust and understanding are among the best guarantees of international peace and security'(2001:1). Since then there has been a distinct shift in international law from focusing on individual rights and national culture, to minority group rights and cultural diversity. In 2008, the UN declared culture one of six cross-cutting themes of the UN Agenda, on the sixtieth anniversary of the Universal Declaration of Human Rights (1948).[2] The choice of culture was explained as follows: 'The concept of Human Rights is bound closely to the belief that culture is precious and central to our identity. The way we are born, live and die is affected by the culture to which we belong, so to take away our cultural heritage is to deny us our identity. At the same time, we can all benefit from the experience of other cultures and we have something to offer them in return'.[3]

One might question, from the standpoint of complex pluralistic societies, some assumptions embedded in this statement, including the implication (in its use of the singular) that human beings only 'belong' to one culture. In a globalised world characterised by migration, displacement, mixing and intermingling, many people increasingly identify with several 'cultures' simultaneously, and may choose to reject their birth culture (if indeed that was mono-cultural in the first place) in favour of identification with a cultural melange – or an identity that does not rest upon conventional notions of culture at all, such as LGBTI, gender, faith group, secularism, class, disability, political or other philosophy. As Ted Cantle writes, as part of a

[2] The other themes were Dignity and Justice, Development, Environment, Gender, and Participation.
[3] Resolution 10/23 of the Human Rights Council, March 2009.

debate about interculturalism versus multiculturalism: 'notions of identity are also being profoundly changed as a result of the growth of the "mixed race/mixed faith/mixed nationality". Public policy has never recognised a mixed race community; it simply does not fit into any of our purist, essentialised (and inherently racist) boxes. It is still seen as being "other", but not part of any particular groupist category' (Cantle in Antonsich et al. 2016: 475).[4] This particular scholarly debate and commentaries on it discuss a range of examples of contemporary societies living (as the authors describe it) not *with* but *in* diversity, and vice versa. (Quebec is flagged as a positive example.) It is highly pertinent to Kenya and our own discussion.

Diversity has generally come to be seen as 'a good thing', so long as it is not deemed to be in tension or at odds with national unity, an ideal encapsulated in 'unity in diversity' – a favourite state mantra in Kenya, as it is in many other multicultural societies. But how has that concept played out in practice in Kenya since 2010, when cultural rights were enshrined for the first time in the country's constitution, whose preamble declares that the 'people of Kenya [are] proud of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation'? What impact has devolution had upon the diverse (and sometimes fiercely antagonistic) components of a nation in which millions of Kenyans, particularly those in urban areas, now live in mixed communities that may be more heterogeneous, yet simultaneously close-knit, than they have ever been historically?

Culture in the Kenyan constitution

Citizens made numerous submissions about culture and traditions to the Constitution of Kenyan Review Commission (CKRC) (2001-2), as it wrestled with how to encapsulate the concept in the draft constitution. Some said: 'Our differences should be seen as a strength and not a weakness'. Less progressively, some people harked back to colonial-era taxonomies of 'tribe' with calls for a 'mechanism to establish [the] number of communities "not mythical 42 only"'.[5] Some 'communities' or their representatives, seeing this as an opportunity to resurrect (and in the process misinterpret) *majimboism*, called for people to return to their 'ancestral' lands and for the

[4] For more information on Cantle and his scholarship see http://tedcantle.co.uk/about-me/

[5] CKRC National Constitutional Conference. Verbatim Report of the Technical Working Committee M (TWC M) Culture. Held at Bomas of Kenya on 24 September 2003. For a discussion of problems around the official classification of '42 tribes', recently increased to 44, see Zein Abubakar's chapter in the earlier companion volume Ghai and Ghai (2013). He calls for 'demystification of the idea that Kenya is made up of 42 communities': 30.

exclusion of other ethnic groups from these territories.[6] Discussions between members of the Technical Working Committee on Culture echoed some of these refrains. Rapporteur Kavetsa Adagala attempted to counter talk of 'tribes' among her colleagues, who invariably introduced themselves according to ethnic group, by warning against Ethiopian-style ethnic federalism: 'We need to learn each others' languages, or we need to inter-marry, all that so that it is not [sic] that purist vision, like Ethiopia has.'[7] Many people referred to traditional knowledge, and the importance of protecting it. Tension between sub-national and national identity was already apparent here, but the CKRC's recommendations were clear: 'that our shared experience and values should form the basis for building our *national* cultural identity' (emphasis added). This report placed multiculturalism centre stage, described as a principle that 'embodies the ideals of reconciling respect for diversity with concerns for societal cohesion and the promotion of universally shared values and norms' (op. cit.: 89). Other recommendations on how culture should be recognised in the constitution included respect for African traditional moral values, languages, religions, beliefs, practices, and recognition of heroes. At the same time the CKRC's report emphasised the need for 'nationhood', recommending 'real national commitment to stamp out ethnocentrism, racism, xenophobia' (op. cit.: 97). At this stage of the review process there was considerable support for a chapter on culture, with environmental campaigner Wangari Maathai among those most vocal on this point at the Bomas talks. The Bomas Draft (the product of the National Constitutional Conference deliberations, 2003-4, on the CKRC Draft) had a substantial chapter on culture, and tried to capture the idea of diversity with unity (clause 25). It recommended the establishment of a National Commission on Culture to promote research into and documentation of the cultures of Kenya, protect cultural sites and historic monuments for the benefit of communities for which these sites have significance, as well as for the nation, and the promotion of Kiswahili and vernacular languages. The Commission never materialised.

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[6] These sentiments were expressed at some of the public hearings. See for example the Verbatim Report of the Constituency Public Hearings, Kajiado North Constituency, at Magadi Cinema Hall, Magadi, 15 July 2002. With regard to the overused terms 'community' and 'communities', which are arguably too ubiquitous to be meaningful and have also come to suggest an undifferentiated homogeneous mass, we would prefer the terms collectivities, groupings or groups. For a discussion of issues around this terminology, see for example Hughes forthcoming 2017; Waterton and Smith 2010.

[7] The Final Report of the Constitution of Kenya Review Commission (10 February 2005). Kavetsa Adagala, who died in 2014, was a member of the Constitution of Kenya Review Commission, and Co-Chair of the Taskforce on Culture.

Though the first draft by the Committee of Experts (2009) largely followed Bomas, the culture chapter was dropped from the final draft, along with plans for a National Commission, on the basis of the Parliamentary Select Committee's objections that 'culture need not be entrenched in the Constitution'.[8] The most substantive provision in the final document is Article 11, which states that the constitution 'recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation'. This article also refers to promotion of 'national and cultural expression' by various means, promotion of intellectual property rights, the enactment of laws to ensure communities receive compensation or royalties for 'the use of their cultures and cultural heritage', and recognition of indigenous seeds and plants used by communities. Language and the right to cultural life are dealt with in Article 44, together with a prohibition against forcing anyone to perform, observe or undergo a cultural practice. Various other provisions elsewhere in the document concern culture and communities, including marriage and family life, choice of life styles, community land, minority communities, and religion and belief.

