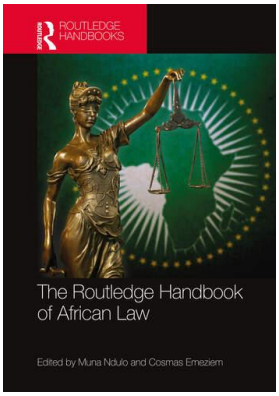

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GODS AT WAR
Religion and law-making

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Introduction

An uncritical rendering of Kenya's history always begins at the declaration of protectorate, over what was then called British East Africa, on June 15, 1895 (Ghai and McAuslan 1970, 3). That fallacy is steeped in the machinery of the interruption by British imperial policy of Indigenous people groups living in fairly sophisticated precolonial social formations. This interruption was played out by the changing character of European visitors to the continent, from curious explorers to benign missionaries, to traders, and eventually to (malevolent) imperialists, with the rise of capitalism and imperialism in Europe culminating in the Berlin Conference of 1884–85 that systemized the scramble for partition and land in Africa (Were and Wilson 1987, 99–109).[1]

The making of the Kenyan state was accompanied by religious confrontation on several levels. First, the Indigenous populations had various ethno-specific religions, organized within their social formations. The religions, though fragmented and diverse, continue to fly under one banner called African traditional religion. Second, almost a millennium before the British set foot on the coast of East Africa, Arabs and Persians arrived for trade and named the area the "The Land of Zanj" (the land of Black people) and proceeded to spread their culture and their religion, Islam (Were and Wilson 1987, 1–25).[2] The spread of Islam into the "hinterland," however, was slow, as the Arabs generally remained at the Coast for trade, and Africans in the hinterland viewed them with suspicion as they controlled the slave trade at the Coast (Asad, 1993). Third, since the building of the Kenya–Uganda Railway,[3] in an attempt to control the source of the Nile, underpinned Britain's presence in East Africa, Indian builders (from the British colony of India) were shipped in to provide skilled labor, and thus, brought with them their Hinduism to add to the religious pot.[4] Finally, the European missionaries arrived with their gospel of Christ, a few years before colonization began in the region. Over the next century, the Indigenous tribes were charismatically evangelized, resulting in today's multireligious landscape in Kenya.

Colonialism, in fact, was not just the conquest of foreign territory and the imposition of imperial law. It was a superimposition of Christian (Anglican) values over existing, though fragmented, Indigenous values (Mutua 1999). Successively, the Natives' religion was demonized and recast in dark, ominous, and subhuman light, and Africans who converted to Christianity

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were preferred and incentivized (Mutua 2008, 54). Thus began the establishment of a thoroughly foreign legal system over the territory, which systemically dismembered the identity of the African Indigenous population.[5] African legal thought was at odds with British colonial legal thought, and thus, had to collapse under the weight of the latter.[6] On a second plane, a contestation between Christian legal thought and Islamic practice occurred, especially at the Coast. The colonial government weighed and placed in a hierarchy Christianity, Hinduism, Islam, and ATR. The other religions postured themselves in modes of compliance, negotiation, and resistance, respectively.

The Declaration of Independence in 1963 announced the beginning of the era of self-rule. Was it the end of colonialism? As the Union Jack was lowered, and the Kenyan flag hoisted for the first time, the hegemony remained intact. Decolonization of culture, conscience, belief, opinion, and religion would take much more than the promulgation of a piece of law and the exchange of flags.

Fifty years after independence, the constant struggle to reclaim religious ground in ideology and law continues in earnest. The legal system attempts to mend the cleavages existing along religious and (historically) racial lines.

In this chapter, I will analyze this clamor for domination through three major epochs:

I. Declaration of protectorate to independence
II. Independence to 2010
III. Post-2010

The first epoch: pre-1895 to 1963

In this epoch, the major players were the colonizing Anglican state and the resisting ATR. Through various tactics and technologies, the colonizing state tried to shape the conceptual ideologies of the Indigenous populations to gravitate toward Anglican ideas. In pushing for moral individualism and individual land tenure, some scholars have argued that the colonial state was laying the infrastructure for market capitalism.

Sylvia Kang'ara (2012) has argued that Indigenous family law and the existing family structures were incongruent with market capitalism, and so the colonizing state had to Anglicize them, as a means to this end. The techniques ranged from incentivization, disincentivization, and blatant rewriting of customary law, through judicial discretion, under the cover of the law being repugnant to justice and morality (Demian 2014).

Anglicizing family law

The process of Anglicizing family law began with the 1897 East Africa Order in Council (EAOIC). While, in principle, the EAOIC was to be targeted at the settler community, in fact it set in motion various ideas and tactics that were important in colonizing Indigenous family law.

The EAIOC empowered the commissioner to establish Native courts and to regulate their procedure. The Native Courts Regulations of 1897 provided that matters affecting the personal status of Natives would be determined depending on religion. That is to say, Christian Natives applied the law of British India, Muslims applied Islamic law, and Natives who were neither Christian nor Muslim were subject to their "tribal" law, subject to ascertainability and repugnancy provisions. From this time forward, family law was divided along racial, religious, and ethnic lines. Importantly, this idea began to cast marriage in a religious light and set the stage for the alien concept of secularity. This was further complicated by the notion that "personal

status" remained a fluid concept. It allowed judicial officers to make determinations on a wide array of matters.

The 1902 East Africa Order in Council applied Indigenous law to all civil and criminal cases, sanitized for the repugnancy and inconsistency. Again, this "repugnancy" rider allowed colonial officers to rewrite much of custom in the name of "curing" it of injustice and immorality. The 1902 Marriage Ordinance acted as a statute of general application and informed by Anglican legal thought, provided for the following: monogamous marriage only, and Natives marrying under the Ordinance removed themselves from the operation of customary law and enjoyed greater protections, such as in *Cole v. Cole.*[7]

The 1904 Native Christian Marriage Ordinance was enacted as a form of "civil marriage for dummies" for Christian Africans only. It required monogamy and enshrined the protection of widows. The 1904 Divorce Ordinance was enacted to give relief in monogamous marriages only. Fast forward to 2014: the Marriage Act was enacted to consolidate all family law, and for the first time, brought customary law into the fold.

The running theme throughout these ordinances was one of family law reform, with each successive law pushing the Native closer and closer to the idea of marriage in "Christendom." Invariably, *Hyde v. Hyde and Woodmansee* was considered the gold standard to which all marriages must aspire,[8] and by and large, over the next few decades, colonial courts would pronounce themselves as having disdain and judicial disgust over marriages that differed from this standard (see, generally, Njogu 2016).

Lord Penzance, who proclaimed the superiority of English monogamy over Indigenous marriage systems, held: "… marriage, as understood in Christendom, may be defined as the voluntary union for life of one man and one woman, to the exclusion of all others …" (*Hyde v. Hyde and Woodmansee*).[9] This became the yardstick for marriages celebrated an ocean away, and a marker of sophistication and civilization (see, generally, Kang'ara [2012]).

