

# JAHAZI

Culture  
Arts  
Performance

Vol 6 Issue 1 2017



Reflections on Culture, Arts  
& the Constitution of Kenya

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Published with the support of The Lambert Foundation by:  
Twaweza Communications, P.O. Box 66872 - 00800 Westlands, Twaweza House, Parklands  
Road, Mpesi Lane, Nairobi Kenya  
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The Journal is the result of an initiative by Twaweza Communications - Nairobi, and Bantu Mwaura, to encourage dialogue between academicians and art practitioners. The space will be used to capture practical experiences in arts, culture and performance in Kenya and the East African region and suggest theoretical and policy directions.

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# From the Editor

Two things of significance to culture have happened recently. The Culture Bill was finalized and approved by Cabinet in April after years of lobbying, and following endless drafts, with sectoral input by such groups as the Consultative Committee on Culture. Its passing by parliament and assent by the President will enable implementation of constitutional provisions related to culture. And in May, in an historic victory, the Ogiek people won judgment against the State in a battle to protect their right to a traditional way of life—from food to cultural practices.

Conversations around the implementation, and implications of the new constitution began soon after promulgation with, for instance, the GoDown Arts Centre and Arterial Network Regional Office jointly hosting conversations with members of the Committee of Experts who drafted the document. Since then, many cultural actors have come together both loosely, and in more structured ways for the same purpose. The Creative Economy Working Group (CEWG), an alliance of arts organisations, exemplifies this civic engagement. They have taken progressive positions and pushed relentlessly for facilitative policy, which is crucial to growth in the sector. We also salute partners from the Department of Culture for sharing the broad vision.

Jonah is a farmer. His story, as told by The Food Alliance, is perhaps one of the most urgent pieces in this Issue, dealing directly as it does with the very

food we eat. Culture combines the science and the art of food production, and consumption. We forget this at our own peril.

Marisella Ouma and Nelson Tunoi tackle the Traditional Knowledge Act, looking at it both analytically and in context. They are both clear that although the Act provides certain protection, in its present form it is impossible to implement, leaving indigenous resources vulnerable to exploitation. The Creative Commons is an ingenious idea that enables sharing in the face of intellectual property (IP) legislations. Alex Gakuru, and Nzomo and Rutenberg look at the area of IP.

Kimani wa Wanjiru engages the part played by artists in pushing for the recognition of culture in the Constitution against the backdrop of devolution to County, whilst Aghan's reflections on the Kenya Cultural Centre/KNT consider the arcane proposition that it is desirable to situate locally embedded, heterogeneous culture in foreign space.

The fluidity enjoyed by Gospel music across popular culture has both Ntarangwi and Mutonya grapple with the boundaries and nuances of consumption—when expressed in the language of the everyday, is gospel inspired, or is it just another genre?

Anyang' Nyong'o weighs in on ethnicity in fine Marxist form, reminding us the material basis of nation-formation, and that it will take a real revolution (in whatever new, or old forms this may present) for us to achieve this state. Our diversity and nationalism are prone to 'cultural jingoism', a loaded term he resurrects in certain warning.

Identity remains a key anxiety in Kenya, and a sticking point in the Constitution. Indeed, since Brexit and the US election of Donald Trump the world is waking anew to its narrowness, and insularity. Abubakar Zein argues for the opportunity the 2010 Constitution offers to establish a truly pluralistic society following the missed opportunity at Independence in 1963. What Zein yearns for in terms of a memorialization that will embrace the past and figure in the future, Yvonne Owuor fulfills, in the difficult task she sets herself in the award-winning novel, *Dust*. In fact and fiction, she knits together an unspoken, and unspeakable past, giving us the now signature language of silence. An earlier case of corruption involving oil that saw generators imported by a cartel in Excerpt I is sadly mirrored in the current national maize scandal. *Plus ça change, plus c'est la même chose*.

Our book review is of MG Vassanji's new work, *Nostalgia* (2016) in which he moves from historical retrieval to longing for pasts truncated, and futures so fragmented and fractured as to constitute a new reality. Some call it science fiction.

We feature visual artist Paul Abwao. His impressive range in technique, from watercolour to three-dimensional impasto is masterfully displayed here in remarkable study featuring the guinea fowl.

Over fifty years after independence, Kenya is still caught up in constitution making. We have a rare opportunity to get things right.

K a r i b u n i.

**Garnette Oluoch-Olunya & Mueni Lundi**

## Promoting culture and the arts through policy and legislative framework

**Kimani Njogu**

# From The Publisher

The theme of Culture and the Constitution of Kenya in this Issue of Jahazi is apt. This is because the Constitution is anchored on culture and the people, whose supremacy is underlined severally. More specifically, Article 11 recognizes 'culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.' This foundational function means that all political, economic, social, technological and artistic elements manifest our 'collective way of becoming.' Indeed all state actions ought to be guided by the mutually agreed and constitutionally protected cultural principles and values and all public officers at the national and county levels have the responsibility of ensuring adherence to the unity of national purpose enshrined in the Constitution and especially under National Values and Principles of Governance.

The constitutional provisions echo the sentiments of many cultural scholars involved over the years in ensuring that culture and artistic freedom were protected in the constitution. The ideas of these scholars started coalescing around the Constitution of Kenya Review Commission (under the chairmanship of Professor Yash Pal Ghai), the Ad hoc Committee on Culture at the Bomas (of Kenya) Constitutional Conference and the Consultative Committee on Culture and the Constitution. The freedom to imagine and create art and culture is correctly viewed by these scholars as integral to political and economic transformation.

Writing on the challenge for Africa, the late Professor Wangari Maathai shows the relevance of culture for development of Africa. She argues that Africa's inability to see culture as a weapon (to use the words of Amilcar Cabral) denies the people a crucial 'reference point to the past' and 'antennae to the future'. Because the cultural base is not foregrounded communities start doubting themselves and their abilities. Recognizing the power of culture, colonial rule purposively targeted culture as a site of struggle and sought to repress it. In so doing, the self-confidence and esteem of communities were undermined. It is not surprising therefore that the development paradigm adopted by many African countries, and the institutional framework to deliver it, has been indifferent to

the context of its operations and the people for whom it is supposedly targeted.

As Claude Ake (1996: 15) observes; “ Because the development paradigm tends to have a negative view of the people and their culture, it cannot accept them on their terms. Its point of departure is not what is but what ought to be. The paradigm focuses on the possibility of Africa’s becoming what it is not and probably can never be. Inadvertently, perhaps, it discourages any belief in the integrity and the validity of African societies.” The result has been self-alienation and self-doubt and the internalization of a negative image of the self. To help individuals and communities to regain self-confidence, the state has a responsibility to build the infrastructure which is required for cultural revival within the confines of fundamental human rights. This is the foundation that the Constitution of Kenya seeks to build by assigning responsibilities to the national and county governments. Sadly, the pace of bringing to life the facilitative provisions has been extremely slow and minimalist, suggesting the need for changes in the mind-set of those charged with implementing the culture and arts agenda.

The Constitution obligates the State to promote all forms of national and creative expression through literature, the arts, celebrations, science, media, communication, heritage and libraries. It behoves the State therefore to initiate and support and in the advancement of culture, creativity and innovation, build the requisite infrastructure, source markets for creative goods and services and put in place incentives for the growth of the sector.

Language and culture are intrinsically connected. Recognizing this relationship, the Constitution makes clear provisions on language as facility of human expression and as a tool for social and economic development. When we become fully conscious of the possibilities of language in development we are able to address key societal concerns such as inequality, access to education, access to health care, freedom of expression, the rule of law, respect for diversity, protection from violence, and environmental sustainability. Through language choices we can, collectively, embark on building the nation-state. This is because the nation is born when community members collectivize the meaning of life and how individuals will relate with each other. They build structures to capture this understanding. In reality, the nation is a work of labor; it is not self-constructing but is, rather, a political process pursued deliberately and rigorously by citizens. Through a shared language, communities construct a speech community and this, coupled with a shared vision, increases trust and collective sense of belonging.

For decades, language and culture workers in Kenya have advocated for provisions in the Constitution that would guarantee linguistic, artistic and cultural rights of individuals and communities. These can now be found



in the Constitution of Kenya Articles 7, 10, 11, 35, 44, 53, 54, 55, 56, 59 and 159 and the Fourth Schedule Section 5 on promotion of official and local languages. Moreover, Articles 6(2), 21(3), 27(4), 46 (1) b, 57 and 232 also rely on the proper handling of the linguistic diversity of Kenya.

Creative work thrives best in an atmosphere of freedom. Therefore any legislation targeting the sector ought to be within the parameters set out in Article 24 of the Constitution. Moreover, it must take into account Article 10 of the Constitution (on national values and principles of Governance) and Article 33 (on freedom of expression which encompasses the freedom to seek, receive or impart information or ideas; freedom of artistic creativity). The fact that artistic creativity is mentioned is significant. In the past novelists, poets, cartoonists and playwrights have been imprisoned because of expressing their ideas on corruption, inequalities and misuse of power by public officers. This right is now constitutionally guaranteed.

Media are critical to culture and the arts. Article 34 sets out the freedom of the media and further provides that the State shall not exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; penalise any person for any opinion or view or the content of any broadcast, publication, or dissemination. In addition, Article 34 of the Constitution mandatorily restricts the State from interfering with any broadcast, production or circulation of any publication or dissemination of information by any medium. Indeed, the Constitution decriminalises opinions, views or contents of broadcasts, publications or dissemination.

The Fourth Schedule of the Constitution sets out the functions of the national and county governments and provides a schedule of functions for the two tiers of government. The national government is in charge of language policy and the promotion of official and local languages. The Schedule 4 provides that cultural activities, public entertainment and public amenities including cinemas, video shows and hiring, libraries, sports and cultural activities and facilities are the functions of county governments. Part 2, Article 13 of the Fourth Schedule to the Constitution bestows upon county government the responsibility to control drugs and pornography.

The Constitution has built the framework for the advancement of languages, culture and the arts. Now the real work, that of implementing these provisions for political, economic and social transformation, must begin.

# Food in Culture: Kikulacho...

*The emplacement of protection of seed and all plant varieties under Culture in Article 11:(3)(b) of the Constitution is instructive, drawing one to a holistic appreciation of the compound nature of the term agri/culture itself. In this integrated piece the team at the Food Alliance draw us into the story of the intricate and inextricable ways in which food is an essential part of social practice.*

**Dorothy Muthini - Kenya Food Alliance'**

## Jonah's Story

My grandfather, Jonah, has lived on his fifteen-acre farm in central Kenya for close to eight decades now. He derives fulfillment from working on his farm. However, he is getting weaker with age, so this is proving to be a challenge. He has raised five children – my dad and his siblings – through income from his farm. Now they are influential business people and corporate executives in Kenya and cannot understand why their dad is reluctant to leave rural life and join them in the city for a 'better lifestyle,' as they put it. But Jonah is stubborn; he wants to live on his farm. As a result, my dad and his siblings have employed workers to help him with the farm work.

Every morning, Jonah takes a tour around his farm checking on the progress of farm activities and whether the workers are doing a good job. This is his daily routine. As his grandchildren, we visit him on alternate weekends and during holidays just to keep him company and enjoy country life. He was mission-educated, and has a good command of both English and Kiswahili. His favorite form of entertainment is the local dialect radio station that has good reception within his area.

Lately on visits to grandpa we have noticed he doesn't seem quite happy. Operations on his farm, although quite intense, are yielding less each



season. He blames it on his lazy farm workers, and has consequently been demanding for new workers almost every week. Initially, grandpa had three granaries for agricultural produce. From a bumper season, they would all fill up with mostly cereals. Nowadays, hardly does one fill up. He thinks his farm workers are not working as much as they should. On one afternoon, as he sits on his stool listening to his favorite Kikuyu station, he clicks hard and complains that the presenter duped them into buying seeds that did not yield. This catches my attention, and I draw near.

“But grandpa, I thought dad sent seeds for planting last season. Why did you purchase others?”

“Nyambura,”—that’s me— “our agricultural officer was on the radio for three consecutive morning shows telling us to buy these seeds that will yield double as much since they are hybrid,” he retorted. “He even came to our church last Sunday accompanied by officers from seed companies and repeated what he had been saying on radio. In fact, there was a raffle competition where some congregation members won 4kg bags of seeds. They promised to be coming more often, and to replace the grain bags if the seeds failed to germinate. They called it seed insurance.”

“For how long has this been happening,” I asked.

“It has been more frequent this year. Last year, they advertised on radio only but nowadays there are people walking around at the centers talking about it.”

He went on to explain how earlier practices of sorting, preserving, storing and exchanging seeds are not as common as they used to be. “You should ask your dad how I used to force him and his siblings to sort out the best seed for the following season. For almost five decades before this new commercial seed revolution, we would select the best produce and preserve it as seed.”

By now I had already grabbed my small notebook and was jotting down his musings. It now turned into some sort of interview. He also got elated since none of my other cousins was willing to have an ‘agricultural chat’ with him. Finally! Someone was showing interest!

“Crop failure was a rare occurrence, and when it happened, we were always ready to deal with the situation. Most of the times it was as a result of unfavorable weather conditions. With the changing weather patterns, we thought the seeds advertised by the agricultural officer would be the saviour. The situation has not changed. In fact, it is worsening by the day. Maybe it is a case of falling from the frying pan into the fire?” He pondered aloud.



“Grandpa, where are these new seeds coming from? Aren’t they tested on how they perform in different agro-ecological zones?”

“We’ve been asking the same questions. The answer is that these seeds were previously collected from here. Our local farmers selected and strengthened them through years of repeated rains, droughts, pests and insects challenges. These local seeds can withstand the changing climatic conditions. Unfortunately, foreign seed corporations take these seeds and profit from our sweat as they extract useful (genetic) traits and sell them worldwide. They take away our best genetic traits and replace these with less locally adapted varieties that must be planted with lots of water, fertilizers and require repeated dousing with poisons to control pests and diseases. I actually think we are being hoodwinked because our seeds were better—and these are now being sold back to us at a higher cost but with less value. The agricultural officer explained that these corporate commercial seeds have also been protected through Breeders Rights and Patents and now belong to the multi-nationals. Farmers have lost their age-old cultural rights to preserve these seed, replant, exchange, bequeath or even sell to meet their livelihoods needs.”

*Most of the companies enhancing our seeds are multi-national corporations*

“But grandpa, what happens to those peasant farmers who can’t afford to purchase seeds every season? Can they replant seeds purchased previously?”

“It will be a criminal offense to replant the seeds because they are not insured.... Each planting season comes with its own type of seeds that are insured for the season.”

*The agricultural officer explained that these new seeds have also been patented and protected under International Property Rights and now belong to the multi-nationals. He says that all these new practices are legal and fall within the constitution.”*

“Don’t you think this is a harsh and punitive law?” I asked.

“Now that you state it, I see how trapped we are.”

Grandpa went on to lament the overuse of chemicals in their farming. They had to buy fertilizers to get better yields, and pesticides as these new seeds were prone to pests and diseases. “These chemicals are expensive and not many farmers can afford them. It also means that we get lower profits when you calculate the expenses we incur before the crops mature. Most food being consumed nowadays is full of chemicals!”

He remarked his shock at the increasing loss of indigenous plants, explaining that some of these plants had medicinal value and used to grow wild. He even suggested that the rise in health problems might

be as a result of the change in our eating habits. “Loss of our traditional healthy plants has led people to alternatives that are not healthy, hence the rise in lifestyle diseases such as diabetes, gout, and even cancer! Some plants have also been altered!” He gave an example of a traditional vegetable called nightshade. [*managu*; *osuga*] The local one was bitter and had small sized leaves while the “engineered” one has very big leaves and is not bitter at all. “This has been done just to enable those who sell to get better sales. The nutritional value of these altered plants is actually lower than that of traditional plants!”

Grandpa and I also noted that the packed maize flour is fortified with some nutrients and vitamins. He said that small-scale locally milled flour was healthier than the fortified variety. “It is only that the town people do not like its appearance and prefer the one that they buy in shops.” He wondered aloud why flour companies should remove all the nutrients to produce the ‘best’ flour only to add back artificial alternatives.

Grandpa was in flow! Suddenly, he asked me to enlighten him on the suicides in India that he had heard about a while back. I shared what I had read about it. The rate of suicides was high among the Indian farmers mainly due to stress and depression. One of the main reasons was the drought. Since they rely on rain fed agriculture, when the rainfall is not enough the crops fail and they get low yields. Cattle feed also becomes scarce. This, as well as the introduction of genetically modified crops had led to an increase in farmers’ suicides. The main crop associated with this modification is Bt (*Bacillus thuringiensis*) cotton. This type is much more expensive than the more common variety and as a result farmers have had to take loans from private moneylenders who charge very high interest. The farmers then made a deal with the moneylenders to sell their produce to them at prices much lower than what they would normally fetch at the market. The stress resulting from these high debts led to the suicides.

He really looked worried after I told him this. “I hope this will not happen in Kenya. I hope the government will not lift the ban on genetically modified crops,” he said.

“I also hope so grandpa; these crops cause more harm than good.”

He went on to tell me he had heard some of the farmers supporting the introduction of these crops. “They claim that it has high yields therefore more profits. They do not seem to care if they will suffer or not. All they care about is money. The plants are also said to be pest resistant.” I told him that this was not the case. “It is very expensive to purchase these seeds. The traditional seeds are much better because they have adapted to their various ecological zones. These new crops cannot withstand harsh climatic conditions. Research has also shown that prolonged consumption has led to people contracting various diseases.”

I gave details of the case of green revolution that involves adopting new methods of farming, use of agro chemicals, chemical fertilizers, irrigation and adoption of high yielding varieties of cereals such as rice and wheat. “The use of chemicals has led to pollution of water bodies, loss of soil fertility and even biodiversity because many farmers are concentrating on planting the same types of crops since they are supposed to have high yields. It has also led to commercialization of agriculture as many people are doing it just for profit.”

Jonah agreed, adding: “Nowadays it is hard to see variety in market produce. Everybody is selling almost the same things. The only difference is in price, as they compete for customers. This has affected us farmers because we are not getting the big profits we used to.” He lamented over his own crop, maize:

“There are too many people selling maize and so prices have gone down. We also get duped by brokers who buy at a very low price.”

After a long moment of silence he asked, “Nyambura, would you move from town and come stay here?”

“No grandpa, but I do visit?”

“Why not? Is it not a good place?”

“It is a good place but being in town is much better for me. There are so many opportunities especially now that I am done with my university education,” I answer.

*Traditionally, farmers would acquire seeds through saving the best seed from season to season, exchanging with other farmers and through seed banking. As times have changed, so have these practices.*

“That is where the main problem is”, said Jonah. “Once you people get educated, you do not want to come back to the village. You want a ‘better lifestyle’. Your father and his siblings also refused to come back, and now they want me to go join them there! Who will be left to farm in the village if all of us go to the city? Where will people get food supplies? Should we leave the big companies to feed us? We need you people who have degrees to come and make farming better since you can put into practice what you have learnt.”

“Wow, I have never thought about it like that, grandpa.”

*Seed is the basis of any agricultural activity*

Our discussion had made many things clear. Farmers, particularly those within rural areas are not aware of the new agricultural policies, either useful or destructive, that have been put in place for agricultural activities in Kenya. After asking around my other relatives on the agricultural policy

situation, I found out that they were unaware on what is happening in the complex arena of modern farming. The question now was how to create a broad awareness.

Agriculture has clearly evolved since ancient times from hunting and gathering of food, to actual crop cultivation and mechanization. There has been tremendous growth in the sector, both positive and negative, not only in Kenya but also globally. There is a clear-cut difference between traditional and commercial agricultural methods. Traditionally, farmers would inexpensively acquire seeds through saving the best seed from season to season, or from exchanging with other farmers and from local seed banks. As times have changed, so have these practices disappeared. The changing climatic conditions have also led to the development of seed technology. The inception of hybrid seeds acquired through commercial seed system has lessened the practice of seed saving and exchange. Seed is the basis of any agricultural productivity. However, the commercialization of seed with little regard for the nature of the traditional seed that was adapted to particular environments has resulted in a paradigm shift in agriculture. As in my grandpa's case, there is little or no awareness of the implications of this change.