There are two ways of viewing the chapter's 'disappearance': either the original chapter was watered down to near invisibility, or the more positive view that culture was mainstreamed.

What has happened since?

When the constitution was promulgated, indigenous groups in particular heralded it as opening a new chapter in the claiming and exercise of cultural rights. In fact take-up has been relatively disappointing, though we shall go on to describe some exceptions. Yet *notions of culture* [9] have become ubiquitous and are increasingly employed in the devolved counties in particular, in positioning by lobby groups, and in claims by specific communities for the return of alienated land and resources, or for an increased stake in revenues and the fruits of development.

[8] The Parliamentary Select Committee recommended its deletion from the harmonised draft in January 2010, expressing the view that 'culture need not be entrenched in the Constitution'. Report of the Parliamentary Select Committee on the Review of the Constitution on the Reviewed Harmonized Draft Constitution, 4.4: Chapter 3: National Values and Culture (2010: 7).

[9] We use the term 'notions of culture' to refer to a broader spectrum of 'things cultural' besides what the word 'culture' may otherwise imply. Notions may encompass received ideas, idealised concepts, beliefs, impulses, desires, and 'a vague awareness or understanding' (Concise Oxford English Dictionary, Tenth Edition, 2002: 974).

Why has there been such low take-up? One reason may be that many Kenyans remain ignorant of what the constitution generally says, let alone its cultural provisions – there was little or no civic education on culture, hence it is hardly surprising that most citizens are unaware of these particular articles. While the Protection of Traditional Knowledge and Cultural Expressions Act, 2016 purports to be concerned with "promotion of the traditional knowledge and cultural expressions", it is mostly concerned with the protection of traditional knowledge rather than dissemination of or about it.[10] Provisions for civic education, although limited and couched in terms of stimulating public discussion and awareness, not education about cultural rights *per se,* did not survive the enactment process. Secondly, in order to claim rights via judicial means people require sufficient funds to pay lawyers, which is prohibitive for many individuals and communities. However, litigation is not the main way to give life to a constitution, and turning to courts should not be a first resort, so we should not be unnecessarily concerned about the low number of judicial claims brought since 2010 that centre upon cultural rights. Furthermore, many Kenyans do not trust the judiciary or the courts, and since the court processes often seem interminable people prefer to turn to alternative customary mechanisms such as traditional dispute resolution processes led by elders. The constitution pledges to promote alternative forms of dispute resolution, so long as they do not contravene the Bill of Rights, are not used in a way that is 'repugnant to justice and morality', or are inconsistent with the constitution and other written laws (Art. 159 (1c) and (3)). The trend towards citizens' greater use of alternative mechanisms in itself constitutes an increased exercise of cultural rights.[11]

So, we may conclude from early research findings[12] that the constitution is only one of a number of factors in a constellation of forces, drivers or developments which have led to raised awareness and increased use of notions of culture and heritage in public discourse and socio-political-economic practice in Kenya today. Other factors include devolution (which is central to the constitution but should be treated separately, for our purposes, from its cultural provisions)

[10] The Protection of Traditional Knowledge and Cultural Expressions Act, 2016.

[11] This is perhaps witnessed in how the notion of 'alternative' plays out. In some instances, the traditional is alternative while in others it is the courts that are an alternative.

[12] Authors Lotte Hughes (Principal Investigator) and Steve Ouma Akoth (consultant) are members of the research team working on the ESRC-funded project Cultural Rights and Kenya's New Constitution (2014-17), based at The Open University, Milton Keynes, UK. Celia Nyamweru is a former member of the project's Advisory Board, and has kindly contributed in numerous ways to the project and research outputs. Zoe Cormack, whose case study research is briefly cited, was the project's Research Associate until June 2016, later replaced by Mark Lamont.

and its tendency to reify and reinvigorate awareness of bounded ethnicity and assumption of mono-culture;[13] a deepened anxiety among citizens about identity, land, belonging and socio-economic security, all of which can be linked to 'culture'; and the drive to commodify culture as an economic resource, especially at county level where governments are aggressively using ethnicised notions of culture to brand counties in order to boost tourism and attract foreign investment. Furthermore, we have noted the uses of 'culture' as a political propaganda tool, especially in the protracted run-up to elections in August 2017 where politicians openly 'used' Councils of Elders, and vice versa, in a bid to ensure that 'their' community would get to 'eat' (a euphemism for enjoying the fruits of political power and patronage); UNESCO's increasing promotion of culture's role in development, though most Kenyans will not be aware of this (see its 2016 report); and more generally a continuing post-independence response to colonial oppression of Africans and their culture, which manifests (not only in Kenya but in many post-colonial states) in a quest for a 'return to self' (e.g. Biko [1987]; Thiong'o [1993]; Fanon [1967]). At the supra-national level, Kenyans linked into internet activism are increasingly aware of and inspired by global indigenous and minority rights' discourses and activities which employ culture (or notions thereof) as a lobbying tool and means to achieve broader rights, including those to land. There are many examples of this, including activism by Ogiek people, Endorois (Lynch 2011), Sengwer-Cherangany (Lynch 2016), Maasai (Hughes 2016), and struggles for recognition and citizenship by minority groups such as Nubians (e.g. Njagi 2013).[14] Furthermore, we are seeing culture and heritage being 'revalorised' by certain groups in response to large infrastructure development plans, in for example Northern Kenya, Lamu County and sections of the Rift Valley. 'Cultural heritage' seems to be emerging as a way of negotiating change at grassroots level, one example being Borana pastoralists' attempts to revive customary institutions in Isiolo County (Cormack 2016).[15]

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[13] One example is the explicit promotion of mono-ethnicity in cultural festivals organised (very often) by county governments, which, in counties dominated by one ethnic community, such as the Maasai-dominated Narok County, are fast becoming vehicles for the reification of single communities, and the marketing of mono-ethnic 'culture'.

[14] This story described how two new Nubian cultural ambassadors were 'unveiled' at Bomas of Kenya, to mark Nubian Cultural Day. See References.

[15] Major projects in development, largely part of Vision 2030 plans, include LAPSSET (Lamu Port-South Sudan-Ethiopia Transport Corridor), geo-thermal energy expansion in the Rift Valley, and the Lake Turkana Wind Power Project, the 'single largest private investment in Kenya's history', according to http://ltwp.co.ke/ These and other extractive projects have provoked widespread protest and opposition, although some citizens and civil society groups are positioning themselves in relation to these 'opportunities', in hopes of benefiting from them.

