UNIVERSITY OF THE WESTERN CAPE

DEPARTMENT OF ANTHROPOLOGY AND SOCIOLOGY

Topic:
Human Rights Modernities: Practices of Luo Councils of Elders in Contemporary Western Kenya

A Thesis Submitted in Fulfilment of the Requirements for the Award of a Doctoral Degree in Anthropology

PRESENTED TO:
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Abstract

This dissertation is an ethnography of human rights discourse in postcolonial Kenya. It situates itself in the inexorable rise of the application of International Human Rights Law witnessed in the 21st century. For this reason, many contemporary observers refer to this period as an ‘era of Human Rights’. With an ethnographic account centred primarily in Luo Nyanza, western Kenya, the dissertation seeks to open up questions about the practice of Human Rights by reference not to their philosophical origin but their practical manifestations. It conceptualizes Human Rights as a discourse of ongoing conversations of ‘multiple realities’ thus resulting to an empirical rather than ideological account of manifestations of personhoods and modernities.

It is a study of the production of human rights that journeys in particular contexts and moments but conscious enough not to be circumscribed by its specific location. With this strategy, the dissertation is based on some sort of dialogue. On the one hand is a notion of Human Rights as rooted in Western enlightenment discourse which one can describe as a Eurocentric perspective visible through the International Human Rights Instruments promulgated by the United Nations (UN) and its agencies and the other a perspective common among a section of Luo people of western Kenya visible through chike, kido and kwero that are articulated and safeguarded by Luo Councils of Elders. In suggesting the distinction between ‘the Western’ and ‘the Luo’ notions of personhood, the researcher is aware that both frameworks are manifestly plural and ‘intercivilizational’ in their conceptualization.

Theoretically, the research starts from the argument that rather than experiencing the arrival of the Western modernity of Human Rights as the disintegration of their “old” worlds, marked by the establishment of an unproblematic new and “pure” code of communication and rationality, Luo Councils of Elders tend to visualize the Rights reality as made up of living assembles that juxtapose and inter-relate different materials thus embracing notions associated with aspects of both ‘modernities’. It is these ongoing conversations and negotiations between and within ‘cultures’ (in both the reified form and as a process in perpetual movement through time) of Human Rights that this research has sought to understand and document.

This ethnographic study has explored questions related to the following amongst others: Why have Luo Councils of Elders become such important institutions in the invention, performance and enforcement of human rights in the 21st century Kenya? How are productions of human rights practices moved back and forth between homesteads and urban centers in Luoland, Non-Governmental Organizations and National Human Rights Institutions in Nairobi and, between human rights monitoring bodies in Geneva and New York? And how does subjectivity as a basis of
agency manifest itself in the postcolonial practice of human rights in Kenya?

To answer these questions, I have undertaken a historical anthropology of human rights practices of Luo Councils of Elders in contemporary western Kenya. Cultural festivals, specific radio programmes and encounters with councils of elders have been chosen as spaces for collecting research material. The narrative that develops is about how the content of human rights and its subject is produced in contemporary Kenya. What is most outstanding is how the past is constantly present in the present. In my discussion of the unfolding realities and manifestations of human rights practice, I recover the narrative of *mwananchi* who is not any different from the subaltern and the subject around whom the economy of human rights knowledge circulates. In the end, this thesis demonstrates how human rights as knowledge regime are engaged and engages African realities and mythological representations.
Declaration

I declare that Human Rights Modernities: Practices of Luo Councils of Elders in Contemporary Western Kenya is my original work, that it has not been submitted before for any degree or examination in any other university, and all the sources I have used or quoted have been indicated and acknowledged as complete references.

Stephen Ouma Akoth,

Signed..................................................................................
April, 2013
Acknowledgments

When I arrived at the University of the Western Cape in February 2008, I knew very little about both the Institution and the Department of Sociology and Anthropology. I stepped into the office of Professor Heike Becker to share my story and understand the Department. After talking about human rights as my subject of interest and my aversion to the ever lingering debate of relativism vs. universalism, Heike remarked “You are my kind of person!” That would be the beginning of a process that was as much of personal reflection and transformation as it has been one of unfolding a situated narrative of human rights. This turned out to be unmeasured intellectual support that culminated in crafting of my intellectual project as ‘the social life of human rights’. Heike guided me not just on how to ask the right questions but most important on how to engage anthropology as an actor oriented discipline.

Soon after this encounter I took time to engage more with many other staff of the Department. It is a process that has taken me to various places and spaces where I have found numerous shoulders on which I have supported myself. Having come from the practice industry of human rights- as Director of Programmes at the Kenya Human Rights Commission, it is the great people of UWC who have provided me with transforming encounters and initiated me into a league of thinkers, researchers, scholars and cohort of students around whom my thinking, ethnography and writing have taken shape.

At the end of this stage, I must confess that those who take credit for my work and thoughts have become countless. Among these, there are individuals whose imprints are not erasable. At the Department of Anthropology, it is Emile Boonzaier who inducted me to what he insists is “the Craft of ethnography”. By insisting that this is a “Craft”, Boonzaier guided me on how to formulate anthropological questions and undertake ethnography. While he always thought I was a disciplined student, I learnt the discipline from him! Then there was Jide Oleyede who was ‘my Mudimbe’ at the Department. He problematized the African thinker as a subject of unequal and insubordinating knowledge production. For Jide (as he is popularly known in the university community), the success of aspiring African scholars like myself is measured on how one confronts “epistemological domination”. It is this thought that would later create heightened awareness in me and aid in formulating my research questions as well as writing this dissertation as more of a search for some sort of subaltern narrative of human rights.

And then there was the most outstanding team of peers and young scholars at the Centre for Research and Humanities at the UWC. I was glad to have been admitted as a fellow under the
Programme on the Study of the Humanities in Africa where I met a team of robust thinkers whose arguments and study group remains formidable. But it is Premesh Lalu, the Director of the Centre who was much available and a consistent companion in this process.

When it was time to venture outside UWC, it is Premesh who wrote letters of introduction to Wallace Marion, Curator of African Collections at the British Library in London. Marion would later prove to be extremely helpful in accessing both British Council as well as the Kew Garden Public Records Archives. But it is in Minnesota where I got the solitary opportunity to write. Once more, Premesh organized for my research fellowship at the Interdisciplinary Centre for the Study of Global Change of the University of Minnesota under the leadership of Eric Shepherd and Karen Brown. I met an outstanding international community of scholars and PhD fellows from whom I have been able to locate my work and write a set of complete dissertation draft. Indeed Eric and Karen took every available step to make me and other colleagues comfortable and at all times remained attentive to our work.

Even though authorship of this dissertation is solely mine, I am most indebted to my partners in ethnography: Ker Riaga Ogalo, Dorothy Awino, Priscilla Oluoch, Ascar Madote and many others who accommodated me in their space and tolerated my inquiry. Often, I opened discussions on issues that were ‘silent’. To accompany me in these ethnographic discussions were John Ogam, Brian Odinga, Tony Owuor, Patrick Oroka—commonly known as Mwalimu, Wambui Kimathi, Catherine Mumma and many readers of my nascent chapters.

In the final stages of writing this dissertation, it is Heike Becker once more who encouraged me to apply for Next Generation Social Science Fellowship from the New York-based Social Science Council. She followed this with a generous endorsement and the ever present guidance as I wrote my dissertation. I sincerely thank her once more.

But all these would not have been possible without the ‘subsidy’ of my family. In South Africa Martin Onani and his family hosted and welcomed me as a member of their household. This was stone caped by my editorial assistants Brigit Saas and Amos Booker. Back in Kenya, my wife—Sarah—took the toil of explaining to our daughters—Achieng’ and Wanjiku why I had to be away. These three women continue to remind me of how gendered the process of production and reproduction is. My absence seemed possible because of the very structural limits that my thesis unravels. To all great people in this sojourn—Asanteni sana!

Cape Town, April 2013.
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<tbody>
<tr>
<td>ACHPR</td>
<td>African Charter on Human and Peoples’ Rights</td>
</tr>
<tr>
<td>AFC</td>
<td>Agricultural Finance Corporation</td>
</tr>
<tr>
<td>AIDS</td>
<td>Acquired Immune Deficiency Syndrome</td>
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<td>ARVs</td>
<td>Antiretrovirals</td>
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<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<tr>
<td>AWORD</td>
<td>African Women for Research and Development</td>
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<tr>
<td>CBOs</td>
<td>Community Based Organizations</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All forms Discrimination Against Women</td>
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<tr>
<td>CEDPA</td>
<td>Centre for Development and Population Activities</td>
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<tr>
<td>CEMIRIDE</td>
<td>Centre for Minority Rights</td>
</tr>
<tr>
<td>CMS</td>
<td>Church Missionary Society</td>
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<tr>
<td>DO</td>
<td>Division Officer</td>
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<tr>
<td>DC</td>
<td>District Commissioner</td>
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<tr>
<td>EA</td>
<td>East Africa</td>
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<tr>
<td>FAO</td>
<td>Food and Agriculture Organization of the United Nations</td>
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<tr>
<td>FIDA-K</td>
<td>Federation of Women Lawyers in Kenya</td>
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<tr>
<td>FM</td>
<td>Frequency Modulation</td>
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<tr>
<td>GJLOS</td>
<td>Governance, Justice, Law Order Sector Reforms Programme</td>
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<tr>
<td>GOK</td>
<td>Government of Kenya</td>
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<tr>
<td>HIV</td>
<td>Human Immunodeficiency Virus</td>
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<tr>
<td>Hon.</td>
<td>Honourable</td>
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<tr>
<td>HRW</td>
<td>Human Rights Watch</td>
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<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<tr>
<td>ID</td>
<td>Identification Card</td>
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<tr>
<td>IFAD</td>
<td>International Fund for Agricultural Development</td>
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<tr>
<td>ILC</td>
<td>International Land Coalition</td>
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<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
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<tr>
<td>IWHRC</td>
<td>International Women’s Human Rights</td>
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<tr>
<td>JOOF</td>
<td>Jaramogi Oginga Odinga Foundation</td>
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<tr>
<td>KANU</td>
<td>Kenya African National Union</td>
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<tr>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>KBC</td>
<td>Kenya Broadcasting Corporation</td>
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<td>KELIN</td>
<td>Kenya Ethical and Legal Network</td>
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<td>KFA</td>
<td>Kenya Farmers Association</td>
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<tr>
<td>KHRC</td>
<td>Kenya Human Rights Commission</td>
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<tr>
<td>KLC</td>
<td>Kenya Land Commission</td>
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<tr>
<td>KLRC</td>
<td>Kenya Law Review Commission</td>
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<tr>
<td>KM</td>
<td>Kilometre</td>
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<tr>
<td>KNCHR</td>
<td>Kenya National Commission on Human Rights</td>
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<tr>
<td>RAWA</td>
<td>Ramogi Africa Welfare Association</td>
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<tr>
<td>K-Rep</td>
<td>Kenya Rural Enterprise Programme</td>
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<tr>
<td>KSE</td>
<td>Kenya Society for Ethnoecology</td>
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<td>KWFT</td>
<td>Kenya Women Finance Trust</td>
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<td>NCIC</td>
<td>National Cohesion and Integration Commission</td>
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<tr>
<td>NGOs</td>
<td>Non-Governmental Organizations</td>
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<tr>
<td>MP</td>
<td>Member of Parliament</td>
</tr>
<tr>
<td>MSF</td>
<td>Médecins sans Frontières</td>
</tr>
<tr>
<td>NCGD</td>
<td>National Commission on Gender and Development</td>
</tr>
<tr>
<td>NCWK</td>
<td>National Council of Women in Kenya</td>
</tr>
<tr>
<td>NTV</td>
<td>Nation Television</td>
</tr>
<tr>
<td>OAU</td>
<td>Organization of African Unity</td>
</tr>
<tr>
<td>PC</td>
<td>Provincial Commissioner</td>
</tr>
<tr>
<td>RIAT</td>
<td>Ramogi Institute of Advanced Technology</td>
</tr>
<tr>
<td>RSA</td>
<td>Republic of South Africa</td>
</tr>
<tr>
<td>SOAS</td>
<td>School of Oriental and African Studies</td>
</tr>
<tr>
<td>TRC</td>
<td>Truth and Reconciliation Commission</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNESCO</td>
<td>United Nations Educational, Social and Cultural Organization</td>
</tr>
<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
</tr>
<tr>
<td>UNICEF</td>
<td>United Nations Children’s Fund</td>
</tr>
<tr>
<td>UNIFEM</td>
<td>United Nations Development Fund for Women</td>
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</table>
USA  United States of America
USAID  United States Agency for International Development
UWC  University of the Western Cape
USD  United States Dollars
USSR  Union of Soviet Socialist Republics
VCT  Voluntary Counseling and Testing
VHS  Video Home System
VoK  Voice of Kenya
WB  World Bank
WiLDAF  Women in Law and Development in Africa
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CHAPTER ONE