Which begs the question, what should the focus be while making and implementing agricultural policies? For the technocrats, the idea is to gain control over the essential thing— the seed. Society elites are busy trying to make money. It is the ordinary citizen who doubles up as farmer that can provide contextual detail of the evolution of agriculture. It is this farmer that we must empower.

*The yeast and the sausage tree are genetic resources from communities that have seen a serious erosion of their traditional knowledge and practices*

## **A Coda: Food, Culture and the Conservation of Genetic Resources**

Why do the Kamba eat *Muthokoi*? How did *Mursik* become a delicacy of the Kalenjin people? Why are the Meru and Kisii people known for eating and growing Bananas? Are *pilau* and *biryani* an intrinsic part of Swahili culture? And if the ubiquitous 'white ugali' were to be removed as a staple food for the Luhya and Luo communities, what would they eat?

The Spanish explorers brought genetic resource including maize back to the old world. Not long after, maize became a staple crop throughout Africa and Europe. Unfortunately, the Europeans inadvertently left out the traditional knowledge of preparing a meal out of the corn. They did

not understand that throwing some ash or lime into the cooking water made the maize much more nutritious and softened the kernels, making it easier to digest and process into flour. This cultural practice is called nixtamalization. Not only do ash and lime contain minerals, when mixed in water they create an alkaline solution that frees up essential amino acids and niacin (vitamin B3) that would otherwise be locked in the grain. Skipping the lime process has led to outbreaks of Pellagra (*upele*) among communities that eat maize as a staple.

Way back in 1893, East African millet beer led to the discovery of the earliest records of a special fermentation yeast. And from the 1950s to the present, this yeast has become the wonder of science and the beer industry. Now used the world over, it is called *Schizosaccharomyces pombe*, paying homage to its East Africa roots. When the word *Muratina* is mentioned, it is the local brew that comes to mind first, and not the fruit tree commonly called the “sausage tree” (*Kigelia africana*) from which this traditional beer is derived. The yeast and the sausage tree are genetic resources from our local communities. Kenyan communities have seen a serious erosion of their traditional knowledge and practices, driven by the conveniences of an easier western agriculture and lifestyle. Knowledge of preparation of this alcoholic drink was passed down through generations. *Muratina* played a central role in almost all social and cultural functions in the Kikuyu culture, such as births, deaths, initiations, and weddings. But why was it important to drink this beer from the horn of a cow?

Who cares to remember how traditional salt, *munyu*, was made from the filtered ashes of special forest herbs? How many hypertensive cases would be avoided if we went from using pure table salt to this original seasoning? It is disheartening not to find local scientific publications that reflect back on the role of a traditional lifestyle and diets that contrast these with modern living. We have been assimilated into the western culture and the accompanying diseases are particularly brutal on our African genes.

*The erosion of our cultures and the loss of Kenya’s heritable (genetic) resources underscore the need for policies and legislation to conserve and regulate access to genetic resources, to protect traditional knowledge and practices and to facilitate the equitable sharing of benefits from the use of such resources*

Article 11 of the Constitution of Kenya recognizes culture as the foundation of the nation and as the cumulative civilization of the people and nation of Kenya. It calls for the state, through an act of parliament, to recognize ownership and the role of communities in the conservation and promotion of their scientific and indigenous technologies and to provide for intellectual property (IP) rights of the people of Kenya. Article 11 throws readers into several disconnected camps. On the one hand are people who imagine that this section deals mostly with recording of



folklore, practices, dances and outfits of the communities. On the other hand are the scientists who only see the mention of Kenya's wealth of genetic resources as a misplaced element under this section on culture. There is yet a third category - the so-called digital generation that squirms at things traditional and would rather look up a recipe on the internet, order food delivered or pick a drive-through take-away. Unfortunately and increasingly, this is where the majority of Kenyans fall. Urban and western-style of living will continue to disconnect communities from their genetic resources and the practices associated with their farming. It is not uncommon to hear of urbanite children who only know that carrots and tomatoes are "made" at the supermarket. Some have been traumatized by witnessing an egg come from the backside (bottom) of a chicken on a rural farm.

The erosion of our cultures and the loss of Kenya's heritable (genetic) resources underscores the need for policies and legislation to conserve and regulate access to genetic resources, protect traditional knowledge and practices, and facilitate the equitable sharing of benefits from the use of such resources. Deliberations over the protection of traditional knowledge can all be linked to economic globalization. Before the 1970s, museum curators, archivists and anthropologists had no concerns with regard to ownership of the information they collected. After the 1980s issues relating to the protection of traditional knowledge started to emerge, with a lot of discussion on the intellectual creativity of indigenous people, although much of this discussion was primarily

focused on folklore. Consequently indigenous peoples, local communities and governments, mainly in developing countries, have demanded equivalent protection for traditional knowledge systems.

In 2016, two pieces of legislation were passed that are distinct and disconnected: the Protection of Traditional Knowledge and Cultural Expressions Act, 2016 and the obscure amendment to Section 27A of the fairly clumsy and embellished Seed and the Plant Varieties Act of 2016.

The Protection of Traditional Knowledge and Cultural Expressions Act, 2016 aimed at creating a sui-generis mechanism for the protection of traditional knowledge and cultural expressions in Kenya which gives effect to Articles 11, 40 and 69 (1) (c) of the Constitution.

The Constitution under Article 11(3) (b) obligates parliament to enact legislation to recognize and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya. It is this constitutional imperative that has resulted in the recent amendments to the Seeds and Plant Varieties Act of 2016. The amendments took the narrow view and only implemented Kenya's obligations to the International Treaty on Plant Genetic Resources for Food and Agriculture (The Plant treaty), which provides for farmers' rights. Left out are constitutional requirements to recognize and protect community rights to genetic resources that extends to animals, and even microbial life forms. This has left wide open doors for exploitation by rich and knowledgeable Multinational Corporations that have scientific muscle and know-how, and who are searching for lucrative novel drugs and genetic sequences, through bio-piracy and/or bio-prospecting.

The two 2016 legislations were hurriedly enacted towards the end of the constitutional time limit, and six years after promulgation. When these legislations were being passed, there was little public consultation and participation among the relevant stakeholders, contrary to the national values and principles of governance under Article 10 of the constitution. Is it a wonder therefore that these two pieces of legislation seem disconnected and their approach vague?

Traditional knowledge can be defined as any knowledge originating from a local community that is the result of their intellectual activity and insights, including know-how, skills, innovations, and practices and learning that are passed on from one generation to another. It includes knowledge associated with their agriculture, environment, genetic resources and medicinal practices. However, traditional Knowledge can be watered down and distorted through integration into the cultures of others.

The Genetic resources and Traditional knowledge and folklore legislations are closely intertwined and need to be addressed together. They have

common characteristics, similar problems and raise analogous questions on matters concerning intellectual property rights (IPR's). It is therefore difficult to deal with them separately and sequentially. These legislations cannot therefore be deemed to fully implement Article 11(3b) and 69(1c) of the constitution

It is therefore time for social scientists to sit down with natural scientists and transparently in a public participatory manner formulate a better Act. The title of the new combined act should be "Traditional knowledge, genetic resources and Cultural expressions". This is the only way to connect Kenyans to their food and culture and to promote the protection of their inherited scientific knowledge and genetic resources, while assuring access and benefit sharing for sustainable development.

*'Dorothy Muthini and Daniel Maingi. Info@kenyafoodrightsalliance.net*





# **Breaking it Down: The Protection of Traditional Knowledge and Cultural Expressions Act**

**Marisella Ouma**

## **Introduction**

Traditional knowledge and traditional cultural expressions have in the recent past become an integral part of our lives and are increasingly being used in the global market. There have been attempts at national, regional and international level to protect traditional knowledge and traditional cultural expressions from unauthorized use, misuse and misappropriation by third parties. This is evident in various industries such as agriculture, pharmaceuticals, cosmetics, music, handicrafts and fashion among others. It is important to note that in various communities, there are systems in place to protect and preserve traditional knowledge and traditional cultural expressions; these include customary law, customs and taboos.

To safeguard the interests of the custodians of traditional knowledge and traditional cultural expressions, there is need to ensure that the legal system provides for protection. This can either be through positive protection, that is, the grant of specific rights to the custodians, giving them the right to take action and/or seek remedies against any form of misuse of their traditional knowledge and traditional cultural expressions. The second way is through defensive protection, which prevents others from asserting or acquiring intellectual property rights over their traditional knowledge and traditional cultural expressions. An example is the traditional knowledge digital library in India.

Protection at multilateral level has been discussed at length. Several international instruments have tried to address specific aspects especially in the case of traditional knowledge and biological resources, and traditional cultural expressions and cultural industries. These include the Convention for Biological Diversity, the Nagoya Protocol, and United

Nations Declaration on the Rights of Indigenous Peoples. <sup>1</sup>Negotiations are ongoing at the World Intellectual Property Organisation (WIPO) under the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC) towards an international *sui generis* system of protection.

At regional level, the ARIPO Swakopmund Protocol was adopted in 2010 and came into force on May 11, 2015. Although Kenya has not ratified the Protocol, the law in Kenya is to a certain extent drawn from the Protocol. The Protection of Traditional Knowledge and Cultural Expressions Act (The Act) was passed in August 2016 and come into force on 21 September 2016. Before the enactment of the Act, there were different laws that attempted to address certain aspects; for instance, expressions of folklore were covered under the Copyright Act. <sup>2</sup>This paper seeks to provide a critical analysis of the Act as it relates to the cultural industry in the country.

## **A Critical Analysis of the Act**

This is an Act of Parliament that is meant to provide a framework for protection of traditional knowledge and traditional cultural expressions in Kenya. It also gives effect to Articles 11, 40 and 69 (1) (c) of the Constitution of Kenya.<sup>3</sup> Article 11, recognises the importance of culture and requires the State to promote all forms of national cultural expression and provide an enabling legal environment.

The Act, not only seeks to address the abovementioned Articles of the Constitution, but also to ensure the protection of traditional knowledge and traditional cultural expressions in Kenya. To what extent has the

*the Cabinet Secretary is defined as the Cabinet Secretary responsible for matters of intellectual property. This creates a problem in terms of administration as there are currently three Ministries that deal with Intellectual Property,*

Act addressed the above objectives, and what needs to be changed or reviewed to address any shortcomings or gaps? The Act, as stated above, to some extent draws from the ARIPO Swakopmund Protocol on the Protection of Traditional Knowledge and Traditional Cultural Expressions. It also seems to have some aspects of culture and heritage drawn from international conventions such as the Convention on the Protection and Promotion of Diversity of Cultural Expressions and the Convention for the Safeguarding of Intangible Cultural Heritage. This however has brought about a mix of issues and limited provisions on protection and promotion of traditional knowledge and traditional cultural expressions. It is evident from several definitions, as well as specific provisions, that there are gaps in the law that need to be addressed. Interpretation of terms under section 2 of the Act provides some clarity for some of the terms used but in some instances may cause confusion. In the case of the Ministry to take charge of the implementation of the Act,

the Cabinet Secretary is defined as the Cabinet Secretary responsible for matters of intellectual property. This creates a problem in terms of administration as there are currently three Ministries that deal with Intellectual Property, namely Industrialisation, Agriculture and the Office of the Attorney General. It is also important to note that the Ministry of Sports, Culture and the Arts also deals with cultural industries. The Act uses the term “cultural expression” which is defined to cover traditional cultural expressions. It is important to note that culture is dynamic and can include contemporary culture, which might make the use of the term “traditional” in the Act problematic.

Under defensive protection, Section 5 of the Act designates the Kenya Copyright Board to establish and maintain the repository of traditional knowledge and cultural expressions as well as implementation of the Act at the national level. This section presumes that the implementation of the Act will be under the Kenya Copyright Board within the Office of the Attorney General. However, inter-ministerial collaboration is crucial to ensure that all aspects of traditional knowledge and traditional cultural expressions are covered and this may be through specific provisions in the implementing regulations.

In this field, a community may be defined to include a local or indigenous community, as they are the custodians or holders of traditional knowledge and traditional cultural expressions. The Act however gives a definition that could include communities other than the local and indigenous communities. A group of people may, for instance, share the same geographical or ecological space or community interest but have different cultural industries and forms of traditional knowledge. There is need to have a simpler definition of community in this context.

The term “exploitation” has been defined as a negative term in the context of use of traditional knowledge and cultural expressions. It is important to note that in Intellectual property, exploitation is not necessarily a negative term but becomes a problem when third parties “exploit” the protected work without the authority of the owner, rights holder or custodian. This definition should either be deleted or qualified as unauthorized commercial exploitation and use beyond customary/traditional context.

Section 4 sets out the responsibilities of the county governments which include primary registration, preservation and conservation, facilitation of access and sharing of information and allocation of financial resources for traditional knowledge and traditional cultural expressions. The Act presumes that all these will be covered by the office responsible for culture at the county level and does not take into account the traditional knowledge aspect, which goes beyond culture. There is need to have a clear linkage of what is done by the county governments and the national government through the designated offices.



*The Act presumes that all these will be covered by the office responsible for culture at the county level and does not take into account the traditional knowledge aspect, which goes beyond culture.*

Under Section 10 of the Act, the community is empowered to promote its traditional knowledge and traditional cultural expressions, control its uses and benefit from its commercial exploitation, thus limiting or outlawing the unauthorised use by third parties. The community shall adopt its own rules and procedures prescribing procedures for authorisation of use by third parties.

The Act is clear that there shall be no formalities for protection and any form of registration or database entry shall be voluntary and does provide for secret and sacred traditional knowledge or cultural expressions. It takes cognizance of shared traditional knowledge and traditional cultural expressions within and outside the country when it comes to registration or entry into the database. The onus is on the Kenya Copyright Board and the county governments to ensure that the rightful community/holder is entered into the register based on existing customary laws and protocols. This, although well intended, can create a problem as it will require additional documentation by the authorities. The Kenya Copyright Board and the county governments are expected to work with other organisations that deal with matters related to traditional knowledge and traditional cultural expressions to establish and maintain the database. The mode and scope of engagement should be clearly defined in the implementing regulations.

Protection against unlawful acts under Section 18 of the Act is modelled along the conventional intellectual property rights by conferring positive protection subject to exceptions and limitations under Section 19. The National Government is required to consult with county governments to set up mechanisms to prevent the misappropriation, misuse or unlawful access and exploitation of traditional knowledge and cultural expressions. Any user shall be required to obtain prior informed consent from the community holding the knowledge. Use of the knowledge shall be compatible with fair practice, relevant customary laws, protocols and practices and acknowledges the moral rights of the community. The Act does not define what is meant by “fair practice”.

One of the main challenges we face in Kenya is the use of traditional knowledge to create works that are protected under existing intellectual property rights. This is addressed by section 20(1) which requires written authorization of the use of such works for commercial purposes. Therein lies the challenge. The definition of derivative work is restrictive and covers any works that may have been inspired by traditional knowledge and traditional cultural expressions. This limits creativity and creates a “lock in” of knowledge. For instance, a local artist may be inspired by

traditional cultural music to create modern contemporary music. Does this mean that they would have to get authority from the community? This is different from someone who uses the actual traditional music for commercial purposes. A distinction should be made from works inspired by and works that are actual traditional knowledge and cultural expressions. In order to avoid situations where sharing of ideas is limited or even made illegal, it is important for the law to limit itself to the use of existing traditional knowledge and cultural expressions. Prior informed consent is applicable where third parties seek to acquire intellectual property rights for instance pharmaceutical patent over medicine identified through traditional knowledge or copyright over a traditional copyright work.

*a local artist may be inspired by traditional cultural music to create modern contemporary music. Does this mean that they would have to get authority from the community?*

The issue may not always be acquisition of rights but also protection against use that may be prejudicial to the interests of the community such as the sacred and secret knowledge. This should be clearly spelt out in the Act. The Act provides for the rights to equitable remuneration and empowers the Cabinet Secretary to make the relevant regulations to facilitate the process.

Part IV and specifically Section 25 of the Act seem to cover provisions that already exist in previous parts of the Act. For instance, authorization of use of traditional knowledge and cultural expressions, or notification of agreements – this creates more bureaucracy in management. An application for consent is done through the Cabinet Secretary and not the community itself. This is cumbersome as it requires public participation before the Cabinet Secretary grants or rejects the application. Ideally, the application for consent should be done to the community and maybe filed with the Ministry or Kenya Copyright Board, or the county government, as the latter two are expected to maintain a register/database. The main purpose of the database or register so maintained is to help identify the rights holders so that they can get the necessary consent, as is the case with the Traditional Knowledge Digital Library in India.

Section 27 should have come immediately after section 12 on compulsory licences. There is need to reconcile Section 27, which deals with application for consent and Section 32 that addresses the issue of authorized user agreements. Based on the provisions of the two sections, does the user require consent from the Cabinet Secretary as well as have to sign a user agreement with the community? The ideal situation is where the user gets consent and signs a user agreement with the community, which may register the same with the Cabinet Secretary or the authorized entity. Section 25 should therefore be deleted, and section 36, which allows for direct consent from the community retained. Part VII provides a comprehensive list of offences and penalties as well as civil action, sanctions and remedies. It provides for alternative dispute resolution remedies but does not provide for administrative action and remedies.

## Conclusion

How do creative/cultural industries stand to benefit from this Act? The cultural industries such as music, art, visual arts, performances, media to name a few, to a certain extent rely on traditional knowledge and cultural expressions. The law seeks to regulate use of traditional knowledge and cultural expressions, ensure that the communities or individuals holding the knowledge can control their access and use, benefit from commercial exploitation, protect against misuse and misappropriation and promote use and preservation of the same.

*The defensive protection offered under the establishment and maintenance of a database will also help provide access to works that were previously not accessible, or the communities of origin not known.*

To a certain extent, the Act has achieved part of this objective in an attempt to implement Article 11, 40 and 69 of the Constitution. We have noted that there are several gaps and shortcomings that need to be addressed for the creative industries to get maximum benefits of protection under the Act. The defensive protection offered under the establishment and maintenance of a database will also help provide access to works that were previously not accessible, or the communities of origin not known. The proposed amendments and implementing regulations should also help in implementation of the Act.

It is imperative that the government ministries and agencies that are dealing with various aspects of intellectual property, traditional knowledge and traditional cultural expressions work together at national and county level to effectively implement the Act. Although the Act is a good attempt at protection, more needs to be done.

## Notes

<sup>1</sup>Article 31 of the UN Declaration on the Rights of Indigenous Peoples, Article 8(j) Article 10(c) Article 17(2) and Article 18(4) of the Convention on Biological Diversity, Article 7, Article 11 and Article 16 of the Nagoya Protocol.

<sup>2</sup>The Copyright Act Cap 130 of the Laws of Kenya defines “expressions of folklore” (Section 2) and requires anyone who wishes to use expressions of folklore for commercial purposes to get authority from the Attorney General (Section 49).

<sup>3</sup>Protection of Traditional Knowledge and Cultural Expressions Act No. 33 of 2016.

# Traditional Knowledge and Cultural Expressions: Caught in up the Act

**Nelson Tunoi**

*Tunoi argues here that the TK Act may provide certain benefits, but by itself is not effective in ensuring effective protection.*

## Introduction

This paper examines the applicability of the Protection of Traditional Knowledge and Cultural Expressions Act (henceforth referred to as the act). Its applicability will be viewed under two frameworks: Legal Framework and Intellectual Property Framework

## Legal Framework

The Act provides for a framework for the protection and promotion of Traditional Knowledge and Cultural Expressions in Kenya. <sup>1</sup>The Act gives effect to the existing Constitutional legal framework of Traditional Knowledge (TK) and Traditional Cultural Expressions (TCE) in articles 11, 40 and 69(1)(c) of the Constitution. Article 11 obliges the State to promote all forms of national and cultural expression<sup>2</sup> and to ensure that communities receive compensation or royalties for the use of their cultural expression.<sup>3</sup> Articles 11(2)(c), 40(5) and 69 (1)(c) promote the intellectual property in TK and TCE. Intellectual property protection of TK and TCE, specifically the commercialization of folklore, is protected under sections 2 and 49(d) of the Copyright Act 2001 as read with Regulation 20 of the Copyright Regulations 2004.