It did not matter that marriage among the various Indigenous communities existed in a different geometry than proclaimed by *Hyde v. Hyde.* Marriage was a loaded concept with various stakeholders beyond the celebrating persons. John S. Mbiti (1991, 104) described it as "… the meeting-point for the three layers of human life … the departed, the living and those to be born. The departed … are the roots on whom the living stand. The living are the link between death and life. Those to be born are the buds in the loins of the living, and marriage makes it possible for them to germinate and sprout …".

Marriages were often polygamous, leviratic, sororate, and always coexistent with the life of the wife. They were inundated with ceremony and steeped in ethnic formalities, such as the dowry (Armstrong, 2003).

In its Anglicizing mode, the colonial state disincentivized and punished those who chose the latter geometry.

In *Rex v. Amkeyo*, when a woman, married under customary law, invoked spousal privilege to avoid testifying in court against her husband, the court held that a wife married under African customary law was not a legal wife or spouse, and thus, compelled her to give evidence against her husband.[10] Justice Hamilton, in his decision, called African forms of marriage "concubinage" and wife purchase, stating "… it is a misnomer to call customary law 'marriage' a marriage given that taking a woman by a native is like buying a chattel …".

Amekeyo stands in contradistinction to *Cole v. Cole*, a Nigerian case where a widow married under English law was able to secure her inheritance against her husband's relatives by pleading English monogamy, therefore enjoying the protections against the "barbaric" customary law.[11] *Cole v. Cole* is important in showing how sometimes Africans used the colonial system to their advantage.

The extension of this "benevolent" cover was not always guaranteed, however. In *Benjawa Jembe v. Priscilla Nyondo*, the court held that, while parties might have been married under the 1904 Native Christian Marriage and Divorce Act Order and had converted to Christianity, their estate was subject to customary law.[12] Conversion came with limited and sometimes uncertain "equality."

Hyde v. Hyde was the colonizing ideology of both marriages and divorces. In defining marriage as the "… voluntary union for life …", the Christian idea that marriage was for life animated the Anglican state's begrudging attitude toward acceptance of divorce law. Granted, while separation and divorce in precolonial Africa was not as rampant as it is in contemporary Western culture, it was allowed and provided for in custom, with many communities having clear guidelines on custody of children and return of the dowry. Anglican law introduced a new form of restraint.

For most of the last century, therefore, the law and state infrastructure was deliberately set up to disincentivize divorce, in a bid to "protect" the *Hyde v. Hyde* model. Of course, the "voluntary union" element, that is, the parties' agency, was the casualty in this geometry. Roadblock after roadblock was erected for those who no longer wanted to voluntarily cohabit.

First, courts did not automatically have jurisdiction to hear divorce proceedings. Common law gave jurisdiction based on domicile while the Kenya Divorce Ordinance (1904) based jurisdiction on residence.[13] In *Magean v. Magean*, for example, a wife seeking divorce on the grounds of desertion was denied, with the court holding, quite preposterously, that by leaving the jurisdiction and relocating to Tanganyika, the deserting husband had moved the petitioner's domicile, therefore robbing the court of jurisdiction.[14] This position would eventually be remedied by a 1952 amendment to the Matrimonial Causes Ordinance, enabling a deserted wife to petition for divorce based on her residency in Kenya. Eventually, the Law of Domicile Act (1970) provided that a married woman could acquire her own independent domicile.

Jurisdiction was also based on the system of marriage that parties contracted. Suits arising from marriages under the Hindu Marriage and Divorce Ordinance and civil marriages would be entertained by the High Court. Marriages under the Native Christian Marriage and Divorce Ordinance (later, African Christian Marriage and Divorce Act) (NCMDO, ACMDA) and customary marriages were entertained by magistrates' courts, and Islamic marriages by *Kadhis* courts. The prevailing thought retained African marriages, even statutory ones, as inferior to English and Hindu marriages. A court would eventually rule that the provisions of the ACMDA restricting Africans suits to the magistrates' courts were discriminatory and unconstitutional.[15]

Second, the law only provided for fault-based divorces. The idea that grounds for divorce arose only upon the commission of a matrimonial offense (aptly termed) meant that the focus was not on the agency or willingness of spouses to continue to cohabit. Indeed, the language of the offense evoked the need for "quasi-criminal" litigation. The petitioner had to claim certain grounds, whose elements were similar to criminal law, had thresholds of proof. The grounds were a closed list: adultery, cruelty, desertion, mental instability, presumption of death, or certain sexual offenses committed by a husband.

In true penal nature, each ground had to be painstakingly examined. Consider, for example, adultery. Adultery necessarily meant "consensual sexual intercourse between a married person and a person of the opposite sex." The said intercourse required consensual penovaginal penetration.[16] The procedure for prosecuting a divorce suit on the grounds of adultery differed for men and women. Desertion required *animus deserendi*, the absence of justifiable cause,[17] and the factum of separation.[18]

Further, because of this quasi-criminal nature, the courts insisted on a high standard of proof. In *Mathai v. Mathai,* the court applied the same standard as in a criminal suit stating, "…

when considering the question of the standard of proof requisite to establish the commission of a matrimonial offence, the safe and proper direction should be that the Court must be satisfied beyond reasonable doubt or satisfied so as to feel sure, that guilt has been proved …".[19]

Third, the law erected bars to divorce. Absolute bars to divorce included connivance, condonation, and collusion.[20] Under §10 of the Matrimonial Causes Act, a court had the duty to guard the process against the "ills" of connivance, condonation, and collusion, and had the discretion to deny divorces where parties were "guilty" of unreasonable delay in presenting or prosecuting the petition, or where their spouse's matrimonial offense was due to their "conducive conduct."

Fourth, divorce proceedings could be commenced no sooner than three years after the celebration of the marriage.

Subjugating custom and ATR

To say that the colonial government systematically subjugated customary law, and by extension, ATR is an understatement. This is hardly surprising, considering that the ethos behind the colonialism was the civilizing mission. Nowhere else were the Natives so "uncivilized" as in their customs and traditions.

The colonizers deployed indirect rule, and elements of indirect rule included codifying much of Native law, using proxy laws and incentivizing the move to European law.

In Kenya, this incentivization began with the earliest British law in Kenya, the East African Order in Council of 1897. This order in council orchestrated one of the most important projects in legal transplant in history by the Reception Clause in the Order in Council, which imported the substance of English common law, doctrines of equity, and statutes of general application in force in England at August 12, 1897 (Reception date) and made them laws of the Protectorate known as British East Africa. Importantly, all these foreign laws ranked well above customary (Indigenous) law. Although the subsequent 1902 EAOIC stipulated that customary law generally applied to the Indigenous population, subject to the repugnancy and ascertainability threshold, over time customary law continued to be edged out beyond the "repugnancy" requirement.

The clause was later incorporated into Kenyan law by §3(1) of the Judicature Act, which would eventually provide:

> (1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with—
>
> (a) the Constitution;
>
> (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;
>
> (c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date:
>
> Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.
>
> *KLR 2012, para. 3, "Mode of exercise of jurisdiction"*

This first part was inherently problematic, as it placed all foreign law hierarchically over Indigenous law. Further, it required that courts conform to the procedure and practice observed in English courts. This particular element continues to plague Kenyan courtrooms, with African lawyers donning blond wigs and addressing judges as "my lord/lady."

