Summary: A comparative review of cultural rights provisions in the Constitution of Kenya and constitutions of other countries
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This paper compares and contrasts cultural rights provisions in the Constitution of Kenya with those in constitutions of other countries. It is part of a broader project exploring the impact of cultural rights provisions in Kenya’s new constitution, including rights for minorities and non-discrimination provisions, on Kenyan society and its heritage sector.

A new constitution was adopted by the Republic of Kenya in 2010, one of a large number of constitutions in African countries that have been revised since the 1990s. Since the second world war, cultural and minority rights have come to play an increasingly important role both in international law and within constitutions globally (Goderis and Versteeg 2014). The Constitution of Kenya makes all international agreements signed by the state part of national law (Lumumba et al. 2014), including human rights instruments such as the Universal Declaration on Human Rights and the African Charter on Human and Peoples’ Rights (the Banjul Charter) of 1981. The Constitution’s Bill of Rights (Chapter 4) protects basic human rights such as freedom of expression and artistic creativity (Kenya 2010: Art.33), and also recognizes other ‘cultural’ rights, such as the right to own communal land (Kenya 2010: Art.63).

A national constitution is both a political charter and a legal document (Muigai 2006), which makes it an important focus for the analysis of the link between culture, rights and politics in any country. The Constitution of Kenya was revised partly to address widespread dissatisfaction with the patchwork nature of 1963 Constitution, the lack of general principles of governance, ways of ensuring accountability, and checks and balances on public office (Muigai 2006). One of the aims of the revised constitution was to reduce ethnically-charged political conflict after the violence of 2007-8. Akoth argues that the ‘central motif’ of the constitution is to ensure that, in the spirit of human rights, differences between groups of people based on choice or birth, such as culture or language (‘horizontal pluralisms’) do not translate into ‘vertical pluralisms’, or differences in wealth, opportunity or social status (Akoth 2011:9, following Smith’s 1969 framework on pluralism). In contrast to the 1963 Constitution, drafted at independence from Britain, limitations on rights now have to be made in law, and to be ‘reasonable and justifiable’ given the principles of ‘human dignity, equality and freedom’ (Kenya 2010: Art.24(1)).

Article 11 recognizes ‘culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation’ and the state is given the responsibility to promote ‘all forms of national and cultural expression’. However, the concept of culture does different kinds of ‘work’ in the Constitution, as ‘values and principles of governance’ at the national level, cultural group identity at the level of communities (usually at the county level), and cultural creativity at the level of individuals. The paper explores how these different conceptualizations of culture in the constitution create

¹ This desk study was commissioned for the three-year ESRC-funded project Cultural Rights and Kenya’s New Constitution (2014-17), based at The Open University, Milton Keynes, UK. Principal Investigator is Dr Lotte Hughes, Senior Research Fellow in the History Department, Faculty of Arts. Enquiries about the project, up until it ends on 31 August 2017, may be addressed to: Kenya-Culture@open.ac.uk. We would be grateful for feedback on this report and especially information on how it has been used by readers and the organisations for which they work. Thanks to Steve Akoth, Zoe Cormack, John Harrington, Lotte Hughes and Rieks Smeets for their comments on the paper.
different kinds of rights and responsibilities, and how they compare to provisions in other constitutions.

First, in article 10.2, Kenyans as a nation are represented in the Constitution as united by common ‘national values’ such as ‘national unity, sharing and devolution of power, ... human dignity, equity, social justice, ... integrity, transparency and accountability’. This rather universalist view can be contrasted with the idea that the citizens of a state are likely to share a common African culture as a ‘national community’, as expressed in the Banjul Charter (OAU 1981: Art.29) and many constitutions in other African states.

Like the South African constitution, also drafted in a context of recent ethnic conflict and devolution of power, the Constitution of Kenya thus adopts a neutral approach to national culture as democratic values. According to one commentator involved in the drafting process, the constitution had to identify acceptable, common national values ‘central and critical to our social and political cohesion’ (Nyasani 2003: 103), to move away from ‘mutual phobia’ caused by ‘the traditional culture of blind prejudice and tribal profiling’ (2003: 101-2). In identifying these common values,

... the final document of the new constitution must, as far as possible, exhibit qualities of relative objectivity and palpable sense of detachment from possible narrow interests that may threaten to creep into it through the backdoor (Nyasani 2003: 98).

Second, the Constitution promotes cultural diversity and confers certain rights on culturally-defined communities at the sub-national level, while still promoting these national values. Compared to other constitutions globally, the Constitution is unusual in the breadth and depth of its provisions for minority rights. Minorities and marginalized groups are to be supported in promoting their culture (Art.56(d)), communities are to be compensated for use of their traditional knowledge (Art.11(3)), and communal land ownership is to be affirmed for culturally-defined communities (Art.63). The ‘diversity of language of the people of Kenya’ and ‘the development and use of indigenous languages’ are to be promoted (Art.7(3)).

Prohibition of certain cultural practices on human rights grounds is common in African constitutions (Ibhawoh 2000:848), but in a number of cases, African customary law and matters of personal law are exempt from human rights provisions. The Constitution of Kenya places limits on ‘harmful cultural practices’ (Art.44(3), 53(1)(d) and 55(d)). Individuals have the freedom to practise their culture as part of a group, except where this conflicts with provisions in the constitution (Art.44, see ICCPR Art.27). While the Muslim Kadhis’ courts gained some exemptions in this regard (Art.24), traditional African culture and African traditional leaders are afforded no special status. Recognising ‘community’ ownership and control of ‘community land’ (Art.63), the Constitution nevertheless aims at ‘elimination of gender discrimination in law, customs and practices related to land and property in land’ (Art.60.1(f)).

Finally, in regard to individuals, article 33 makes specific provision for freedom of individual creative expression and cultural association. The idea of culture as an expression of individual personality in creative activity is more likely to be explicitly recognized in constitutional provisions of former African colonies influenced by traditions of civil law (such as the French tradition) rather than common law (in the British tradition). However, recent constitutions in South Africa and Kenya do recognise freedom of individual creative expression, perhaps to underline the political independence of artists.

The revised Constitution of Kenya thus defines and protects cultural rights rather differently at the national, community and individual level, and balances these rights against each other. This presents
opportunities for community members to take advantage of new protections for land ownership, for example, but these rights are tempered by values such as equality and protection of human rights. Also, because public knowledge about rights provisions is limited, access to courts is expensive, and changes to the interpretation of the law, or changes in the law itself, come about very slowly to bring them in line with the constitution. Even where disadvantaged people are aware of their rights under the constitution, they may be reluctant to exercise these rights because they are thereby disadvantaged in other ways within their cultural group.

References