INTRODUCTION: WESTERN KENYA IN AN ERA OF HUMAN RIGHTS

1.1 Introduction

On December 18, 2009, about a year into my fieldwork, I attended a goyo dala (erection of a homestead) ceremony at West K’Oguta, sixty one Kilometers away from Kisumu City, the predominant town in Luoland. On this day, Ascar Akinyi Madote was being resettled under the leadership of the K’Oguta Clan maximal\(^2\) of the Nyakach Council of Elders\(^3\) (one of the increasing number of councils of elders in Kenya who claim to ‘safeguard culture’) and a human rights Non-Governmental Organization working in Nyanza known as the Kenya Ethical and Legal Network (KELIN)\(^4\). Madote is the widow of the late Oremo, a member of the K’Oguta clan who died March 22, 1998. This goyo dala ceremony signaled the end of Madote’s five-year asylum at a rented house next to Bar Oyuma Market in West K’Oguta Shopping Centre. She had moved there after yuore (brother-in-law) sold off part of their family land—including her home—in 2004. She reported the case to the Federation of Women Lawyers of Kenya (FIDA-K), which is a leading women’s rights organization and four years later the matter was yet to be resolved.

The event of goyo dala had been planned between Madote and the leadership of the Nyakach Council of Elders since November 2009. The date of the event was fixed for December 18, 2009, a month after the harvest from kodh opon (the short rains) and when most Luo people

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\(^1\) I know that this term is problematic as the notion of erection is masculine. But indeed what I attended was part of a longer process of establishing dala. The common reference to this undertaking in Dholuo is chungo dala (which literally translates to erecting a home).

\(^2\) By maximal, I mean sub-groups within the category of Luo people. Luo people tend to use the term Dho-oot whose closest translation is maximal to refer to both lineage and clan. But there are many occasions where a lineage is also synonymous to a clan. The conventional anthropological distinction between a lineage and a clan is that a lineage can be traced back to a known ancestor, whereas a clan’s origin is more mythical; a ‘clan’ is usually larger than a lineage and comprises several lineages/clusters of lineages. See Evans Pritchard (1949).

\(^3\) The full convocation of the Nyakach Council of Elders brings together the 11 clans of Nyakach maximal namely: Gem-Rae, Ka’Jimbo, Ka’ Ndaria, Ka’Dianga’, Ka’Bodho (Bodho is actually a woman, a mugogo who couldn’t settle down in marriage and was derided as Bodho, and who as ‘odhi odugo’ founded what is probably the only matrilineal clan of the Nyakach), Jimo, K’Oguta, Ka’Saye, Wasare, Ramogi and Agoro. It is however useful to note that strictly speaking, Gem-Rae is not a clan of Nyakach, though it occupies Nyakach ‘ancestral’ land. It is actually a clan of the Gem, which somehow was accommodated by Nyakach, but still remains, at least in the ‘blood’ sense, a sub-clan of the Luo Gem Clan whose primary ancestral abode is in the other side of Nyanza.

\(^4\) KELIN is one of the numerous human rights non-governmental organizations which have proliferated in Kenya after the re-introduction of political pluralism in the 1990s with the mandate to promote and advocate for the adoption of human rights laws in Kenya.
living in Kapango (urban areas) return ‘home’\(^5\). No one knew the exact spot where Madote’s house should be erected. On that morning of December 18, 2009, Madote and her son Victor, a young man in his early 20s (who did not know about the date of the event until the actual day when it happened) woke up before cock-crow to go to the place that had been designated for the new *dala*. In their quest, they were accompanied by a *jaduong’* (an elder) who relates to Madote as *yuore* (brother-in-law) and a local pastor from the Disciples of Mercy Church who came ‘armed’ with a Bible and a bottle of ‘holy water’. At the same time, Madote and her son took along with them a *thwon dala* (cock), *beti* (panga or machete), *le* (axe) and an empty 20 litre water bucket. Victor clutched the cock under his right arm. On arrival at the scene, he was instructed to place it on the upper part of the location that would become their *dala*. The *jaduong’* designated to assist the pastor carried *beti* and *le* in one hand and on the other, straws of grass with smoldering fire as symbols of the ancestral fire. The *jaduong* led the way followed by the pastor and Madote in that order, while her eldest son, Victor brought up the rear. Besides the elders and villagers of K’Oguta, others who were in attendance at the occasion included two Commissioners (Wambui Kimathi and Lawrence Mute) from the state-sponsored Kenya National Commission on Human Rights (KNCHR) and journalists from the print media and national television stations. The representatives of the KNCHR were present because they had pioneered similar working models between the Luo Council of Elders and widows in other parts of Luo Nyanza.

It was about 5.30 a.m when the group arrived at the designated *dala*. They went straight to the middle of the new site where the pastor led in prayer. Recalling the biblical journey of Moses and the people of Israel to the Promised Land, the pastor beseeched: "*Nyasach Jacobo gi Musa omiu hawi e dala ni um Madote kod nyithinde, kendo maricho duto mag Farao okethi*" (*May the God of Jacob and Moses pour blessings on this home and on Madote and all her children, and may he dismantle all the evil designs of the Pharaoh*). The pastor then made a sign of the cross on a spot that would later become the middle of *dala*, at the same time sprinkling *pi hawi* (the holy water) on the spot and across the compound. Thereafter, the whole group sung together a series of Christian hymns. At about 6.00 a.m., the *jaduong’* went to the nearby forest to cut down the first tree for poles using the *panga* that he had brought along that morning. Once he had finished cutting down four poles that would be used for the four corners of the house, he ported them to the site of the would-be *dala*. As is held by most Luos to be proper, no

\(^5\) The reference to ‘home’ in Luoland has multiple meanings. It is used to refer to Luoland, a specific *dala* or generally a place of family or blood connections.
one aided him in this task that was his alone to accomplish. It is only after he had delivered these poles that some other younger men joined in at about 7.00 a.m when I also arrived.

As wuod Ugenya (son of Ugenya), Madote, who I had not met before, referred to me as owadwa (my brother), a position that permitted me to engage in the process of gero ot (house construction). So, together with the other yawuoyi (young men), we dug the remaining 16 holes for the house, selected the appropriate poles and followed guidance from the local fundi ot (a person skilled in building, repairing and maintaining houses) as the construction went on. All that time, Madote was busy preparing nyuka (porridge) using fire that had been ignited using the ancestral fire. The pastor had left, but the jaduung’ kanisa (church elder) who had been designated to assist him remained with us throughout, although he did not do much. He kept pacing between the construction spot and a nearby rocky site where members of the K’Oguta Clan who were now arriving one by one took their seats and continued with a series of mbaka (open conversations).

The director of KELIN, Catherine Mumma, and Nancy Abisai, the Chief Executive Officer, arrived at about 11.00 a.m with journalists from a leading daily newspaper, The East African Standard and a private television station with national coverage, Citizen Television. We were requested to break from work and join the elders for a meal of nyuka as we listened to some speeches. Jaduung’ Owiyo⁶ of the Nyakach Council of Elders, a much-respected former primary school teacher, spoke for the K’Oguta Clan. He started his speech by clarifying that, ‘Ok adwar dhi e weche ma osekalo (I do not want to revisit the past) and then went on in English:

We have always taken care of our widows and orphans since time immemorial. Although sometimes mistakes happen, today we have shown that Luo people still have their culture and their culture observes human rights.

He continued building on this concept of Luos and how they protect human rights. Then Catherine Mumma took the microphone and thanked the elders of Nyakach and people of K’Oguta for “demonstrating that human rights are part and parcel of Luo culture”. She went on:

In my 15 years of human rights work, I can assure you that not many human rights organizations can do what the Nyakach Council of Elders has done today. I therefore want to assure you that we as KELIN and other human rights activists here today shall work with you to protect your rights. The Jodongo who you see here are human rights defenders.

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6 His fame had recently risen when one of his daughters, Suzannah Owiyo, hit stardom as a musician with her first major hit in the ethnic music genre with the release of her first recording, Kisumu 100. Her famed song, Kisumu Ber (Kisumu is good) is not just award-winning, but is also regarded as the best memoir for the Kisumu City centenary celebrations in Luoland.
Just like Madote, Catherine believed that the event of *goyo dala* was possible because Luo people uphold notions of personhood and human dignity. She got a resounding applause and after concluding her speech, invited the chairman of KELIN, Ambrose Rachier, who had arrived when the speeches were going on. A practicing advocate in Nairobi, Rachier spoke in *Dholuo*. He pointed at details of how Luo people had lived in the past. He spoke about ‘those days’ when Luo people took care of all its members. He claimed that it was the current trends of abandoning Luo culture that had led to the mistreatment of *mond liete* (literally ‘wives of the grave’—a graphic description of widowed women) and *nyithind kiye* (orphans). “Luos never used to abandon *mond liete*. They protected their rights”, he charged. “We must go back to our culture and protect our people”, he concluded.

After the speech by Rachier, construction work resumed. Women went back to the fire place, while some trooped between the river and the construction site, bringing water to fill drums that had been placed next to the construction site. The *jodongo* resumed *mbaka* (social chat) while I and other *yawuoyi* went on with the construction.

Two days later, the event of Madote’s *goyo dala* was featured on the 7.00 p.m. news of *Citizen Television*. The reporting journalist introduced the story line by the headline, “How councils of Elders protect human rights in Luoland”. She went on:

The Nyakach Council of Elders and a local human rights organization, KELIN, have negotiated and given land and housing to the widows in Nyakach. Their work was a success where the courts of law have been unable to deliver.

The news item featured interviews with six people including Madote, the chair of the Nyakach Council of Elders and the chairperson of the KELIN Board of Directors. In their interviews, they explained how ‘culture’ and ‘rights’ had converged through the work of the Nyakach Council of Elders and KELIN. Emphasis was placed on the importance of councils of elders in promoting human rights in contemporary Kenya. Wambui Kimathi was also featured in the news item. She stated that human rights work needs collaboration with cultural institutions in order to respond to local issues. I later encountered similar sentiments in human rights NGO workshops that I was invited to attend.

The stories I had heard about human rights in Luoland were intriguing. Luoland is part of what was formerly Nyanza Province\(^7\) in western Kenya (see Figure 1.1). At one place I would hear

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\(^7\) Provinces which had served as administrative units were replaced by Counties when a new Constitution of Kenya came into force on August 27, 2010.
claims such as, “even Luos have human rights in their culture” while, at other times, the claim was that ‘those days’ favoured Luo people more than ‘these days’. Attending various church functions, *mbaka* at the market places, NGO events and invitations to cultural festivals took me to many places of Luoland (see Figure 1.2), all of which contributed to my growing understanding of the social life of human rights.

**Figure 1.1 The Geographical Location of Western Kenya**

![Map of Western Kenya showing the location of Luoland with various regions and places marked.](image)
Figure 1.2 Fieldwork Locations

Note: The areas marked in red are sites that I stayed or visited during my extended field work between December 2008 and June 2010.