The proviso that the application of common law, equity, and statutes of general application would only apply as far as the circumstances and inhabitants of Kenya permitted was hollow poetry. Often, the gatekeeper charged with determining whether the circumstances of Indigenous population permitted application was biased.

The second portion that provided for the application of customary law was inundated with subjugating language:

> The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.
>
> *KLR 2012, para. 3, "Mode of exercise of jurisdiction"*

This provision limits the applicability of African customary law by various strokes. First, it may only apply as a guide. Although other sources of law are binding on the courts, this provision allows courts to disregard custom. Second, its jurisdiction is limited to civil matters. This limitation was further narrowed to the matters listed in §7 of the Magistrates' Courts Act, being: land held under customary tenure; marriage, divorce, maintenance, or dowry; seduction or pregnancy of an unmarried woman or girl; enticement of, or adultery with, a married person; matters affecting status, and in particular, the status of widows and children, including guardianship, custody, adoption, and legitimacy; and intestate succession and administration of intestate estates, so far as they are not governed by any written law.[21]

Customary law only applies in criminal law where the crime has been captured in the Penal Code or other statute (Jackson 1988, 21).

Third, customary law only applies where at least one of the parties is subject to or affected by it. Now, this "subject to or affected by" standard is as technical as it is fluid. The quintessential case illustrating this element is *Virginia Edith Wambui Otieno v. Joash Ochieng Ougo and Omolo Siranga*, commonly referred to as the SM Otieno Case, in which the court held that the deceased had been unable to divest himself of the association with his father's tribe and was subject to customary law, and thus, his wife (the applicant) was affected by customary law.[22] The court then granted the deceased's clan the right to bury his body.

Fourth, it applies only so far as it is not repugnant to justice and morality. This disability is perhaps the most (in)famous. And the language is used in various colonized countries to subjugate Indigenous law. The repugnancy clause was particularly problematic. Repugnant according to who? Naturally, this gave the colonial government, through the courts, a very wide discretion to strike down "non-conforming" laws and push Anglican ideologies.

In *Maria Gisese Angoi v. Marcella Nyomenda*, the High Court, sitting in Kisii, held that the Gusii custom that permitted a woman to marry another in certain circumstances was repugnant to justice and morality.[23] Where a woman (ideally, an older wealthy woman) did not want to get married or was widowed, but wanted to raise children of her own, she would identify another woman, usually younger and also unmarried, and for a price, she would "marry" her. This younger woman would be a surrogate parent, and the older would pick suitable suitors

to impregnate her. In the case of a widow, the suitor would be from her late husband's clan. Justice Aganyanya held:

> Much as a people's customs should be respected, I am constrained to believe that a custom which allows this sort of arrangement, where a woman will have no right to choose which man should have sexual intercourse with her, is repugnant to justice and an abuse of individual freedom of choice … This is obviously against the rules of natural justice and I feel the custom does not fit with modern developments.[24]

Although *prima facie* emancipatory, this case must be understood against the utility of surrogacy and within a geometry in which an unmarried childless woman was likely to be condemned to a subaltern life. Custom created this surrogacy safety net that the court flippantly belittled.

Fifth, it applies only if it is consistent with written law (statute). While statute always trumps customary law, ideally common law and equity only apply when, according to the judge, customary law is repugnant to justice and morality (Jackson 1988, 22). The hypocrisy of choosing English custom (baptized common law) over African custom to be applied in African circumstances and to African subjects is glaring.

Finally, §16 of the Magistrates' Courts Act and *Ernest Kinyanjui Kimani v. Muiru Gikanga and Another*[25] establish that customary law must be proved in court before a party can rely on it. Although courts generally take judicial notice of all other laws, custom must be proved through adducing evidence (Kariuki 2015).

Using this six-point system successively, customary law was subjugated and relegated in many ways to the annals of history. In this first epoch, through seizing state machinery and wielding colonizing power, Anglicanism won time and again and pushed back most of custom and ATR.

The second epoch: Independence to 2010

The Sultan retaliates: Kadhis *courts and Islamic succession*

In the run up to independence, Islamic law, a player that had been somewhat in the background, was thrust to the fore. The war between Islam and the Anglican State began in earnest and would eventually shape the legal landscape of the newly independent nation. The tactics of Islam in this era were largely negotiation. This section will focus on two major flash points: *Kadhis* courts and Islamic family/succession law.

Kadhis *courts: Pre-1895–Independence*

After years of Arabic settlement and trade at the Kenyan coast, in 1856, Sultan Said Seyyid of Oman transferred his headquarters from Muscat to Zanzibar, a move that would reconfigure the politics of East Africa for hundreds of years to come. The Sultan of Zanzibar would eventually exercise colonial control over the East African Coast, and ultimately, the hinterland stretching all the way to Uganda by the end of the century.

Over the many years of Arabic colonialism of the East African Coast, Islam became the default religion, and Islamic law the default law of the land. This conquest over the hegemony was fairly easy—the Arabs were seen as sophisticated and controlled the capital at the Coast. A cornerstone of Islamic law, the *Kadhis* courts, therefore, were part of that new hegemony, along with other Muslim administrators, such as the *liwali* (governor) and *mudir* (chief). The

blend of Islamic law applied in these *Kadhis* courts was identical to that observed in the Sultanate courts. The declaration of protectorate by Britain in 1895 over British East Africa reconfigured and perhaps began to legitimize the institution of *Kadhis* courts.

This chapter argues that three factors, perhaps, allowed *Kadhis* courts to survive, while other Islamic or Indigenous African institutions fizzled out. First, Britain's Indirect Rule policy assured the survival of many preexisting social formations, and systems were left undisturbed.[26] Recall that Britain was a reluctant colonizer of the East Coast. In fact, between the mid-1800s and 1896, the "spheres of influence" phase, Britain exercised jurisdiction over the territory via trading companies. It made sense, therefore, to let existing systems stand.

Second, in 1920, as the rest of the territory now known as Kenya was converted by the Kenya (Annexation) Order in Council from Protectorate to Colony, the 10-mile coastal strip remained a Protectorate. Granted, although it has been argued that the change in status from Protectorate to Colony was purely academic, recall that, as per the Anglo-German Treaty of 1886 between Britain, Germany, and France, the 10-mile coastal strip was considered the domain of the Sultan of Zanzibar. In fact, the British East Africa Association (BEAA), the trading company through which Her Majesty's government exercised control over East Africa, entered into a Provisional Concession Agreement in 1887 where the Sultan ruled over the BEAA, with all his powers concerning the mainland for 50 years. The Imperial British East Africa Company (IBEACo), the successor to BEAA, later inherited this concession agreement. In a later lease agreement of territory (that was converted to a concession agreement), the Sultan required that the area be administered according to Sharia as far as the Sultan's subjects were concerned. This marked the beginning of differential treatment for Muslims by the colonial government.