The applicability of the Act is challenged by a couple of factors.

### **a) Interpretation of various terms in the act**

The first challenge is the interpretive section of the Act.<sup>4</sup> Benefactors, duty holders and the body with the regulatory function to protect TC and TCE are not clearly identified. Rights holders of TK and TCE are

communities, who pass it down from generation to generation. The Act creates an overlap between community ownership of TK and TCE and individual or organizational ownership of TK and TCE. The act provides for holders and owners, who may be recognized individuals or organizations within a community, to whom the custody of TK and TCE are entrusted within the customary law practices of that community. The definition of 'owner' in the Act overlaps with that of 'community'.<sup>5</sup> There is no clear difference between a holder and an owner; the terms are used interchangeably in the Act.<sup>6</sup>

*No mention is made of a specific parent ministry. This is a glaring gap; the applicability of the Act is put in jeopardy where there is no institutional framework to provide oversight, administration and enforcement.*

Under the Act, the Cabinet Secretary is ambiguously<sup>7</sup> defined as the Cabinet Secretary responsible for matters relating to intellectual property rights. No mention is made of a specific parent ministry. This is a glaring gap; the applicability of the Act is put in jeopardy where there is no institutional framework to provide oversight, administration and enforcement. Nevertheless, one can deduce from the Act that the Office of the Attorney General is most likely to be in charge since Kenya Copyright Board (KECOBO), a state organ under the Office of the Attorney General has the duty to host a TK Digital Repository.

Lastly, the term 'exploitation' is defined derogatively with the inclusion of expressions like 'selfish purposes' and 'taking advantage of unwary holder' yet in the body of the Act, the term is used in neutral terms in the context of authorisations, licenses and assignments granted to users.<sup>8</sup>

### **b) Lack of uniform authorization procedures**

Under the Act, the procedures for authorization are community based. These procedures are not vetted by any institution to ensure that they meet Constitutional principles of fairness. These processes are also not amenable to judicial review. The authorization procedures of communities should be vetted to ensure that they protect the persons licensed to exploit TC and TCE<sup>9</sup> from exploitation and unfair trade practices. The act should also provide for uniform authorization procedures should the community fail to have these in place.

### **c) Lack of redress by Communities against the owners and holders**

The Owners and Holders act as agents for their communities. They are tasked with consulting the community before engaging with potential exploiters over the use of the community's TK and TCE. Ultimately,



the task of authorization lies with them. Whereas the Act protects communities from external exploiters who seek to use their TK and TCE, it does not consider the agents and holders as potential exploiters. The Act does not protect the community in the event that the owners or holders misrepresent the community or authorize the use of TK and TCE for inadequate compensation or personal gain. The Act does not envision a scenario in which the holder or owner does not act in the best interest of the Community. Holders and Owners should be chargeable with a criminal offence should they neglect their duties. They should also be liable for civil action instituted against them by their respective community.

#### **d)Lack of regulations on Compensation.**

Compensation is at the heart of protection of TK and TCE. The Act provides communities with the right to fair and equitable sharing of benefits arising from the commercial or industrial use of their knowledge, to be determined by mutual agreement between the parties.<sup>10</sup> This is the main purpose of the Act, along with providing acknowledgement. It is cursory for the Act to provide for this right and to ignore making regulations, guidelines or policies regarding the compensation. The Act not only fails to provide said regulations, it also fails to oblige the Cabinet Secretary to make such provision. The wording of Section 24(3) of the Act is nebulous; it allows that the Cabinet Secretary 'may' make regulations, proposing or recommending the matters that should be included in a benefit sharing agreement.

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The Act acknowledges the aforementioned obligation, but creates a gap in its implementation. Compensation should not be the sole responsibility of the owners or holders, or the community. Compensation by mutual agreement is not a viable long-term solution. There need to be regulations and measures in place to ensure that there is adequate compensation for exploitation of TK and TCE.

#### **e)Lack of adequate measures for Compulsory Licences**

Section 12 of the Act grants that the Cabinet Secretary compulsorily licences for exploitation in accordance with article 40(3)(b).<sup>11</sup> Article 40(3)(b) states that the State may compulsorily acquire property as long as it is for public purpose/public interest, as long as there is prompt and adequate compensation, and as long as the property owner has access to court. Article 40(3) states that the State may not deprive a person of property of any description. The question therefore is whether the State can acquire TK and TCE.

A compulsory licence is an action of government forcing an exclusive holder of a right to grant the use of that right to others on terms decided by government.<sup>12</sup> Such a license takes away the community's exclusivity allowing others to make, use and sell the TK or TCE. It is a feature common in the TRIPS (Trade-Related Aspects of Intellectual Property

Rights) agreement, and applies to patents. Borrowing from this, it is possible to think of circumstances under which TK and TCE may be in the realm of public interest. However should there be need to issue a compulsory licence, the Act is ill equipped to handle the issuance of such a licence.

The TRIPS agreement provides limited exceptions to the exclusive rights conferred by a patent.<sup>13</sup> However use without authorization of the right holder is only granted under very specific circumstances.<sup>14</sup> Such authorization is granted after prior negotiation with the right holder, with the licence liable to be revoked as soon as the circumstances that led to its being granted cease to exist. Such a licence is non-exclusive and non-assignable, and is limited to the effective scope and time. The right holder shall be paid adequate compensation, with the legal validity of any decision relating to compulsory acquisition being subject to judicial review.<sup>15</sup>

## Intellectual Property Framework

Intellectual property in TK and TCE are protected under a *sui generis* system. This is the most practical approach and offers protection in a variety of ways:

- a) By offering defensive protection over genetic resources.
- b) By providing Positive Rights in TK and TCE that empower TK and TCE holders to protect and promote their TK and TCE.
- c) By granting inalienable moral rights. This ensures that TK and TCE may be passed down from generation to generation.
- d) By creating a database. The National Government has the duty of establishing and maintaining a Traditional Knowledge Digital Repository. This enables access, conservation and sustainable utilization of TK and TCE.

Offering *sui generis* protection is practical because it grants rights over TK that are independent of the current intellectual property framework. It takes into consideration the common nature of TK and provides for a mechanism of exploitation, community participation and access to benefit sharing in relation to the use of TK.<sup>16</sup>

## Conclusion

The Act provides a reasonable first step in the protection of TK and TCE. However, the Act by itself is not practical. There is urgent need to specify the regulatory authority and the Cabinet Secretary tasked with performing the duties under the Act. There is also urgent need to pass regulations that fill the gaps discussed above.



## Notes

<sup>1</sup>Preamble of the Protection of Traditional Knowledge and Cultural Expressions Act

<sup>2</sup>Constitution of Kenya 2010, Article 11(2)(a)

<sup>3</sup>Ibid Article 11(3)(a)

<sup>4</sup>Section 2 of the Protection of Traditional Knowledge and Cultural Expressions Act

<sup>5</sup>Nzomo Victor. (2016) Kenya's Protection of Traditional Knowledge and Cultural Expressions Act No. 33 of 2016 Comes into Force, at <https://ipkenya.wordpress.com/2016/09/23/kenyas-protection-of-traditional-knowledge-and-cultural-expressions-act-no-33-of-2016-comes-into-force/>

<sup>6</sup>Whereas section 25(1) of the Act grants the owners the duty of authorizing the exploitation of TK and CE, section 29

makes reference to section 25(1) and mentions the holders with the duty of providing consent for exploitation of TK and CE.

<sup>7</sup>Supra note 5

<sup>8</sup>Ibid

<sup>9</sup>Protection of Traditional Knowledge and Cultural Expressions Act, Section 25(3)(1).

<sup>10</sup>Ibid Section 24(1)

<sup>11</sup>Constitution of Kenya 2010, article 40(3)(b)

<sup>12</sup>Tarun Jain, (2009) Compulsory Licences Under Trips And Its Obligations For Member Countries. Accessed at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1136767](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1136767)> See also The Icfai University Journal of Intellectual Property Rights, Vol. VIII, No. 1, pp. 27-50, February 2009

<sup>13</sup>TRIPS, Article 30. Accessed at <[https://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm3\\_e.htm#Footnote7](https://www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm#Footnote7)>

<sup>14</sup>Ibid., Article 31.

<sup>15</sup>Supra note 12.

<sup>16</sup>Sihanya Ben, (2016), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Rights Management in Kenya*. The Law Society of Kenya Journal, Vol 12 No 2, pp1-39

# Towards a National Intellectual Property Policy in Kenya

*What was once perceived as belonging to community is today complicated by the idea of ownership. How do we begin to understand this shift?*

**Victor Nzomo & Isaac Rutenberg**

## Introduction

As many may know, intellectual property (IP) refers to the creations of the human mind. IP law protects the interests of creators, innovators and inventors by giving them property rights over the products of their intellect. IP is frequently divided into two branches, namely, industrial property and copyright. The former includes patents for inventions, trademarks, industrial designs and utility models, while copyright protects creative works such as fine art, books, music, films, broadcasts, paintings, sculptures, photographs, sound recordings, computer programmes, and electronic databases, among others.

IP is widely recognized as an instrument for promoting socio-economic development. It serves as a tool in unlocking local creative, inventive and innovative potential, stimulating the transfer and use of technologies and creative works, encouraging fair competition thereby promoting the creation of wealth and fostering national social, cultural and economic development. The significance of IP has increased in today's knowledge economy where the key for national development is knowledge instead of natural resources. As such, effective use of IP as a tool for development requires a policy framework that will ensure policy coherence and facilitate greater coordination amongst the key government and private bodies. However, no such policy instrument has yet been put in place in Kenya.

*The significance of IP has increased in today's knowledge economy where the key for national development is knowledge instead of natural resources. As such, effective use of IP as a tool for development requires a policy framework*

## **IP-related Legal and Policy Developments**

In 2005, World Intellectual Property Organization (WIPO) commissioned an IP audit in Kenya to assess the prevailing situation of the IP system in the country. The audit was to identify strengths and weaknesses that would be taken into consideration in development of a national IP policy and strategy. Although the final audit report was prepared and submitted by WIPO to the Kenya government in 2006, the formulation of a national IP policy and strategy has never been formally completed, with the last known attempts dating back five years. Meanwhile, from 2006 to-date, there have been several major IP-related legal and policy developments in Kenya touching on culture and the arts. These developments include Kenya Vision 2030, a National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions 2009, a National Policy on Culture and Heritage 2009, the Constitution of Kenya 2010, the Copyright (Amendment) Acts of 2012 and 2014, a National Music Policy 2015, and the Protection of Traditional Knowledge and Cultural Expressions Act 2016. Highlights from these developments are briefly discussed below.

Starting in 2008, Vision 2030 is Kenya's long-term development blueprint which seeks to achieve a sustained economic growth in gross domestic product (GDP) of 10% per year. Culture and the arts fit well in both the Economic and Social Pillars of the Vision due to their contributions towards improved economic growth through employment and national cohesion. It is specifically stated under the Social Pillar that the 'the government will provide stricter enforcement to copyright laws in music and performing arts and provide facilities for most talented musicians and actors.' The mention of copyright in this context is an acknowledgement that IP has the potential to spur growth and that, if well protected and properly harnessed, it can contribute to improved livelihoods and prosperity of vulnerable groups, especially the youth.

The 2009 Policy on Traditional Knowledge (TK), Genetic Resources (GRs) and Traditional Cultural Expressions (TCEs) provides a national framework for recognition, preservation, protection and promotion of sustainable use of TK, GRs and TCEs. Many stakeholders felt that the intellectual property (IP) rights system of the day was an inappropriate legal regime for the protection of TK and TCEs, and the Policy proposes a new mechanism based on 10 guiding principles: respect, full disclosure, prior informed consent, confidentiality, good faith, fair remuneration, equitable benefit-sharing, access, sustainable development and international cooperation.

The 2009 National Policy on Culture and Heritage was informed by the challenges posed by modernization, free trade, democracy, good governance and the need for the respect of human rights, as well as balancing the diversity of cultural expression with economic and sustainable development. Since culture provides the ideological and philosophical foundation for national development, which is central to all development programs, the Policy was intended to help in assessing and selecting ideas before adapting them to development programs. The Policy was also aimed at creating the benchmark necessary for mainstreaming culture and heritage and setting standards as well as raising awareness and the capacity building necessary for infusing culture and heritage as integral parts of public policy and development plans. Further, this policy seeks to define the major components of Kenyan culture as well as national heritage and further identifies and outlines major cultural institutions. Finally, the Policy maps out operational strategies and identifies the resources, approaches and administrative practices necessary for cultural renaissance and sustainable preservation of national heritage.

In 2010, Kenya ushered in a new Constitution. Under Article 11, the Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. It mandates the State to promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage. It recognizes the role of science and indigenous technologies in the development of the nation; and promotes the intellectual property rights of the people of Kenya. The Article obliges Parliament to enact a law to ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage. The Constitution also expressly protects IP. First, Art. 260 (c) includes IP in the definition of “property”. Secondly, Art. 40 (5) obliges the State to support, promote and protect the intellectual property rights of the people of Kenya.

In 2012 and 2014, substantial amendments were made to the Copyright Act which is the cornerstone for protection of creative works in Culture and the Arts. These amendments include the now highly controversial section 30A (recently struck off by a High Court ruling) on equitable remuneration for related rights holders, including performers’ rights. New amendments were also introduced in connection to the administration of the blank media levy – the levy payable to copyright owners by manufacturers and importers to be applied to recording equipment or media used by individuals to store music for their private use. Additionally, section 46A was introduced, which requires that all license fees payable to copyright owners through collecting societies must first be approved and gazetted by the Attorney General. Finally the insertion of a new section 33A to the Act officially introduced compulsory licensing in Kenyan copyright law.

The 2015 National Music Policy seeks to address the challenges facing the music industry in Kenya with a view to creating an environment characterized by more coordinated operations between state agencies and the industry, adequate support structures for all players in the industry, deterrence of piracy and other forms of fraud in the industry, enforcement of existing laws by relevant bodies and finally the increased flow of benefits to all music industry players, from their respective undertakings, for the realization of a robust music industry that generates employment, facilitates national cohesion and contributes positively to social and economic growth.

In 2016, the Protection of Traditional Knowledge and Cultural Expressions Act came into force and it is intended to give effect to Articles 11, 40 and 69(1) (c) of the Constitution discussed above. The Act provides that every community shall have the exclusive right to authorize the exploitation of their traditional knowledge; and prevent any person from exploiting their traditional knowledge without their prior informed consent. In addition to all other rights, remedies and action available, the owners shall have the right to institute legal proceedings against any person who exploits traditional knowledge without the owner's permission. Furthermore, the Act stipulates that a person who uses traditional knowledge or cultural expressions beyond its traditional context shall acknowledge the owner of the knowledge, indicate the source of the knowledge or expression and where possible, the origin of the knowledge or expression, and use such knowledge or expression in a manner that respects the cultural values of the holders. Finally, the Act provides that where protected traditional knowledge is not being sufficiently exploited by the owner or rights holder, or where the owner or holder of rights in traditional knowledge refuses to grant licenses for exploitation, the Cabinet Secretary may, with prior informed consent of the owners, grant a compulsory license for exploitation subject to the Constitution. Although many other nations and international bodies are currently developing similar policies and laws, this legislation is one of the first to go into effect and many stakeholders from around the world will be watching as the law is implemented.

## Case for IP Policy

From the highlights above, it is clear that there is need for policy coordination and coherence on IP-related matters. Currently our government has at least four different state agencies spread across several ministries dealing with IP issues in Kenya. As a result there has not been an inter-agency focal point to coordinate policy-making to ensure coherence, facilitate integration of IP into national and sectoral development policies, develop and promote a unified national position in international fora where issues involving IP are negotiated and decisions are made, promote effective coordination amongst key public and private bodies and play a meaningful role in using IP as a policy

*the vision of a national IP policy should be to ensure sustainable and rapid national economic, social and cultural development and improvement of the welfare of Kenyans through the effective use of the IP system as a strategic tool*

tool for development. This decentralized system of IP administration would likely benefit from a unified policy framework that would guide the development of IP-related policies and legislation.

Therefore the vision of a national IP policy should be to ensure sustainable and rapid national economic, social and cultural development and improvement of the welfare of Kenyans through the effective use of the IP system as a strategic tool. With this vision, the IP Policy should aim to improve and promote increased use of IP in encouraging creative, inventive and innovative activities, protection of IP assets, stimulating transfer of technology, promoting orderly trade and strengthening competitiveness of Kenyan industries and businesses in domestic and international markets. The Policy should address or provide guidance to address all the major issues and challenges that impede effective use of IP in meeting the development goals of Kenya. A key aspect of any IP policy should be flexibility, encouraging IP holders and users to maximize efficiencies with respect to IP. For example, appropriate use of “open source” and similar regimes (Creative Commons, patent pools, etc.) should be encouraged.

These critical issues that need to be addressed by the Policy should be used as a framework for setting clear Policy goals and outlining strategies to be implemented. Like any policy, the national IP Policy should be dynamic to keep up with new developments and meet new needs. The national IP Policy will require the involvement and participation of a number of public and private bodies. The effectiveness of the Policy and achievement of its objectives will require knowledge and experiences drawn from different stakeholders. Once approved, the implementation and impact of the national IP Policy should be monitored and assessed to determine whether or not the Policy objectives and the various goals set are being met.

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# A Creative Commons: Sharing what you own

*In this discussion on Intellectual Property Rights and Development, Alex reminds us that all private property eventually reverts to the public domain. In this sense the private IS public.*

## **Alex Gakuru**

In this era of extraordinary change and globalization, many acknowledge that creativity and innovation are now driving the new economy. Organizations and even economic regions that embrace creativity generate significantly higher revenue and provide greater stability into the future. Based on ideas rather than physical capital, the creative economy straddles economic, political, social, cultural and technological issues and is at the crossroads of the arts, business and technology. It is unique in that it relies on an unlimited global resource: human creativity.

Copyright is located within a broader legal branch called Intellectual Property (“IP”). It encompasses, *among others*, patents, industrial designs, trademarks and trade secrets, and extends to protecting artistic works, discoveries or inventions, generically defined as intangible “works of the mind.” Intellectual Property became commonplace in the majority of the world only in late 20th century making it a relatively new area of the law.

Copyright applies to literary and artistic works such as novels, poems, plays, films, musical works, drawings, paintings, photographs, sculptures and architectural designs. Rights related to copyright include those of performing artists in their performances, those of producers of sound recordings in their recordings and those of broadcasters in their radio and television programs.

## Separating the Original from the Ordinary

In order to discuss Creative Commons and the Arts, it is necessary to first interrogate originality and copyright assignment while simultaneously examining the fundamental human cognitive process—how we learn, discover, memorise, and reproduce. One can then proceed to explore how the law recognises and rewards creative invention, distinguishing it from the penalizing of memory reproduction of common knowledge (“the ordinary”), and actual copying of others’ creations.

Inventions benefit the society and inspire greater innovations leading to newer discoveries; therefore creators are celebrated for advancing humanity and legally rewarded with exclusive copyright to exploit benefits arising from their creation. The input of intangible products of human intelligence and creation such as rigorous thought, costly time, and connected overheads are duly recognised. And save for narrow and clearly defined exemptions and limitations permitted by law, any other use is strictly prohibited.

In contrast, every child is born with no knowledge of any kind, and without self-awareness. They learn everything in order to survive. Indeed, in 2015, researcher Julia Rohrer of Leipzig University established that ‘older siblings get a boost in intelligence from helping teach and educate their little brothers and sisters about the ways of the world.’ Can anyone then lay claim to new “works of the mind”, *that is*, Intellectual Property – as privately owned?

This leads to the inescapable question which has confounded past generations, continues today, and into the foreseeable future: “where then is the distinct line separating the ‘new’ from ‘reproduced’ past [that] others learned, combined or rearranged/reconfigured into a new ‘invention’ or thing?”

## All private creations eventually revert to the public domain

Notwithstanding the complexities surrounding Intellectual Property Rights, the indisputable fact is that every private IP is eventually availed for free to everyone, everywhere, after a certain period of time.