1.2 Beyond the Federation of Women Lawyers-Kenya (FIDA-K)
But *goyo dala* was not Madote’s first effort. Rather, to realize her claim as a rights-bearing citizen and what she believed was her just inheritance according to Luo culture, Madote took her story to the FIDA-K Kisumu office in November 2007. Before finally approaching FIDA-K, Madote had made numerous efforts including speaking to the *Jaduong’ Gweng’* (village elder) and local church leaders to intervene on her behalf. She was determined not to suffer the fate of other passive victims, but to actively claim her rights as a woman married in the K’Oguta Clan. Her complaint was recorded by FIDA-K as a case under reference number FIDA/KSM/GEN/18/07/. Madote was described by FIDA-K as a stable, self-conscious juridical person and a victim of human rights violations. At the end of November 2007, FIDA-K filed the case at the Kisumu Magistrates’ Court.

In a petition drawn by FIDA-K as between Ascar Akinyi Ogembo (Madote) vs. Sajius Otieno Ochola and John Juma Oburu, Ascar Akinyi Ogembo claimed that John Juma Oburu (who is a
paternal cousin to her late husband) had abused his position as custodian of family Land LR. No. Kisumu/K’Oguta West/1889. She charged that instead of holding this piece of land in trust for Ascar Akinyi Ogembo and other legitimate heirs of the late Tom Ogembo Oremo who had died on March 22, 1998 and was buried on the land in question, Mr. John Juma Oburu had sold the land to Sajius Otieno Ochola. In her complaint, Madote asserted that neither she nor other legitimate claimants to the land in question had given consent for its sale. She further complained that when Sajius Otieno Ochola bought the land, he evicted her and her family leaving them with no shelter, source of livelihood or property.

In her plea to the courts under Sections 28 and 148 of the Registered Land Act and Orders XXXVI and XXXIX Rule 1 of the Civil Procedure Rules, she was seeking a direction from the court that the Land Registrar in Kisumu be ordered not to divide the parcel of land LR. NO. Kisumu/Koguta West/1889; the said court should determine her beneficial share from the LR. No. Kisumu/ Koguta West/1889; and that, pending the hearing and determination of the case by the court, John Juma Oburu be restrained from selling, transferring or otherwise disposing of the parcel of LR. NO. Kisumu/ Koguta West/1889.

By taking her story to the Federation of Women Lawyers-Kenya (FIDA-K), a leading human rights NGO in Kenya, Madote suggests that even though she was not in a levirate union, she was an equal citizen by law (as a Kenyan) to other members of her society. While the levirate institution would have been a useful pathway of Luo cultural identity and citizenship (Mamdani 1996), Madote’s actions at this moment can be read as an appreciation of the fact that, since all citizens of Kenya are equal before the law, there was no reason why the Kenyan courts of law should not compel her relations to facilitate her economic, social and cultural rights to secure land tenure. She made these claims known to her late husband’s brothers and relatives.

After a two years’ wait for justice, Madote turned to the Nyakach Council of Elders. It is here that KELIN worked with the Nyakach Council of Elders to organize the December 18, 2009 goyo dala to deliver justice to Madote. She and her children were allocated land after elaborate discussions which explained a land tenure system described by the elders as according to ‘Luo culture’.

By defying the International Human Rights Law centered on the hegemonic legal logic of delivering gender justice through the state courts (Kapur 2006), the event opened up a conversation between ‘Luo culture’ and a ‘legal model’ of human rights discourse. The
human rights vs. culture dichotomy that still features in a section of liberal legal and human rights scholarship (Tamale 2008: 50) is strongly challenged here by the determination evident in the story of the likes of Madote and the Nyakach Council of Elders to take forward situated ideas of justice. I shall later show how anthropologists like Nyamnjoh (2004), Englund (2004), Wilson (1997) and the Comaroffs (1993) who work in this field have made use of similar ethnographic accounts in explaining postcolonial human rights practices. The strength of these ethnographic accounts is their response to the direct questions that they pose to human rights actors: How well do legal scholars engage in dialogue with anthropologists to understand the complexity and deep interconnection among the factors that influence the practice of rights in the postcolonial era?

As will be demonstrated in this thesis, human rights among indigenous peoples such as the Luo are not just matters of legal deliberation but also of emotions and interdependence in a large space and ambiance. The practice of human rights here illustrates not only the mutability of the dominant notions of human rights, but also the diffuse and dissolvable relations that exist in what is often presented as a binary of ‘culture’ and ‘rights’ (Mamdani 2000, Cowan et al., eds., 2001).

First, KELIN worked with the Nyakach Council of Elders and pursued an understanding of Luo customs and practices which called on Madote’s marital relatives to adhere to their obligation to their chi liel. This process involved what Ugandan legal feminist Sylvia Tamale (2008:52) has described as negotiations around the discourse of gender differences and equality from multiple perspectives. What stands out is what the actors referred to as perspectives of ‘Luo society’ on the one hand and, on the other, yet another perspective associated with Western legalism. To ground these arguments, KELIN and the Nyakach Council of Elders argued that there were practices in Luo society to take care of the vulnerable members such as mond liete and kiye (orphans, sg. kich). These categories of people were recognized as being in need of special attention and protection because of their precarious positions and conditions (Mboya 1938: 5). I observed during the exercise of goyo dala that the value propositions such as non-discrimination, equality and opportunity quoted as ‘Luo customs’ during this event were not much different from the moral creed claimed by the human rights discourse. The contemporary practices of the Nyakach Council of Elders therefore demonstrate an embrace of philosophy of life that cannot be split into simple categories of ‘modern’ and ‘traditional’. Rather, it embodies a multi-layered vision that allowed its actors like Madote to appropriate and make claims from multiple identity
positions.

Indeed, *mond liete* and *nyithind kiye* were precarious as the patrilineal system and position of women and children practiced by most Luos provides a ‘bundle of rights’ that are often accessible only through *dala* as a space and unit of social organizing. However, the ultimate resettlement of Madote was based on evoking and presenting Luo customs in the current context of western Kenya rather than on the basis of some age-old historical precedent.

The second logic of argument used by the Nyakach Council of Elders was that because Madote had children (amongst whom there were two boys)\(^8\) with the late Tom Ogembo Oremo, himself a *bona fide* son of the K’Oguta Clan, she was entitled on an equal basis with other heirs of Oremo to a share of her husband’s inheritance. Oremo, the elders argued, was their son with equal rights as all sons of West K’Oguta and therefore could not be deprived of any of his rights even in death. According to the elders, Madote’s claim to her rights was derived both from her late husband’s entitlement to equal treatment by his kinsmen and her own position as a mother (Sofola 1998) in patrilineal African societies. In embracing novel and multiple meanings and interests in the so-called Luo culture, the *jodongo* (elders) ‘invented a response’ that was useful in delivering a *dala* for Madote where liberal notions of legal and human rights were yet to yield results. As Chanock (1985) observed in Malawi, inventions of customs tend to rely on existing ethno-ideologies and habitus. In this context, my interest is not about what human rights discourse can do, but rather what happens to human rights discourse in a context such as that where councils of elders operate.

Therefore, it seems of greater importance to engage the language of human rights not as an instrument of intervention but rather as an object of study. By engaging human rights discourse as an object of ethnography and its subject as made and unmade historically by multiple philosophies of life, I ask a new set of questions: Why have Luo Councils of Elders become such important institutions in the invention, performance and enforcement of human rights in the 21\(^{st}\) century Kenya? How are productions of human rights practices moved back and forth between homesteads and urban centers in Luoland, Non-Governmental Organizations and National Human Rights Institutions in Nairobi and, between human rights monitoring bodies in Geneva and New York? What motivated the white missionaries, black converts and colonial officers’ efforts to make and control the Luo nation and country? And how does subjectivity as

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\(^8\) Although there are variations among the various maximalis in Luoland, it was the general practice that all members of the society with male offspring would establish their *dala*. In any case, it is the oldest male that accompanied the man when he went out to inaugurate the new *dala* (homestead).
a basis of agency manifest itself in the postcolonial practice of human rights in Kenya?

This dissertation aims at responding to these questions through an ethnography that engages human rights discourse as an incompletely theorized agreement (Stunstein 2007) and by offering new ways of thinking about the ongoing conversations and representations of personhood in the postcolonial era. Working on the basis of an inherent connection between theorization of human rights and study of personhood allows us to study human rights and subjectivity as social rather than natural phenomenon. This thesis builds on the works of scholars such as: the historians Dipesh Chakrabarty (2000) and Katherine Luongo (2011); anthropologists Mahmood Mamdani (2000), Abdullah Ahamed An-nim (1990) Comaroff & Comaroff (1993,2004), Sally Folk Moore (1989) and Geschiere and Nyamnjoh (2000), and; philosophers Kwasi Wiredu (2004), Odera Oruka (1990) and Leopold Seder Senghor (1988)—all who have opened conversations to demonstrate that the idea of human dignity is historically and situationally constructed and has always existed in all human societies. I develop these arguments by moving beyond the binaries of the Western and the non-Western.

Human rights are therefore understood as a specific vocabulary used to describe scripts of personhood and modes of governmentality. While I appreciate that the 21st century notion of human rights is a product of the post-enlightenment language in European philosophy and politics, there are two sets of debates that render any attempt to turn this discourse to the reference point of examining moral codes in non-European countries futile. First is the assertion by Chakrabarty (2000) in his influential Provincializing Europe, which questions the validity of universalizing terms like ‘human rights’ as concepts that are specific to the reading of European history. For Chakrabarty the achievements of European political and social thought must be understood as products of an interactive human society. Similar views of conjoined human civilization are espoused by Kwame Appiah (2006). Appiah’s argument about the co-joined history of human civilization is an implicit recognition of difference and cautions against absolute truths that is useful in understanding human rights in postcolonial Kenya. It is in the above context that the story of Madote can be understood.

Indeed, as will be shown in this thesis, the story of Ascar Akinyi Madote is not an isolated case in the Kenyan postcolony. During my fieldwork, I encountered forty similar cases of disinheritance of mond liete and orphans, twenty of them where resettlements have been undertaken. Madote’s story is however intriguing not just because it is not isolated but more so because it occurs at a time that contemporary observers and scholars describe as the “era of human rights” (Ignatieff 2002). This is an era dominated by pursuance of equality and justice
by those presumed as autonomous, physically discrete, market-driven subjects who are rights-holders (Comaroffs 1999, Nyamnjoh 2004, Englund and Nyamnjoh 2004).

Madote’s narrative makes it apparent that the realization of the objectives of gender justice (which scholars like Ratna Kapur (2007) presents as prime argument for human rights discourse) is multi-faceted and mediated by ever-changing culture, human rights as well as mediating factors like gender and power in postcolonial Kenya. It also requires a re-engagement with questions like: who is the subject of human rights? What is the knowledge economy that produces, gets produced and enables circulation of human rights in postcolonial Kenya? And, how do we write narratives of postcolonial human rights subjects like Madote who disrupt the common myth in the dominant model of human rights subjects thought to be good, decent, enlightened and civilized through the technologies of law and education as well as binaries such as ‘rights’ versus ‘culture’, ‘citizens’ and ‘subjects’, ‘rural’ versus ‘urban’ and so on?

This dissertation is about both the ongoing changes in discourse as well as subjects of human rights in postcolonial Kenya.

The salvific logic of the human rights project is often entangled with the colonial epistemic attitude of the ‘white man’s burden’ to civilize Africa while these human rights tend to have a Eurocentric and American flavour that attests to its neo-colonial attitude and alignment to US global domination (Makau 2003: 36). This thesis engages these questions of binaries and this so-called “emancipatory discourse” (Riles 2006:53) using ethnography from Kenya and shows that the discourses of human rights can be very different and situational. In this endeavour, I am aided by the works of literary theorist Gayatri Spivak (2004), Women’s Studies professor Chandra Mohanty (1986), feminist Oyeronke Oyewumi (2002), anthropologists Heike Becker (1995, 2006) and Nyamnjoh (2002b) who question the tradition/modernity binaries of gender and “African culture” and emphasize the historicity and situatedness of categories of gender.