Cultural impact of devolution

Heritage scholars including one of these authors, have previously argued that 'Kenyan devolution is exacerbating [the] trend towards the reification and essentialisation of bounded sub-national identities, and with it the idea that heritage is bounded too' (Fouére and Hughes 2015:550). Kenyans' growing obsession with boundaries began long before 2010, starting with the political enforcement of ethnic identity and separation under colonial rule, but appears to have increased apace since devolution was implemented.[16] Earlier, historian and former heritage professional Karega-Munene had warned that constitutional provisions including safeguards for the culture and identity of marginalised or minority communities, devolution, and the likely emergence of 'ethnic or 'tribal' county museums outside the control of National Museums of Kenya, could 'Balkanise the country along ethnic/cultural lines given that that majority of the counties are essentially single ethnic entities' (Munene 2014: 44). This trend is borne out in our current research, although we will also discuss more positive shifts and developments[17].

An unwitting outcome of devolution includes the (apparent) increasing gravitation of citizens, partly for economic reasons, towards predominantly mono-ethnic counties – or at least, counties dominated by a single ethnic group or closely related groups (e.g. Gikuyu, Embu and Meru). Some Kenyans may regard this as a positive move. Counties may claim otherwise (see for example Embu County's draft Culture Bill which talks of encouraging inter-cultural dialogue and respect), but mono-ethnicism is manifesting itself in many ways, such as in the proliferation (as Munene warned) of private and county-run museums centred on preserving the cultural heritage of single ethnic groups.[18] Another worrying trend is the tendency for new satellite universities in particular to recruit their academic and other staff overwhelmingly from single

[16] 'In the colonial period, ethnic identity and separation were politically enforced. Although forged through colonial experience, this form of the state survived alien domination' (Mamdani 1996: 286). Concern over constituency boundaries and the implications of these for groups such as minorities was evident in many of the CKRC hearings, e.g. see memorandum presented by Tachoni people, Verbatim Report of the Constituency Public Hearings, Webuye Constituency, Ndivisi Secondary School, 6 August 2002. All these reports are freely available online.

[17] The CKRC was aware of these ethnic developments which go contrary to the orientation of the constitution. So it tried to build in safeguards. See art. 174 (b) and (e), art. 177 (1) (c), and art. 197 (2). Other safeguards include the use only of English and Swahili for official purposes, and the very considerable protection of minorities in the Bill of Rights which bind county governments.

[18] Embu County Cultural Heritage Bill 2015, seen in draft. Embu County Gazette Supplement No. 30 (Bills [sic] No. 7), 2015. Under 'Objects of the Act' it states the intention to 'protect and promote the diversity of culture and cultural heritage in the County' and to 'encourage dialogue among persons of different cultures and cultural heritage to promote inter-cultural respect and mutual benefits (point 3, e and f: 90).

communities, which means that students (also predominantly drawn from those same communities) are not being exposed to diversity.[19] Moi University recently witnessed the unedifying spectacle of mass protest, led by two county governors and a county assembly speaker, against the appointment of an acting vice chancellor who was not Kalenjin, with protesters asserting that the university was Kalenjin. Clearly, notions of the righteousness of mono-ethnic institutions, supported by mono-ethnic counties, was at play here.[20] Yet another example is the public and media fanfare that accompanies the 'homecomings' of Nairobi-based political leaders when they visit their presumed homelands. Though this phenomena pre-dates devolution, homecomings crucially centre upon the public performance of 'culture', and may be interpreted as attempts to demonstrate the relationship between an elite politician and their 'original' culture, and to cement the relationship between a political patron and their clients. For a useful South African comparison, see Herwitz (2015) on President Jacob Zuma. Herwitz regards Zuma's public performance of his relationship to culture, through for example dancing and wearing 'traditional' dress, as an attempt to demonstrate the continuation of his relationship to Zulu ethnicity. Herwitz suggests that Zuma employs these devices in particular when he is in political trouble (Herwitz 2015: 45). Similar observations may apply to the homecomings of members of the political elite in Kenya, most strikingly after the termination of the International Criminal Court (ICC) cases against President Uhuru Kenyatta and his deputy William Ruto – although these mass public events, especially that held principally for Ruto and fellow indictee Joshua arap Sang at Nakuru's Afraha Stadium in April 2016, were dubbed 'thanksgiving' prayer rallies, by both the government and local media.[21]

- <u>Self-segregation</u>

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[19] Also see the National Cohesion and Integration Commission report described in the story 'Report: Six communities hold nearly three quarters of all jobs in public universities, colleges', *Saturday Nation*, 20 August 2016. The six are the Kikuyu, Luo, Luhya, Kalenjin, Kisii and Kamba. Kikuyu are reported as occupying 23.6 per cent of all such jobs. The story's strapline, at least in the online version, was: 'Skewed picture does not reflect national face.' No byline. http://www.nation.co.ke/news/six-communities-hold-nearly-three-quarters-of-jobs-universities/1056-3352304-icxnu0z/

[20] Michael Ollinga, 'North Rift leaders storm Moi University in protest against the appointment of acting VC', 20 Sept. 2016, *Standard Digital.* Seen online at: www.standardmedia.co.ke/article/2000216731/north-rift-leaders-storm-moi-university-in-protest-against-appointment-of-acting-vc

[21] All members of the so-called Ocampo Six attended this event. http://www.president.go.ke/2016/04/10/thank-you-for-anti-icc-prayers-president-tells-kenyans/. A closely related phenomenon to homecomings, though more rare and arousing greater controversy, is the anointment as 'tribal' elders of elite politicians from a different ethnic group Notably Raila Odinga was made a Gikuyu elder on 20 July 2008 at Ruring'u Stadium, Nyeri. Former President Moi was given similar treatment in the early 1990s, and Jomo Kenyatta was made both a Luo and Luhyia elder. Also see McIntosh 2009.

In some regions it appears from anecdotal evidence that out-migration to cities for economic reasons is reversing, and that this is having unexpected cultural impacts. When asked what impact he felt devolution had had on people's engagement with and awareness of culture, one former Narok County MP put it this way: 'We are able to get employment now in our own places. Long time ago it used to be in Nairobi only. Our treasury is also there [in the county], our health department, our water department. So you find that somebody easily gets a job in Narok without having to go to Nairobi. So we start identifying with one another, we are [living] closer to the people who are close to the culture and live it every day. My children go to school in Narok and they live with their grandparents, not on a [Nairobi] estate.' All this is producing heightened awareness, he believed, of cultural traditions and the need to embrace them, for fear of loss – especially among indigenous and minority peoples.[22] He regarded this as a good thing, but it may also be interpreted as evidence of an increased withdrawal into ethnic enclaves.