Patents are, for example, protected for 20 years without the option of renewable protection, allowing anyone to exploit the invention thereafter. Trademark rights hold for a period of 10 years with optional renewal for a further period of 10 years – but should the mark not be used for a continuous period of 5 years and one month, it loses exclusive protection.

Copyright in literary, musical or artistic work other than photographs

survive life of the author plus fifty years. For audio-visual works and photographs it is fifty years from the end of the year in which the work was either made, first made available to the public, or first published, whichever date is the latest. On sound recordings it applies fifty years after the end of the year in which the recording was made, and on broadcasts it is fifty years after the end of the year in which the broadcast took place.

*Simply put, CC grants creative authors the option and tools to reset to zero the wait time for their various copyrighted products to be shared under standard license conditions. The copyright holders simply specify how their works may be used by anyone interested*

Since all copyrights eventually revert to the public, is Creative Commons (or “CC”) of value? And why release creative products to the world for free? Also, quite apart from long waiting times for surrender, are there other benefits to Creative Commons?

## **Creative Commons Means ‘No-Waiting’**

Simply put, CC grants creative authors the option and tools to reset to zero the wait time for their various copyrighted products to be shared under standard license conditions. The copyright holders simply specify how their works may be used by anyone interested. Rather than relying on direct sales of their Works, creators exploit other benefits resulting from high publicity generated thereafter.

Creative Commons is not an alternative to, and only exists courtesy of, copyright law. The six licenses at <http://creativecommons.org/licenses> offer a standard stipulating the freedoms under which authors freely share their creativity. The licenses universality and simplicity alleviate users fears of copyright infringement lawsuits for sharing. The resultant author publicity emanating from increased usage elevates creators’ profiles with consequential benefits that include referrals from more users, increased audiences and amplified celebration of the author.

Consider a painting, play, book, song or video released under (a) ‘all rights reserved’ and (b) ‘creative commons’ license. Under ‘all right reserved’, its use without the explicit written permission of the author potentially infringes on copyright, with plausible exposure to litigation. From an individual internet user, a blogger, journalist or media house to educational institutions – the litigation net is cast wide. The possibility of being sued has an unsettling effect on users, who then often refrain entirely from using such material.

Indeed, there are *Fair Dealing* (also called *Fair Use*) exceptions and limitations granted under copyright law, but the ordinary user is neither a lawyer to discern what that means, nor conversant with the qualifying legal thresholds. This leads to a lot of copyrighted works remaining safely locked away from the widest public attention.

## **Economists and Intellectual Property**

For Economists, the traditional view of ‘cash economy’ is complicated by the relationship of innovation and knowledge to economic growth.

They acknowledge goodwill premium, such as the value of a company's brand name, solid customer base, Intellectual Property and other proprietary assets or technology as intangible assets at the acquisition of a going concern. But this approach masks the fundamental fact that there exists a parallel 'free economy' symbiotic to the cash economy – one cannot exist without the other. The difficulty of valuing intangible Intellectual Property complicates economists' efforts in affixing figures to the economic and social development arising from shared creativity. Copyright Industries value added nearly 2 trillion dollars to the US economy in 2013. In the *Copyright Industries in the US Economy Report*, 2014, Stephen E. Siwek of Economists Incorporated, and the International Intellectual Property Alliance argues that:

The most appropriate way to measure an industry's contribution to the national economy is to measure the industry's value added. Value added reflects the economic contribution of labour and capital of a particular industry. The sum of the value added of all industries in the United States is equal to gross domestic product ('GDP'), a standard measure of the size of the U.S. economy.

## The Constitution and Copyright

The Constitution of Kenya, 2010 explicitly mentions 'Intellectual Property/Rights' five times, in Articles 11, 40, 69, 260 and the Fourth Schedule. The old constitution made no reference at all to IPR.

In contrast, the 1787 US Constitution acknowledged the importance of the Arts (Article I, Section 8):

*Congress shall have the power...to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

However, Federal government offered little assistance to artists until the 1930s. Early unsuccessful attempts to aid the arts included an effort by President James Buchanan to establish the National Commission of Fine Arts, a project that failed within a year when Congress did not apportion funds. President Theodore Roosevelt also encountered a reluctant Congress half a century later when he proposed the Council of Fine Arts, but success came when his successor, William Howard Taft, persuaded Congress to create the National Commission of Fine Arts.

In *Key role of cultural and creative industries in the economy*, the Director of UNESCO's Institute for Statistics in Canada, Hendrik van der Pol, argues that growth strategies in the creative economy actually focus on harnessing the development potential of an unlimited resource, and not on optimizing limited resources as in traditional manufacturing industries.

*the government has clearly failed to fulfill its constitutional obligations to ensure that Kenyans fully benefit from copyright, in particular, and IPR in general. There is urgent need to challenge the misplaced view, by policy-makers, of the Arts as pastime, rather than powerful economic pillar*

Many obstacles faced in the Arts in Kenya today are sorry reflections of the situation in the United States back in the 1930s. A missing national intellectual property policy, inadequate copyright knowledge, disparate and incomprehensive legislation formulated with questionable stakeholder involvement, wanting implementation and regulatory frameworks, IPR appropriations, funding challenges – among others – underscore the longstanding official sector neglect.

When contrasted with the American scenario, one can see clearly the challenges that lie ahead for Kenya. But the elevation of IPR on the constitution platform presents us with an opportunity to reflect on the critical developmental role played by copyright under various usage frameworks. Kenya was commended, for instance, for assenting to UNESCO's 2012 Paris Open Education Resources (OER) Declaration calling on governments worldwide to openly license publicly funded educational materials for public use. It was noted that OER are resources shared under Creative Commons licenses.

One can argue that regardless of the individual artistic creator's desired copyright interests – from the exclusive 'all rights reserved', to open licensing spectrum – the government has clearly failed to fulfill its constitutional obligations to ensure that Kenyans fully benefit from copyright, in particular, and IPR in general. There is urgent need to challenge the misplaced view, by policy-makers, of the Arts as pastime, rather than powerful economic pillar.

**Alex Gakuru is a Technology Rights Defender and an advocate for Open discourse. He has an interest in the intersection between culture, information and communication technology—the layers and processes therein that make for improved access to knowledge and rich content.**



# Culture in the Counties-A call to Innovate

*Underpinning the current constitution is the vital energy that artists have expended to see culture breathe life into the document that orders civic life.*

**Msanii Kimani wa Wanjiru**

## Introduction

In 2010, Kenya embarked on a new journey that was ushered in by the transformative Constitution that they approved through a referendum. The country gained this constitution from a prolonged and protracted process after the independence Constitution became ineffective and out of place in modern Kenya.

The independence Constitution was deliberately targeted to be weakened. Immediately after independence, “the KANU political elite sought to dismantle the independence Constitution in order to implement a theory of a singular executive authority. They wanted to do away with the Westminster-model that was adopted at Madaraka, where the Governor and Prime Minister had their roles spelt out.”<sup>1</sup>

*Under the singular executive authority theory, the President holds all the executive authority as head of State and Government. Moreover, under this theory the President has related powers to delegate to or commandeer (powers of) other institution of government against all basic tenets of constitutionalism that underscores limited or restraint of government. In 1964, Kenyatta sought and got the first Constitutional amendment that transmuted the Prime Minister into a President with both full executive authority and ceremonial powers. Those who supported the amendment argued that the country couldn't have two centres of power. However, when they created this model, checks and balances to contain any excesses were not put in place. More amendments that were meant to strengthen the Executive (read Office of the President) were put in place..... The period following independence was characterized by repressive leadership, impunity, lack of rule of law, and a coercive state that did not respect the human rights of its citizens.<sup>2</sup>*

These changes went against all the basic tenets of constitutionalism such as principles on sovereignty, supremacy of the constitution, separations of powers, citizen participation, strengthened and independent institutions, effective checks and balances on the institutions, offices and arms of government. Ensuring that these basic tenets were restored, augmented and protected was a critical agenda in the push for Constitution reform that started in earnest in the 1980s and culminated with the transformative Constitution of Kenya 2010.

In this new dispensation, all sovereign power was given back to the people of Kenya, who are allowed “to exercise it directly or through their democratically elected representatives.” This power is delegated to legislative, executive and judicature state organs. “The sovereign power of the people is exercised at the national and county level.”

## Artists in the Struggle

In this struggle for constitutional reforms, the Kenyan artists and cultural workers were not left behind. When the KANU political elite deliberately attempted to weaken the independence Constitution by dismantling it in order to implement a theory of a singular executive authority, artists raised their voice. The cultural workers and artists did not shy away from what was happening in the country. Through their art, they played a significant role in the reform process and influenced it both directly and indirectly by engaging as individuals, groups or even institutions.

Their contributions have ranged from composing and writing works of art that championed the reform agenda, to organizing and participating in reform rallies, demonstrations and meetings. Throughout the struggle they have remained as the conscience of the society even during the most repressive days of the dictatorial regimes in Kenya. These contributions ensured that the embers of the reform agenda were kept alive and fomented in minds of all Kenyans, every time that anti-reformists tried to thwart the reform process.

Since the late 1960s and through to the 70s and 80s, there were strong voices by cultural workers and artists such as Professor Ngugi wa Thiong'o, Ngugi wa Mirie, Professor Micere Mugo, Professor Almin Mazrui, poet and author Professor Abdilatif Abdalla and many others. Abdilatif is also considered as the first post-independence Kenyan political prisoner. He was imprisoned by the Kenyatta regime for four years and hard labour after he wrote an article titled *Kenya Twendapi (Kenya Where are we Headed)*, in reaction to the disbandment of Kenya People's Union (KPU). In an interview with Kymsnet Media Abdilatif said:

*KPU was legally formed and registered by the government as a political party in 1966. As you will see, this was just three years after Kenya attained its independence. The formation of KPU was necessitated by the fact that about two years after independence some of those who were in power (and it was a very powerful and very ruthless small group) had already started to divert from the path which Kenyans*



had charted during the independence struggle, and which was enshrined in the KANU Manifesto of 1963, which was a relatively radical document. Greed, which was manifested by this group through the amassing of wealth, mostly by foul and unjust means, and the unashamedly grabbing of land by the ruling class, was already in full swing. The rot had already set in. The government had also started to be intolerant of any opposing views, and did not want to listen even to its own members of government who saw things differently, and who offered suggestions on how things should be put right and, in the process, return to the path agreed upon while fighting for independence.

While serving his term, Abdilatif wrote a collection of poems called *Sauti ya Dhiki*, which ironically won the second the edition of the erstwhile prestigious Jomo Kenyatta Prize for Literature. It is not just Abdilatif, who got into trouble for raising pertinent issues. Ngugi wa Thiong'o also raised his voice but unfortunately he also became a "state guest". While in prison, he penned works of art such as *Detained: A Writer's Prison Diary* and the novel, *Devil on the Cross*. Professor Alamin Mazrui's anthology of poems, *Chembe cha Moyo*, was also written when he was detained without trial for more than two years in different Kenyan prisons after his play, *Kilio cha Haki (Cry for Justice)* was performed at the University of Nairobi.

Throughout the 1990s, the role of the cultural workers and artists as agents of change was enhanced as they went around the country using unique participatory methodologies such as the Participatory Education Theatre (PET), Theatre for Development (TFD) to engage citizens in discussions around issues such as governance, social justice and human rights. Their role was even more pronounced in the election processes of 2002 general election when *Unbwogable*, a song by the hip-hop duo of Gidi Gidi Maji Maji was turned into the change clarion that galvanized the entire country. Various artistic and cultural fora were also set up to examine and interrogate the country's trying times after the 2007 disputed general elections.

Artists were involved in the reform process that followed the mediations process that was led by Kofi Annan. They were particularly active with the Constitution reform process that was championed by the Committee of Experts (CoE).

When the *Harmonized Draft Constitution of Kenya* was launched to the public by the Committee of Experts on November 17, 2009, artists and cultural workers actively engaged with the document. They not only gave written memorandums that addressed the specific chapter and articles discussing matters cultural, they contributed significantly in enriching this document that sought to restore and protect the basic tenets of Constitutionalism. This engagement continued to the time the country held the 2010 plebiscite. Artists and cultural workers actively campaigned for the *Draft Constitution* that had for the first time recognised "culture as the foundation of the nation and as the cumulative civilisation of the Kenyan people and nation." (Article 11(1)).



## Artists in the Constitution Implementation Phase

At the poll, *Draft Constitution* got the support of Kenyans and that of the Kenyan artists and cultural workers too, who had for the first time, negotiated and succeeded to get a legal document that was going to compel the government to invest in the sector. Article 11 (2) where the State shall—

- a) promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publication, libraries and other cultural heritage;
- b) recognise the role of science and indigenous technologies in the development of the nation; and
- c) promote the intellectual property rights of the people of Kenya.

When the implementation process started, the Kenyan artists and cultural workers had very good and valid reasons to be involved in the process. At this point, engagement has been mainly limited to policy and legislative work at the national level where significant effort has been noted. However, it is important to state that the delay and eventual complete failure to develop subsequent legislation to breathe life into Article 11 as stipulated in the Schedule, remains a blot in the implementation process.



## Implementation in the Counties

The inadequate legislation and policies related to culture and the arts, and low appreciation of the impact this situation has on the development of the sector has not just been limited to the national level. Artists and cultural workers have not made concerted and robust effort to enhance constitution implementation in the counties, as they could have.

As the country gears up for the August 8, 2017 elections, a critical review of the current county governments reveals that while some governors created ministries that would deal with culture and the arts, it came as a small department within a ministry. Further, the ministries charged with culture and arts matters were not innovative, were underfunded, not supported by strong policies & legislation and programmes not well planned. For most counties, focus has been on organizing celebrations of national days and cultural festivals.

As counties seek to elect new governors or retain the current ones, artists need to rise once again and focus on the culture agenda at the county level. The opportunities for artists lie in the County Executives and Assemblies. The two arms of government are driven by elected officials and this forms the first line of engagement. For artists and cultural workers, The manifestoes of all the leaders contesting for position in the County Executive and Assemblies need to be also scrutinised with a culture lens.

After elections artists' engagement with the Executive should include scrutinizing the set-up of the government the Governor will be forming. What ministries will be created? Artists should engage with the list of people the Governor will pick for his/her County Executive Committee (CEC).

The County Executive is the driver of the county's development agenda which are encompassed in the County Integrated Development Programmes (CIDPs). Artists and cultural workers need to work towards inclusion of culture and arts related priorities into this plan as CIDPs inform the budget making processes. It is therefore imperative that artists and other cultural workers participate in development of CIDPs to support County Executives in drawing up comprehensive programmes and well thought out implementation plans. This would ensure that investment is not only planned for the traditional categories of the creative economy, but newer ones get the necessary policy and financial backing.

Artists also need to be involved in the county budgeting process so as to ensure adequate allocation of resources to the sector. Since the counties became operational after the last general election, many functions were devolved and supported through the accompanying devolved resources. There is no county government that has received less than two-billion shillings every year. However, the culture sector has received very little budgetary allocations, a situation that is mirrored at the national level too.

County assemblies are another key institution that artists need to engage through lobbying and advocating for the culture agenda. Like their counterparts in parliament, Members of the County Assemblies (MCAs) play a critical legislative and oversight role in the counties. The culture agenda in the county needs to be grounded on sound legislations and policies that would need the support and input of the county assemblies. They also play a critical role in the budgeting process and their support is crucial in passing culture programmes in the CIDPs and allocation of resources to enable running of the intended projects therein.

The counties are going to be the centre of development and this should include the growth of the culture sector. This vital task of developing the county should not be left to politicians alone. Artists should not see their role as beginning and ending with voting only, but should deliberately work to continually engage with the implementation of the constitution and its entrenchment at national and county levels.

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<sup>1</sup>Zein Abubakar (Hon), Member of the East African Legislative Assembly, (unpublished paper)

2012.

<sup>2</sup>Ibid.

# The Kenya Cultural Centre/ National Theatre: Relocating Culture

*Perhaps more than any cultural icon the KNT, with its chequered history, stands as testament to the unremittingly contested nature of culture itself. Can village arena relocate to colonial stage? How can performance be refashioned to fit new spaces, and dialogue with pre-existing forms? What is really at stake as it gains traction? In this candid discussion, Aghan contextualizes its compelling journey.*

## **Aghan Odero Agan**

In the article 'Watered with Blood', Mshai Mwangola aptly locates the Kenya National Theatre in Nairobi City's Harry Thuku Road cultural hub, a space "... rich in the tensions and conflicts inherent in performance ... haunted by history, often explosive politics, and a colorful cast of characters bringing into conversation widely different agendas, visions, and perspectives of the roles and responsibilities of national cultural institutions."<sup>1</sup>

Incorporated as part of the Kenya Cultural Centre, it is significant that the Kenya National Theatre was the first major infrastructural undertaking towards creating suitable facilities for practice and enjoyment of cultural expressions within a highly diverse Kenyan society. It was a dream that sought to capture the need for open public spaces within a burgeoning urban metropolis that the city of Nairobi was fast becoming from the 1950s. Given the discriminatory racial policy of colonial government, the idea that led to the establishment of the Centre can rightfully be considered as having been radically ahead of its time. It was envisaged as a space where Kenyans of different races, beliefs and even class could converge easily to enjoy the wide array of diverse cultural expressions without any limitations or barriers. The pioneers held this ideal as the core impetus for the undertaking, even though its operational reality was eventually warped to conform to colonialist racist bigotry.

<sup>1</sup>(2008) *Jahazi* 1 (3), 4.

*It was envisaged as a space where Kenyans of different races, beliefs and even class could converge easily to enjoy the wide array of diverse cultural expressions without any limitations or barriers*

The concept of 'public space' for purposes of the practice of creative cultural expressions draws its philosophical imperative from the essential nature of the cityscape environment. Cities are primarily spaces rooted in diversity. It is through diversity that cities or urban metropolises derive their essence of being, life, soul, character and identity. As composite wholes, cities virtually exist and survive on the pulse of their inherent diversities. This is a phenomenon so definitive of urban realities that it often goes unnoticed. This kind of diversity traverses architecture and design, everyday political interactions, social livelihoods, communities, trade and commerce. From the 1930s well into the 1950s, Nairobi already had the hallmarks of such diversity. Thus, as the idea of a Kenya Cultural Centre came to be conceived and eventually implemented, many shared awareness of the need for such a space within the emergent metropolis. Various community based cultural organizations supported it. Colonial government wholeheartedly endorsed it by donating land on which the Centre was eventually built and also provided core funding for the project. Individual arts and culture practitioners, professionals and various enthusiasts joined hands eagerly to see the initiative through.

One can therefore appreciate how critical and important creative cultural work is to a city such as Nairobi and consequently, the importance of the spaces where this work can be shared with the public. In spaces such as these, people are able to gather in communion with one another through enjoyment, celebrating and affirming who they are by way of culture and creativity. Importantly, these spaces in themselves solidify continuous critical reflection, examination, discourse, re-imaginings as essential processes in the ever-evolving realities of nation states. These public spaces also function as platforms that facilitate intra-communal exchanges as one way of confronting and appreciating the larger global culture. It is also within these spaces that cultures from the wider international community including thoughts, practices and expressions find avenues for interaction and exchange.

As a public space offering unrestricted access, the Kenya Cultural Centre/ National Theatre has over the years posted a fractured scorecard when it comes to ease of freedoms to explore, associate and assemble. As a functional institution, it has waded through difficult terrain in its 66 years of existence. The project was ongoing by 1952 when the Mau Mau war of liberation erupted, and at its fiercest the colonial government had to declare a restrictive state of emergency countrywide as one of the measures to try to contain the revolt and heightened agitation for independence. As a public project, the Centre's development was

suspended alongside other government programs. Only two built facilities had been completed. These comprised the National Theatre building and an administration office wing that contained a small concert hall, dance studio, offices and some music lesson rooms. The impact of Mau Mau was profound, with Kenya set never to return to the pre-war state of colonial normalcy.