Over several subsequent treaties, agreements, and dealings between the Sultan and the British colonial government, it was clear that the latter considered the former the somewhat de facto leader of the region, and to some extent, his wishes and power were respected. Thus, when the hinterland morphed into a colony, the 10-mile coastal strip, the Muslim stronghold, remained a protectorate. This status, and the Sultan's godfathering of the Coast, proved a major negotiating chip in the run up to independence.

Third, most Muslims in the colonial state were Arabs and, as such, received preferential treatment by the colonial government in consonance with the racial segregation policy of the colonial administration.

The EAOIC 1897 created a dual system, under which Indigenous Africans were governed by African customary law, and their disputes were dealt with at the Native Courts, while the British had "mainstream" courts.

Pursuant to the EAIOC, art. 57 of the Native Courts Regulations Ordinance clarified that the law of succession (and marriage) for Muslims was the law contained in the Qu'ran. These regulations were reenacted in the 1907 Native Courts Ordinance, which established the *liwali* courts, a precursor to the *Kadhis* courts. These courts had jurisdiction to hear and determine matters arising out of Islamic law.

This remained the position until the run up to independence (even when the Native Courts were abolished). The coastal Muslims (predominantly Arabs), afraid that their religious freedoms would be disrespected by a new "upcountry" government, began to agitate for cessation from the hinterland. In particular, while invoking the 1895 concession agreement, they sought either to remain the Sultan's subjects or to be granted independence as a separate "Mwambao" territory.

During the Lancaster House Conferences, after conflicting positions were presented by the Arabs and Africans concerning the 10-mile coastal strip, Sir James Robertson, the former

Governor of Nigeria, was appointed to head a commission of inquiry on the future of the strip. Robertson recommended, *inter alia*, that the strip be integrated with Kenya before independence, and that Muslim law, religion, and education be incorporated into the Kenyan constitution to safeguard the rights of the Sultan's subjects. This would later become the constitutional basis for *Kadhis* courts. Shortly after the attainment of self-rule in 1963, Prime Minister Jomo Kenyatta signed an agreement with the Prime Minister of Zanzibar that guaranteed the free exercise of any creed or religion in Kenya and preserved the jurisdiction of the Chief Kadhi. Subsequently, Britain, Kenya, and Zanzibar entered into an agreement that released the strip from the Sultan's dominion and nullified the 1890 and 1895 agreements.

Section 66 of the Independence Constitution gave effect to these agreements by providing for the establishment of *Kadhis* courts.

Independence to 2010

To give effect to §66 of the Constitution, the *Kadhis* Courts Act, the Mohammedan, Marriage, Divorce and Succession Act and the Mohammedan Marriage and Divorce Registration Act were passed to create the framework for the operation of Islamic law. For the first several years after independence, *Kadhis* courts remained limited only to the Coast.

The Independence Constitution provided that "… [t]he jurisdiction of a Kadhi's court shall extend to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion." This delineated the extent of application of Islamic law in Kenya.[27]

Succession law

In 1972, the Law of Succession Act No. 14 of 1972 was passed to harmonize all inheritance regimes. As a general law of application, it had a major impact on Islamic succession as it quite simply took over the *Kadhis* courts' jurisdiction captured in the Independence Constitution. The Act came into force in 1981.[28] Operationalized in 1981, the Act applied to all Kenyans dying after this date. Subversion became Islam's next tactic. In the clamor for party plurality, Muslims were able to exert unceasing pressure on the now cornered President Moi, who in exchange for support, engineered a legislative "out" for Muslims from the Law of Succession Act. While all other communities and faiths remain(ed) under the unifying Act, Muslims were able to keep Quranic succession.[29]

The turmoil of the 1980s and the call for increased democratic space, specifically the agitation for the reintroduction of multipartyism, led to a unified call for the creation of a new Constitution. Of course, the Independence Constitution (which by now had undergone several amendments) had been a decolonization agreement. At best, it represented a patchwork of agreements to secure the interests of various stakeholders, including the British settlers, Indian workers, immigrant Arabs, Indigenous Africans, and the British Government.[30] There was nothing in it akin to a unifying philosophy, and the new African elite proceeded to mutilate it to fit their interests. After years of a despotic and untamed Executive, the time was ripe for the creation of a homegrown authentic Constitution. It is against this background of civil activism, gross human rights abuses, despotic executive, and grand corruption that the *Kadhis* courts question was reopened.

The run up to the 2010 Constitution became an important crucible for the all-out ideological battle. The flashpoints coalesced around the following debates: abortion, marriage, the secularity of the state, and *Kadhis* courts.

While religious groups supported the sanctity of life and differed with secular organizations about abortion, there was an interreligious consensus on this issue. Christians, in particular, ensured that "life begins at conception" was inserted.[31]

Marriage was a mixed bag. Christians pushed for the *Hyde v. Hyde* position.[32] Traditionalists wanted a provision that respected precolonial heterodox marriages, while Muslims wanted Quranic polygamy, as well as unequal rights between husbands and wives. Some civil rights groups pushed (unsuccessfully) for homosexual marriages. The harmonized position is now captured in art. 45(2)—the right to marry a person of the opposite sex based on free consent. The Marriage Act of 2014 would eventually derive from this position.

The debate on the secularity of the state was fairly heated. Positions ranged anywhere from establishmentarianism to *laïcité.* While freedom of religion and conscience was not in contest per se, the text that eventually became art. 8 went through various iterations. The second to last version read: "Kenya shall be a secular state, and there shall be no state religion." The declaration of secularity eventually disappeared, and art. 8 now simply reads "there shall be no state religion." I have argued elsewhere that Kenya is not a secular state, as it maintains *Kadhis* courts, religious holidays as public holidays, religious curriculum in public schools, and so on (see Njogu 2013). This ambiguous state continues to create a ripe environment for discourse and realignments within the new paradigm.

The retention of *Kadhis* courts was perhaps the hottest flashpoint. Non-Muslims argued that maintaining state-funded religious courts was unsustainable. *Jesee Kamau & 25 Others* had held that *Kadhis* courts were in fact unconstitutional, as per the old Constitution.[33] Abolitionists argued therefore that *Kadhis* courts were unnecessary, establishmentarian, unfair to women, and sectarian in the new order. They proposed options such as harmonization of the two court systems (similar to the absorption of Native Courts), codification of Islamic law, demand of proof while relying on Islamic law (as the case in customary law), as well as introduction of other religious courts. Ultimately, against severe protestation, a Constitution that retained the *Kadhis* courts was passed. The tussle, however, granted Muslims the right to opt out of the *Kadhis* courts system.

Article 170(5) is clear that *Kadhis* courts may only pronounce themselves on matters of marriage, divorce, succession, and personal status, where both parties to the suit profess Islamic faith and subject themselves to the jurisdiction of the court. In view of the foregoing, one could say that Muslims have been more successful than other religions in reclaiming their identity and religion in law and ideology.