In situating methods of human rights practice that depart from emancipatory discourse in postcolonial Kenya, the objective of this thesis is to explore the category of rights produced and claimed by Kenyans like Madote where the so-called ‘traditional’ is found in the ‘modern’ and the ‘modern’ embodies ‘traditional’ as well (Meyer 1995, Nyamnjoh 2002b, Becker 2001). This intertwining between ‘traditional’ and ‘modern’ has received critical attention from Comaroff and Comaroff (1993) and Geschiere and Nyamnjoh (2000) in their discussion of neo-liberalism. These authors have suggested that neo-liberalism is not only
characterized by ‘freedom to do what you wish’, but rather with deployment of the so called ‘traditional’ cultural forms by people seeking empowerment or to understand other imageries of modernity such as human rights. But as the Comaroffs show in their Introduction to the edited volume, *Modernity and its Malcontents* (1993) and Geschiere and Nyamnjoh (2000) have shown in an article, ‘Capitalism and Autochthony’, the forms of modernity in Africa must be viewed from these appropriations and situated formulations of otherwise globalizing discourses. As this thesis suggests, although both the notion of rights and that of human rights are older than the neo-liberal epoch, their practice is rather situated.

This thesis argues that the experience of Madote is better understood from perspectives such as those suggested by the above authors. In taking this approach, the thesis aims to avoid slipping into the often common narratives of teleological mono-modernities, which would otherwise read Madote’s actions as pre-modern or ‘counter tendencies’\(^9\). While descriptions of ‘counter tendencies’ used by development scholars such as Weiss (2004) rightfully insist on the malleability of neo-liberalism as demonstrated by such episodes, it cannot capture the complex array of situated and historicized encounters of modernities illustrated by scholars such as Ferguson (1999), Comaroff and Comaroff (2001) and Geschiere and Nyamnjoh (2000). The other limit of the notion of ‘counter tendencies’ is that it tends to position debates on either a euro-centred position or the essentialist stark dichotomy of ‘West’ versus the ‘non-West’ and cannot explain why personhood has remained such a fraught realm of state intervention in colonial and, after 1963, *post-uhuru\(^{11}\) Kenya (Thomas 2003).

In this dissertation, I use both the term *post-uhuru* and postcolony. As clarified by Anne McClintock (1992), *post-uhuru* means the period after independence which in Kenya lies between 1964 and 1978. McClintock has argued that although “Post-colonial studies” has set itself against this imperial idea of linear time—the “grand idea of Progress and Perfectibility,” as Baudelaire called it—yet the term “post-colonial,” like the exhibit itself, is haunted by the very figure of linear “development” that it sets out to dismantle. The notion of postcolony as

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9 Much more influential is Geschiere’s 2009 book, *Perils of Belonging*. The 2000 article was an early tentative piece written in the early stages of the project on autochthony.

10 The re-reading of actions and agency of postcolonial subjects like Madote has led to authorship of important edited works such as the essays in *Millennial Capitalism and the Culture of Neoliberalism*. Besides an extended introduction by the Comaroffs, the book has a chapter by Geschiere & Nyamnjoh entitled, ‘Capitalism and Autochthony’.

11 *Uhuru* means independence in Kiswahili and the *post-uhuru* moment refers to the period after the 1964 flag independence until the demise of the first president in 1978.
used in this dissertation is informed by the works of Achille Mbembe (1992) and Jean Comaroff and John Comaroff (1993). These authors amongst others have seen postcoloniality as a future-present that manifests itself profoundly in African post-colonial states. Similar limitations bedevil explanations that such practices are illustrative of pre-modern and evolving African contexts. In using the two analytical terms, this dissertation pays equal attention to the moment. As Chanock (1985) has suggested, any documentation of customary law or other forms of public moral scripts like human rights must pay attention to both the politics of encounter as well as the moment of its production.

This dissertation follows Chanock’s counsel by engaging with how human rights discourse is ‘dissolved’ and ‘reconstituted’ in postcolonial Kenya. Here the focus is more on the ‘situated production’ rather than ‘traveling’ of aspects of human rights discourse. In so doing, human rights discourse is engaged as an object of study rather than an instrument of advocacy and emancipation (Riles 2006, Cowan 2001). This way, creative and inter-subjective realities emerge in which people like Madote and organizations like KELIN, FIDA-K and KNCHR merge ‘traditional’ and ‘exogenous’ ideas (commonly regarded as those from the West) to create what in the words of Francis Nyamnjoh are “modernities that are not reducible to either but superior to both” (Nyamnjoh 2002a: 135).

Indeed, accounts such as Madote’s and many others that I encountered in western Kenya tend to contest liberal notions as espoused by human rights advocates that human agency exists only in the form of individual free-will as well as by psychologists who suggest the existence of a pre-social agency (Ortner 2005). A closer reading of agency in post-colonial Africa such as that done by Richard Werbner (2002), suggests that historicizing agency in Africa enables us to appreciate agency in the postcolonial as experienced through “interdependence and intersubjectivity” (Nyamnjoh 2002b:111).

Francis Nyamnjoh has described this historicized and situated agency as “domesticated agency or subjectivity” (Nyamnjoh 2002b: 115). In the practice of domesticated agency, achievement is given meaning as part of and on behalf of the group. Domesticated agency however, Nyamnjoh clarifies, “does not deny individuals the freedom to associate or to demonstrate self-reliance, initiative and independence, but simply places a premium on interdependence as insurance against the risk of dependence, where people face the impermanence of independent success”

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12 Martín Chanock's work is based on his study of Mango justice systems in colonial Malawi.
This form of domesticated agency provides discursive space where subjects of human rights have a wider array of choices.

This notion of domesticated agency can be understood through the concept of *Ubuntu*\(^{13}\) that was popularized by Archbishop Tutu during the Truth and Reconciliation Commission in South Africa. *Ubuntu* is a word from the Nguni language family (which constitutes Zulu, Xhosa, Swati, and Ndebele). In academic literature, *Ubuntu* is often used to express a philosophical concept of pre-colonial Southern African images, values and beliefs that constituted their worldview. This perspective has been discussed by anthropologist Binsberger (2001). It refers to the co-joined notion of personhood in these societies that is best captured by the Zulu saying “*Umuntu ngumuntu ngamuntu,*” which means: “I am a person through other people.” Of course I have no doubt as Richard Wilson (2000) has clarified that ‘Ubuntu’ (like the notion of ‘traditional’) as used today is a modernist discourse used to give human rights discourse an ‘African’ face.

While some of the arguments and representations of a pristine African past associated with *Ubuntu* is problematic (Comaroffs 2001), its philosophy of personhood is closely related to Nyamnjoh’s idea of domesticated personhood. In engaging with this notion of domesticated agency, the argument of this thesis is that the subjectivity of human rights in postcolonial Kenya can best be understood by appreciating what Comaroff and Comaroff (2001: 276) has referred to as the different views of realities which affect personhood.

In the practice of domesticated agency, individuals acting to pursue their goals must take into account and account for the action of others (Nyamnjoh 2002b:113). This understanding of agency is different from the one that often presents an individual as an atomistic unit of the society and human rights (see critique by Makau 2002: Comaroff and Comaroff 1999, Kapur 2006). I suggest in this thesis that Madote’s action and broader human rights practices in postcolonial Kenya (and indeed Africa) can best be understood by engaging subjects of human rights as embodying Nyamnjoh’s notion of domesticated agency. This notion of domesticated agency is used both for the purpose of confronting the Western myth of universal legalisms as well as making intelligible subjective practices in the postcolonial Kenya.

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1.3 The Post-uhuru and Postcolonial Modernity in Kenya

As ethnography of the particular (Abu-Lughod 1991) this dissertation makes observations at particular moments and circumstances of Kenya’s unfolding history while avoiding reductionist binaries of relativism vs universalism. It is an era that has been characterized by shifting positions for the state and its citizens as well as the language of modernity in a context of engaging postcoloniality. This dissertation starts from the assumption that there are multiple modernities14 of human rights. The understanding of modernity here is informed by Wentzel Van Huyssteen’s notion which sees modernity not as a historically bound phenomenon solely determined by the course of European history and culture, but rather as a project endorsed at a certain point in history by whatever community of citizens (in Engdahl, 2008). There has been prolific discussions and searching critique around the concept of modernity in recent years. While these deconstructions have been conducted within a variety of disciplinary areas, all of them in one way or the other are critical of the notion of a primordial, universal and timeless modernity. As I have progressed with my research, I have encountered numerous scholars, and especially anthropologists Dorothy Hodgson’s (2001) distinction between Modernity (with a capital M), i.e., the Western enlightenment project, and modernities (plural). In this sense, modernity is engaged as a “time orientation” (Hodgson 2001).

In this context, the premise of this dissertation is that of multiple modernities. Only that such plural modernities do not exist in dichotomies or reconcilable dialectical antagonism. Rather, they tend to be products of conjunctures of ‘tradition’ and ‘modern’. Modernity in my view is therefore situated in and a reflection of history and cultural consciousness. This is why this dissertation is more of a historical ethnography of modernity in Kenya. It makes use of the work of post-uhuru historians like Bethwel Ogot and later postcolonial scholars of Kenya like David Cohen and Atieno Odhiambo (1989, 2004). Outside Kenya, this strategy of historical ethnography has been well developed by Achille Mbembe (2000), Appadurai (1996) and Nyamnjoh (2004). As an emphasis of specificity, the Comaroffs (2001) even coined the term Afro-modernity around the phenomenon of “the kingdom of culture”.

For Kenya, the language of modernity (often expressed as synonymous to modernization) has shifted with the times and broader national and international movements. In the post-uhuru

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14 Lots of scholars have engaged with this concept but my learning here follows on sociologist Peter Wagner (2008) who has made an important contribution when he argued that modernity has never been realized in its perfect form. Even Europe, where most dominant notions trace their beginnings, usually displays more divergence than convergence. And even those who have fronted for universalism and Archimedean points such as Jurgen Habermas (1985) have often appreciated the reality of multiple modernity.
period, the “national project” was adopted as the language that represented the vision of modernity. The idea of a national project was about both improvements in material circumstances as well as re-making of the African identity that had been undermined and subordinated by the colonial experience. As such, it was a continuation of the struggle from colonial domination and a declaration of self-determination which embodied the independence nationalism. This “national project” was referred to as “Kenyanization” (Nyong’o 2007: 35).

“We are also wananchi and what we want is maendeleo,” said Mama Sarah Obama during K’Ogelo Cultural Festivals in February 2011. Someone had posed a question about why Luoland has not seen much progress in terms of roads, access to water, electricity connection and well equipped schools 48 years after flag independence. The terms wananchi and maendeleo have a history from the pre-independence nationalist movement and the promise of change that was captured in the post-uhuru ‘national project’. They resonate with the imageries of the past and focus on the future. They often tend to make those who are lowest in economic rungs or political recognition to make claim as people of Kenya. People in Kenya now tend to differentiate wananchi (lit. citizens) and wenyenchi (lit. owners of the country). The term wananchi represents patriotism and loyalty while wenyenchi is disparaging—used to describe the political elite who ‘fill their stomachs’ using public resources and patronage. Wananchi is often used to describe the common Kenyan who is surviving and struggling to create mechanisms to belong and improve their lot. Maendeleo (lit. progress) on the other hand is like a promissory note of nationalist struggles. Maendeleo (Capital M) is more about the post-uhuru national project that often follow from nationalist movement. It is hegemonic and state centric (Kenyatta and Moi, Mobutu Sese Seko of Zaire) with a drive of developmentalist discourse. Although sometimes read from economic terms, it means more than that. It is a promise from the nationalist movement for change in political, economic and social terms. It implies effective participation in everyday decision making; it promises affirmation of effective belonging and of course modernist investment through infrastructure and other enablers of wellbeing.