In her insightful new book on white identity in Kenya, Janet McIntosh refers to 'benign cultural insularity' and 'self-segregation' with regard to the country's white community (that is, Kenyan citizens of European descent, not expatriates who are only in the country temporarily). This group is not (together with Somali Kenyans, and Nubians, among others) included in the 42 official 'tribes' – and is often excluded from discussions about national culture, both scholarly and popular.[23] McIntosh argues that self-segregation is 'a common pattern in Kenya', and that whites use it to justify their insularity – some claiming that they are only acting like other 'tribes' in this respect, and that this tendency therefore makes whites *more like* other Kenyans. Nairobi-based whites from former settler families, for example, tend to choose to live in Karen and Langata. 'Some speak wistfully about the divide', others not. They rationalise it as 'a national thing … to cluster along ethnic lines'. Businesswoman Naomi is quoted as saying: 'I'm a *Kenyan,* so I live the other side of town. I'm rooted here and I find I mix more with people this side of town. Whether (or not) I find them to be the most interesting. Actually, I probably don't' (emphasis in original). McIntosh quotes another informant, Clem, as saying: 'People stay in their

[22] Conversation with Lotte Hughes, Nairobi, April 2016. The name of the former MP is withheld for ethical reasons, since this was a private meeting about other matters, rather than part of the cultural rights research project.
[23] Asian Kenyans, on the other hand, were recently said to have been recognised as the 44th 'tribe' (the 43rd being the Makonde). For one—unenthusiastic—reaction to this, see Zarina Patel and Jill Cottrell Ghai, 'Big Read: A tribe, a nation, a people – or just Kenyans?' *The Star*, 14 August 2017. https://www.the-star.co.ke/news/2017/08/14/big-read-a-tribe-a-nation-a-people-or-just-kenyans_c1615522.

own cultures. It's the same even within the black culture, there's tribal divisions. They are the same, the Kikuyus, the Luos, they are doing exactly the same as us' (McIntosh 2016: 122, 123). This has also been illustrated by Grace Ogot (1988) in her short story *Land Without Thunder*. Ochola, the main character in one of the stories in the volume, which gives the book its title moves to the 'Promised Land' where he succumbs to a mysterious illness which cannot be cured by medical means in the far-away *dala* (homestead) that he has built away from his homeland. Eventually, he turns to his homeland in Seme where he is attended to by a local medicine man in his father's homestead, and he gets healed. Ogot's account draws from local oral histories and provides insights not just into the subject of Afro-modernity but most importantly about the meaning of belonging and how land among most Luo people is itself culture. This claim is, however, belied by the fact (mentioned earlier) that in cities and other urban areas Kenyans are increasingly living in ethnically-mixed communities.

- <u>Branding of counties and tourism promotion</u>

The increasing commodification of culture is clearly seen at county level, where it has become central to branding. It is a vital ingredient in county government efforts to attract investment and tourism, exemplified in the advertisements governments placed in the national press in 2015 to commemorate two years since devolution, in county newspapers and in online marketing. Mono-ethnicity is again strongly evident here. Some counties are luckier than others in having iconographic 'culture for sale' that has immediate global recognition value (for a wider discussion of the commodification of culture and ethnicity, see Comaroff and Comaroff 2009). For example, the professionally-produced video on the home page of the Narok County website was (at the time of writing, July 2016) laden with clichéd images that intersperse the annual wildebeest migration with leaping Maasai warriors, sunsets over the Mara, lone warriors standing on one leg, and more wildlife, ending with a close-up of a roaring lion that (maybe unwittingly) simulates Hollywood's Metro Goldwyn Mayer trademark image. This, and other videos on the site, are designed to market the county as an international investment opportunity. Guess who is doing the sales pitch? Two young Maasai women dripping with beaded jewellery, who are named as Sianto Sikawa (Miss Tourism Africa) and Stephanie Dikirr (Miss Tourism Narok 2015). They may look thoroughly 'traditional', but they reel off economic indicators (wheat, barley, milk, gold, energy, tourism) in eloquent English as if addressing an international

trade show.[24] This is cultural performance par excellence, and as in any branding exercise, it essentially signifies *difference*. The unique selling points of Narok County (which are presented as rooted in culture-nature) are cited repeatedly, by both these women and Governor Tunai, as evidence that Narok is *the* place to do business. The Misses Tourism are the embodiment of these signifiers of difference; they are portrayed as 'traditional' and 'authentic', while simultaneously selling 'modern' commodities on a global stage. Something similar can be seen in the dozens of other Miss Tourism competitions and beauty pageants that have flourished nationwide since devolution took off.[25]

- Legibility

The notion of legibility is a central project in state production and governance, and useful for our discussion. Legibility refers to various processes deployed by the state to make meaning and/or attempt to homogenise the diverse population in its geographic boundaries. These include mapping, surveying, census and spatial planning. James Scott (1998) describes it as being characterised by an array of processes including national censuses, standardization of language, abstraction, codifications, simplification and numerous valorisation procedures that are deemed to be scientific. These so-called 'scientific processes' capture the 'optic' (or the perspective of seeing) of the state, often at the expense of local knowledge. In the case of Kenya, we suggest that recognition of cultural diversity as an avenue for governance has provided a useful 'optic' for citizens. The post-1963 nation-building project, characterised by gross mis-governance, has resulted in the alienation of the majority of citizens from the state. That process has also had the undesired result of reifying localised identities and particularised notions of the state.[26] The idea of acknowledging and embracing diversity, as captured in the Preamble and other articles of the CoK, creates space for multi-vocality in expressing what Kenya is. Such an approach of

[24] www.narok.co.ke In December 2016 Lotte Hughes met Stephanie Dikirr, who was a VIP guest at an (anti-FGM) Alternative Rite of Passage organised by the NGO World Vision at Siyapei, Narok County. No longer a Miss Tourism, though she was (re)playing the role that day alongside other Misses Tourisms from different parts of Kenya, all involved in the campaign against FGM, she was employed as a PR/marketing officer for Narok County.

[25] Videos on the Narok County site may be contrasted with investment videos on other county sites, e.g. Siaya, which barely mentions culture. Mombasa County predictably features heritage tourism and cultural performance, while Homa Bay boasts that its 'very own local hero lives with us' – in the shape of the mausoleum of assassinated politician Tom Mboya. It fails to mention how and why he died.

[26] Here we mean the trend and practice whereby the nation state tends to be understood on the basis of its manifestations at local level rather than descriptions of it in metanarratives, notably nationalist ones.

accepting multiple voices tends to make clear and give importance to questions of situated[27] governance that takes into account local interest, situations, actors and the state-citizen relationship. These multi voices have persisted but are largely marginalized in the pursuit of mono lingua such as 'accept and move on'.[28] In a context of political patronage that characterises governance in Kenya, the localized experience of many citizens has often been negated with the use of the political mantra *siasa mbaya maisha mbaya.*[29]

Indeed, under the previous constitutional dispensation[30] and authoritarian presidency (as Anyang' Nyo'ngo' [2007] calls it), it was not unusual for questions concerning governance and accountability raised outside the capital to be dismissed by state bureaucrats in Nairobi as mere vernacular matters. In this way, recognition of diversity and especially ethnic diversity (also read as cultural diversity) present an alternative visual economy in Kenya's state-citizen relationship. The incorporation of notions of culture and tolerance for diversity seem to have contributed to legibility and visualization of local realties in a way that moves beyond how the state has always been seeing.