Custom fights back

In the period between independence and the 2010 Constitution, customary law also fought back against the Anglican colonizing ideology. Section 82 of the repealed Constitution allowed discrimination in certain instances, based on sex. It read, in part:

> … no law shall make any provision that is discriminatory either of itself or in its effect …
>
> (4) Subsection (1) shall not apply to any law so far as that law makes provision—
>
> (a) with respect to persons who are not citizens of Kenya;
> (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

> (c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; …
>
> *Kenyalaw.org, Repealed Constitution, 64–5*

The Constitutional cover for discrimination in the private sphere entrenched and reclaimed a lot of customary ideas. Polygamy reigned, patriarchal land tenure was extended, and women continued to be disinherited, without the original customary law safeguards. Women's rights were the casualty in this phase of the battle. This fracture between Anglican law and customary safeguards became increasingly apparent with time.

Alongside the creation of the Law of Succession Act in 1972, the Law of Matrimony Bill was also being debated. The idea was to create a general law of marriage and succession, to tie together the now five regimes. While the Law of Succession passed and was enacted, the Law of Matrimony Bill failed, largely due to major retaliation by custom. Although it recognized polygamous marriages and other creatures of culture, perhaps society was still reeling from the effects of *Hyde v. Hyde* and could not risk further *Rex v. Amkeyo* situations.

The failure of this bill created certain untidy situations emerging from the Law of Succession Act (LSA). Eventually, very inelegant patchwork had to be done to ensure justice. The LSA, for example, allows wives to inherit from their deceased husbands. The definition of "wife" was, however, incongruent with a geometry in which the Law of Matrimony Act did not exist. Over time, §3(5) of the LSA was introduced to cater for wives "in death but not in life."

Section 37 of the now repealed Marriage Act provided that a man in a statutory marriage was barred from marrying another woman under any system of law, and specifically customary law, for want of capacity to contract another marriage.[34] This position was affirmed in the decision of *Re Ruenji's Estate*, where the court held that: "… women married under customary law by a man who married under statute are not wives and their children are not children for the purpose of succession, and they are therefore not entitled to a share in the estate of the deceased."[35]

Similarly, in *Re Ogola's Estate*: "… a man married under statute is statute-barred from contracting other marriages during the pendency of the statutory marriage, and any marriages so contracted are null and void."[36]

This left a lot of "illegal" wives unprovided for. Section 3(5) was eventually included to provide for illegal wives, who had no recourse during the life of their husbands (respecting *Hyde v. Hyde*) but could be provided for in death.

It read:

> … notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.
>
> *Republic of Kenya 2012, §3(5), L13-10*

The effect of the provisions of §3(5) of the Act is that a woman will not be recognized as a wife to a man previously married under a statute during the pendency of his life, but as soon as that man dies, the woman automatically becomes a wife by operation of law for purposes of division of the deceased's estate.

In the matter of the *Estate of Reuben Nzioka Mutua,* the court held that: "… the Law of Succession Act protects women married under customary law by men who had previously or subsequently contracted statutory marriages, and such women are entitled to be provided for of the estate of the deceased."[37]

Further in the decision of *Irene Njeri Macharia v. Margaret Njomo and Another*, the High Court held that: "… women married under customary law are regarded as wife for purpose of succession notwithstanding the fact that by reason of section 37 of the Marriage Act the man lacked the capacity to marry her."[38]

Perhaps, one of the most vicious battles put up by customary law is the SM Otieno Case. In *Otieno v. Ougo*, a reputed Nairobi lawyer died intestate in 1986.[39] Upon his demise, his wife commenced the process of making burial arrangements in their Ngong home. The deceased's clan, however, wanted to have the body of deceased buried at his ancestral home according to the Luo customary law. What ensued was a fierce legal battle in court that took 140 days. In court, the widow prayed that she be allowed to bury her husband at their Ngong home in the outskirts of Nairobi, while, on the other hand, the clan insisted that the Luo customary law must be observed and that the deceased had to be buried at his ancestral place in Siaya.

The court held that the Luo customs and traditions must prevail and that the wife of the deceased had no duty to bury the deceased at their Ngong home. The court further stated that, in the absence of the African customary law, the duty to bury the deceased still did not lie with the deceased's wife; the duty rested on the personal representatives of the deceased's estate. The court further held that the deceased had not renounced his Luo tribe and had at no point denounced the Luo customary laws. It stated in part:

> … there is no way in which an African citizen of Kenya can divest himself of the association with the tribe of his father if those customs are patrilineal. It is thus clear that Mr. Otieno having been born and bred a Luo remained a member of the Luo tribe and subject to the customary law of the Luo people.[40]

The decision in this case probably represents the most shocking affront put up by custom in the new colonial order.

Redeeming the redeemer: The rise of African Christianity, taming the state, and multiparty constitutional reforms

After decades of being viewed through the lens of the oppressor and carrying the label of the colonizer's bride, the church got its moment in the sun in the 1980s and 1990s.[41] By this time, Daniel Arap Moi's increasingly despotic government had choked out all political dissent through various successive strokes. Following Kenyatta's systematic destruction of the Independence structure of quasi-federalism, extinction of bicameralism,[42] and effective destruction of opposition politics, the state entered into a more sinister phase that was characterized by detention without trial, state-sponsored torture, extrajudicial killings, suppression of academic freedom, and the eventual amendment of the Constitution to make Kenya a *de jure* one-party state.

By and large, the KANU state led by a president without presidential term limits was, in the words of Makau Mutua, a "leviathan that needed taming." Civil society was essentially nonexistent. Dissenting politicians were systematically targeted, captured, and destroyed.[43] Academics were similarly silenced,[44] while lawyers who represented them were not spared.[45] It

is against the background of such dire times that African Christianity, which was distinguished from colonizing Anglicanism, almost heroically returned to its mission of social justice and "speaking truth to power" (Eastman 1995).

From February 28 to March 3, 1992, a group of rural elderly mothers descended on Nairobi to demand the release of political prisoners. They staged a sit-in at "Freedom Corner" in Uhuru Park, a few meters away from the notorious Nyayo House and within a mile radius of State House, office of the President, and various media houses. After days of showdowns between them and the police, the police attempted to arrest them. A number of the protesters, well advanced in age, stripped naked to keep the policemen from touching them. The show of nakedness by an older woman is a well understood technique of shame (to the holder) and a last resort for an oppressed woman. The curse and social stigmatization associated with beholding the nakedness of a woman of one's mother's age should have stopped the police's advance, but the despotic state chose to disregard what these black bodies meant, and in true neocolonial fashion, attempted to arrest these women.

The All Saints Cathedral, which lies some 200–300 meters away from Freedom corner, opened its doors to these women, offering sanctuary and refusing to hand them over to the police. This was one instance of Christianity's resistance to the state. The then head of the Anglican Church, Archbishop Manasses Kuria, would tell the police officers laying siege for several days to leave the church premises (Amnesty International 1995).