Independence soon followed ushering in the newly independent republic in 1963. The next decade saw the beginning of a protracted struggle between the old colonial order and an emergent, loose movement of Kenyan cultural workers. Institutionally, the Kenya Cultural Centre/ National Theatre remained stuck with its colonial governance and administrative framework. It intentionally excluded African practitioners of art and culture from accessing the Center. Programming of activities and everyday use of the space still favored the privileged British settler class and a few community organized Asian cultural groups.

In time, even the latter group found it practically impossible to plan and run their cultural activities at the Centre. They ran into barriers placed by the colonial British executive management team backed up by the Governing Council members whose composition was numerically skewed in favor of the white settler minority. Notwithstanding that some of the Asian cultural groups were founder constituent members of the Centre, their access and use of the facilities was restricted through rigorously controlled bookings and programming. Preference was often given to amateur and semi-professional theater groups from the white settler community. In instances where their local productions were inadequate, travelling Shakespearean theatre companies and ballet dance ensembles from London would be invited to fill up the calendar gaps on an annual basis. Thus, the original impetus for establishment of the Centre as an exalted space for multicultural engagement simply gave in to the problematic racial tendencies of the British colonialists.

If the experience of the Asian cultural community was problematic, the Centre's relationship with the African majority was even worse. No African featured within the entire ranks of governance and management of the Centre. It also followed that they were neither considered for inclusion in the Centre's programming, nor allowed physical access to the facilities. Instead, they were seen and treated as non-human savages possessing no culture, no creativity, and no sensibility. Backed by the colonial official color bar ordinances, the Kenya Cultural Centre was strictly out of bounds to Kenyans of African descent. Thus, the noble ideals that informed the establishment of the Centre as a space for pluralistic cultural engagement remained purely in writing and not practice.

However, with time and sustained cultural activism occasionally punctuated with acrimonious confrontations, engagement of African administrators in the running of the Centre eventually became a reality

*State control of thought, laws inhibiting gatherings, censorship and routine banning of critical works of art alienated cultural workers further. No performance or gathering of people could take place anywhere for whatever purpose without a mandatory special license, and direct supervision of state agents. Plays were routinely censored, and their public performance sometimes banned*

in the early 1970s. This period was marked, ironically, by shrinking of the overall national political space through intolerance of divergent views by the first postcolonial government. The Jomo Kenyatta regime clamped down on, and persecuted critical voices, progressive artists, intellectuals and cultural workers. Such action meant that the Centre could not rise to expectations and become a bona fide public space for unfettered enjoyment of cultural activities. After Kenyatta died in 1978, this intolerance escalated to unprecedented levels of suppression through the subsequent Moi regime that lasted 24 years.

State control of thought, laws inhibiting gatherings, censorship and routine banning of critical works of art alienated cultural workers further. No performance or gathering of people could take place anywhere for whatever purpose without a mandatory special license, and direct supervision of state agents. Plays were routinely censored, and their public performance sometimes banned. The process of obtaining these licenses was itself harrowing. A Creative Director or Producer of a play might be required to submit full scripts, rehearsal schedules and publicity materials to a dreaded cauldron of state security agents. The final degrading procedure would often involve applicants being summoned to the State Security headquarters for questioning before being forced to provide a line-by-line interpretation of the script to be performed. There was such a tight leash on creativity that those who tried to disregard the license requirement or failed to adhere to state sanctioned restrictions had their performances stopped, cast scattered or arrested and public audiences kept away.

Consequently, creative public space became a stifling prohibitive place where one felt watched and closely monitored by undercover informers and security agents camouflaged as civilians. From noble dream of enriching the Nairobi metropolis with a liberating and enriching multi-cultural space, the theatre mutated into one of the most feared destinations for the free spirited who might have nurtured dreams and committed to the creation of a new and better Kenya.

This, then, is the background of the Kenya Cultural Centre/National Theatre. It explains how the space moved from being a symbolic site of cultural celebration, to backdrop or arena of all manner of contestations—over identity, culture, politics, and artistic freedom. The elusive search for nationhood and cultural relevance finds resonance here to date. Save

for discordant programming of performances by semi-amateur groups based in Nairobi, the institution is yet to achieve any expansive impact or influence as a reputable national cultural space.

The Centre has suffered mixed fortunes over time. One of the most crippling onslaughts on this national public institution must be its exclusion from accessing national public funding over the years. Deliberate official ambivalence towards the Centre by successive governments condemned it to an unspoken policy of neglect and abandonment. Its legal status as a semi-autonomous public agency for the arts was blatantly disregarded. This was in spite of it having been one of the oldest established state corporations from as far back as 1 March 1951 through a standing parliamentary legislation, The Kenya Cultural Centre Act CAP 218. The popular excuse was the 'convenient' denial of the existence of the Centre's old colonial ordinance land title document, reported as missing from the roll of public property documents kept by the National Treasury. This effectively provided the justification for exclusion of the Centre from the annual public fiscal planning processes. In effect therefore, no public financing was ever given to the Centre to cater for administrative overheads, programming, physical development and maintenance of facilities, making it almost impossible to function.

*Generation after generation of artists kept the space alive through independent and private mobilization of small funds to hire the space for the use of the moribund facilities. Over the years, they made the Centre their operational base and platform for their creative works in spite of the unfavorable circumstances*

The outcome of this neglect was the gradual disrepair and disintegration of the Centre's limited facilities. This, and a litany of protracted ills clearly condemned the Centre to institutional stagnation that bordered on near collapse. No additional facilities were ever constructed to cater for the variety of expressive cultural undertakings by an ever-increasing constituency of creative cultural workers and artists. Administrative management, programmatic mapping, development and implementation of initiatives covering Kenyan art in its varied genres and emergent strands remained dormant due to complete lack of state financial support from the time of independence.

The tenacity of generations of independent Kenyan creative workers who, despite these unending woes, kept faith with the Centre has been its saving grace. Generation after generation of artists kept the space alive through independent and private mobilization of small funds to hire the space for the use of the moribund facilities. Over the years, they made the Centre their operational base and platform for their creative works in spite of the unfavorable circumstances. They carried out rehearsals, programmed their theatre, music concerts and dance performances even as they mobilized the general public to patronize their creative works.

## **The Turnaround**

The Kenya Cultural Centre/National Theatre remains the only public entity responsible for the development and promotion of Kenya's creative cultural expressions. It has the massive potential to accomplish



its 64-year-old foundational dream for Nairobi, and Kenya. Indeed, a rebirth is already taking place. Circumstances have been changing for the better as previous sociopolitical exigencies that mitigated the Centre's stunted growth have been largely whittled down over the past decade. The politics of open democratic governance and plurality have opened up opportunities for the institution to carve out its rightful place and relevance to the larger Kenyan society. Important steps have already been taken to this end.

In the last seven years (between 2009 and 2016) a committed governance and administrative intervention has helped turn the Centre around on a path of potential growth and success. The protracted ambivalence over the Centre's institutional ownership status has been addressed and streamlined. Sustained advocacy and lobbying within government circles carried out from 2010 into 2016 has resulted in the inclusion of the Centre within the National government fiscal planning framework with its own public grant access account. These two actions have now translated into an assured annual funding support from the National Treasury for both recurrent and development expenditures.

The previously decrepit physical facilities have already been fully refurbished and upgraded with befitting modern equipment installed to allow for multi-genre performances. These include the National Theatre building, Cultural Centre wing with its mini theatre auditorium, visual arts gallery, music instruction studios, contemporary dance hall and administrative offices. There are improved outdoor spaces suitable for rehearsals, concerts and cultural fairs. An adjoining Land parcel previously earmarked for expansion of the Centre but lost through grabbing in the 1980s has also been restored to the Centre. An Institutional management framework and internal systems and processes have also been streamlined with requisite policy and human resources for effective running of the institution as a modern creative arts and cultural centre.

The re-strengthening of the Kenya Cultural Centre/National Theatre as a public institution ready for robust take off could not have come at a more opportune time. Promulgation of the progressive 2010 Kenya Constitution with its strong proactive elevation of culture as an overarching pillar in nation building provides the best opportunity for further growth of the Centre. If properly and strategically utilized to leverage the institution, this mother law holds out the best chance of securing massive future development for the Centre, and the country. This is attainable if the Centre, through its successive governance and management entities, appropriately seizes this special opportunity with creative inspiration. This must start with proactive appreciation and carving of the Centre's identity as a public space for the celebration of Kenyan nationhood, identity, pride, imagination and international influence. It is a journey whose time has come.

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## References

Uraia. 2012. *Laws of Kenya: The Constitution of Kenya, 2010*. Nairobi, Uraia Trust.

Njogu, K., ed. 2008. *Getting Heard: Reclaiming Performance Space in Kenya*. Art, Culture & Society 1(3). Nairobi, Twaweza Communications.

Mwangola, M., 2008. 'Watered with Blood': Kenyan National Institutions and the search for Cultural Identity, *Jahazi: Culture, Arts, Performance* 1(3), 3-11.

The Kenya Cultural Centre Act, CAP 218, Laws of Kenya

The Kenya Cultural Centre. Strategic Plan 2012-2015.

# Popular Music and the Challenges of Freedom of Expression in Kenya

*Social media has sliced through the structures that moderated the way we create, access and consume popular music, impacting on all aspects of music production. And genre has not been spared. Here, context and register are in tension...*

**Mwenda Ntarangwi**

In today's world of social media and other forms of information sharing brought by accelerated access to information technology, it is hard to control what gets produced and distributed as popular culture. With increased access to information as well as ease with which to widely share it, Kenyans have found multiple ways of articulating their lived experiences and new forms of gaining public prominence. For popular music creators, social media has emerged as the most important medium through which they construct their identities and products outside the control of the state, and of necessary review processes. As Mbugua wa Mungai notes, expressive cultural forms availed through "music, films and folklore" allow Kenyans to "imagine their lives in ways other than those the politicians might desire" (2010:88).<sup>1</sup> No longer at the mercy of state machineries of control and regulation, some artists with an eye on easy paths to stardom sidestep proven paths of peer review to hastily produce songs that soon rub the public the wrong way. Just as their songs quickly gain popularity through online distribution, they also earn the wrath and scrutiny of the public as speedily, and easily. Kenya's popular musicians creating work in the genre often termed "gospel" provide multiple examples of this phenomenon. Artists such as Jimmy Gait (real name James Ngaita Ngigi), Bahati, Size 8 (Linet Munyali), and SBJ (Fred Keraro) in 2016 gave Kenyans reason to question the identity of their music as "gospel." SBJ and Jimmy Gait in their respective songs *Nyonyo* and *Yesu Ndie Sponsor* are a case in point.

Both songs drew a lot of criticism from Kenyans on social and broadcast media for their association of God and Jesus with terms or concepts

that are operationally considered secular. In *Nyonyo*, for instance, SBJ sings, “Eeh Baba nipe nyonyo ooh Yesu niko tayari, (Eeh Father breastfeed me, ooh Jesus I am ready). The video for the song starts with an image of a large yellow plastic baby bottle with an inscription derived from 1 Peter 2:2, “*Nyonyo ya* God is fresh.” The referenced Bible verse reads, “Like newborn babies, crave pure spiritual milk, so that by it you may grow up in your salvation.” *Nyonyo* comes from the Kiswahili verb *Kunyonya* (to suckle) and is a colloquial term children use to refer to their mother’s breasts/milk. In *Yesu Ndie Sponsor*, Jimmy Gait plays with the newly mobilized meaning of the word “sponsor” that in Kenya today denotes a (mostly) sexual relationship between an older man or woman and a younger man or woman based on the material resources the former provides (sponsors) to the latter. In the song Jimmy Gait says that relationships built on sponsor/ship are short-lived and end up in sorrow. For him, the true sponsor is Jesus. If one were to listen to the content of the songs without specific reference to the “controversial” words *Nyonyo* and sponsor, then one might not consider them offensive in any way. Both artists have nevertheless apologized to those offended by the music even as they have defended their songs by clarifying the message they intended the music to convey.

This scenario begs the question of what makes a song acceptable as gospel or even as a product for public consumption in Kenya today. Is it the intended message as explained by the artist or the interpretation of message by its audiences? To answer this question we turn to the Universal Declaration of Human Rights, which guarantees the freedom of expression of all individuals. This Right is also guaranteed in the Constitution of Kenya (Revised 2010) Chapter Four Part 1:33,<sup>2</sup> granting every Kenyan the right to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers. And yet such freedom can only be mobilized in relation to the rights of others. As humans we are social beings, living in a world that functions well because of right relationships we have with others—fellow citizens, neighbors, co-workers, family members, etc. Having lived under a dictatorship for most of the country’s political independence, Kenyans ushered in the new constitution on August 27, 2010 in the hope that it would not only provide a new era of freedom of expression but also help cultivate a new form of sociality. That sociality has interacted both positively and negatively with the increasing advances in new technologies that have produced the social media phenomenon we witness today. On the one hand Kenyans are finding more spaces for self-expression and mobilization of mass action in unprecedented ways. On the other, some of these expressions threaten social and moral decorum because of the ease with which they can be broadcast publicly without moderation or feedback.

Part of the complexity surrounding the songs referenced here can be seen in two ways: first, is the interactions that are taking place between

*Improved technology has seen music production become more and more an individual enterprise, and artists come to be their own peer reviewers and creative directors.*

expanded information technology and livelihoods in urban spaces. For many popular artists the urban space provides a certain level of anonymity where new social codes of behavior are negotiated and relationships extend beyond familial or descent territories dominant in most rural communities. Second, is the ease with which popular culture can be produced and broadcast by individuals without any real ways of vetting such productions. The heightened level of competition for audience members, new ways of relating to each other, and constantly changing forms of morality that are experienced by many urban populations also compel popular culture creators to push society's moral envelope. Improved technology has seen music production become more and more an individual enterprise, and artists come to be their own peer reviewers and creative directors. In such a set up there is very little in terms of checks and balances. By its very nature, social media is itself averse to any forms of control, and strives to provide freedom to share content broadly as long as one has access to that media. This is where a regulatory body is essential in assisting artists to anticipate some of the responses that popular music products might draw from their audience members. But such a regulatory body needs to operate within the parameters set by the constitution. Recent attempts by the KFCB to muzzle the creative industry in Kenya provide an example of how not to regulate the creative industry.<sup>3</sup>

Mendel and Salomon's overview of freedom of expression and broadcasting regulation provide a framework that might be useful



for Kenyan popular culture. They argue that the right to freedom of expression “protects both the right of the speaker and the right of the listener” and that regulatory rules can be justified in some “cases to protect equality and children.”<sup>4</sup> Had there been a dialogue mediated by a regulatory body on behalf of SBJ and Jimmy Gait on the one hand and their audience members on the other, might the controversy that accompanied *Nyonyo* and *Yesu Ndie Sponsor* been avoided? Yes, as long as that regulatory body was constituted in consultation with all stakeholders and reflected a desire to balance artists’ creativity with agreed-upon forms of expressing such creativity. It is the kind of cultural creation around popular music in which all participants develop sensibilities that guide their production without the need to always be patrolled and vetted. As Kenya grows its democratic ethos and as constitutionally guaranteed freedoms take root, there is need for constant conversations and consultations between artists and audience members, as well as government representatives and professional organizations. It is how good artistic products will grow and be sustained. Striking that fine balance in a world where the floodgates of cultural production are open and with no option for closure, is a real exercise in negotiation.

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## Notes

<sup>1</sup>See, Wa Mungai, Mbugua, 2010, “Iconic Representations of Identities in Kenyan Cultures” in Mbugua wa Mungai and G. M. Gona, eds, pp. 72-95, *(Re)membering Kenya: Identity, Culture and Freedom*. Nairobi: Twaweza Communications Ltd.

<sup>2</sup>The Constitution of Kenya 2010 edition pp. 26 available at <http://www.kenyaembassy.com/pdfs/the%20constitution%20of%20kenya.pdf> accessed December 29, 2016.

<sup>3</sup>The Kenya Film Classification Board’s (KFCB) 2016 proposed bill for regulating films had included a clause that requires a police officer to be present during the filming of a film in Kenya. After a meeting and discussion of the bill with Kenyan creative community the bill was shelved until all stakeholders are consulted.

<sup>4</sup>See, Mendel Tony and Eve Salomon, 2011, “Freedom of Expression and Broadcasting Regulation,” CI Debates, No. 8, February 2011. Brasilia, Brazil: UNESCO. Available at <http://unesdoc.unesco.org/images/0019/001916/191623e.pdf> accessed January 6, 2017.

# Imagining the Nation

*Mutonya grapples with the paradoxes inherent in a constitution that must speak for many in one language.*

## **Maina Mutonya**

Prior to the 2010 promulgation of the Constitution of Kenya, culture was not mentioned specifically as an integral aspect of governance in legal documents. The current Constitution, however, in Article 11(1) makes culture the thing that underpins all else. The Article states: “This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people.” It further obligates the State to “promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage,” amongst other responsibilities. This article focuses on music as cultural expression, and how the nation has been imagined in the Constitution. The question that this article tries to answer eventually is whether the Constitution and its provisions are facilitative of this aspect of the creative economy.

An attempt to explore possible ambiguities in both understanding the role of culture and the promotion of these cultural expressions is made, while avoiding the overall legal interpretations of the Constitution. These ambiguities could emanate from the very understanding of what constitutes the nation, an idea that needs to be problematized. Kenya is itself made up of a conglomeration of conflicting and competing political and ethnic nations, with diverse interests, cultural beliefs and practices.

It is from this perspective that Kenya can be viewed as an ‘imagined nation’, to borrow from Benedict Anderson’s (1983:6) postulation that a nation “is an imagined political community—and imagined as both inherently limited and sovereign. It is imagined because the members of

even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion.”

Thus, when the Constitution talks of culture as the ‘foundation’ of the nation’, several interpretations can be gleaned, depending on how the nation has been defined. The diversity of the Kenyan nation and the multiplicity of cultures could present ambiguities in the interpretations of the varied cultural expressions of the different communities.

The creative sector is well protected in Article 33 of the Constitution that guarantees freedom of expression. The presupposition here is that artists are in an environment where they can and should create freely, within the provisions of this Article. The question here would be if by *promoting* cultural and creative expressions, the state might inadvertently be limiting the very freedom of expression envisaged in the Constitution, an idea we shall revisit.

The significance of cultural expressions in nation building cannot be denied. Culture is intrinsic to, and forms a critical part of this process. This is the very reason the state has to protect and meaningfully promote creativity. Music has, for instance, played an important role in increasing intercultural understanding and sharing of community experiences. Over and above the entertainment value, music can be an important tool for fostering national unity, as well as an avenue to advocate for peace and justice and build prosperity. In this way, music is a fundamental carrier of culture. However, when inappropriately used, it can create tensions and sow seeds of discord that lead to disunity in the country, an aspect that Ntarangwi discusses in the preceding article.

During Daniel arap Moi’s time as president, he perfected the role of music in politics, using it to propagate his rule. In 1982, the Permanent Presidential Music Commission (PPMC) was formed under his personal patronage. For a commission whose primary mandate was “to enhance research, development and education in the performance of music and dance in Kenya” (Okumu 2010:162), it ended up with the responsibility of vetting all songs and dances that were to be performed at public presidential functions. As Mindoti and Agak observe, “[P]atriotic songs in particular, were vetted to ensure the inclusion of only those songs propagating the Nnyayo philosophy of love, peace and unity” (2010:159). This was patriotism as sanctioned by the regime.

In the new constitutional dispensation that guarantees a variety of rights, it is not the dictatorial tendencies, as above, that are likely to dominate the music scene. Rather, it is the overarching ethnic and political realities of contemporary Kenya. It is in this regard that the ambiguities in the Constitution manifest themselves. Two cases are a reminder of this. In 2012, three musicians were arrested and arraigned in court for hate





speech. They were later to be acquitted for lack of evidence, while others settled for out-of-court modalities. In 2016, the head of the Kenya Film and Classification Board (KFCB), itself a government agency, banned a number of musicians for using stage names that were considered 'obscene'. KFCB argued that the three Kamba musicians banned were accused of 'eroding Kenyan moral standings', emphasizing that the music industry needed 'taming'.