- <u>Pathways towards pluralism?</u>

The increase in cultural performance since 2010 – in which we include not only blatantly cultural phenomena such as festivals (more on these below) and county branding, but also some of the activities of Councils of Elders, Alternative Rites of Passage (alternative female initiation ceremonials), and other examples we will mention shortly - may be read more positively than some of the above discussion suggests.[31] They have the potential to put Kenya on a trajectory towards a plural society. Other examples of burgeoning pluralism include the Storymoja Literary Festival (held outside Kenya for the first time in 2016, when it moved to Ghana); the bi-enniel

[27] The use of 'situated' here assists us in appreciating the various histories and geographic exclusions in Kenya. It moves beyond metanarratives such as *maendeleo* and *harambee* that displaced particularized concepts and quests for progress.

[28] See Steve Ouma Akoth 2015. 'We have moved on': human rights and intersubjectivity in post- 2007/2008 violence in Kenya. *Acta Academica* (2015) 47(1): 228-246.

[29] Meaning bad politics, bad life.

[30] This was especially so in the period 1964-1978 under President Jomo Kenyatta, and later during the regime of President Moi (1978-2002).

[31] Lotte Hughes will be writing about her research on FGM/FGC and Alternative Rites of Passage (ARP) in forthcoming articles (it is the focus of a case study within the cultural rights project previously cited). A relatively new invention, ARPs are promoted by NGOs, donors and campaigners working to end FGM/FGC in Kenya as an alternative to initiation for girls in a number of ethnic communities where FGM/FGC is still practised. ARP aims to replicate 'traditional' initiation but without the physical cut, and includes purportedly 'cultural' elements. They may be read as forms of cultural performance.

Samosa Festival;[32] a Maasai-Indian Kathak dance fusion event in Nairobi in 2009; [33]and the Sigana Storytelling Festival for children, held this year in Nakuru (previously Nairobi). The last event attracted participants from not only Kenya but also Tanzania, South Korea, Singapore and Ethiopia. A librarian involved in the event, who organises regular storytelling sessions for children in a local library, was indirectly quoting as saying, 'Nakuru being a cosmopolitan county, the [storytelling] sessions have helped the children to live harmoniously and peacefully with each other'.[34] However, many of these events are urban based and beyond the reach of poorer rural Kenyans, hence these pluralistic messages may well not be reaching more remote and marginalised populations, especially those that may feel threatened by incomers.

- Cultural festivals

During the process of negotiation towards the new constitution after its promulgation in 2010, practices and events that are invariably framed as 'celebrating culture' that are largely used to "position various constitutional claims"[35] have proliferated, and received increasing media coverage. One example is cultural festivals, which have become commonplace across Kenya, especially in December.[36] This is the time of year when many Kenyans leave the cities, their urban dwellings (as opposed to homes) and places of urban employment to go 'home' – up country. Home, as captured by Cohen and Odhiambo (1992) in the famous case of the burial of S. M. Otieno, is seen as the place of culture. While carrying out research in Western Kenya, co-author Steve Ouma Akoth encountered the practice where residents, particularly women, would move from homesteads and reside in shopping centres or/and settlements in urban areas like Nairobi or Kisumu because they had not fulfilled certain 'appropriate cultural requirements' such as wife custodianship or proper establishment of *dala* (homestead).[37] This tends to suggest

[32] The stated aims of the Samosa Festival are to 'create cross-cultural awareness and interactions with a view to develop a national identity irrespective of the ethnic backgrounds of the citizens and residents of Kenya'. www.samosafestival.com/about

[33] The new dance form was dubbed Fusion Indo Maasai. See http://www.nation.co.ke/magazines/lifestyle/-/1214/519210/-/8wss4ez/-/index.html

[34] 'Nakuru hosts annual Sigana storytelling festival', *Sunday Nation*, 19 June 2016. Sigana was described as 'a Luo word meaning story'. Storymoja also held a Read Aloud for Peace and National Cohesion event in June 2016 in Nairobi, which appeared to share a similar ethos.

[35] See Steve Ouma Akoth (2017). 'Positioning and making citizenship through Obama K'Ogelo Cultural Festivals in Siaya County, Kenya', *Journal of African Cultural Studies* 29 (2): 194-210.

[36] We are not referring here to other types of festival such as school festivals, events such as the Samosa Festival, or others organized by radio stations that broadcast in vernacular languages.

[37] The project data will be archived at the end of the project.

inscription of culture on land. Indeed Akoth (2017), has argued that land in postcolonial Kenya ought to be read as culture. But that culture is no longer passive or a matter of private practice as was the case for many years. Rather, culture is now a public practice, where local residents of 'homelands' make legible their questions and demands to the state.[38]

Cultural festivals observed in Siaya County in December 2014 attracted women's dance groups, *Ajua*[39] players, exhibitions of batik textile, mats and traditional regalia. They also drew Members of the County Assembly and the Deputy Governor, who used that occasion not just to join the local residents in dances but also to give speeches on what they had done for their people. It was clear that, while the organizers treat these as autonomous community events, they tend to be organized around political elites, with song lyrics and dances manifesting as praise songs for local politicians. One example was the *Dodo*[40] dance performed by women, mostly widows from the larger Siaya area. The dance builds on popular Luo rhythms, and the accompanying lyrics predominantly sing the praise of leaders and urge them on to defend the rights of the community. Informant Monico Mbitho, who leads the Riwrok Women Group, explained that one right they require their leaders to lead on is land rights.

According to Collins Odhiambo from Siaya County's Department of Education, Youth Affairs, Gender, Culture and Social Services, the role of cultural festivals is to promote the county's identity. He said the County Government saw cultural festivals as having the potential to attract tourists and raise income for the county, while also allowing for interaction between citizens of the county. Although attendance was rather small (approximately 500 people), it seems that the county government had invested a lot of money in it.

While the County Government has been organizing cultural festivals for political purposes such as described above, the festivals such as the Migwena Cultural Festival (also in Siaya County) reportedly date back to 1928, and were started by four senior chiefs of Bondo Division. They began as various games played by teams of market traders. Since 2008 the events have taken a

[38] Co-author and anthropologist Steve Akoth noted this when carrying out research at the Siaya Cultural Festivals on 19 Dec. 2014 and the Migwena, Bondo sub-county, Siaya County, Cultural Festivals on 29-31 Dec. 2014 and 1 Jan. 2015.

[39] The Luo version of a game involving a wooden board and seeds played through East and West Africa, with various names including Ayo, Mancala and Bao.