For people in Luoland calling themselves wananchi, it is a mechanism for claim-making as all wananchi can expect from the state. Indeed, it is only after being recognized as wananchi that people can claim human rights and benefits of political democracy, maendeleo (small m), which is an appropriation by wananchi. It is an oxymoron or even metaphor for progress in the postcolony. For instance while cultural festivals are frowned upon in the discourse of Maendeleo it is embraced and engaged as a medium of maendeleo. While many residents of
Luoland make claim of *wananchi*, what they want out of this category is *maendeleo* such that anything that enables well-being and freedoms is often regarded as *maendeleo*. Kenyans like Madote and Mama Sarah Obama are careful to differentiate themselves from *wenyenchi* who they accuse of causing poverty and marginalization of Luoland. Although for many years politicians from Luoland have been in competition to control state power, it is only the Obama presidency (which they see as a Luo presidency) that is popularly perceived to have brought *maendeleo* in Luoland. K’Ogelo (Obama’s paternal homeland) has benefited from improved roads, electricity supply, water supply, security installations and agriculture—all these are *maendeleo*. The bigger economy of western Kenya is also looking forward to benefit from the just-completed Kisumu International Airport that many say should be re-named Jaramogi Oginga Odinga International Airport. In this perspective *maendeleo* brings with it what liberal political theory calls rights. It is only *wananchi* who can claim rights and so the struggle in Luoland is to become *wananchi* (get integrated into the post-uhuru state) and thus effectively claim rights or *maendeleo*.

During the 1980s up until the late 1990s, human rights constituted the common language of *maendeleo* used by *wananchi* and civil society elites to counter the failed national project. Later after 2002, the language of human rights was appropriated by the state as the language of *maendeleo*. It is in this historical context of Kenyan modernity (that is represented by *maendeleo*) that this thesis unfolds. It attempts to establish how *wananchi* and “traditional” institutions such as Luo councils of elders engage and actively reconfigure meanings of human rights and *maendeleo* in contemporary Kenya. *Wananchi* and councils of elders demystify the image of a hegemonic human rights discourse and project that is often promoted by the United Nations and its member states. Rather than accept human rights and any form of *maendeleo* as what the Comaroffs describe as the “mysterious march of modernity” (1993: xxiii), they attest to the moral economy around which pragmatic innovations are deployed in the social life of human rights. My proposition is that if modernity is engaged in a non-eurocentric sense, *maendeleo* can pass as both progress and representational form modernity.

Luo notions of dignity and personhood when looked at from their functions are treated equally to the idea of dignity and personhood as developed from the Judeo-Christian traditions of human rights. Thus, I proceed on the premise that Luo notions of personhood and practices of human rights are deeply entrenched on thoughts guided by their particular history and experience in Africa just as the 21st century dominant notions, associated with the
era of human rights, are deeply entrenched in European thought. Besides, Kenya’s colonial experience means that ours is a modernity of a society that was once colonized (Chatterjee 2004, 2001, Hall 1996), and for that reason it is an entangled modernity (Macomo 2005).

In an edited volume, *Negotiating Modernity: Africa’s Ambivalent Experience* (2005), Macomo (2005) and other contributors (like Julani Niaah and Samuel O’ngwen) have written mainly to respond to the impression often given that modernity is alien and has often been met with resistance in Africa. Rather than demonstrate how modernity has been resisted in Africa, the volume gives an account of how Africans have tended to negotiate terms of modernity thus giving readings that may be relevant in developing further contemporary social theory. However, despite numerous studies that have shown the continuous conversations and engagement of the various notions of human rights and personhood, there is a persistent insistence by proponents (like Luo councils of elders) of Luo notions of rights on the one hand and the agents (like the United Nations Human Rights Committees) of Western notions of human rights on the other hand to present their various versions as universal and authentic.

In fact the claim of an “era of human rights” is part of such an idea of hegemonic universalization. My thesis follows much other work, from the Comaroffs on South Africa to Geschiere (2009), *Perils of Belonging*, on West Africa and Europe, Netherlands and Belgium that suggests that the notion of “hegemonic universalization” that persists in UN-led human rights literature and process is more of fiction than actual practice.

The human rights project (which I distinguish from the idea of human rights) is the mechanism through which the so-called era of human rights expands its presence. The project is pursued through creation of three major categories, namely: a centre, which is the West; a periphery, mainly the so-called Developing Countries waiting to receive whatever comes from the West, and, the Recalcitrant Evil, mainly the Islamic countries, refusing to receive the “word” (Galtung 1994: 13). This was well captured by legal scholar, Thee Marek (1993: 90), when he stated that “…compliance with the basic standards of human rights has become a gauge and key indicator of national and international civilized society”.

There is indeed numerous literature (mainly in philosophy and law) that claims, purports, or

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15 The idea of universalization has in itself a notion of power, dominant interests and expansion of compass. Prof. Brian Raftopoulos brought this point to my attention. Brian has emphasized that both the Luo and Western notion of human rights as production of knowledge by the dominant grouping do attempt to project themselves as universal. Edward Said (1993), while talking about culture, has referred to these universalized ideas and idioms as that which is elevated or is in a superior position to authorize, to dominate, to legitimate, demote, interdict, and validate (see Edward Said's *Culture and Imperialism* (1993).
critiques a particular human rights discourse linked to a Modernity following Galtung (and others). But studies such as mine actually show that there are serious contestations and contradictions that seem to edge this model on its way out. However, it must at the time be noted that, from the kind of evidence from my fieldwork, in the end human rights reporting (such as the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW and the like) still ignores the realities such as those of Madote, KELIN and cultural festivals. This attests to the knowledge/power and power/knowledge relationship that Foucault (1972) speaks about. That is, human rights knowledge seems to be constituted through accepted forms of power. In the discourse of human rights, state-generated narratives and the UN perspectives are apparently the accepted forms of power in producing human rights discourse.

This thesis is written at a time when the human rights project is experiencing internal (conceptual) and external (practical) contestations, especially regarding the question of the importance of rights in the postcolonial era against the background of “politics of the belly”, corporate-led globalization and unmet expectations from modernization (Halsteen 2004; Thomas 2003; Ferguson 1999). Therefore, multiple modernities are engaged as a series of entanglements and not isolated bifurcations.

The point of departure of the theoretical reflections that I offer in this thesis is contrary to neo-liberal ideologists who as political theorist Chantal Mouffe (2007) has argued, would like us to believe that political questions (such as those of the practice of human rights) are mere technical issues to be solved by experts. This incapacity of the neo-liberal ideologists to think theoretically, argues, Chantal Mouffe “is to a great extent due to uncontested hegemony of liberalism” (Mouffe 2007:2):

The typical liberal understanding of pluralism is that we live in a world in which there are indeed many perspectives and values and that, due to empirical limitations, we will never be able to adopt them all, but that, when put together, they constitute a harmonious ensemble. This is why this type of liberalism must negate the political in its antagonistic dimension (2007:2)

However, liberalism and multiple modernities the way I use the terms in the context of this dissertation appreciate the place of the often antagonistic and conversational nature of the various alternatives. By bringing to the fore the inescapable contestations, negotiations and negations in human rights practice in the post-uhuru and postcolony Kenya, this dissertation reveals the limits of universal consensus often fronted by neo-liberal ideologists.

In essence, human rights in the postcolonial era is under ongoing production by subjects who
appropriate multiple positions, historicities and life histories that give this thesis a space for taking forward the work that has been done by Cohen and Odhiambo on the economy of “knowledge production” (1989, 2004). As the two scholars have demonstrated, knowledge produced (and here I am interested in human rights knowledge) in the postcolonial era is not merely about the contingency and times, but is also about specific uncertainty that particular actors experience as they try something that matters to them or undertake to deal with problems such as that of the mysterious disappearance and murder of a prominent Kenyan politician, Dr. Robert Ouko in 1990 or, as we shall see in Chapter Two, the charges that some Kenyan politicians face at the International Criminal Court (ICC) in the Hague following the post-election violence in December 2007 and January 2008. This approach of anthropological research in a context of uncertainty and the accompanying methods of developing social history runs through this thesis. To give meaning to the always-shifting notions of human rights in postcolonial Kenya, Cohen and Atieno Odhiambo’s (2004) idea of the economy of “knowledge production” have been deployed as analytical categories.

1.4 The Era of Human Rights in Kenya

The unfolding of the post-uhuru and postcolonial moments in Kenya has links not just to the imprints of colonialism and endogenous factors, but also to numerous exogenous factors. Indeed, the idea of uhuru in Kenya and other post-colonial African countries was expressed not only as a quest for cultural freedom but also, as has been demonstrated by Bonny Ibhawoh in, Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History (2006), about Africans seeking to enjoy privileges and entitlement that were generated from the European political philosophy. Ibhawoh demonstrates how after 1945, the language of human rights had already taken circulation as the symbol and vocabulary of moral progress, governance and cosmopolitan citizens’ relationship in the gamut of European political philosophy. Certainly, the political language of the liberation movements such as Kenya Africa National Union (KANU) and Kenya Africa Democratic Union (KADU) was one that demanded the extension of human rights and citizenship rights to all. To this, Louis Henkin (1990) would later declare: “Ours is the age of rights” (p. ix). He went on to develop this bold proposition by declaring rather triumphantly that “Human rights are the ideas of our time, the only politico-moral idea that has received universal acceptance” (ibid.). Such triumphant claims and emancipation aura in support of universalization of European moral projects is

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16 This subject is a running theme in the works undertaken by David Cohen and Atieno Odhiambo both as joint projects as well as separately. For outstanding engagement with the subject with ethnographic material from Kenya, see David William Cohen and E.S.E Atieno Odhiambo (1989). Siaya: the historical anthropology of an African landscape. Athens, Ohio: Ohio University Press and London: J. Currey.
nothing new (Cowan et al., eds., 2001: 1). It is an ethnocentric drive that is embodied in Immanuel Kant’s leading question: Is the human race continually improving? (Kant 1795) It is a “philosophy of conquest” (Mudimbe 1988: 49) and assimilation that is the common bond between the colonial project and postcolonial instrumentalist human rights epistemology.

Therefore, although with its epicenter in European and North American capitals, the idea of human rights and its accompaniment of good governance, democracy and freedom has been a present factor in the shaping of the post-uhuru and postcolonial Kenya. As Lyn Thomas noted of Kenya’s colonial experience, the British colonial officers sought to balance colonial demands for land and labour against the need to maintain political control and the ‘white man’s burden’ of civilizing the ‘barbaric native’ (Thomas 2003: 5; see also Chapter Three of this dissertation). In essence therefore, a reading of the postcolonial as this thesis does with encounters such as that of Madote also provides discussions into the continuities of the “othering machine” (as Appiah 1992 calls it) in the pre-colonial, colonial and postcolonial moments. The civilizing perspective of human rights that is based on unstable categories of ‘here’ and ‘there’, ‘we’ and ‘them’, ‘West and ‘non-West’ tends to discuss human rights in terms of ‘arrivals’. That is, that human rights travels from one location to another. It goes to this ‘other place’ (abroad) to convert, civilize and enlighten. While this thesis is about ‘production’ rather than mere travel of human rights, it is useful for us to engage with these debates of arrival at least as a ground-clearing strategy. As Mudimbe (1988) has argued, this intellectual strategy where modernity is represented and explained as a battle against the past is a form of “epistemological domination”17 (ibid. 1988). Even then, in the post-World War Two period, the language of human rights was much developed and put into use by the independence movement. Thus the so-called era of human rights is at one point part of epistemological domination that ignores the order of knowledge and things such as exercised by postcolonial subjects like Madote while on the other it offers an avenue for cross-cultural conversations.