The two examples reflect the tensions and ambiguities in the Constitution's provision of the state as the promoter of creative cultural expressions. While each case may have its merits, questions might be asked about the artistic freedom and freedom of expression, vis-à-vis the understanding of culture as the foundation of the nation.

The three musicians were arrested for 'hate speech' because whilst their music praised their preferred presidential candidate in the 2013 elections, it also poured scorn on key competitors. The song lyrics were clearly borrowed from pronouncements made by both sides in their political campaigns. On what grounds therefore were the arrests made? Were they based on a misinterpretation of the Constitution, or on the lyrics of the songs?

This dilemma resurfaces in the use of vernacular languages, which are used to communicate, but can be twisted to carry *double entendre*. Each community will have leaders they hold in awe, and those they scorn, and the innuendo is easily reflected in the cultural productions. The Constitution is very clear in this area: Article 44 (2) states that "a person belonging to a cultural or linguistic community has the right, with other members of that community— (a) to enjoy the person's culture and use the person's language; or (b) to form, join and maintain cultural and linguistic associations and other organs of civil society. (3) A person shall not compel another person to perform, observe or undergo any cultural practice or rite."

In the case of the artists who were arraigned in court, where does freedom of expression, and state support of it, stop? In what ways can the state promote cultural expressions without limiting the very same freedom of expression enshrined in the constitution? But more importantly, who bears the ultimate responsibility for ensuring that cultural idioms and expressions in the music do not offend? And then there are the stage names. In the case of the banning of the musicians because of stage names, the clearly offended CEO of the state agency concerned, in advancing his position, claimed that these names 'glorify evil and are an affront to the moral fabric of the Kenyans'.

Music and other cultural and artistic expressions are known to respond to everyday practices, in the ways that they draw inspiration from people's experiences, and that the audiences also appropriate musical



idioms and expressions in their daily parlance. As Stokes (1994:97) aptly argues, 'performance doesn't simply convey cultural messages already known, it reorganizes and manipulates everyday experiences of social reality, blurs, elides, ionizes and sometimes subverts common sense categories and markers'.

This in itself underlies the creative ethos in producing works of artistic and cultural expression. The artist will borrow heavily from the experiences of his culture that might differ markedly from other cultural backgrounds and probably whose beliefs are in direct contradiction with the practices of others. This is what Odhiambo and Oduor (2013: 149) capture as the dilemma of cultural relativism and universalism of human rights, in our Constitution, especially in Article 11.

*There are [...] provisions that will likely present ambiguities, if not difficult challenges in terms of application and interpretation of the Bill of Rights and other constitutional guarantees. While on the one hand the Constitution bars discrimination based on any cultural or religious practices, it on the other hand recognizes 'culture as the foundation of the nation and the cumulative civilization of the Kenyan people'. In addition, the state is obliged to promote all forms of national and cultural expression [...] While this section has a wider application, the question would be whether it obligates the state to recognize cultural expressions that may produce discriminatory practices.*

Article 33 of the Constitution also guarantees freedom of expression. This does not, however, extend to propaganda for war, incitement to violence, hate speech and advocacy of hatred, and protects the rights and reputation of others. Legal experts argue that prosecution of hate speech, as in the case of the musicians above, should be handled delicately for it not to be seen to discourage the freedom of expression. It is these contradictions that inform the role of the state as promoter of cultural expressions. The ethnic diversity that characterizes the nation of Kenya also means that the 'culture' that has been defined as the foundation of our nation is one whose template is based on the multiplicity and complexity of ethnic identities that define Kenya. What is imagined as the nation in the Constitution is carried in the various cultural expressions that the state is obligated to promote. The rights that the Constitution guarantees then should be interpreted taking the above in consideration.\* As Kenya heads to the elections in August 2017, we are bound to experience a proliferation of musical productions and other artistic expressions. The question will be how these dilemmas will play out in this wider discussion of the Constitution and culture.

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\* [It is, of course, to be read in conjunction with the Bill of Rights—ed]

# Ethnicity and Nationhood: Down The Trodden Path Of History

**Peter Anyang' Nyong'o**

*The Preamble to the Constitution of Kenya holds the Nation's commitment to ethnic, cultural and religious diversity, underscoring commitment to living in peace and unity as 'one indivisible sovereign nation.' National unity is additionally embedded as a constitutionally recognized national value and principle. But how do ethnic and national identities relate? And what kind of visionary leadership can deliver this nurturing and inclusive idea, and program for community and belonging to build the desired nation, Kenya? These are some of the issues raised by Nyong'o as he takes us on a reflective journey through history.*

*But how was nation building conceived and practiced? Essentially it entailed keeping together diverse peoples and cultures under one coercive authority called government, taxing them and engaging them in what the government determined as "development."*

The Guinean revolutionary, the late Amilcar Cabral, once observed that for the wars of national liberation to succeed in Africa, the social forces leading such wars must be prepared "to die a tribe and be born a nation." Mao Tse Tung had a three stage theory of national liberation. He put it this way: "Countries want independence; nations want liberation; and people want revolution." In other words, independence is simply a change of the guards from colonial oppressors to native oppressors who derive their legitimacy by dint of "having been chosen by the people." When the British journalist, Phillip Short asked Kamuzu Banda of Malawi whether he was a dictator or not, the Ngwazi replied nonchalantly: "Yes, I am a dictator; but I am a dictator that the people choose to put up with. Let us begin from there."

In the decade following flag independence in most African countries in the early sixties, not many countries were really prepared to go through the stages needed to accomplish "national liberation," even as the leaders declared "nation-building" to be their most urgent task. But how was nation building conceived and practiced? Essentially it entailed keeping together diverse peoples and cultures under one coercive authority called government, taxing them and engaging them in what

the government determined as “development.” Resources, whether monetary or natural, were controlled by this government and used in ways that the government regarded as “developmental.” But very soon what the government (read “ruling elites” or “ruling class” or “ruling military junta” or “the one-man led authoritarian regime”) regarded as developmental the people perceived as discriminative, exploitative or oppressive. That is why Chairman Mao saw the first decades following independence as decades during which “nations wanted liberation.”

To Mao, the “nation” could be perceived in two ways. First, as a culturally distinct entity with language, customs, and a generally contiguous territory within which people lived and shared common political aspirations. Such nations, existing within the multi-national nation-state that was the object of nation building by the nationalists, had a two-pronged aspiration in the national liberation struggle. The first aspiration was the need to realize liberation as “a people” whose cultures, ways of life and political aspirations were dictatorially and illiberally ignored and/or exploited within the nation building project. The second way saw the urge to accomplish the nation-building project as part and parcel of liberating the nation state from autocracy and with the “people”—individually and collectively—as the makers of history in this process.

The only African leader who realized that this “national liberation project” was important after independence was Mwalimu Julius Kambarage Nyerere, the late President of the United Republic of Tanzania. He relinquished state power for a year in 1962 to concentrate on building the Tanganyika African Nationalist Union (TANU) as a people’s party which was to define, shape and determine the nation building project for dismantling the vestiges of the post-colonial state. In this process he made all people of Tanganyika, and later Tanzania, become politically conscious of their identity as makers of the history of the Tanzanian nation. It was in that process of national liberation that Tanzanians died a tribe and were born a nation. Nowhere else has this happened in Africa. Everywhere the national liberation struggle is stillborn, stunted, starved of political oxygen or literally in reverse gear.

Many analysts have pointed out that, almost everywhere in Africa, an atmosphere for revolution can easily be felt. People are fed up with the plethora of kleptocratic regimes. As more wealth is created through economic growth so do more people sink into poverty. The gap between the rich and the poor widens on a daily basis. When elections are held, democratic or otherwise, small elites rise to power and either continue with the kleptocracy or only tinker with it at the margins with a few reforms. Large groups of nationalities are marginalized within the nation-state; they cannot be seriously considered as part of the nation building project. Nor are the economically active social classes that cut across nationalities but who do not galvanize their economic deprivation into revolutionary zeal. Granted, people may want revolution. But the

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social forces to carry out this revolution for the advent of the mature and integrated nation seem too far in the distant horizon; too far in the future.

Vladimir Ilyich Ulyanov, better known as Lenin (1870-1924), was probably right when he noted that a society may be ripe for revolution but if it is bereft of revolutionary agents, it may enter into a period of decay, a process that may continue for decade upon decade. At the dawn of her independence, the Congo missed a revolutionary moment under Patrice Lumumba. The process of decay has continued unabated, with the birth of a Congolese nation remaining a pipe dream. The same could be said of many African peoples across the continent that from time to time, have risen up to overthrow the shackles of the post-colonial state without success. The periods that follow have been periods of regrettable socio-economic and political decay; to wit South Sudan, Somalia, Equatorial Guinea and almost all other countries which have veneers of so-called political stability without any sound legitimacy of the state across the entire society.

What is called “tribalism” is a visible sign of contradictions over nationhood; the presence of a state power that extracts values from the people stratified as “tribes” and hence alienated from the presumed national project. Indeed, the ideology underpinning the national project rationalizes and justifies discrimination based on tribe, in turn criminalising nationality. It is a negative force, and one that cannot transform nationalities into nation. It requires its antithesis, a popular revolution, to usher in the nation. This seems long in coming on the African continent. But why is Africa lacking in revolutionary leaders who can mould different nationalities into powerful nations? Italy had her Garibaldi. France was transformed by Napoleon. Mexico had Lázaro Cárdenas and Cuba, Fidel Castro. England took a long time to become a nation, a process that started in the 13th century with the Magna Carta. Yet it wasn't until the Glorious Revolution in 1688 that the clear contours of modern Great Britain started to emerge. Through the twists and turns of time, and sometimes out of the proverbial ashes of history, nation formation is a process that can indeed take centuries.

So Africa may not be that late; may even be well in process. But England emerged over that long period of time into a modern nation because of certain accumulated experiences and changes in her modes of production. Nations do not emerge out of nowhere: they have a material basis. Empires do not thrive on the mere wish of their rulers. The latter quite often fight vicious wars with enemies near and far to acquire the wherewithal to build empires to the pride and satisfaction of their people. That pride and satisfaction transforms into nationalistic feelings which can easily border on cultural jingoism. That is why Marxists seemed to prefer internationalism and universalism, and at times held nationalism in suspicion.

But the age of jingoistic nationalism has come back with a vengeance with presumably the most universalistic nation, the USA, electing to the presidency an insular and chauvinistic American: Donald Trump. History, obviously, cannot come to an end with Trump. There must be a new chapter he is opening, a chapter the world is anxiously waiting to see unfold. The glimpses of this chapter witnessed so far are a throwback to the inter-war years of the last century when the crises of the capitalist state were interpreted by fascists as crises of cultures and different human pedigrees. The fascists believed they were born to rule the world by dint of their colour, language and psychological make-up. That was a special nation distinguishing itself from other inferior peoples, or what a Ugandan military fascist once referred to as “biological substances.” The hope is that Trump does not succeed to complete the writing of this tragic chapter in world history.

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# Memory, Identity and Pluralism in Kenya's Constitution Building Process

**Zein Abubakar**

## Introduction

The current Kenya constitution was developed using a citizen-based participatory process that sought to recognise the diverse backgrounds of Kenyans and the plurality of the Kenyan state. The third paragraph of the Preamble establishes a vision of a united nation that values and accommodates diversity. It states that Kenyans are “Proud of our ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation”.

This ethos is expounded in various parts of the constitution – for example, by recognizing both individual and group rights as fundamental rights; accepting Kenya as a multilingual society and requiring the state to promote and protect the diversity of language of the Kenyan people; and including ethnic identity in the definition of community land. Further, the constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation (Art. 11). This marks a dramatic departure from the treatment of identity within the previous constitutional dispensation. Yash Ghai and others have argued correctly that the nature of the Kenyan state has remained mainly colonial. One constant imperative has been managing ethnic, cultural, linguistic and religious diversities. This is partly due to the colonial amalgamation of territories, irrespective of indigenous identities and sensibilities (echoing the formulaic Berlin Conference philosophy) and partly to the failure of the post-independent administrations to promote nation building. The 1963 constitution included some mechanisms to recognise diversities and to build a plural state, including the parliamentary system, a quasi-federal governance structure called Majimbo, a bill of rights, separation of powers, and so forth. Unfortunately, these provisions were among the first casualties in the government's quest to consolidate and centralize power.

At the outset, the independence government had two choices. It could implement the new provisions which required completely departing from the colonial state, philosophy and mindset; or it could adopt and adapt the colonial state to suit the personal needs of the country's new "leaders." The first choice required a complete overhaul of the undemocratic colonial legal infrastructure to accommodate the democratic independence constitution. To embrace the second choice, the independence government would have had to amend the 1963 constitution to reinstate aspects of the undemocratic colonial legal regime or simply ignore the constitution where it conflicted with the colonial legal regime.

Given this history, we must approach the implementation of the new constitution differently. Its promulgation marked the end of the constitution review process and the beginning of the constitution building process. The challenge now is to deconstruct the old constitutional regime and bring into effect the 2010 constitution. For the first time in the history of our country, we are grappling with the serious agenda of building a nation that recognizes its diversity, and complicated past. An important aspect of this constitution-building project is managing Kenyan diversities, identity, and the social and political aspects of the constitution to ensure greater social and political pluralism.

This paper seeks to identify a number of important issues for understanding and building pluralism in Kenya. In particular, it examines the question of memory and memorialization in the conceptualization of ethnicity and identity and considers the legacy of Kenya's ethnic configuration. It draws lessons from the work of others, including Ngugi wa Thiongo (1983, 1986), Ali Mazrui (1995, 2002a, 2002b), and Bethwell Ogot (1996, 2005, 2010), on deconstructing the past and proposing how to construct the future.

These two processes are intertwined and one cannot be completed without the other. The deconstruction of the past requires coming to terms with the colonial period, the single party excesses including dictatorship, gross human rights abuses, corruption, falsification of history, and so on. Deconstructing the past requires understanding the colonial state and post-independence dictatorship and dismantling these experiences brick by brick. It involves the fundamental alteration of their philosophy, architecture and design. This fundamental change ought to focus on their motivation, theoretical underpinning, cultural agenda, policies, and ideological, legal and constitutional frameworks for executive agencies. The first philosophical components are used to imagine the nation and the state and establish the value system and other socially binding concepts—the cosmological imperatives that are used to encode and decode social meaning, build social solidarity and form the bases of a people's world view. The state agencies in turn enforce the social code and extract compliance or, using more coercive modes,

*For the first time in the history of our country, we are grappling with the serious agenda of building a nation that recognizes its diversity, and complicated past. An important aspect of this constitution-building project is managing Kenyan diversities, identity, and the social and political aspects of the constitution*

dispense sanctions. The second part of this equation deals with what the colonial system and post-independence dictatorship is replaced by and how that is done.

Where the state is based on the supremacy of one identity, the new dispensation will be based on plurality of identity, replacing divisions with shared aspirations, discrimination with equality and inclusion, marginalization with recognition, equity and affirmation, and so on. This paper addresses both the deconstruction and reconstruction of a new Kenya based on the 2010 Constitution by focusing on three thematic areas: memory and memorialization, the conceptualisation of ethnicity and identity, and the constituting of the territory of Kenya.

## Memory, memorialization and nation building

The question of memory, memorialization and nation building has two interrelated parts: what our nation remembers, how it remembers and why it remembers; and what has the nation forgotten, how it has forgotten, and more importantly, why it has forgotten. On the level of memorialization it is critical to interrogate historical and social symbols, public monuments and other imagery that covers the past. What story or history do they tell, from whose perspective and interpretation; and what are the consequences of such telling to individual, communal or national remembrance and psyche? Ngugi wa Thiongo (1983, 1986) has examined the importance of memory and the implanting of memory and meaning in the colonial project. For him, decolonizing the mind is a critical step in understanding the nature of the Kenyan state. Given our divisive and contested past, the journey of rediscovering our past is not going to be easy. A good example of this difficulty is how Kenya has dealt with the history of the struggle against British colonialism in general and with the Mau Mau in particular. In the case of the latter, Atieno Odhiambo and John Lonsdale (2003) demonstrate how tortuous this journey can be. Thus, for now, the examples raised here remain below the radar of scholarship or have not received adequate analysis. We interrogate these examples to demonstrate the crisis of memory that exists and the enormity of work that lies ahead.

*How may Kenyans come to terms with their past? How is Kenya's past imagined and understood? How far back should we go? What theory should we use?*

## Constructing the past: selective amnesia?

How may Kenyans come to terms with their past? How is Kenya's past imagined and understood? How far back should we go? What theory should we use? Deciding where to start is itself a contentious issue. For my community – the Swahili people – one natural place to start is the moment when, as Chinua Achebe put it, “the rains began to beat them” – that is, with the arrival of the Portuguese colonial forces in 1498, which commenced the long story of imperial domination and dominion in Africa. Long before Kenya became a British colony during the second wave of colonialism, their arrival made the local people believe that the



superiority of the European would be superimposed on all other people. It is recorded that Vasco da Gama landed in the city of Mombasa on the evening of Sunday, 7 April 1498. He was met with boats laden with gifts and a fresh supply of food and drink. On 13 April, only five days after reaching Mombasa, the Portuguese ships bombarded the town, leaving Mombasa in ruins. The devastation of colonialism had begun.

The devastation was wrought with the power and authority of the 1455 Papal Bull issued by Pope Nicholas V. This edict defined and validated the mission of the Portuguese:

to invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ wheresoever placed, and the kingdoms, dukedoms, principalities, dominions, possessions, and all movable and immovable goods whatsoever held and possessed by them and to reduce their persons to perpetual slavery, and to apply and appropriate to himself and his successors the kingdoms, dukedoms, counties, principalities, dominions, possessions, and goods, and to convert them to his and their use and profit -- by having secured the said faculty, the said King Alfonso, or, by his authority, the aforesaid infante, justly and lawfully has acquired and possessed, and doth possess, these islands, lands, harbors, and seas, and they do of right belong and pertain to the said King Alfonso and his successors, nor without special license from King Alfonso and his successors themselves has any other even of the faithful of Christ been entitled hitherto, nor is he by any means now entitled lawfully to meddle therewith. (Papal bull *Romanus Pontifex* issued by Pope Nicholas in 1455<sup>1</sup> as quoted by Biblo and Tannen, Sidney Z. Ehler and John B. Morral (trans. and eds.) 1967:146.)

This document and others like it gave rise to the “doctrine of discovery” which the Europeans used as the legal basis for expropriating land particularly in the Americas. This doctrine, which informed the laws of the nations, legitimized the robbing of indigenous peoples’ lands. In 1823, the United States Supreme Court used the 1455 Papal instruction to uphold the seizure of indigenous territory in *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823). Many indigenous peoples in America trace their colonial and post-colonial tribulations to this Papal doctrine. Today various efforts are underway to repudiate its force as a first step in deconstructing colonialism.

In Kenya and other parts of the world this connection was less formal but it was still the basis for locating land ownership in the monarchy and/or the state to the detriment of local indigenous communities. In Kenya, the concept of crown lands during British rule was based wholly on this doctrine (Okoth-Ogendo, 1995). At independence, when Kenyans regained their sovereignty, the doctrine was not deconstructed, with



the result that the law governing so-called government and trust land continued to be informed by this doctrine.

Thus first contact, characterized by unprovoked attack and slaughter, was motivated by the desire to entrench the doctrine of discovery in Africa – against the resistance of the people. This doctrine also drove the second wave of colonialism in the late nineteenth century, when the quest for domination and dominion was justified by religion. Portuguese domination continued for more than 200 hundred years, until Portugal was finally defeated by a Muslim multinational force led by the Imam of Muscat, which included Swahili forces and other local communities on the East African coast. Nevertheless, according to Chapurukha M. Kusimba (1999), this early interlude of colonial domination fundamentally altered the history of the Swahili city states and led to their downfall.

Outside the Waswahili and other coastal communities how does our nation recall the arrival and presence of the Portuguese? How do we reflect the resistance and struggle of the Waswahili and other coastal communities against that foreign domination? Without such resistance could the Portuguese have continued to occupy the coastal areas and also venture further inland? Would Kenya have come within the Portuguese sphere by the time of the Berlin Conference like Mozambique and Angola?