[40] *Dodo* is a type of traditional Luo music mostly used for entertainment at weddings, drinking parties and wrestling festivals. Songs are sung in praise of the happy couple, the hardest drinkers and the best wrestlers.

different form. Apart from attracting numerous corporate sponsors and the Ministry of Tourism, which uses cultural festivals to promote tourism and other forms of merchandizing ethnicity, politicians at both national and local level use the festivals to narrate their experience of the state. When the chief guest, MP Hon. Gideon Ochanda spoke during the 2014/15 cultural festivals, he narrated how he had used the Constituency Development Fund to support the youth[41]. What he was implying is that, as a local person, he was committing more resources and supporting local citizens in areas the state had neglected. As Peter Otieno Aduwa, one of the organisers of the 2015 Migwena festival, explained in an interview:

> You see, this cultural festival is one of the few places where people can learn about Kenya and where Luos can learn about themselves. This is important because in today's Kenya [meaning after the enactment of the new constitution] you have to belong somewhere. Your county is your home and indeed without having a home you will be left out there.

Festival goers see these experiences not as moments to distance themselves from the state and its history of dispossession and marginalization, but rather as a way of 'speaking to the state' through the narrative of culture.

What is apparent and most intriguing about cultural festivals is not only the way in which culture is scripted in these social spaces, but also the ways in which culture (in this case what is called Luo culture) intersects with state politics. Cultural festivals visualize and create imageries, using notions of culture that have been useful in constituting post-2010 citizenship in Kenya. This is why cultural festivals and the various performances of culture that are now widespread in Kenya are not merely about creating what Minkley and Mnyaka have described, in the context of heritage debates in South Africa, as 'more real, more accurate, or more able to articulate a meaningful heritage' (2015: 62). Rather, these events can be read as Derek Peterson, also writing on South Africa, has urged: heritage and the debates around it should be seen as a 'critical mode of political organization and governance' (2015:66). Engaging with cultural performances as modes of political organization and governance in contemporary Kenya enables us to speak not of multiculturalism but rather of pluralism, which furthermore allows us to understand the mingled nature of the cultural festivals. They are spaces in which politicians, local residents and other elites make legible their interests and claims using the language of culture and other realms

[41] In the framework of devolution this component is an obligation of the national government.

of diversity such as class, generation and gender. This mingled nature and context has promoted the assimilation of citizenship, albeit within a political culture of patronage and ethnicized capitalism in Kenya which promotes fusion rather than separatism. Such fusions, possible when every Kenyan (as individuals and communities) become legible, have the potential to produce the kind of realization to which the CoK Preamble referred – Kenya as 'one indivisible sovereign nation'.

Cultural rights: some problems arising

Areas of contention, apart from those already discussed, include the potential or actual exclusivity of cultural rights, which can be used to bind a particular group or community together and create a sense of belonging and identity for the group to the exclusion of others, rather than embrace and acknowledge the shared humanity and dignity of all peoples. This prompts some critics to assert that cultural rights are incompatible with universalised human rights. This is one of the areas where the Bill of Rights in the Constitution of Kenya attempts to make a precedent setting balance. This is partially responded to by the assertion in the preamble of the Constitution as well as the centrality of human dignity dated in Article 19. It is entirely understandable that some communities, particularly those that have experienced historical marginalisation and oppression, should wish to 'preserve' their cultural identity and cultural cohesion in the face of what they perceive to be attempted extinction – the swallowing up of their small group by larger and more dominant ones.[42] These concerns are evident in narratives of loss, which can be found in many oral traditions in the region (Kassam and Bashuna 2004: 201), and feed into what may be called an extinction discourse. Since devolution was implemented, 'minorities within minorities' have become increasingly vocal in their calls for greater recognition, as they feel the squeeze and invariably couch this in cultural terms (e.g. Carrier 2011 on the Yaaku who are rejecting their historical assimilation by Maasai on Laikipia.) In an attempt to secure benefits of one kind or another for the group (such as recognition, compensation, a bigger slice of the national or county cake, political power, economic development) there is a dangerous tendency for ethnic groups to seek to privilege and reify 'their' culture over others, and to reject assimilation, which is surely antithetical to the embrace and championship of diversity.

[42] Examples other those already mentioned include the attempt by Abasuba people to reassert their identity, culture and heritage as separate from the Luo community (e.g. https://rising.globalvoices.org/microgrants2013/kenya-voices-of-the-abasuba-community/); Yaaku moves to assert a separate identity from Maasai (Carrier 2011); and Waata Oromo efforts to establish themselves as separate from Borana and Gabra (Kassam and Bashuna 2004).

These are issues that scholars of multiculturalism have long wrestled with (e.g. Taylor 1994, and other contributors to that important volume.) Amy Guttman, in her Introduction to that collection, writes:

> Liberal democracy is suspicious of the demand to enlist politics in the preservation of separate group identities and the survival of subcultures that otherwise would not flourish through the free association of citizens. And yet democratic institutions, more than any others, tend to expose citizens to a diverse set of cultural values. Hence liberal democracy enriches our opportunities, enables us to recognize the value of various cultures, and thereby teaches us to appreciate diversity not simply for its own sake but for its enhancement of the quality of life and learning. The liberal democratic defense of diversity draws upon a universalistic rather than a particularistic perspective (Guttman in Taylor 1994:10).

However, many of our research contacts past and present, who include citizens engaged in non-state heritage activities that are in part centred on the reclamation of 'their' group's history and heritage from colonial and neo-colonial masters, for wholly understandable reasons, would profoundly disagree with that ethos (Coombes, Hughes, Munene 2014). Although when exposed to other communities within Kenya, people come to appreciate the shared values, traditions and histories that unite far more than they divide.[43] The aforementioned Samosa, Storymoja and Sigana Festivals also go some way towards achieving this.

The CoK is underpinned by a liberal democratic ethos, and also contains notions of separateness; for example, as we have noted, devolution aims to foster national unity by recognising 'diversity', but also recognises 'the right of communities to manage their own affairs' and aims to protect and promote the interests and rights of minorities and marginalised communities (Article 174). There is an obvious tension here. Furthermore, individual members of such groups may wish to exercise their right to 'opt out', and reject particular cultural norms they find

[43] This was one of the lessons that emerged from inter-ethnic exchange visits for community peace museums and other Kenyan cultural groups, an activity Lotte Hughes carried out with colleague Karega-Munene in 2009-11 with British Academy funding (Hughes 2011). Poorer citizens who are unable to travel widely within Kenya often have very little knowledge of other ethnic groups, and are susceptible to believing the stereotypical portrayal of these groups as 'Other' or 'traditional enemies', a notion peddled by elite actors for political gain, especially during election campaigns. But when they get to meet members of other groups, they may be agreeably surprised. See also Cantle 2016: 478: 'Intergroup contact needs to be made much more pervasive on an experiential learning basis, in which people can experience diversity in a non-threatening and enjoyable way'. He recommends scholars et al. take note of contact theory, claiming 'multiculturalists [have] generally ignored evidence from other disciplines and "contact theory" and other models of interpersonal and inter-communal dialogue … whereas it is central to interculturalism' (op. cit.: 477).