Indeed, the post-uhuru Kenya under its first president, Jomo Kenyatta (1964- 1978), second president Daniel Arap Moi (1978-2002) and third president Mwai Kibaki (2002-2013) continues to grapple with the international human rights movement led by organizations such as Amnesty International and Human Rights Watch that was for long proposed by Western states,

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17 This highly significant phrase in Mudimbe’s work means that the notion of superiority of Western philosophy over African modes of thought is a mere ideology that is lacking in objective evidence. Its purpose is to create a perpetual gulf between the European ‘self’ and non-Western ‘Other’ and an order of knowledge that is Eurocentric.
Non-Governmental Organizations and United Nations agencies. In the 1990s this international human rights movement took advantage of the relative peace (meaning absence of any successful military coup) and critical scholarship at the University of Nairobi to ‘ground’ civil and political rights in the capital city of Nairobi and later to the countryside of Kenya. What stands out in this thesis is the malleability and the changing meanings of human rights in post-uhuru and postcolonial Kenya. By using analytical concepts such as domesticated agency, economy of knowledge production, maendeleo and wananchi, this thesis offers a reading of not quite what human rights does in favour of ‘victims’ in Kenya but rather what is done to the notion of human rights in the context of Kenya’s realities. Ultimately, the meanings and uses of human rights discourse in Kenya are characterized with connections, contestations and never-ending shifts in the conceptualization and realization.

The central location of this study is western Kenya. The reason for this choice of Luoland is that there are certain parallels about colonial and post-colonial western Kenya that make it very attractive as a place and space for understanding the ‘era of human rights’. This parallel lies in the apparent zeal to ‘spread the good news’. While the zeal to convert Africans from their past ‘traditions’ to cosmopolitan ‘modern’ citizens has been spread throughout Kenya, both colonial and post-colonial systems share in their emphasis on Luo Nyanza. The colonial administrators and the missionaries alike had found natives in central Kenya (read Agikuyu) and those in central Kavirondo (read Luo) ‘more civilized’ (Hailey 1942). In a report, Natives Administration and Political Development in British Tropical Africa (1942), Lord William Hailey recommended that more civilized ‘tribes’, particularly Luo and Agikuyu, be offered an opportunity for work in the settler farms and clerical duties in the colonial administration while paying attention on the possible revolts (Hailey 1942: 201-203).

In the long run, it is the Luo people who were preferred for menial labor and office work owing to the vexed relationship between the British and the Agikuyu (Firstbrook 2010). This focus on Luo people compelled the white missionaries, British colonial officers and their local collaborators to convert Luo people into Christianity, strengthen institutions of customary law and convert Luos into responsible citizens of the colony. An association such as the Kavirondo Taxpayers Welfare Association in Luoland was, for instance, founded by the

18 This means that although the African natives were generally categorized as being in the lower rungs than the European and Asians, there was further differentiation within the category of natives.
likes of Archdeacon W. E. Owen (Odinga 1967:66)\(^{19}\) to build taxpaying ‘responsible citizenship’ among Luo people. The ‘new’ responsible citizens were referred to as *jonanga* (literally meaning those who dress well) and are described by historian Bethwel Ogot (2003) as those who “had become progressive farmers using new seed varieties and now they could read and write and had become Christians” (2003: 9).

In postcolonial Kenya, the Kenya National Council of NGOs records show that, by 1997, at least 123 NGOs (excluding church groups and Community Based Organizations), worked in western Kenya. Out of these, 40% are legal and human rights NGOs. As interest continues to grow amongst NGOs and state agencies to do human rights work with Communities\(^{20}\), the question is: what is the result of these interventions in terms of the language and practice of human rights?

The common link between these interventions in colonial and *post-uhuru* Kenya is their assumption about ‘moral progress’. The intervention by the white missionaries, colonial officers’ and *jonanga* assumed ‘moral superiority’ that needed to be shared and where necessary imposed on Luo people to make them more responsible citizens and part of ‘the family of God’. *Jonanga* as an identity of natives in the colony was a negation of African Black identity and what was considered to be pre-colonial customs and practices. While *jonanga* did not sound derogatory, it symbolized subordination of natives’ history, culture and script of personhood.

This notion of *Jonanga* synonymous with “modern Luo” and its contested practices is glaring in postcolonial Luoland as well. It manifest in the story of Silvano Melea Otieno (commonly known as S.M. Otieno) and Wambui Otieno that was widely discussed in Luoland and Nairobi in late 1980s. The story of Wambui Otieno first came to light in 1986 when a long court battle ensued after the death of her husband. The late Otieno’s brother, Joash Ochieng Ougo and Omolo Siranga—another representative of the Umira K’Ager Clan—contested that being a Luo, S.M. Otieno ought to be buried in his ancestral land in Nyalgunga in western Kenya. This was contrary to Wambui’s wishes. Wambui Otieno had argued that S.M. Otieno was a

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\(^{19}\) Although most literature on western Kenya often present Owen as an ardent supporter of Africans, Odinga has argued in his *Not yet Uhuru* (1967) that it is indeed Owen who ‘blunted the political sword of Piny Owacho (the Young Kavirondo Association). Also see Roger M.A van Zwaneberg, “The Missionary Conscience and Colonial Injustices. The Life and Times of W. E Owen of Nyanza”, in Aloo Ojuka and William Ochieng, eds., *Politics and Leadership in Africa* (Nairobi, 1975), pp. 63.

\(^{20}\) The communities with which the Kenyan NGOs work show large areas of overlap depending on the criteria chosen to define them. There are instances where the community leaders make claims to speak for a religious, a regional, a linguistic or a persuasively ethnic community depending on the context.
‘modern Luo’ and should be buried at his private farm in the outskirts of Nairobi. The case went through the High Court where Wambui won the right to bury her husband, but this was overturned by the Court of Appeal in the case of *Otieno v. Ougo and Siranga* (Civil Appeal No. 31 of 1987).

Although she did not get to bury her husband’s remains, Wambui Otieno has offered one of the most enduring public discussions on questions such as: What is the identity of a Luo man? What does it mean to live according to Luo customs? Can a Luo man be modern? What is the role of a woman in the production and practice of Luo customs? How does African customary law juxatpose with common law? What is the politics and practice of knowledge production in Kenya? Can a Luo choose to be both ‘modern’ and ‘traditional’? An attempt to respond to some of these questions have even resulted to newspaper commentaries, journal articles, graduate theses and book volumes such as David Cohen and Atieno Odhiambo’s *Burying SM: The politics of knowledge and the sociology of power in Africa* (1992); and Ojwang’ and Mugambi (Eds.), *The SM Otieno Case: Death and Burial in Modern Kenya* (1989).

In the postcolonial Kenya, the civil society organizations (a problematic category that I shall discuss in detail later) in the form of NGO and CBO ‘elites’ are engaged in similar questions and interventions to ‘modernize Luo people’. The method of intervention and message tends to suggest that the attempt by these NGOs is to ‘make’ the Luo people rights-bearing and judicial citizens capable of making legal and human rights claims. Much has been written about these travels of both the Christian gospel to Africa and human rights to Africa. The most progressive of these works on ‘traveling theory’ as Edward Said (1993) has called it have asserted that the concept of God and worship existed amongst African people before the era of European missions (see Mbti 1990; Okot P’Bitek (cited in Imbo, 2004) and that as Makau Mutua (2002: 90) states, the concept of human rights has ‘African footprints’.

21 Prof John Mbti, a renowned Kenyan scholar of religion in Africa, says in his book, *African Religions and Philosophy*: “Africans are notoriously religious, and each society in Africa has its own religious system with a set of beliefs and practices. Religion permeates all aspects of life, so it is not easy or possible to isolate it from other aspects of African society and culture. See John S. Mbti, *African Religions and Philosophy* (1990: 39) and Jean and John Comaroff’s *Revolution and Revelation* (1991 and 1997).

22 Although there are many attempts at this project, the most renowned are Sudanese legal scholar, Francis Deng (2004), Ghanaian philosopher Kwasi Wiredu (2004), Kenyan legal scholar, Makau Mutua (2002), and Englund and Nyamnjoh (2004).
These contestations of ‘traditional’ and ‘modern’ Luo have dominated literature and discourse on Luoland written by historians (generally with an anthropological bent) such as Cohen and Odhiambo and Lonsdale. Cohen and Odhiambo’s (1989) work on *Siaya* and their much-discussed book on the *Burial of SM* (1992) are closely engaging with some of these questions and shall be put into much use in this dissertation. The existence of this body of literature is another strong rationale for doing this work in western Kenya.

Even with the benefit of localized literature, discourse and perspectives, studies on modernities have been changing in the era of globalization. Focusing on the twenty first century Kenya, this thesis builds on the most recent works that see modernities as entangled and in an intensive mobility such as those of anthropologist Arjun Appadurai (1996, 1999). Appadurai (1996) has tended to focus on cultural dimensions of globalization. Far from common ideas in social theory, Appadurai views global cultural flows (which include Christianity and human rights) as composed of complex, overlapping and disjunctive orders that don’t allow for any homogenized perspective. In *Modernity at Large* (1996), he argues that moving images meet mobile audiences (Appadurai 1996). To illustrate this, Appadurai has given the following examples:

As Turkish guest workers in Germany watch Turkish films in their German flats, as Koreans in Philadelphia watch the 1988 Olympics in Seoul through satellite feeds from Korea, and as Pakistani cab drivers in Chicago listen to cassettes of sermons recorded in mosques in Pakistan or Iran, we see moving images meet deterritorialized viewers (Appadurai 1996: pp. 4).

The effect of this intellectual strategy is that it provides an opportunity for us not to view globalization merely as either homogenizing (that is increasing homogeneity such as in Americanization or Coca-Colaization) or essentializing localities (such as localization of Obama in Kenya- see Akoth (2010). In offering a contextual and relational alternative, he suggests that we must pay attention to ‘production of locality’ (Appadurai 1996: pp. 178-200) in which particularity is dissolved and reproduced at the same time. Contemporary Luo society as evidenced in the case of Madote and many others that I shall engage with in this thesis doesn’t experience the arrival of Western modernity of human rights as the disintegration of their “old” worlds, marked by the establishment of an unproblematic “new” and “pure” code of communication and rationality. Rather Jo’Luo (Luo people) and institutions such as the Luo Council of Elders and Nyakach Council of Elders tend to visualize the rights reality in the description of Appadurai (1996:180) as made up of living assemblies that juxtapose and inter-relate different materials thus embracing notions associated with aspects of both ‘modernities’. The effect is a dialectical relationship that demands of us to drop common assumptions in
anthropology such as that; “sites are the same as communities or that localities are simply geographical locations” (Gupta and Ferguson 1992: 2).

These discussions by Appadurai guide this thesis at three levels. At the first level, Luoland is treated as both geographic place as well as a category in Diaspora. The implication is that this thesis is not about the Luo ‘community’ but rather about how the phenomenon of human rights is produced and its circulation among the Luo people in the 21st century. In that way, the thesis is a discussion of multiple relationships such as subjectivity, location, political identification and social imagination. The second dimension is related to the preceding one. This is the idea of the Luo people as diasporic people. Discussions in the thesis demonstrate the ‘new ethnospaces’ (as Appadurai (1999: 155) calls it) where Dholuo speakers seek to invent and perform their authenticity. Luo-ness and cultural consciousness are reiterated in both colonial and postcolonial Kenya as a reaction to anxieties associated with uncertainties and globalization.

Third is about the method of the study. Besides ‘pitching tent’ in Luoland, the thesis is written from my sojourns with Luo people in Luoland and many who live in Nairobi, the capital city of Kenya that is about 300 Kilometers from Luoland. Most of these Luo people stay in touch or visit their rural homestead at the end of the month or in December of every year. In the context of multiple modernities discussed above, the notion of social life of human rights seems quite appropriate to embrace my entire dissertation project.

1.5 Social Life of Human Rights
This component of the thesis reverts to the core idea of focusing on ‘production’ rather than the traveling of human rights. In 1986, Arjun Appadurai in an edited volume, The Social Life of Things: Commodities in Cultural Perspectives, examined the role of material culture in human sciences. His central argument is that commodities (which are only one possible dimension of an object) may be said to have a social dimension because they embody value as created by the society (Appadurai 1986:11). This is the reason why I engage human rights as an ongoing phenomenon that is in constant conversation and contestations.