Later, in 1997, the church would host and offer sanctuary to protestors, including Mwai Kibaki, who would eventually serve as President between 2003–2013, fleeing the police after a political meeting at Uhuru Park had been scattered by tear gas lobbed by ruthless police officers. The beating of the refuge seekers and worshippers inside the sanctuary left the pews blood-stained, and 21 people were dead following the police brutality—a new low for the Moi era. The then Archbishop David Gitari (now deceased) delivered the sermon, "*Mene Mene Tekel Perez*," the writings on the wall based on the biblical story of Daniel, warning the KANU/Moi regime that its end was near. This, in particular, even drew international retribution, including an open letter to President Moi by Roman civilians. The pulpit of the All Saints Cathedral would eventually host some of the bravest attacks of dissent against the authorities, ranging from displacement of slum dwellers, political detention, and calls for multipartyism (Kahura 2018). Some critics would later call the church (the Church of the Province of Kenya) the Church of the Politics of Kenya (CPK), eventually leading the church to rename itself Anglican Church of Kenya.

It increasingly became clear that the war to democratize Kenya was waged not on the streets, in the forests, or the parliament, but on the pulpits on Sunday mornings. The church developed a critical theology of protest and engagements, in which they interrogated the excesses of the state (Gifford 2009). Two kilometers away from All Saints Cathedral is the Nairobi Baptist Church. A younger charismatic Rev. Mutua Musyimi—who would eventually become the General Secretary of the National Council of Churches of Kenya (NCCK), and eventually, member of Parliament and presidential candidate—was waging the same war against the despotic government on his pulpit. He would eventually play a critical role in the Ufungamano initiative, as the then General Secretary of NCCK and co-convener of the initiative, alongside Gideon Ireri and David Gitari, among others. The initiative has been credited with building a middle ground for over 50 civil society groups and forcing the state's hand in forming the Yash Pal Ghai-led Constitution of the Kenya Review Commission.

There has been scathing criticism that, after the push for the 2002 elections in which Moi finally exited, the newly introduced presidential term limits and the midwifing of the new people-led constitution review process, the church lost its prophetic voice and lost the critical

distance between itself and the state (Wasonga 2017). Yet, African Christianity redeemed itself in a major way in that period.

The Third Epoch: 2010 and beyond—the second scramble for partition: The CKRC process

Perhaps the most identifying marker of the post-2010 period is the use of the Constitution by religious groups as both a sword and shield. The debate has now shifted and coalesced around ascertainable Constitutional provisions, as opposed to amorphous ideological arguments and positions. The extensive consultative Constitution-making process ensured that the stakeholders all had a nail in the room on which to hang their coats—and the coats came hard and fast.

To be clear, the Constitution left the question of the relationship between church and state unresolved. Its wording is vague enough to allow a litigator to place the state anywhere on the secularity–establishmentarian spectrum.

Article 8 of the Constitution provides that there shall be no state religion. Article 32 provides for the right to freedom of conscience, religion, thought, and belief. These two articles form the Constitutional basis for the concept of separation of church and state. The real politic is, however, a much untidier landscape that exhibits, at once, secularity, establishmentarianism, tolerance, and more. These two articles form the nails for all to hang their coats on and set the stage for the post 2010 contestation (Kenyalaw.org 2010, Constitution, 2010)

The return of customary law

The 2010 Constitution has been called the Decolonizing Jurisprudence for various reasons, including its attempts to redeem Indigenous law (Mutunga 2012). Importantly, art. 11 of the Constitution "recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation" (Kenyalaw.org 2010) and tasks the State to promote all forms of national and cultural expressions through, *inter alia*, traditional celebrations. This is quite a departure from the tenor of the early colonial laws that were specifically aimed at "taming the native."

In the landmark case of *Monica Jesang Katam v. Jackson Chepkwony and Another*, Justice J. B. Ojwang used art. 11 as an umbrella to protect the inheritance rights of a "wife" in a woman-to-woman marriage.[46] In granting the petitioner the grant of letters of administration of the deceased's estate, this case distinguishes itself from *Maria Gisese w/o Angoi v. Marcella Nyomenda* by redeeming this custom, using a liberating theory of Constitutional interpretation. It holds, in part:

> The state of customary law among the Nandi, there is no doubt, is in a state of flux and, as the community becomes more prosperous, and fuses more with the other Kenyan communities, such ethnic-culture-bound family-practices are likely to be replaced by more ecumenical, public-interest-related practices. But … social change on such a scale is only gradual; and hence the institutions of justice must be relatively accommodative of current practices.
>
> Indeed, contemporary social systems, for instance, in the shape of current practices in the domain of family among the Nandi, are, I think, to be regarded as aspects of culture which will rightly claim protection under Article 11(1) of the Constitution of Kenya, 2010 …[47]

Article 44 is also important in that it protects the rights of citizens to use the language and participate in the cultural life of their choice (art. 44 "Language and Culture").

The return of communal land tenure is one of the hallmarks of this redemption. From 1895, through successive pieces of legislation and case law, British colonial thought sought to divest property from communities while incentivizing individual ownership, a thoroughly foreign concept.[48]

Chapter 10, similar to the Reception Clause of the EAOIC of 1897 and the Judicature Act, sets the tone for the administration of justice through the courts. In particular, art. 159(2)(c) elevates traditional dispute resolution (TADR) mechanisms as alternatives to formal justice—quite different from the subjugating language of the Reception Clause (Kenyalaw.org 2010). (I do not think we need this. It just shows where the constitution can be found.).

In the fascinating case of *R v. Mohamed Abdow Mohamed,* the court, in a murder case, took the unprecedented route of allowing an out of court settlement based on customary law and Islamic law.[49] On the hearing date, the counsel watching brief for the deceased family requested to have the matter marked as settled, as the families of the deceased and the accused had reached an agreement based on blood money paid and rituals performed. Further, it was clear that the deceased's family was unwilling to pursue the matter any further. In applying to have the case withdrawn under the criminal procedure code, the Director of Public Prosecution "… urged the court to consider the case as '*sui generis'* as the parties had submitted themselves to traditional and Islamic laws which provide an avenue for reconciliation …". Justice R. Lagat-Korir, in allowing the withdrawal, relied on art. 159 of the Constitution, which allows the courts and tribunals to be guided by alternative dispute resolutions, including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms (art. 159).

There is now a greater emphasis, especially in family courts, on mediation and other forms of ADR, including TADR. The greatest steps in the reemergence of Indigenous law are in family law, in the recognition of customary marriages, including polygamy.

Interestingly, however, the vestiges of colonialism persist. Article 159(3)(c) still requires that TADR be carried out in a manner that is not "repugnant to justice and morality," language that is not used alongside any other body of law. It will be interesting to see how the courts interpret "repugnancy" in this era (Kenyalaw.org (same observation avout this web site.) 2010, art. 159(3)(c)).

Decolonizing family law

Another important marker of the post-2010 era is the reorganization of the ethos of family law. There is a clear shift in philosophy from the strict *Hyde v. Hyde* rationale to a framework of consent, equity, and inclusion in marriage law. In particular, the Constitution pronounces itself repeatedly on gender equality and state protection of the family.

The 2010 Constitution expands on the Bill of Rights, including guaranteeing extensive protections for economic, social, and cultural rights. For family law, the gains are unprecedented. The Constitution is unequivocal about creating an equality framework.