oppressive. One example of opt-out is the increasing rejection by girls and women in a number of ethnic communities of FGM/FGC and forced early marriage – harmful cultural practices which the constitution outlaws, without naming them (Article 44(3)). [44] Opting out can require an individual to 'choose between leaving the group and exercising their rights', which may not be a viable option (Deacon 2016: 11). Another example of opt-out is the trend toward young Kenyan males spurning customary law on bride price. High rates of youth unemployment are reportedly forcing more Kenyans to stay single because of high dowry demands from prospective in-laws. Local media reported in a story about changing marriage practices among the Bukusu, described as a sub-group of the Luhya 'tribe' of western Kenya: 'Judy Thongori, a family law advocate in Nairobi, warns that many are also opting for cohabitation and *cross-cultural unions* because of demanding bride prices' (Wanjala 2012, no page, emphasis added). Hughes's research findings on FGM/FGC also provide some evidence that young men are increasingly 'going out' (that is, looking outside their ethnic community) in search of partners from other ethnic groups, not for economic reasons but because they prefer to cohabit with or marry women who have not undergone FGM/FGC. One assumes that the reasons for this include the greater likelihood of mutual sexual pleasure.[45]

Elders, councils and culture

Certain special interest groups present specific challenges to the ideals of pluralism and diversity, and the attitudes and activities of such groups reflect tensions between 'tradition' and 'modernity' – although we share with other scholars a concern that this binary opposition is too simplistic. Continuity, change and rupture may be better framing devices.[46] Elders and Councils of Elders (CoE) are one such group: age-organised collectivities, overwhelmingly male, self-described as belonging to a particular ethnic group, that can and often do display intolerance towards other social groups, opinions or ways of life to which they may take exception in the name of 'culture', not only in Kenya but other parts of Africa. Elders and CoE frequently present

[44] This states: 'A person shall not compel another person to perform, observe or undergo any cultural practice or rite'. Scholars and practitioners disagree about the terms Female Genital Mutilation (FGM) and Female Genital Cutting (FGC), hence we give both here.

[45] These points were made by female informants in Lemek, Narok County, in research carried out by Lotte Hughes in 2015.

[46] See for example discussion of the attractions of Pentecostalism, for Kenyans 'struggling with traditional conceptualizations of religion', by Gregory Deacon (2015: 223-224), and debates among scholars of Pentecostalism over the binary opposition of tradition and modernity.

themselves as moral guardians, and gatekeepers of cultural tradition inherited from ancestors, to whom (to take but three contemporary examples) homosexuality, abortion and female dress choices that are believed to 'offend' traditional norms and customs are anathema, and liable to provoke public condemnation.[47] Indeed, women's rights, growing empowerment and independence are judged by some CoE to constitute an aberration from cultural norms. This was evident in a day-long discussion one of these authors (Hughes) had with an Embu council of elders, Nyangi Ndiiriri, in 2014. This council was then lobbying the Kenya government to amend the constitution so that elders receive more recognition – for example, of their role in dispute resolution and transmission of culture. The chairman turned to the researcher at one point and said derisively: 'A woman has *no* culture, only the culture of her husband or father!'[48] There ensued a lively discussion about gender roles, including what they saw as unfair development opportunities for women and youth, from which men are excluded. What they appeared to be expressing was not so much concerns about culture *per se* as anxiety about masculinity and the erosion of male power and 'traditional authority' in the modern world. These concerns are not, of course, confined to Kenya or Africa, but are evident in many other societies.

Morality, and actions believed to be repugnant to it, appear fundamental to CoEs' sense of their self-appointed role as transmitters and guardians of culture – although young urban men also invoked 'culture' in their vocal, sometimes violent, opposition to the My Dress My Choice protests.[49] Again, one may read these responses as reflecting a crisis of masculinity in a fast-changing world in which patriarchal norms are being steadily eroded. Secondly, it may be argued that elders/CoE have been and are increasingly complicit in the process of the political construction of difference in Kenya – examples of which are increasing by the day (Ghai and Ghai 2013:19). Elders' prominent role in the 'homecomings' of political leaders also manifests as a celebration or performance of ethnic difference. How does all this sit with pluralism, and acceptance of diversity that should (as the Ghais' earlier volume noted) go way beyond the toleration of difference?

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[47] For a nuanced discussion of the My Dress My Choice campaign of November 2014 see for example Nyabola 2015. The public stripping and assault of several women by young men in Nairobi, ostensibly because they were dressed 'indecently', sparked street protests and a social media storm, focused less on dress than gender violence.
[48] Andrew Ireri, chairman of Nyangi Ndiiriri, Embu County. Focus group discussion with Lotte Hughes at Aembu Community Peace Museum, Nembure, 16 November 2014. Many thanks to museum curator Njiru Njeru for translation and field assistance.
[49] These protests received extensive media coverage in Kenya, and were fiercely publicly debated.

Mijikenda elders on the Kenyan coast have come to be widely recognized as protectors of nature (particularly endangered *kaya* or sacred forests) and indigenous culture against the forces of modernization and commercialization, both internal and external to their community. They have also played an increasingly visible role in political campaigns, a role well described by McIntosh in her 2009 article 'Elders and "frauds"'. This has also been the case with elders' groups from other parts of Kenya, as vividly illustrated in many recent news stories.[50] What has attracted less attention is the extent to which these and other elders' groups have continued to function in other ways, notably in the administration of alternative justice. This is enshrined in the CoK (Chapter 10, Judiciary, Article 159).[51] However, alternative justice systems are not necessarily acceptable to other social groups, notably women and youth – nor indeed do they always correspond with broader constitutional values. This was illustrated in a news story from Makueni County in February 2016, when six people (four women and two men) described as clan elders were found guilty of pouring a mixture of sisal juice and pepper into a woman's private parts to punish her for drinking alcohol in a bar/lodging with a relative of her husband. The elders, 'who claimed to be conducting a traditional rite' were each sentenced to nine years in prison (Munguti 2016). An account of Kamba traditional law (Penwill 1951: 99) confirms that they were indeed conducting a traditional rite, one described as amounting to 'mild torture'. Yet many elders in other communities may agree with these six that they were attempting to 'instil discipline and order' by customary cultural means, and that this is both justifiable and necessary in what they perceive to be an immoral and out-of-control society.[52]

Councils of Elders, though not explicitly mentioned in the CoK, appear to be enjoying a revival that may partly flow from the constitutional clauses that recognise and promote alternative dispute resolution. Also, some counties in their draft cultural heritage laws recognize elders as

[50] Examples include: 'Embu supreme council of elders disown Governor Wambora' (*Citizen Digital*, 22 September 2015); 'Kikuyus should move to Nairobi for polls – elders' (*Weekend Star*, 27/28 February 2016); 'Elders on collision course with Meru leaders' (*The Standard*, 4 February 2015); 'Elders summon Moi son over Kericho poll' (*Daily Nation*, 11 March 2016): '[Purko] elders endorse Tunai's 2017 re-election bid' (*Daily Nation*, 2 August 2015).