In essence therefore, “commodities”, Appadurai argued, “communicate complex, context-dependent messages operating within a culturally constructed framework” (1988: 13). At the time of penning this chapter, Appadurai was yet to delve into production and circulation of ‘currencies of modernity’ such as human rights. However, the 21st century human rights discourse and project has been reified at a level such that it travels as a commodity. As Makau
Mutua affirms, human rights (as codified today) are part of the cultural package of “the West”, complete with an idiom of expression, a system of government, and a certain basic assumption about the individual and his (her) relationship with the society (2002: 35). In unfolding the narrative of this thesis, the West is treated as more of ideological positioning rather than mere place (see discussions in Chapter Three). In the era of neo-liberalism, “human rights even travels in trains” (Comaroffs 2004: 190).

This idea of how ‘things’ and value systems such as human rights operate in culturally constructed frameworks is a much longer debate. Cohen and Middleton (1970), Sally Merry (1997) and Caglar (2001) amongst others have made more forthright claims against the presumed immutable ‘pure’ nature of ideas such as human rights. Although Ayse Caglar never wrote about human rights, her work on discourses and problematic of hybridity points to the same question of: What is a phenomenon that results from cultural conversations? Merry has stated that:

Even during the high colonialism of the early 20th century, when anthropologists writing the classical descriptions of indigenous legal systems in colonized areas treated them as if they were pristine, most groups had already been influenced by Western law (Merry 1997:29).

Merry’s argument has also been made by other scholars like Cohen and Middleton who opine that ethnic groups in pre-colonial Africa hardly lived in isolation. In most occasions, the norm is more of ‘plural ethnic communities’. These interfaces are summed up by Caglar’s (2001) assertion based on her extensive literature review and research in Berlin that “all cultures are creole”. In spite of these abundant ethnographies of fluid, contested and unstable nature of modernisms like human rights, there has been a persistent theorizing and scholarship mainly by legal scholars like Heinkn (1990), Ignatieff (2004) and international human rights NGOs arguing that when such modernisms as Human Rights are introduced to non-Western societies, the expectation should be the disintegration of their “old” worlds, marked by the establishment of an unproblematic “new” and “pure” code of communication and rationality (see also Acre and Norman 2000). This form of analysis, much common amongst National and International Human Rights NGOs, state agencies, churches and other agents of Human Rights modernism, undermines the place of subjectivity in understanding and evoking meanings of human rights discourse. In the so called ‘era of human rights’, any attribute that is unintelligible or fails to adhere to the universal template often used to report human rights ‘progress’ are labeled as ‘distortions’.

23 This position has been fronted by numerous other scholars. Most notable is the revisionist “Bushman” studies school whose prominent authors include Gordon, Robert J. and Stuart Sholto Douglas (2000).
It is in these so-called ‘distortions’ that the Social Life of Human Rights project is interested. The notion of “Social Life of Human Rights” as an analytical phrase is associated with the anthropologist Richard Wilson. In this strategy, researchers are advised against presuming a pre-determined social or political character of human rights. Rather, attention is paid to the ever unfolding legal and political practices in the practice of human rights. In essence, Wilson (2006) argues:

Studying the “social life of human rights” would involve focusing on, inter alia, the performative dimensions of human rights, the dynamics of social mobilization, and the attitudinal changes of the elite and the non-elite social actors towards formulations of “rights” and “justice”, both inside and outside the legal process (Wilson 2006: 78).


In building on this notion of the social life of human rights this dissertation calls for an understanding of social circulation of what Wilson (1997) calls ‘symbolic capital’ of human rights. These are the social and political relations and processes through which human rights production (Wilson 1997) acquires and constructs social meanings. It is a perspective where various modernisms of Human Rights puts pressure on each other and engages in negotiations and conversations. In this context, my analysis reads the notion of Social Life of Human Rights alongside Appadurai’s (1988) assertion that people don’t allow homogenizing practices of “globality” to obliterate “locality” as an organizing and/or experiential and normative reference to agency. This is best captured by Nyamnjoh’s idea of domesticated agency (Nyamnjoh 2002b) that describes located and historicized subjectivity.

24 Whereas *tero baru* refers to rituals of exorcism after the death of noted Luo adults or elders, and *goyo dala* refers to the cultural establishment of a home, *kalo nyathi* is a less well-known yet very crucial cultural concept. It refers to the cultural way of ritualized sexual activity performed by a couple after the birth of a child and recovery of the mother. Only the *bona fide* biological father, or in his absence through death a close kinsman, can perform this ritual, otherwise the baby may die through ritual contamination.

25 An article that I had not come across at the time but that my academic advisor, Heike Becker, brought to my attention introduced me to the concept that now embraces my thesis.
1.6 Spaces of Ethnography

Much of the action in the following chapters takes place in Luo Nyanza on western Kenya’s shores of the Lake Victoria. The areas were demarcated as administrative districts by colonial officials in early 20th century. At that time it was known as part of the larger Kavirondo. But it is the central and south Kavirondo that would later form most of what in the period 1970-2010 was administratively referred to as Nyanza Province. With the promulgation of the new constitution in August 2010, the province has been replaced with four counties, namely Siaya, Kisumu, Homa-Bay and Migori, which are widely seen as convergence points between the 12 dominant maximals often used in narrating the formations of the Kenyan Luo nation and peopling of Luo Nyanza (Ogot 2003). The 2010 Census put the total population of Luo people at 4,044,44026. Luo people’s occupancy of western Kenya is associated with conquest and assimilation (Ogot 1967). As I shall show in this thesis, the formation of Luo nation and ethnicity is a fairly recent phenomenon and more of an adjustment to immigration into urban cities as well as opportunities and threats posed by colonial rule and its demarcation of political boundaries.

Although the literacy rates in Luoland are not impressive (Cohen and Odhiambo 1989), Luo people are often associated with the academy. Numerous accomplished Kenyan university professors hail from the area, among them being historian Atieno Odhiambo, philosopher Odera Oruka and historian Bethwel Ogot such that it is not possible to write about Luoland or Luo people without making reference to their works. In spite of this, Luo people in contemporary Kenya are regarded as zealous adherents to their ‘culture’ and ‘traditional’ rituals. In any case, numerous Luos have tended to portray an image of a community that has its ‘traditional’ institutions intact by instituting strict rules for rituals such as goyo dala, ter, tero buru and kalo nyathi.

At the same time, Luo people are perhaps the most populous in Kenya’s urban areas of Mombasa, Nairobi and Kisumu. In the mid-20th century, they were the majority railway workers while in the 21st century they have for long been the majority in industrializing zones of Nairobi, Mombasa and Nakuru (interview with Ker Riaga, September 2009). For long, Luo people also formed a majority among Kenyans who lived in the international Diaspora. Much of the discussions here, although focused on Luo Nyanza are cognizant of the fluidity of the idea.

26 The figure is mere approximation. As there is no such thing as ‘pure’ Luo, it is no longer possible to provide such a figure. The trend to insist on such figures persists mainly because of the notion that political pluralism is equivalent to majority.
of the Luo nation as well as limits of linking Luo people to Luoland. But it is these same movements that ‘produces’ the spaces for this thesis. This is why I take a rather diasporic perspective which has allowed me to engage with Luo people in places like K’Ogelo and Boro as well as through radio programmes in Ramogi FM and Radio Lake Victoria.

1.7. Biography of the Author and Insertion in the Field

I had never thought that at any time I shall have to study phenomena such as modernity with Luo people as an entry point. Having been brought up in Korogocho ‘slums’, East of Nairobi, the idea of ‘being a Luo’ was a reminder that I often got only on school holidays when my father ensured that we went to dala (rural home). Dala at that time was in Ugenya, Nyiera Village where my father is in the lineage of K’Ager mak’ Anyango. When in Ugenya I was often referred as Nyathi Ugenya (child of Ugenya), Wuod Ja’Kager (the son of Kager lineage) or Wuod Nyar Boro (the son of the woman from Boro). These are identifications that were unknown to my schoolmates at Kariobangi North Primary School or my playmates in Korogocho.

Rather at my school in Kariobangi and mtaani (the common Kiswahili word used by the youth in reference to their area of residence), I was just a common acquaintance—Steve! This fluidity of who I am persisted to my undergraduate days at Moi University where further negotiations and contestations of who I am were enacted. While my national identification card (ID) taken at Kesses (in the neighborhood of Moi University) read that my home district is Siaya, I was more acquainted with Nairobi. My ID also states that I am Luo but, at that time, I was more conversant with Sheng (a creole that is based on Swahili) and English than Dholuo. Between 2000 and 2007, I worked with the Kenya Human Rights Commission, a premier human rights NGO in Kenya. At the time of my departure in August 2007, I had risen to become the Deputy Executive Director of the Commission. Today, I often tell a joke that until the year 2007, I was a ‘human rights junk.

27 While my elder brother and I stayed with my father in Korogocho in Nairobi, our mother stayed with my four other siblings in dala K’Odinga (the home of Odinga, who is my paternal grandfather).

28 When I joined Moi University in the Rift Valley town of Eldoret, I was lured to join the Siaya Students Association. Although Siaya was my ‘home’ district, I never even knew where the place was until 1994 when I went there to collect my state bursary fund. See Steve Akoth (2011). Challenges of Nationhood: Identities, citizenship and belonging under Kenya’s new Constitution. SID Constitution Working Paper Number 10. www.sidint.net/docs/WP10.pdf. accessed on June 12, 2011.

29 This is not to dismiss the work that I did at the Commission or that is undertaken by many other human rights advocates today; rather, it is a critique of the way human rights workers engage with the discourse of human rights and its subject in a manner that is not adequately problematized.
The above history of my identity was the state of play at the time when I started off my fieldwork in 2009. It is indeed difficult to speak of my Identity (with capital I) in the postcolonial Africa where many of us are diasporic citizens living in a creole of possibilities. Mine for instance is an identity characterized by encounters with the youth culture in the ghetto (as we always called the slums), socialization into Luo culture and engagement with higher institutions that characterize 21st century modernity such as the Kenya Human Rights Commission, the Catholic Church and the University.

Thus while I have symbolic capital (Bourdieu 1991) of Dholuo and Luo habitus, it may not be appropriate to describe myself as a ‘native’ or an anthropologist studying at home. Rather I have to take caution, managing the possible influence of my own perspective as is expected of any social inquirer and remaining open to my reflexivity. My ethnographic experience is therefore more about inter-subjectivity. After I made it known to Ker Riaga Ogalo of my intentions to undertake this research in November 2009, I was soon flooded with invitations to attend meetings and sessions convened by the Luo Council of Elders and other interested parties.

The same happened with human rights organizations and their leadership in Kenya. Between 2009 and December 2010 which was my ‘official’ research period, I was invited to about 20 meetings related to human rights. While some of these meetings took place in western Kenya, a significant majority were held in Nairobi. Over the next 18 months, I would engage with this matter of human rights in postcolonial Kenya as a doctoral student, Luo expert, activist, social elite and researcher that often made me slip in and out between being a subjective actor and ‘scientific’ researcher (Cohen and Odhiambo 2004). Below is a description of my engagement with the field.

1.8 Processes in Ethnography

After my preliminary fieldwork engagement in Luoland that involved visits to homes, attending meetings and funerals in the course of December 2008, I developed a working idea of how to engage with the field and be part of the knowledge generation process that produces contemporary practices of human rights among Luo people. It was clear at that time that this

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30 I can only say official fieldwork because even when I embarked on the process of writing I was often confronted with new invitations and information that I could not ignore. Besides, the various factions that emerged out of the Luo Council of Elders in the long run consider my associations with either of them as major a mechanism of authenticating and legitimating their contested legal status.
was going to be an ethnography located in both Luoland and the Diaspora. Three spheres were identified for this purpose. These were 1) Radio programmes in Radio Lake Victoria and Radio Ramogi that broadcast in Dholuo; 2) Annual cultural festivals held in Luo Nyanza and; 3) The work of Luo Councils of Elders in Luo Nyanza with human rights institutions like the Kenya National Commission on Human Rights, FIDA-K and KELIN.