The preamble to the Constitution provides for governance through equality, namely: "RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law" (Kenyalaw.org 2010) (same observation)

Article 10 on "National values and principles of governance" provides, *inter alia*:

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
   (a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or
(c) makes or implements public policy decisions.

(2) The national values … include—

…

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; …

Kenyalaw.org 2010, art. 10 (same observation)

These provisions will become especially important in this rule-making process as we make or implement public policy decisions.

Article 20 on the "Application of Bill of Rights" gives the Constitution an interpretative framework as far as rights are concerned. Specifically, it states:

"(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom".

Kenyalaw.org 2010, art. 20 (same observation)

Article 27 on equal protection of the law is especially important in private law jurisprudence, and thus I will reproduce it here, in its entirety:

27. Equality and freedom from discrimination

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in Clause (4).
(6) To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies to redress any disadvantage suffered by individuals or groups because of past discrimination.
(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

Kenyalaw.org 2010, art. 27 (same observation)

Article 45(1) provides that the family is "the natural and fundamental unit of society and the necessary basis of social order; and shall enjoy the recognition and protection of the State" (Kenyalaw.org 2010, art. 45(1)). This foregrounding of a private social arrangement is an important signal of an African understanding of family and marriage and mobilizes state machinery to its recognition and protection.

Article 45(2) provides for the controversial right for every adult "to marry a person of the opposite sex, based on free consent" (Kenyalaw.org 2010, art. 45(1)). Sidestepping the heteronormativity of this provision for a second, it is unclear if this right has a corresponding duty, and what the nature of that duty would be. It is remarkable that marriage then is elevated to a right, alongside, life, and health.

Article 45(3) provides the very important equality in marriage protection. It is important to capture the language of the Constitution here, as the Marriage Act reproduces this article verbatim in §3(2): "Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage" (Kenyalaw.org 2010, art. 45(3)). This provision is extremely important, as it deconstructs the patriarchal framework of the repealed Constitution.

Under the repealed Constitution, sex (and other forms of discrimination) were provided for in the law. Section 82(1) and (4)(b) read:

> 82. (1) … no law shall make any provision that is discriminatory either of itself or in its effect …
>
> (4) Subsection (1) shall not apply to any law so far as that law makes provision—…
>
> (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; …
>
> *Kenyalaw.org 2008, §82*

Marriage is now cast in the language of rights. The Marriage Act of 2014 proceeds on a similarly ambitious, albeit more pragmatic, tenor. While it shows vestiges of "Christendom" philosophy a la *Hyde v. Hyde*, it attempts to harmonize the hitherto five family law regimes under one law. It levels them between the different systems, and, importantly, creates enough transparency to allow citizens to opt into a system within the framework of a free marketplace of ideas. The promotion and mechanics of incentivization have all but disappeared.

Freedom of religion litigation

Article 32 of the Constitution gives a very robust protection for the freedom of conscience, religion, thought, belief, and opinion. It further elaborates on the supporting framework for the realization of these freedoms with protections to "… manifest any religion …" where such manifestation may be through worship, practice, teaching, or observance, such as the observance of a day of worship (Kenyalaw.org 2010, art. 32).

Article 27 further buttresses these freedoms by providing for equal protection and benefit before the law, and equality and freedom from nondiscrimination on various grounds, including religion, conscience, belief, culture, and dress (Kenyalaw.org 2010, art. 27).

Finally, art. 24 provides the framework within which rights and fundamental freedoms may be limited (Kenyalaw.org 2010, art. 24).

Shortly after the promulgation of the Constitution in 2010, freedom of religion suits began in earnest in a bid to flex the new paradigm. It can be argued that various stakeholders wished to secure their religious rights and ideologies within the new governing framework.

Remarkably, much of this litigation has involved schools. Perhaps, not surprisingly, schools have been a flash point for religious discourse in Kenya. Seventy percent of schools were built or are maintained by missionaries, with a further 30 percent being Muslim, Hindu, or affiliated with a religious organization. Religion, for a long time, was a surrogate for the state in the provision of education, and continues to be a stakeholder. Thus, perhaps, this turn of events was to be expected.

In *Republic v. The Head Teacher, Kenya High School & Another, Ex-parte SMY (a Minor Suing Through Her Mother And Next Friend A B)*, popularly known as The Hijab Case, the applicant, SMY (a minor), sought, on her own behalf and on behalf of other Muslim students at the Kenya High School, an order compelling the Board of Governors as well as the Head teacher to allow her, and other Muslim students, to wear the hijab at the school, as well as further orders prohibiting the respondents from interfering with her right to wear a hijab as a form of expression and manifestation of her religious right, as provided for under art. 32.[50] The respondents argued that there was need for all students to wear similar uniform that, in their estimation, serves a critical role in the education set-up, as it creates harmony, cohesion, and unity among students, which in turn contributes to high academic performance. They also argued that the standard dress code identifies and associates students with a particular school and helps to maintain uniformity, order, and discipline in schools.

In the first of these post-2010 cases, the court held that the school's limitation of the applicant's right to manifest her religion by wearing a hijab was reasonable and justifiable, in the meaning of art. 24. This decision has been criticized for not properly applying the "limiting framework" of art. 24.

In the following year was the case of *Nyakamba Gekara v. Attorney General and 2 Others*, which involved the same respondent (Kenya High School), where parents of the petitioner wanted a declaration that holding parents–teachers association (PTA) meetings on Saturdays contravened their art. 32 freedoms, as they were Seventh Day Adventists.[51] The courts did not agree.

In *Mohammed Fugicha v. Methodist Church in Kenya (suing through its registered trustees) and 3 others*, the tide started to turn with the court holding that the manifestation of religion, through dress, did not undermine the freedom of equality.[52] This case is especially important since it was decided against a religious (Methodist) school.

Conclusion

This chapter has examined the clamor of various forms of religion to control the conceptual ideology of the Kenyan state through law making.

The first epoch cast the colonizing Christian state's British colonial thought and the various African traditional forms of faith in direct opposition. Here, we see the colonizer at once using tactics of coercion as well as incentivization to convert the "natives'" ideologies. Traditional belief is seen in both its resisting and adapting modes. In certain instances, the traditional believers embraced colonial laws and ideas for their own benefit while always resisting and always using their traditional faith as a basis to mobilize and resist. Toward the close of the first epoch, Islam became a major player and mounted a formidable resistance to the now Christian colonial and postcolonial state. Islam was especially successful in safeguarding its faithfuls'

ideologies on marriage, divorce, succession, and personal status law, which stands to date. It is also the only religion that maintains a distinct uncodified law and judicial system, fully staffed and funded by the state.

The second epoch saw a backlash from ATR with the Christian state losing ground on monogamy, personal status, and gender quality. Perhaps, the most interesting twist is the redemption of Christianity in the late 1980s and early 1990s, with Christian clergy breaking ranks with the state and pushing for the expansion of democratic space. This was a critical break between church and state, redeeming the moral authority of Christianity to disagree with the state and champion social justice.