[51] This states that courts and tribunals shall be guided by certain principles. These include the promotion of 'alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms', so long as they do not contravene the Bill of Rights, are not 'repugnant to justice and morality' or result in outcomes that are repugnant, or are inconsistent with the constitution (Article 159, 1c, 3a,b,c).

[52] Mwachiro 2016.

cultural guardians, as if they are the sole custodians of a community's heritage. According to former Chief Justice Willy Mutunga: 'Specifically, the Constitution requires the Judiciary to promote alternative forms of dispute resolution, among them reconciliation, mediation, arbitration and traditional dispute resolution mechanisms, as long as they are not repugnant to justice and morality, or are inconsistent with the Constitution' (Mutunga 2010). Many sources on African customary law stress that one of its key principles was the preservation of social order through reaching a mutually acceptable resolution rather than declaring 'winners and losers' (e.g. Penwill 1951). But elders' efforts to preserve 'social equilibrium' and the 'established state of things' that he discusses in relation to Kamba are not necessarily acceptable to other groups such as women and youth who, far from accepting the status quo, may seek to challenge and change it. This is another face of plurality, that goes above and beyond ethnicity.[53]

Conclusion

This chapter has not approached the subject of culture and pluralism as if pluralism (and its companion multiculturalism) only, or mainly, denotes ethnicity and multi-ethnicity. In this and other areas, the authors depart, with respect, from some of the ideas and definitions expressed in the earlier companion volume (Ghai and Ghai 2013). For example, we would not use the term 'cultural communities' (as do Ghai and Ghai: p 2), and nor do we concur that identities are, can or should be 'stable' – most social scientists and other humanities scholars regard identities, cultures and communities as profoundly, if not innately, unstable constructs and concepts.[54] We have tried to demonstrate that pluralism, and the cultural aspects of pluralism, also encompass such things as gender, sexual orientation, age and age organization, sub-cultures (in a social scientific sense) such as disability and faith groups, philosophies and lifestyles that have nothing to do with ethnicity, mixed-race identities and collectivities, and so on. Ethnicity is sometimes a cross-cutting identifier or self-identifier with regard to certain collectivities; for example, elders and their councils are groups also characterized by age and gender.

[53] From Nyamweru's research evidence, many if not most of the grassroots-level alternative dispute resolution activities facilitated by Councils of Elders take place in a single ethnic context. But she found examples of groups that function in more ethnically diverse situations.

[54] 'Multiculturalism is the term used to define those systems which provide for the constitutional and legal recognition of cultural communities' (Ghai and Ghai 2013:2). And, quoting Rajeev Bharghava 1999:1): 'the term "multiculturalism" … underscores the need to have a stable identity, emphasises the contribution of cultural communities to the fulfilment of this need and brings out the link between identity and recognition' (op. cit.: 2-3).

In the Kenyan context, however, culture, pluralism and multiculturalism are very often regarded – especially in popular, non-urban and media discourse, though the majority of citizens will be unfamiliar with, and do not use, the term pluralism – as being largely if not exclusively about ethnicity. In contemporary Kenyan society the term 'community' (which we prefer to avoid, or if unavoidable it should be problematized) invariably signifies a mono-ethnic grouping; 'culture' (as in the possessive colloquialism 'our culture') invariably signifies supposedly discrete and primordial mono-ethnic 'traditions' and ways of life; and diversity is interpreted as meaning a collection of mono-ethnic groupings co-existing side by side – the 42 (and counting) 'tribes'. In order to fully embrace diversity, to live *in* it not *with* it (to quote Antonsich et al. 2016, 'with' implying only *toleration* of difference), a lot more work may be required for citizens and state to move beyond this understanding and practice.

While the political class has, since 1963, made use of diversity (or promoted 'competing tribalisms' as Orwenjo *et al* [2010] have termed it) as the basis of negotiating or mobilizing for political power, for the large majority of Kenyans cultural diversity (in the sense of mono-ethnic groupings living side by side) has always been a resource and canopy from which to protect themselves from the vagaries of the market, state and political elites. It is in this context that the drafters of the new constitution openly decided to blend these aspirations for a unitary state with the practices and allegiance towards diversity – mainly ethnic. But, precisely because of the emphasis on ethnicity (both implicit and explicit), this may well not help to deliver a more pluralistic society.

We have argued that Kenya is not yet a pluralistic society, but that certain developments since 2010 have the potential to put Kenya on a trajectory towards this. However, research and observation suggest that devolved governance and the increasing employment of 'culture' in county-level policies, legislation and activities are tending to exacerbate, privilege and reify mono-ethnicism and essentialized, ethnicized identities.[55] Moreover, devolution appears to have led to greater tension and distance between national and sub-national identities, in the construction of which the mobilization and commodification of 'culture' is central. In this push-

[55] For a useful definition of essentialism, see McIntosh (forthcoming). 'Essentialism is a way of conceptualizing categories as if they obtain naturally, intrinsically, or metaphysically in the world, rather than being constructed by human myths and social dynamics. And, on cultural essentialism: 'the notion that "a culture" is neatly shared by a group, largely static, and determinative of deep, sometimes unseen qualities'. No page number can be given.

and-pull struggle between centre and periphery (or are former peripheries, aka counties, now becoming central?), sub-national cultural identities currently appear to be winning – not at all what the constitutional drafters intended. The increasing commodification of culture may also disadvantage many poorer or non-elite grassroots stakeholders, especially those who do not place a monetary value upon culture and are unlikely to comply (possibly because they are unaware of it) with official demands to register as cultural custodians or practitioners, demands central to draft national and county heritage and traditional knowledge legislation (see the work of John Harrington, e.g. 2014, forthcoming 2018.)

On the plus side, culture has become a more public practice than it was in the past (increasing visibility makes for greater inclusivity and knowledge flow, between different groupings and stakeholders, which can only be a good thing), and there has been a proliferation of different types of cultural performance, which can be read as modes of political organization. We have seen the emergence since 2010 of a cultural democracy which is animating alternative visualisations of citizenship. There is emerging evidence that 'culture' and 'community are becoming ways of organizing various forms of political action, with groups making use of the internet to form affinity groups within loosely transnational movements allied to ecological conservation, intellectual property or cultural heritage. In this process, communities whose knowledge was previously marginalised are using 'culture' as a mode of political organization and governance. These phenomena, examples of which we have discussed, attest to the ways in which the performance of culture in post-2010 Kenya is enabling more 'consultation' and 'inclusion'. Furthermore, they are making visible local histories, contestations and ideas about the state, thus contributing towards ongoing negotiations towards cultural pluralism in Kenya.

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