How did this colonial experience affect the coastal communities? What is the legacy of Portuguese colonial rule for Kenya? To explore these questions we will look at two places of remembrance – physical spaces – that have become sites of memorialization in Kenya: Fort Jesus in Mombasa and the Vasco da Gama pillar in Malindi. When these two places are mentioned what memories do they conjure? The Kenyan government and people have embraced them as important historical sites. In the early 1960s, Fort Jesus was opened to the public, becoming a national museum. Following application by the Kenyan government, in 2011 UNESCO declared it a world heritage site.

For the local communities both sites remain symbols of oppression while at the same time affirming their spirit of endurance and resistance. To the Waswahili, Ngomeni, the Fort, was the place of no return: once taken there a person would be incarcerated indefinitely, carried into slavery, or tortured to death. Subsequent ruling powers extended this history, using Fort Jesus as a place to demonstrate the coercive powers of administration, punishment and prison. As Ngome, Muyaka's verse about Fort Jesus, makes clear (quoted in Abdulaziz 1979), this place of death is now a place of remembrance or ziarani in Kiswahili:

Ngome ni Ngome ya mawe na fusi la kufusiza  
Ngome ni ya matumbwe, na boriti kuikiza  
Ngome wetwapo sikawe, enda hima na kufuza  
Ngome imetuumiza, naswi tu mumo Ngomeni!

The Fort is a fort of stone that is reinforced with coral sand.  
The Fort has ceilings well-laid with boriti beams and light coral stone.  
The Fort when you are called there, do not tarry, but hurry and go there quickly  
The Fort has certainly done us a lot of harm, but we are still to be found in it!

The second site, the Vasco da Gama pillar in Malindi, has an equally interesting history that is also linked to the doctrine of discovery. After Vasco da Gama left Mombasa in ruins he was welcomed by the city state of Malindi, which was at war with Mombasa and happily befriended the power that had just devastated its enemy. At Malindi, Vasco da Gama planted a wooden cross, by which act the Portuguese claimed ownership of the city state and its people through “discovery”. In this way the business of discovering people and places arrived in this part of the world.

The invading Portuguese forces claimed the land of “infidels” and “pagans” for Christ as well as for their monarch. Today, the Vasco da Gama pillar, whose meaning remains contested, has replaced the original wooden cross. For the coastal Muslim community, the pillar is a symbol of the crusade that was unleashed against them by a foreign force bent on enslaving and disinheritting them.

Do Kenyans even know of these events? Does this account test people's memory? Why are memories of this period hazy? This remembrance, from a Waswahili perspective, may establish historical knowledge based on the memories of a particular Kenyan community. On the other hand, this remembrance might challenge other memories, including the European narrative that sometimes holds that Christianity arrived in Kenya peacefully with the noble intention of civilizing “the natives”. Could the Waswahili's remembrance give rise to a quest for other lost memories – for example, the histories of enslaved coastal indigenous communities and their transportation to Europe and across the Atlantic? It is no wonder Swahili oral tradition considers the sea beyond Mozambique unsafe. There is abundant evidence to confirm – and refute -- the Christian memory, but to date these other memories remain an unexplored space.

Although Fort Jesus and the Vasco da Gama pillar are now both under the administration of the National Museum of Kenya (NMK), the Museum has not fully explored the ethnic or spiritual histories of either monument, with the result that the Waswahili's remembrance is excluded from NMK narratives about both sites.

The state institution's refusal to acknowledge this history distorts the past and perpetuates false memory in order to suppress an inconvenient

*this remembrance might challenge other memories, including the European narrative that sometimes holds that Christianity arrived in Kenya peacefully with the noble intention of civilizing “the natives”. Could the Waswahili's remembrance give rise to a quest for other lost memories*

or contested past. Indeed, this selective approach to national memory and history is often justified by the state as necessary to retaining social cohesion and harmony. We shall re-visit this state sponsored amnesia with respect to the memories of northern Kenya.

## The education system

What about our education system? What does it teach? Why is coastal history known by so few Kenyans? What does this fact suggest about the government's attitude towards Muslims in modern Kenya? How does this distorted history affect the non-Muslim Kenyan public? If it was widely understood that Islam was rooted for hundreds of years within our local communities by the time Christianity arrived on our shores would their perceptions of Muslims change? Would those who don't believe that Muslims are Kenyans because of their faith change their attitude?

The exploration of the memory of this period raises other fundamental issues about the construction of social meaning and collective recollection in Kenya. Three other examples illustrate the import of this hidden history.



- First, if asked when Indians came to Kenya, a majority of Kenyans would likely say they came between 1896 and 1902 to help build the Ugandan railway line. Yet, in fact, contacts between the Indian subcontinent and the east African coast existed for centuries before that. The navigator who showed Vasco da Gama the way to India was an Indian. A number of Indians were citizens or expatriates in the various Swahili city-states scattered from the Somali gulf all the way south to the Mozambican channel. The Badala community in Mombasa, using oral history, traces its presence in this ancient city to its formative stages. Today the Badala community, just like the Swahili community, is often not considered Kenyan.
- Second, the first Goan community arrived on the Kenyan coast as part of a trusted Christian community to establish the lower cadre of Portuguese governance structures. Even today, the Goan community is still considered alien to Kenya
- Third, the Buluchi community of Mombasa descends from a Baluchistan battalion (representing parts of modern day Iran, Pakistan and Afghanistan) that came to Mombasa to fight the Portuguese under Sayyid Said. Today the Buluchi community is not recognized as a Kenyan community.

These three examples raise the fundamental questions about how we conceptualize Kenyan identity. Who is an indigene? Who is a Kenyan? How does one become a Kenyan? Will some communities forever

remain “foreigners” no matter how long they live in the country? The Badala, Goan, and Buluchi communities can each trace their presence in Kenya back several centuries and can demonstrate their immense contributions to the country’s development. When will members of these Kenyan communities be considered “full” citizens of Kenya? The constitution has accorded such communities full citizenship but it will take time and effort to change mindsets.

To most Kenyans, the Badala, Goan and Baluchi communities are lumped together as “Asians” without distinction, and continue to be associated with the Uganda railway period. What gave rise to the practice of calling those from the Indian subcontinent Asians? Why Asians? In the past, even Kenyan national leaders like Martin Shikuku and Kenneth Matiba got away with using pejorative terms designed to create hatred against the Kenyan communities with connections to that sub-continent. Today, the 2010 constitution has outlawed such excesses.

## Conceptualizing ethnicity and identity and its effect on nationhood

The second thematic area in this paper is the conceptualization of ethnicity. Bethwell A. Ogot observes that ethnicity is a much more plural and dynamic idea than envisaged by the colonialist regime (Ogot, 2005). He analyses the work of various scholars to demonstrate the elasticity of ethnic identities in Kenya. Based on the work of Professor Gideon S. Were, Ogot identifies the interaction and cross influences between the Kalenjin and Luhya communities. And Godfrey Muriuki’s work helps him draw lessons from Agikuyu relations with their neighbors, remarking their close contact with the Maa speaking people, and noting the assimilation of the Gumba and the Athi indigenous peoples into Agikuyu identity.

This fluidity and interdependence of identities is also demonstrated by the coastal communities, including the relations between the Pokomo and Oromo and the extensive relations between Mijikenda and the Swahili community, as shown by Dr. Justin Willis. Other examples Ogot cites include relations between the Samburu and the Rendile, and the Kamba and Kikuyu. Ogot affirms Justin Willis’s assertion that “ethnic identity is constantly being negotiated and defined, renegotiated and redefined, in everyday discourse” (Ogot, 2005:272).

Moreover, completely new identities were formed as a consequence of social forces. Examples of such social constructs include the Taveta, the Luhya, the Kalenjin and the Mijikenda. There were other attempts to form new identities during the post-colonial period that were not as successful or did not result in complete metamorphosis, including the Gikuyu, Embu, and Meru Association (Gema) and the Kalenjin, Masaai, Turkana and Samburu (Kamatusa) experiments.

*fundamental questions about how we conceptualize Kenyan identity. Who is an indigene? Who is a Kenyan? How does one become a Kenyan? Will some communities forever remain “foreigners” no matter how long they live in the country? The Badala, Goan, and Buluchi communities can each trace their presence in Kenya back several centuries*

The symbiotic relationships between various ethnic communities and mutually constructed patterns have profound lessons for future appreciation of pluralism and efforts in nation building. Ogot summarizes this process of becoming in the following way:

This picture can be multiplied across the territory that was to become Kenya in 1920. It emphasizes the complex nature of African traditional frontiers and human patterns. The frontiers were porous and the ethnic groups were malleable and social constructs. There were no pure ethnic groups. Each group was a dynamic and living unit whose continuity depended less on its purity or single origin than on its ability to accommodate and assimilate diverse elements. Most of the myths, legends, epics and rituals one comes across in the stories of migration and settlement are meant to facilitate the process of integrating people whose origins are diverse. We can thus draw useful lessons about nation building from the pre-colonial history of Africa (2005:273).

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At this level, we are given comfort that the conceptualization of ethnicity could take the form of pluralism, pragmatism, accommodation, mutual respect, dependency and survival. The art of fashioning relations based on harmony and cohesion is not such a foreign idea after all. This realization will not only inform the work of the National Cohesion and Integration Commission (NCIC)<sup>2</sup> established in 2008 but also enable people to build structures that will help people shun purist and supremacist approaches. On the other hand, we also need to understand those aspects of identity construction that have been divisive in the past and still retain the potential to disrupt the constitution-building process. One of the issues we need to deal with is the territoriality of ethnic identity in Kenya and the demystification of the idea that Kenya is made up of 42 communities. In Ogot's opinion (2005), these two elements are interrelated. As part of the colonial strategy districts were configured based on the establishment of a dominant ethnic identity in each territory. Later these divisions formed part of local government infrastructure. As Ogot observes:

it was not difficult to introduce the 'tribal' concept of local government upon which the colonial power built its subordinate mobilizing agencies. District councils soon became 'tribal' councils where matters pertaining to interests and welfare of particular ethnic groups were discussed and problems resolved. The Samburu, the Turkana, the Nandi, the Giriama, the Embu, Meru and Pokot had to have their councils. The trend has continued into the independent period. New districts such as Tharaka-Nithi, Kuria, Elgon, Teso, Suba, have been established to give those ethnic groups who still lack a geographical base, their districts (2005: 290).

Given the need for small, manageable number of administrative units, the outcome of this process was that fewer than half of Kenya's communities could be accommodated territorially. Consequently, only communities with large populations have been identified with certain districts or regions and have come to dominate those parts of the country. The colonial practice was to associate one dominant community with every district and to have no more than two to three dominant communities in a region or province. The relatively smaller communities across the country have had to develop various mechanisms to cope with this situation, including accepting co-option in larger ethnic arrangements or even assimilation by the numerically dominant community in their neighbourhood. We believe this explanation largely informed the development of the listing of the mythical 41 communities of Kenya. The 42nd category was created to accommodate the "other".

The majority of the communities not linked to a territory found themselves lumped together in this category. A simple analysis of the communities in this category will show that they occupy the lowest levels of any human development index. Many Kenyan communities such as the Munyoyaya, Elwana, Dasnaach, Okiek, Elchumus, Segeju, Sakweri, Elmolo, Sabaot, Terek, Sengwer, Nubi, Boni, Sakuye, Waata and others still await official recognition. The plight of the Nubian community is especially grim. The Nubians are the only community in Kenya to be categorized as a stateless people.<sup>3</sup> Generation after generation since the time they arrived as a fighting force with the British, the Nubians have struggled to be accepted and recognized as Kenyans. The independence constitution in 1963 conferred Kenyan citizenship on them, but even then they continued to be considered stateless. The 2010 constitution should assure Nubians of citizenship, but the wrong interpretation of the legislative framework could still allow rogue state officials to perpetuate their long state of limbo. Today, the Nubian community is concentrated in Kibera in Nairobi, in the Rift Valley around the Eldama Ravine, on the coast around Mazaras, and in Kisumu.

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All of the communities seeking official recognition fall under the category of minority and/or marginalized communities within the meaning of the new constitution, which defines a "marginalized community" as:

- (a) A community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;
- (b) A traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;
- (c) An indigenous community that has retained and maintained

*The first state effort to enumerate all Kenyan communities (outside the mythical 42 conceptualization) was undertaken by the Constitution of Kenya Review Commission (CKRC)*

a traditional lifestyle and livelihood based on hunter or gatherer economy; or

- (d) Pastoral persons and communities, whether they are –
  - i) Nomadic; or
  - ii) A settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole. (Art. 260)

The constitution thus recognizes minority communities but in order for them to enjoy the full protection and benefits of the law a reliable way to identify them is needed. The emerging issue, then, is how many such communities exist in Kenya, where are they located, and how shall they be identified? The first state effort to enumerate all Kenyan communities (outside the mythical 42 conceptualization) was undertaken by the Constitution of Kenya Review Commission (CKRC). Although the list developed was extensive, the Commission recommended an open-ended approach to allow self-identification by the communities themselves. This approach was designed to allow for a framework that would not exclude any community as well as accommodate future development. It also enabled every community to define itself on its own terms.

This last point is important, given that many Kenyan communities have been defined and labelled by others, including colonialists, anthropologists, missionaries and government agents. Their choice of terminology was not always complimentary or accurate. For example, the Kenyan government labelled the Dasnaach community “Shangila”, a corruption of the word *jangili* which in Kiswahili means rebel or highway robber. Colonial forces labelled the Elwana community “Malakote” to imply they were vagabonds. These naming practices underscore the importance of the International Labour Organisation (ILO) approach to self-identification by indigenous peoples.<sup>4</sup> Early expectations that a cultural commission would be included in the 2010 constitution to undertake this important process were not met. The constitutional provisions for culture were watered down between the Bomas constitution conference in 2004 and the consensus building efforts of the more recent Committee of Experts with the result that Kenya now has no institutional framework for implementing the constitution’s culture-related provisions. That such a framework should be developed is vital.

One of the common challenges facing all the communities mentioned here, and others like them, is the lack of title to land they call home. This problem is further complicated by the close linking of territory to ethnicity. A number of the so-called large groups bordering these communities have either appropriated their land or created myths about their claim to the land, thus enabling them to encroach on what remains.



These communities often face eviction because they are not able to demonstrate title. They may also face eviction before they are able to make their claims using the process outlined in the 2010 constitution. Other interested parties are busy laying facts on the ground that will make reversing the status quo very difficult or almost impossible.

To make matters worse, migration patterns and government allocations do not favour these communities in the competition for limited resources in general and for land-based resources in particular. A case in point is the speculative land grab underway in relation to lands identified for development in the Kenya Vision 2030 blueprint. Communities on both the coast, (particularly Lamu) and in northern Kenya (Isiolo, for example) complain that “well-connected people” are being given title to ancestral land that the Vision has earmarked for development. The communities contend that these lands fall within the meaning of community land as defined by the constitution and fear their rights to them will be undermined.

## The constitution and marginalised communities

How marginalised communities are accommodated in Kenya will depend on the viability of the 2010 constitution and its vision for a pluralistic Kenya. Many marginalised communities supported the new constitution, viewing it as a liberation instrument and as a mechanism for resolving the historical injustices that they have had to endure, including their claims on land. They may use the National Land Commission established by the constitution to seek redress, although in practice the legislation implementing the constitution is unlikely to be sympathetic to their entitlements.

Another major issue is how well marginalised communities will be accommodated in appointive, elective and other representative positions established by the constitution in both national and county governing structures. If the filling of state organs, constitutional offices and other positions already completed under the 2010 constitution is any indication, then the struggles of these communities are just beginning. The 2010 constitution outlaws group discrimination including on account of “race...ethnic or social origin” (Art. 27) and envisages that the state would take legislative and other measures, including affirmative action to redress such historical circumstances. These constitutional principles require an operational infrastructure in legislation and policy; however, this work has not been prioritized by the implementation process.

One area that offers great potential to transform the lives of marginalised communities is the establishment of the devolved system of government, which gives these communities an opportunity to participate politically at both national and county levels. The county level offers opportunities for

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enhancing their status. Indeed, how county governance is constructed and performs its functions may determine the future of our nation as the proper implementation of the devolved system of government is a necessary ingredient for building a nation that appreciates diversity and can perpetuate a pluralistic state. This great potential could also become Kenya's Achilles heel or tragic flaw because of questions of ethnicity and identity.

The continued linking of territory to ethnicity will likely continue to serve as a possible flash point for future conflicts, especially since the 2010 constitution retains the first-past-the-post electoral system and the devolved system of government has divided counties mainly using old colonial arithmetic. More than three-quarters of the counties retain their colonial ethnic makeup. With the exception of towns, the other major transfer of population in post-independence Kenya followed the same ethnic considerations, with the creation of new fault lines and spheres of contestation in such places as Uasin Gishu, Trans Nzoia and Lamu. Thus, one of the key tests of the devolved system will be the extent to which it is able to address historic marginalisation while at the same time building plural communities that do not give rise to further or new forms of marginalization.

**Note:** This excerpt, edited and abridged for *Jahazi* is reprinted with permission of the Katiba Institute. It is taken from *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives*, edited by Yash Pal Ghai & Jill Cottrell Ghai, Global Centre for Pluralism, Ottawa; Katiba Institute, Nairobi, 2013. The complete article is available online: <http://www.katibainstitute.org/wp-content/uploads/2016/06/Ethnicity-Nationhood-pluralism4-returned.pdf>

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## Notes

<sup>1</sup>For full text, see <http://www.nativeweb.org/pages/legal/indig-romanus-pontifex.html>

<sup>2</sup>See the NCIC website at <http://www.cohesion.or.ke/>.

<sup>3</sup>On the Nubians see <http://www.nubiansinkenya.com> (on the book Kenya's Nubians: Then and Now) and [www.fmreview.org/textOnlyContent/FMR32/Adam.doc](http://www.fmreview.org/textOnlyContent/FMR32/Adam.doc). The former site opens with a quotation from a Nubian elder, "A community becomes confident when it is recognized by other communities."



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## Excerpts from the novel

# DUST

### Yvonne Adhiambo Owuor

I

A time in the life of Kenya when the long and short rains failed. El Niño. Odidi had chased after a contract for the repair of the nation's dams. He had lobbied, argued, and dazzled. Their company, Tich Lich Engineers, had won the contract with the power company. A two-hundred-and-seventy-five-million-shilling job.

They had "made it." Doing what they loved, designing with water. They had signed the bottom line, signed nondisclosure agreements—part of the procedure. Dated everything. Received a quarter of the money. Bought guzzling cars and started to dredge the dams. One day, they were summoned for an urgent meeting. They waited in the boardroom for half an hour until a senior magistrate came in.

They were given a paragraph to recite. An oath of secrecy, subject to the Official Secrecy Act. A man in the proverbial black suit witnessed it all. A week later, Odidi, as chief engineer, received top-secret instructions to silt the dams. Contract to "service the turbines" —in other words, render them incapable of delivering power to the public.

At the same time, news of the sudden flooding of the lower reaches of the Tana River. Traveling to the dam site, they found the dam gates opened.

"We knew what was happening. Told that *jama* to back down and shut up. Why be martyrs, man?"

Odidi had insisted on talking to the managing director, who was in another meeting. Odidi had left a note, setting out what he had seen and asking for an explanation.

"Who did he think he was? It wasn't rugby, y'know?"

A few days later, the managing director was on national television,

*A week later, Odidi, as chief engineer, received top-secret instructions to silt the dams.*

*Contract to "service the turbines" —in other words, render them incapable of delivering power to the public*

showing journalists how low the levels of water in the dam had fallen. In sorrowful tones he announced an imminent power-shortage emergency and the enforcement of a power-rationing plan. As if by coincidence, obsolete diesel generators from Europe and Asia happened to be aboard cargo ships on their way to Kenya. They would take care of the shortfall in power at 3,000 percent above the usual cost. A company to administer the supply of power from these generators had already been registered. Tich Lich had been contracted to install and service the equipment

Odidi barged into the minister of energy's offices the next day.

"Something's wrong," he shouted.

Musali smiles as he remembers.