The culmination of this war happened at the moment of the birth and realization of the Constitution of 2010 in the third epoch. Here, there was an all-out overt clamor for power that, amazingly, has yielded a well-balanced governing ideology that reflects the face and faith of the people. The gods appear to have called a truce in the language of the Constitution.

Notes

1 However, Rodney (1973) has argued that the distinction of explorers, missionaries, traders, and imperialists is fallacious and that the entire chain was imperial.
2 Interestingly, the coming of the Portuguese a few hundred years later saw the (failed) introduction of Christianity at the coast.
3 The building of the Kenya–Uganda railway was at the center of the colonial enterprise in East Africa. Much of the story of the colonial encounter and the early operations of the Crown through the British East Africa Association (BEAA), and later, the Imperial British East Africa Company (IBEACo), can be traced by following the construction of the Lunatic Express. See, for example, Miller (1971), generally.
4 For more theories on the coming of European powers to Africa, see, generally, Boahen (1990).
5 This dismemberment is actually more literal than figurative in a sense, as certain tribal leaders (for example, Koitalel Arap Samoei) who did not collaborate with the colonialists were beheaded, and their heads (along with other leadership symbols) carried to Britain as trophies. These "trophies" have not yet been returned, even though activism for their return remains rife, amid denial of their possession by the British Government.
6 I have borrowed the idea of British colonial legal thought (as distinguished from British legal thought) from Nkatha Kabira.
7 *Cole v. Cole*, 54 App. Div. 37 (NY App. Div., 1900) 1952.
8 *Hyde v. Hyde and Woodmansee* (1886) L.R. 130.
9 *Hyde v. Hyde and* Woodmansee (1886) L.R 130.
10 *Rex v. Amkeyo*, [1917] 7 EALR.
11 *Cole v. Cole*, 1898) 1 NLR 15.
12 *Benjawa Jembe v. Priscilla Nyondo* (1912) 4 KLR.
13 *Le Mesurier v. Le Mesurieri* [1895] AC 517.
14 *Magean v. Magean* [1919] 8 EAP LR 154 192.
15 *George Wainaina v. Rose Wainaina* [2004] eKLR.
16 *Dennis* v. *Dennis* [1955] EWCA Civ 2 (17 March).
17 To negative constructive desertion.
18 *Le Brocq v. Le Brocq* (1964) 1 W.L.R 1085.
19 *Mathai v. Mathai,* Civil Appeal No 21 of 1979.
20 *Churchman v. Churchman* (1945) p. 44—the burden of proof on the absence of connivance was on the petitioner.
21 In *Kamanza Chiwaya v. Tsuma* (1970) Civil Appeal No. 6 (H.C.K., Mombasa) (unreported) (Kenya), in holding that customary law is not applicable to cases founded on tort or contract, the High Court in this case held that the list of disputes outlined by §2 of the Magistrates' Court Act (now §7(3) was exhaustive.
22 *Virginia Edith Wambui Otieno v. Joash Ochieng Ougo and Omolo Siranga* (1982–88) 1 KAR.

23 *Maria Gisese Angoi v. Marcella Nyomenda*, Case No. 56A: Civil Appeal No. 1 of 198. See, also, Cotran (1968, 117) on a similar custom among the Nandi:

> A woman [among the Nandi and Kipsigis] past the age of child-bearing and who has no sons, may enter into a form of marriage with another woman. This may be done during the life-time of her husband, but is more usual after his death. Marriage consideration is paid, as in regular marriage, and a man from the woman's husband's clan has sexual intercourse with the girl in respect of whom marriage consideration has been paid. Any children born to the girl are regarded as the children of the woman who paid marriage consideration and her husband.

24 *Maria Gisege Angoi vs. Macella Nyomenda* (Civil Appeal No. 1, Judgment of Justice Aganyanya delivered at Kisii on May 24, 1982.
25 *Ernest Kinyanjui Kimani v. Muiru Gikanga and another* (1965), EA 753
26 It is important to note that while Indirect Rule favored Islamic Law, it did not apply similarly to custom.
27 §68(5), Repealed Constitution.
28 Law of Succession Act No. 10 of 1981.
29 Statute Law (Misc. Amendment) Act No. 2 of 1990 disapplied the Act to persons who, at the time of their death, professed Islamic faith. See, also, Kameri-Mbote (1995) on gender perspectives on the law of succession in Kenya.
30 Makau Mutua describes this Constitution as one that was meant to preserve the colonial order, and at the same time, give legitimacy to emergent African ruling elite. See Mugyenyi (2012).
31 Article 26(2), Constitution of Kenya, 2010.
32 *Hyde v. Hyde* (1866) LR 1 P & D 130.
33 Miscellaneous Civil Application No. 890 of 2004—The Applicants argued that §66 of the repealed Constitution of Kenya, which entrenched the *Kadhis* courts infringed on their constitutional rights to equal protection of the law. The Applicants argued that the financial maintenance and support of the *Kadhis* courts from public coffers amounts to segregation, were discriminative, and of a sectarian nature.
34 Section 37, Marriage Act (repealed).
35 *Re Ruenji's Estate* (1977) KLR 21.
36 *Re Ogola's Estate* (1978) KLR 18.
37 *Estate of Reuben Nzioka Mutua*, Probate and Administration Cause No. 843 of 1986 (Unreported), Nairobi.
38 *Irene Njeri Macharia v. Margaret Njomo and Another*, Court of Appeal No. 139 of 1994, Nairobi.
39 *Virginia Edith Wamboi Otieno vs Joash Ochieng Ougo and Another* [1987] eKLR.
40 *Virginia Edith Wamboi Otieno vs Joash Ochieng Ougo & another* [1987] eKLR.
41 Some trace this shift as far back as 1974, when Bishop Henry Okullu started speaking out against human rights abuses by the state. See Omollo (2014).
42 For a thorough treatment, see, generally, Mutua (2008).
43 Kenneth Matiba was detained without trial for years and tortured by the state, which left him with permanent disabilities. During his detention, he suffered a stroke that went untreated for a week. In 2017, after successfully suing the state for this torture, he was awarded KES 945 million (US$9.45 million, approximately).
44 For example, Dr. Willy Mutunga; see Wolfrom (2019).
45 G. K. Kuria, for example, was arrested while in the courtroom defending a political prisoner; see Kuria and Vazquez (1991).
46 *Monica Jesang Katam v. Jackson Chepkwony and Another* [2011] eKLR.
47 *Monica Jesang Katam v. Jackson Chepkwony and Another* [2011] eKLR. See http://kenyalaw.org/caselaw/cases/view/75868
48 See *Maria Gisese/Angoi v. Marcella Nyomenda* (1982) E.A.L.R. 1
49 *R v. Mohamed Abdow Mohamed* [2013] eKLR. See http://kenyalaw.org/caselaw/cases/view/88947/
50 *Republic v. The Head Teacher, Kenya High School & Another, Ex-parte SMY* [2012] eKLR.
51 *Nyakamba Gekara v. Attorney General and 2 Others* [2013] eKLR.
52 *Mohammed Fugicha v. Methodist Church in Kenya (suing through its registered trustees) and 3 others* [2016] eKLR.

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