Cultural Rights and Constitutional Change in Kenya: Progress and challenges

A one-day colloquium at the Institute for Commonwealth Studies, London, 12 October 2016

Abstracts

Steve Ouma Akoth (OU) - Land as Culture: Discourse and narratives of land claims in postcolonial Kenya

Why do we speak of land reforms and not of dismantling the homelands, the dominant discourse and activism(s) of the post-2010 transformative Constitution of Kenya (CoK)? This is the animating question to which this paper seeks to find something of an answer. It is a question which points not only to the limited public engagement between the academy and society in Kenya but more so, to the kind of pressure placed on all institutions in post-2010 Kenya to address the legacy of land-based and related conflicts. The 2010 Constitution of Kenya that is positioned as the moment of ‘change’ has described land in three categories: private (20%), public (13%), and community land (67%). While community land is the largest category, it is located or defined as ‘cultural land’ - homeland. Therein lies the problem in the ‘problem’.

This paper provides an account of how the question of land as culture has emerged in legislative developments and public debate and among groups and individuals claiming land rights. It will show how this notion of land as culture is the problem in the ‘problem’ for policy makers, and a resource for individuals and groups such as residents of Yala Swamp in Western Kenya who are claiming constitutional rights. The paper concludes by asserting that the CoK has enabled claiming of land as culture through its perpetuation of homelands.

Harriet Deacon (OU/independent scholar) - Cultural rights provisions in the Constitution of Kenya: A comparative view

The paper will compare and contrast cultural rights provisions in the 2010 Constitution of Kenya with those in other countries. It will use this comparative analysis to examine the ‘work’ that culture does in the Constitution, and comment on the implications thereof for the use of its cultural rights provisions for local activism.

John Harrington (Cardiff): Transforming Traditional Medicine in Kenya: Recent legal developments

This presentation examines current initiatives to regulate traditional medicine in Kenya. It sets these developments in historical context, considering the manner in which colonial and independence governments managed the relationship between African medical practices and scientific biomedicine. It reviews the current weak system of licensing and regulation, as well as proposals to integrate traditional healers into the formal healthcare system in line with the recommendations of the World Health Organization. Plants used in traditional medicine have been the focus of conservation efforts on the one hand, and commercial horticulture on the other. They have also been the object of bioprospecting and, in some cases, biopiracy across Africa by foreign companies involved in drug development. In response Kenya has implemented the Convention on Biological Diversity through legislation and in the Constitution of 2010. A sui generis regime of intellectual property rights over traditional knowledge, stimulated by developments at the World Intellectual Property Organization, has also recently been progressing through parliament; the paper will consider the opportunities and challenges that this presents. The paper concludes by reflecting more generally on the role of law in the ‘problematization’ of traditional medicine. From this perspective, legal standards provide both a normative orientation and a technical means for the reform and reconstruction of practice in order to serve the state’s modernization and developmental goals.
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Lotte Hughes (OU) - Alternatives Rites of Passage as invented tradition and cultural performance

This paper will explore the phenomenon of Alternative Rites of Passage (ARP), which is touted by development NGOs, international donors and anti-FGM campaigners as a viable alternative to girls’ initiation into womanhood – without the act of female genital mutilation or female genital cutting, as some prefer to call it (FGM/FGC). Kenyan girls who refuse FGM/FGC are increasingly being encouraged to undergo this coming-of-age ritual, which allegedly preserves many features of ‘traditional’ initiation while avoiding the physical ‘cut’. ARP is not unique to Kenya, but is also becoming popular in Tanzania and other parts of Africa, notably West Africa.

FGM/FGC still persists in many Kenyan communities despite having been outlawed both in the 2010 constitution (though it does not name it specifically) and other legislation. Some proponents of the practice believe, however, that the constitution’s cultural rights provisions allow citizens to follow a cultural life of their choosing. ARP may be read as cultural performance, whose so-called cultural elements (which include instruction for girls, blessings by elders, wearing of ‘traditional’ adornment) are included out of respect for the communities concerned. This paper approaches the subject through the lens of critical heritage studies. Neither FGM/FGC nor ARP tend to be analysed through a heritage lens, but are seen from a range of development, women’s health, human rights and anthropological perspectives. In ARP ceremonies and the other activities that surround it we can see an intertwining of cultural rights and human rights in the same social space. The paper will argue that ARP constitutes an invented tradition and appropriation of heritage outside formal heritage institutions, in which pick-and-mix notions of pastness are being incorporated into a newly constructed ritual that is presented as evidence of progress, development and modernity. On top of the ‘cultural’ elements, the ritual also weaves Christian symbolism into the performance, making it a unique hybridised vehicle for personal transformation.

Mark Lamont (OU): #GoCutMyHusband: Forced male circumcision and ritual violence in Kenya

What does forced male circumcision suggest about the friction between human rights and cultural rights in Kenya? Are incidents of forcible circumcision within a ‘community’ that normatively obliges its males to be cut to be viewed with a different ethics from occurrences where the victims of such violence are members of a non-cutting ethnic group, even a minority? Are such distinctions even useful in contemporary Kenya, where the politics of identification have become complex within the county level, where urban areas are without exception pluralistic? Furthermore, has Kenya’s new Constitution of 2010 created spaces for new subjectivities and social relations to re-evaluate all male circumcision as potential forms of unconstitutional ritual violence?

Nicola Stylianou (OU) - The changing fate of culture in the Kenyan Constitution

This paper explores how and why cultural rights came to be included in the 2010 constitution, tracing the fate of cultural rights provisions through the various drafts. Calls for a new constitution can be dated to the early 1990s, when they were driven by a desire for political reform and multiparty democracy. From early on ‘culture’ was part of this debate. The paper will focus on how culture was included and understood in the Bomas Draft (2004) where it formed a whole chapter, and also seek to understand why and to what extent cultural provisions were watered down in the final version.