"The minister listened, then said, 'put it in writing.' "

So Odidi wrote a letter to the minister headed *Acts of Treason Against the People and Nation of Kenya*, backed with data and evidence, dates and figures.

When there was no response from the minister's office, he circulated it to the dailies. It was not published. Musali grimaces when he recalls Odidi rushing to record a statement with the police. "He even wanted to see the president." He wipes his eyes.

A minor functionary told Odidi to record another statement, and as he did so, more diesel generators were brought into the country. Tax-free. To cope with the national emergency caused by the power shortages.

"We were offered five percent of profits for ten years, y'know?" Musali says. "Odidi called a board meeting to demand that we resign the job and expose everything."

Musali sips his tea. "I told him, 'We have to survive. This thing of mahonour ama patriotism, man—you must be practical. Mortgages, mbesha. Y'know?'" Musali rubs the edge of his bandages.

"This was big. Really big. When you see something like this, man, you say yes or you die, y'know?"

Ajany reads in Musali's shiftiness the extent of her brother's isolation.

"What happened?"

"We voted.

"And?"

"Opted to stay with the job. Odi took it badly, man." Musali leans over.

"Went crazy!"

Ajany flinches.

Odidi broke into the office of the managing director, having driven through the company gates in his new green Prado. He shouted that

*"We were offered five percent of profits for ten years, y'know?" Musali says. "Odidi called a board meeting to demand that we resign the job and expose everything."*

*Musali sips his tea. "I told him, 'We have to survive. This thing of mahonour ama patriotism, man—you must be practical. Mortgages, mbesha. Y'know?'"*

this was treason. Everyone who gathered to hear him watched and did nothing. The managing director's bodyguards hustled Odidi out, tear-ing his shirt in the process. In an hour's time, a board meeting was called.

"The chairman called for a vote. We voted out Odidi." Silence. "He was being difficult. Wouldn't listen. We're talking billions, man. Y'know?" Musali pushes out his lower lip.

Tich Lich's partners received instructions to reregister the company under a different name if they still wanted the contract. Within two hours, an oily Ivy League university–graduated lawyer who represented the establishment personalities turned up with relevant documents extracted from his brown, black, and gold python-leather case. As they looked through the documents, the lawyer played classical music from a small device, hummed musical phrases, and witnessed the signing of the company reregistration documents.

"That man," Musali says, giggling. "Insane! After we sign, he speaks mara Beethoven *mara* Heili-Heiligenstadt Testament. Imagine." Musali adds that he had looked up the testament and learned to say *Heiligenstadt* properly.

Tich Lich was renamed T. L. Associates Engineering.

Odidi was no longer a partner.

Ajany's whole body has been shivering; her teeth chatter.

Musali touches her shoulder.

Ajany shrugs his hand away, ducking her head.

Musali asks, "Which Kenya did Odi grow up in? That jama could be so, so, so stupid, y'know?" Ajany hisses. "Sorry, man, just that, you know..."

Musali shrugs, a practical man.

When he showed up for work, it was Musali who told Odidi what they had done.

"Tough day, that." Musali shivers at the memory of Odidi's look.

He had told Odidi to leave the premises. Urged him to take a break until the contract was serviced. Promised him that when it was over Tich Lich would return. "You know what he said?"

Ajany glances up.

"Nothing."

Musali stares at the carpet.

"He just left."

Ajany asks, "Where's my b-brother, Musali?"

Silence. Then, "Don't know." Adds, "Lost touch." A tinge of malice. "Heard he'd been moving from office to office with a petition form for citizens to sign."

Musali stops short of revealing to Ajany that Odidi had once been spotted speaking on street corners. Cannot tell her that, seven months

*"We silted the dams.  
No choice. We have  
our money."*

*National power  
shortages worsened.  
Companies closed  
down.  
Utility bills exploded.  
Citizens paid up.  
The managing  
director held a party  
to celebrate his first  
personal billion  
shillings*

after he had walked away from the offices, Odidi had phoned Musali for money and a place to stay. The bank had all of a sudden recalled his mortgage and had then thrown him out with his things. They were auctioning the house. No lawyer would take up the case against the state. Odidi was threatened, followed, summoned, booked for loitering with intent. Some NGOs he visited made the right sympathetic noise but emphasized to him that AIDS, women, malaria, girl children, and bore-holes were priorities.

Musali gives Ajany a direct look. She sees the cold glimmer of a green mamba's stare. "We silted the dams. No choice. We have our money."

National power shortages worsened.

Companies closed down.

Utility bills exploded.

Citizens paid up.

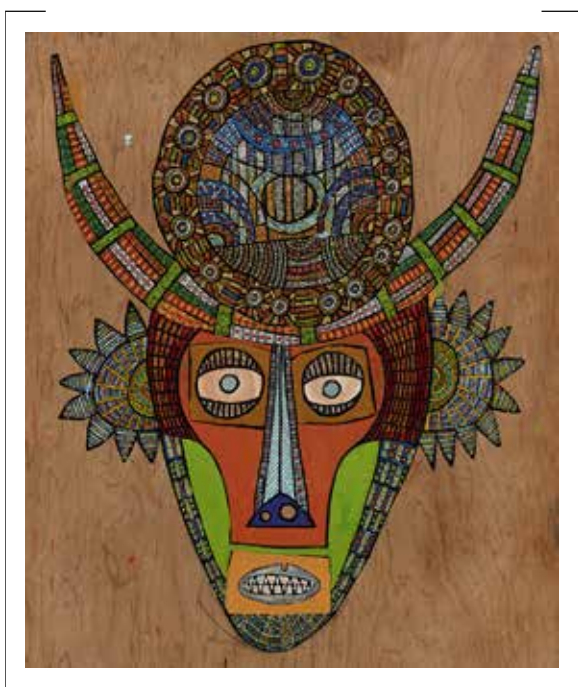
The managing director held a party to celebrate his first personal billion shillings. Others were more discreet. T. L. Associate Engineers thrived.

"After you make money, you can afford to be an activist."

Musali stares at the carpet. "We deposited a year's salary into his account."

Musali leans back. "Last December, when I was carjacked"—Musali rubs the brace—"I thought . . . it was late. . . ." He looks at Ajany's stricken face. "Ah! Man. When you see that *jama*, tell him we're in business again. We can do those ka sweet, sweet projects he wanted."

—Chapter 18, pp 169-172.



## **THE ART SPACE**

Opened in 2015, The Art Space has evolved from a commercial art gallery based in Kenya, into an online space with regular pop-ups in popular and sometimes unusual spaces around Nairobi. We feature art for sale from new and established artists in our Vault and for hard to find works, in our Collector's Den.

Through art exhibitions and informal conversations, The Art Space allows for growth and critique in the visual arts.

The Art Space focuses on contemporary art from Africa and links artists with the contemporary art market, locally and internationally.

We offer art advisory services for new collectors and assist current collectors to curate and catalogue their existing collections.



THE ART SPACE

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## II

Nyipir had lost his Kenya on July 5, 1969, in Nairobi, when Tom Mboya was assassinated. The murder was the culmination of fears, swirling rumours, the meaning of clandestine oaths that made the rest of the country enemy territory to be owned. It was the purpose of the silences that had started before.

Nyipir and a colleague, Mzomba, had been looking across the Jeevanjee Gardens and had paused when the report of something punched the air. Then silence. They started to walk in the direction of the noise. Twenty minutes later, a woman in a green dress, barefoot, carrying white shoes, raced past them. She was crying, a horrible sound that seemed to come from all around her, and from within her.

*Ka-Sehmi.Mayieeee! Gi-neeeee-go Mboya.*

*Mboya!*

Nyipir's body temperature had dropped.

*Tom. Mboya.*

His heart had slowed down, and he collapsed with his disintegrating national dreams.

Then.

*It is a lie. Nobody would kill Tom. Nobody would dare kill Tom, because it means they would be willing to kill Kenya.*

He started to stutter something.

Later, Mzomba lit a cigarette and offered it to Nyipir, who was on his knees and clinging to a telephone pillar.

This death created a fissure in the nation, as if it had split apart its own soul. The funeral cortège was more than two kilometres long. A wailing nation lined up on three hundred kilometres of road to touch the passing hearse. In the silence of everything else, in the farce of a trial, a man named Njenga, who had fired the gun, cried, *Why pick on me? Why don't you ask the big man?* Before he could suggest much more, Njenga was hanged.

After Mboya, everything that could die in Kenya did, even schoolchildren standing in front of a hospital that the Leader of the Nation had come to open. A central province was emptied of a people who were renamed cockroaches and "beasts from the west." But nobody would acknowledge the exiles or citizens who did not make it out of the province before they were destroyed. Oaths of profound silences—secret shots in a slithering civil war.

In time.

A train would stop at a lakeside town and offload men, women, and children. Displaced ghosts, now-in-between people. No words. Then

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one night a government man drove into town from Nairobi. He carried petri dishes of *vibrio cholerae*. He washed these in a water-supplying dam. Days later cholera danced violently across the landscape, dragging souls from that earth, pressing dessicated bodies deep under the earth. No words.

Under the trance of fear, a nation hid from the world. Inside its doors ten thousand able-bodied citizens died in secret. Some were buried in prison sites, and others' bones were dissolved in acid. Nyipir knew. He saw. He did not speak. He hoped it would end soon. Just like the others who had also seen, he told no one. A hundred, and then a hundred more, herded into holding houses.

Picked up—taken from homes, offloaded from saloon cars, hustled from offices, stopped on their way to somewhere else—prosecuted, and judged at night. Guilty, they were loaded onto the backs of lorries. And afterward, lime-sprinkled corpses were heaped in large holes dug into the grounds of appropriated farms. Washed in acid, covered with soil that became even more crimson, upon which new forests were planted.

After Mboya, Kenya's official languages: English, Kiswahili, and Silence. There was also memory.

Nyipir's mind had collected phrases shouted out to those who were within hearing range:

*Tell my wife.*

*My brother.*

*Daughter.*

*Son.*

*My friend.*

*Someone.*

*Tell my people.*

*That I am here.*

*Tell them you saw me.*

Because there was silence, he tried to memorize names, never speaking them aloud.

Some he wrote out in a child's notebook.

In case one day a stranger might ask if so-and-so had existed.

*Patrick Celestine Abungu.* University professor of history, returned from Russia, bearded and bespectacled. Broad-chested and terrified. He shouted, *Tell my wife and children.*

*Onesmus Wekesa.* Musician, composer of songs with double-meaning

*After Mboya, Kenya's official languages: English, Kiswahili, and Silence. There was also memory.*

lyrics. A song that mocked an oafish, greedy hyena that ate up its own body had brought him to the police cells. He wept when they dragged him away. He clung to everything. He shouted, *Tell my brother*. . . .

*Cedric Odaga Ochola*. Engineer. Former major. Dragged out the door, he had screamed, "How can you do this?" He glimpsed a figure and shouted, *Tell my daughter*. . . .

Odd.

No one would emerge to ask after men who had been erased.

It was as if they had never been born.

Kenya's official languages: English, Kiswahili, and Silence.

But there was also memory.

*Odd.*

*No one would emerge  
to ask after men who  
had been erased.*

*It was as if they had  
never been born.*

### **–Chapter 31, pp 284-287**

Note: The editorial team acknowledges and thanks Yvonne A Owuor, and her publisher, Kwani Trust, for permissions to carry this selection. The selection was performed at the inaugural Pointzero Book Café in January 2017.

*Dust*. Nairobi: Kwani Trust, 2013.

# Book Review: Memory, Alienation and a particular Yearning: A review of MG Vassanji's *Nostalgia*

**Godwin Siundu**

For many of us, reading MG Vassanji's oeuvre has mainly been a foray into the labyrinths of communal memories, often rendered in 'traditional' tropes: historical allusions, family biographical narratives, material artefacts and their symbolic value, all generally grafted on the idea of the journey as the structuring device. Two marked differences emerge in reading his new novel, *Nostalgia*. One, he seems to break free from 'East African Asianness' as his main point of reference, instead taking a generational and regional address where the Asians exist as individuals, little tied to a particular racial community. Set in Toronto, with peeps into *Maskinia* – clearly referencing Africa and its so-called stock problems – *Nostalgia* addresses the subject of memory and its impact on individuals.

Second, the idea of memory to which *Nostalgia* addresses itself differs from that which made earlier works like *The Gunny Sack* and *The Book of Secrets* so compelling; the current idea focuses on memory as a package that can be created, *ex nihilo*, to replace or displace the undesirable variant. In *Nostalgia* the operational idea of memory shifts to forms of fragmented anecdotes, fears, and anxieties that torment individuals in a cosmopolitan space.

In *Nostalgia*, therefore, a new experience awaits readers – that of a life that almost defies mortality, one that can control what is to be remembered. If memory, a common motif in Vassanji's fiction, has previously been presented as a collective concern of which individual experiences are but a small part, in *Nostalgia* the focus is on the individual in their own right, and not as representative of a marginalised or threatened community.

The torments of memory are hinted at right from the title where nostalgia is emptied of the romantic connotations that it has been associated with for a while now, to the throbs, pains, and aches that are traceable to the

etymology of the Greek word *algos*, from which 'nostalgia' is derived. Yet, if the throbs, pains, and aches of nostalgia are as bothersome as they are undesirable, can memory in this sense be completely wiped out and replaced with a new type that is acceptable, a new slate on which one can begin again, as it were?

Or, can individuals bear to live without traces of previous memory, which has been supposedly wiped out? What happens to the memory that has been ostensibly deleted? Does it disappear completely, or does it come back in bits and pieces at awkward times and places? What happens to individuals who bear young memory in old bodies?

*The novel begins with Presley Smith, whose tragic life as a victim of imposed identity and memories reveals both the possibility of enhanced longevity, reshaped personal memories, and the perils of both processes of scientific marvel.*

It is these questions that Vassanji plays around with in *Nostalgia*, examining the possibilities for, and dangers of erasing undesirable memory. He creates Dr Frank Sina, whose private life captures both the marvels of medical science and its limits in addressing humanity's anxieties occasioned by aging, by inheriting agonising pasts, and by dealing with the emotional and social needs of individuals.

The individuals, who are in a sense living second lives, are drawn from different parts of the world. All bear different pasts, some of these quite dark. It is such characters who resonate with the novel's epigraph, borrowed from Book VI of the *Aeneid*: "[t]hey are spirits destined to live a second life / In the body; they assemble to drink / From the brimming Lethe, and its water / Heals their anxieties and obliterates / All trace of memory."

The novel begins with Presley Smith, whose tragic life as a victim of imposed identity and memories reveals both the possibility of enhanced longevity, reshaped personal memories, and the perils of both processes of scientific marvel. One of the problems is that the rejuvenated people become objects of derision by the mainly idealist youths and religious puritans who see the whole scientific idea of tinkering with the normal cycles of mortality as not only unnatural, but also as threatening the futures of the naturally young and educated, now unable to secure gainful employment and pursue their life dreams. But the greatest danger of this scientific advancement is perhaps in the way it is hijacked by powerful governments (the North Atlantic Alliance in *Nostalgia*) to impose their own will on different people (Maskinia) whose academic, political, and military leaders are all 'transformed', often against their will. Many of such transformed characters, like Smith in the novel, are allowed to live in the North Atlantic Alliance, where they continue to render their services as experts and specimens at the same time.

The transformed Smith, for instance, sadly begins to be haunted by memories of a past that he is not sure he had. This experience torments him, worsening with time, and he is compelled to engage the services of Frank Sina, a rejuvenation doctor who is himself a victim /client of the

same medical engineering, for help. Both of them are watched by the big brother, who is anxious that Sina can help Presley to discover his true self. This leads to unimaginable consequences.

The problem that Presley faces, the torments from his past, derive from failure of the memory rejuvenation process to achieve full success, which leads to old memories filtering into the consciousness of the patient / victim / client, in a phenomenon called “the leaking memory syndrome.” This syndrome is the worry not just of powerful governments, but also rejuvenation doctors like Sina who is himself ironically a victim / client / patient / specimen of the same regime. He is a ‘creation’ of Dr Arthur Axe, whom he meets later in the novel. Sina habitually watches news from Maskinia and one day, as a hostage rescue operation unfolds on screen, something familiar startles him. “[...] I knew I had seen the place, I could recognise those hills where I would go for walks. And I saw my little brother’s face blown off.” (pp. 228-9). Sina’s destruction takes a turn for the worse after this memory leakage, and soon he is completely broken.

Overall, the psychological destruction of the rejuvenated individuals begin as commonplace desires of the heart, similar to Sina’s plea to Radha, his only friend: “I want it [the repressed / destroyed memory that has begun leaking to his consciousness] all to come back to me. I want to know who I was – actually, who I was born as, who I really am. I want to recall my real family. I want to know my real friends and relations even if they are now dead or unreachable to me.” (p. 246)

Up to this point, he does not know of his past as a Maskinian, or even of his pedigree as a prince of sorts. He has also begun to be unsure of his place in the world, and apprehensive of medical science and engineering. Sina’s self-confidence, and certainty about science are challenged by a persistent hankering for self-understanding, hence his anguished realisation: “[...] I have this strange feeling that I myself don’t belong ... The world is not mine anymore. I who implanted idyllic fictions am a fiction myself and that fiction is falling apart.” (p. 206)

As events in the novel advance, it emerges that virtually all the protagonists are re-engineered characters from a Maskinian past. Although given new memories of the past and different roles in the present, they eventually begin to suffer the leaking memory syndrome that leads to painful death. Ultimately, *Nostalgia* is about the ravages of memory on individuals who wish to use science to conquer mortality, and the attendant pain of realisation of the impossibility of such (mis)adventure.

*Nostalgia* is rendered in a narrative style that blends a modernist fragmentation that brings out the loneliness of alienation of Frank Sina, Presley Smith, and their acquaintances, notably Radha. The use of allegorical aesthetics and distancing irony all cumulatively point to the

different layers of meaning that the novel encapsulates, besides the projection of a collective plight that all of us – rich or poor, western or African – suffer. This comes out towards the end of the novel, when it emerges that the main characters are blood relations: Frank Sina (Elim Angaza) and Presley Smith (Emirul) are step brothers, sons to Nkosi, the leader of the Maskinia army that is responsible for the abduction and radicalisation of Holly Cho, a young journalist who is also the biological great-grand-daughter of Frank Sina / Elim Angaza.

This fabric of imagination – to borrow Guyanese writer and critic Wilson Harris' metaphor used in reference to *Palace of the Peacock* – takes us back to the idea of community, only that this time it is a community whose members are unknown to each other, but who nonetheless coalesce because of some metaphysical pull. The same logic explains Frank Sina's obsessive following of political developments in Maskinia, and his outrage at the patronising, stereotypical tone of its coverage by media in North Atlantic Alliance, where he resides in his new self. Unbeknownst to him, it is the bonds of kinship and affiliation that tug at his conscience. In this manner, Vassanji's *Nostalgia* revisits the idea of community, exile, and alienation in an unusual way.

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# Appreciation

...to Africans, culture is really the single word that explains and justifies most things, from the organization of private domains to complicated political institutions.

Toyin Falola, *The Power of African Cultures*.

This issue of *Jahazi* salutes all those cultural workers who continue to dedicate time and energy to the sector. And for Ndua Chege – we remember.

To all our contributors. Regina Wandera, who ‘farms God’s way’, for bringing the Food Alliance on board, and for priceless insights on food culture. Zein Abubakar, and The Katiba Institute for permission to carry ‘Memory, Identity and Pluralism in Kenya’s Constitution Building Process’. Yvonne Owuor, and Kwani Trust for permission to carry an excerpt from *Dust*. Paul Abwao for the Artwork, and Henry Omondi for Photography. Rosemary Okello-Orlale, former Program Officer, Advancing Public Service Media at the Ford Foundation for facilitating the more structured emergence of the Creative Economy Working Group’s (CEWG’s) policy work. Team Jahazi, Twaweza Communications, Victor Gitonga at Twenty Twenty Design. And to Joy Mboya and Judy Ogana, and the GoDown Arts Centre, for allowing that all things are connected.

We thank the Lambent Foundation for supporting the publication of this Issue.

**A h s a n t e n i**

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ISBN 978-9966-028-21-1