Beginning May 18, 2009, I asked my brother, Tony Owuor Akoth and a local primary school teacher, Patrick Oroka (mwalimu as we often called him), to start recording the Abila programme at the Radio Lake Victoria. I decided to start the recording this early because radio stations in Kenya change their programmes regularly. Besides, the mobility of the elders from one station to another is so frequent and ‘disruptive’ to what I desired to capture. Starting the recording early was going to afford me a longer time-frame in which to understand and ‘read’ through the various political, economic and cultural struggles that inform discussions in Abila. Tony was attentive and active in listening and in the month of July and August 2009, I joined him in this role and joined a ‘community’ of listeners in the western region and its environs that are reached by Radio Lake Victoria.

As the programme on Ramogi Radio also went on air at the same time, I bought a second radio set; we would listen and call the studio for interactive sessions. Together with my brother and mwalimu, we recorded these entire programmes on Video Home System (VHS) cassettes and had all of them transcribed (see annex 1.1). However it was perhaps the sessions after the programmes that was most informative. On several occasions, I met the ‘elders’ at Radio Victoria and met the one in Radio Ramogi once. During these sessions, we discussed matters that had come up in the programming, revisiting the context and reasons why listeners raised certain questions.

The other space was that of cultural festivals which took place in December. The holiday month of December is often characterized by various performances and ceremonies most often organized around those coming dala from kapango (town or city). The cultural festivals are one of such moments. The festivals are often held in open sport grounds or schools. They are a practice that now transcends Luo and Bantu Nyanza. In the 18 months of my fieldwork, I attended six such festivals (see annex 1.2).

In most of these festivals, I was an anonymous participant. However, there are many others
where I was ‘elevated’\textsuperscript{31} to a guest. I also had an open presence in Luoland where I visited markets, shopping centers and many homes either on invitation or where the councils of elders were undertaking an activity. I visited certain elders severally just for open discussions. I often went to find how they were doing and just have mbaka with them.

During such moments, I would visit FIDA-K Kisumu offices in the morning and then have lunch with my friends John Ogam\textsuperscript{32}, Dorothy Awino (Doro)\textsuperscript{33} or some other elder in town. Lunch was best at cafeterias at the outskirts of Kisumu’s Central Business District (CBD), just next to Jaramogi Oginga Odinga Hospital and under a tree at Ofafa Hall compound. The owner of the cafeteria was a nyar Alego (lady from Alego) who specialized in Luo delicacies such as aliya (roasted meat), osuga (bitter vegetables) and rech (fish). This was the place to find kuon omuogo gi kal (Ugali made from sorghum and cassava flour). The only other place I got such ‘Luo delicacies’ in western Kenya was at Ker Riaga’s home in Homa-Bay.

It was not long before I was overwhelmed with numerous invitations to attend workshops to offer ‘expert’ opinion to NGOs like KELIN, FIDA-K and Kenya National Commission on Human Rights. Ker and the Luo Council of Elders invited me to several of their sessions as an ‘advisor on human rights’ issues. Once we had established trust, numerous councils of elders invited me to their consultative meetings while the Nairobi-based NGOs often asked me to recommend names of elders who they could invite for their numerous workshops on alternative dispute resolution (ADR).

The three spaces informed interviews, in-depth literature review and engagement with archival materials at both the Kenya National Archive and the Kew Garden Public Records Office\textsuperscript{34} in London. The first two chapters of this thesis offer some sort of conversation between these

\textsuperscript{31} Being a guest at the cultural festivals is an issue of honour and prestige. You get to sit on a tent and get a bottle of soda or water, which are not available to the common people attending the festivals.

\textsuperscript{32} Ogam, whose name in Dholuo means ‘to get’ (a name used to refer to the person who assists another to get a wife, that is, jaga), is a long time friend of mine. He hails from Gem Anyiko and was for a long time the liaison person of Radio Ramogi in western Kenya. He is the initiator of Luo chike programmes at the Kenya Broadcasting Corporation (KBC), Radio Ramogi and Radio Lake Victoria. It is through him that I always got information of upcoming cultural festivals. It is Ogam that organized my first meeting with Ker Riaga Ogalo.

\textsuperscript{33} Dorothy had a very interesting role that was always liminal. In the late 1990s, she was attached to the Jaramogi Oginga Odinga Foundation (JOOF) but went in to support the Luo Council of Elders in basic administration. Later in 2006, the Kenya National Commission on Human Rights started working with the Luo Council of Elders and she was given a short contract by the former as their liaison person in western Kenya. In this position, her role was to identify widows who had been disinherit in the name of culture and ensure their ‘reparation’ by the Luo Council of Elders. At the meetings of the Luo Council of Elders, she was always the only woman present though not as a member as she had not yet reached her menopause.

\textsuperscript{34} Most of this was done between June and October 2009 in London.
various archival materials. As I went through engaging in production of notions of moral values and practices of human rights in Luoland, it was soon clear how to ask questions. As some of the people I interacted with were seized of my background as a human rights advocate, I often played down my past role and presented myself as a common person. On several occasions, I skipped ‘high table’ lunches with politicians and commissioners of the Kenya National Commission on Human Rights so as to remain accessible and away from power.

As Briggs (1986) has noted, often the way you ask questions or how you construct your presence can elicit particular responses. Thus, most of my conversations were about ‘life histories’. I often gave my story as a nyathi Ugenya and of how my father moved from Jinja, Uganda to Korogocho in Nairobi and how he regaled us daily with stories and news about ‘the Luo’. Often, I got great insights from this strategy. Most importantly, I learnt how to listen with eyes, ears, feelings and heart. Beyond the organizations, I met numerous postcolonial subjects like Madote during my research. When I met about 40 widows in their homes or at shopping centres, I often shed a tear but remained firmly present, not drifting to fate as most of them had done.

There were however underlying muzzled debates and narratives that were often not talked about. Postcolonial Kenya is characterized by ‘Christianity’ and ‘Tradition’, ‘Luo norms’ and ‘common law’ all embedded and practiced from various perspectives of competing power relations. For instance when there is goyo dala, a chi liel who confesses to be ‘saved’ from Luo traditions (and out of 40 whom I met about 36 confessed ‘salvation’) find it difficult to have their pastor know that they shall have a jater. But because she is both ‘Christian’ and ‘Luo’ she often opts not for either but for both. As Christianity has the image of being ‘modern’ and Luo is ‘traditional’ it is the ‘modern’ elements that are often available for public glare but beneath are many other narratives which are perhaps most important but that remain unspoken. At the time of writing I had figured out how to engage with these unspoken narratives.

1.9 Organizing the Chapters
This study is ordered thematically although its emphasis on historicity has made it possible to understand it chronologically. It opens with a discussion on western Kenya in an era of human rights in Chapter One. The other purpose of Chapter One is to locate the research process and findings by narrating the modalities that accompanied fieldwork conceptually, methodologically and in data assimilation. The narrative of Ascar Akinyi Madote that opens
the chapter is a pointer to the apparent contradictions and contestations in the discourse of human rights in postcolonial Kenya. It also offers a reflection of the researcher in the context of the field and the subject under study.

In starting (in Chapter Two) with genealogies of human rights, I attempt to organize literature and contemporary practices of human rights. This chapter reviews human rights discourse as a capsule of 21st century modernity. It starts by tracing the genealogy and the philosophical contingencies around which the concept of contemporary human rights discourse is constructed. In so doing, I overlay social and cultural history of human rights as a strategy of moving away from essentialist binaries such as that of ‘relativism’ versus ‘universalism’ or ‘culture’ versus ‘rights’. By locating postcolonial genre of rights in specific perspectives of humanity and lego-political institutions, the chapter disposes of the philosophical origins of human rights and thus opens the debate on its practical, contextual and situated manifestations.

A discussion of how human rights have acquired its hegemony is thereafter pursued by creating distinctions between rights, human rights and human rights project. This strategy proves useful in understanding the dominance that has been acquired by the legal model of human rights. Such clarification paves way for an analysis of other possible genealogies of the notion of human rights and their manifestations. Pioneering works of anthropologists like Max Gluckman’s (1969) landmark study of Barotse jurisprudence in Africa and Isaac Schapera’s (1943) work among the Kgalatla’In are useful texts in that endeavor. It is however the works of anthropologists in postcoloniality such as Jean and John Comaroff, Francis Nyamnjoh and Richard Wilson that serves to locate the multi-disciplinary nature and perspectives in human rights scholarship and practice. The idea of these works is not about looking at the human rights consonance in non-Western societies but rather to see how human rights production and functions are undertaken in particular societies.

Learning from V. Y Mudimbe’s (1988) work on *The Invention of Africa: Gnosis, Philosophy, and the Order of Knowledge*, Chapter Three opens with a quest to understand the colonial Kenyan state as a space developed on ideologies of ‘Otherness’, which Mudimbe calls “alterity” and Said’s work on Middle East has made famous as “Orientalism”. This discussion between human rights, othering and emergence of the Kenyan state is useful in understanding the epistemology of colonial state creation. It is this link between human rights and “alterity” (common in colonial and racial literature such as Joseph Conrad’s thought of “Heart of Darkness”) that illustrates how the dominant notion of human rights associated with the European Enlightenment of the 18th and 19th century gets reproduced in the colonial project.
The twining of the development of Kenya Colony and practice of rights attest to the vexed relationship between the state and the production of subjectivity and dominant normative systems.

The chapter opens by revisiting the British colonizers’ construction of Kenya as a cultural state. A Memorandum on Native Policy in East Africa authored in 1930 for the British Parliament by Secretary of State for Colonies Lord Passfield (formerly Sidney Webb), has been used to narrate the imperial administration’s architecture and design of governing Kenya. The 1930 Memorandum was written in the tenor of the European Enlightenment. Its underlying attitude is that of hierarchical, distinct and asymmetrical relationships between human civilizations. It is this episteme that is used to invent colonial ethnographies of Luo and Luo-ness, demarcate and propose administration of Kenya Colony, and in the design and implementation of the Dual Policy according to Fredrick Lugard. Mohmood Mamdani (1996) has popularized the idea that this colonial socio-spatial architecture and ontology produced citizens and subjects. Although the Memorandum was a broad directive, its discussions in the chapter are centered on central and southern Kavirondo or Luo Country as the British administration called it.

The second part of the chapter captures a discussion of the racist colonial project to produce a black\textsuperscript{35}’responsibilized’ colonial subject. This section imports information from the colonial archive\textsuperscript{36} to demonstrate the nuanced conversations of the language of rights, moral values and law in the colony. Lurking beneath this conversation is a discussion on genealogy of customary law which may well be synonymous with the practice of human rights in the colony. The chapter explores how this practice was informed by the various notions of rights which were sometimes in competition, other times oppositional and in some cases complementary.

Chapter Four takes a closer look at the dominant notions of human rights in contemporary Kenya as a moving equilibrium. While historical debates of the 1980s associate human rights with non-governmental organizations, urban scholars and opposition politics, there has been considerable rethinking that currently positions human rights in postcolonial Kenya as a state-

\textsuperscript{35} Although my dissertation does not pursue the racists’ construction of the colonial native subject, I have illustrated how the production of citizenship and gamut of governmentality such as customary law was based on a race hierarchy that marginalized and indignified blackness.

\textsuperscript{36} The Chapter is primarily based on archival research and oral interviews. Most of its data shall come from court records, Judicial Department Annual Reports, Police Department Annual Reports, manuscripts of hearings and rulings of native courts or tribunals in Western Kenya and Nyanza Province Annual Reports.
sanctioned project. Human rights in 21\textsuperscript{st} century is therefore the official policy of the state as manifested through the establishment of institutions like the Kenya National Commission on Human Rights and as evidenced through official speeches by state officials (GOK; KHRC, KNCHR). Through these multiple human rights actors, the chapter documents how neo-liberal milieu has enabled production and numerous uses of human rights in postcolonial Kenya.

Using the case of the Federation of Kenya Women Lawyers (FIDA-K), the chapter illustrates the disjuncture between the claim for a universal and inflexible script of human rights and the lived experiences in western Kenya. It illustrates how FIDA-K’s strategy has had to change over the years and open up for a contrapuntal reading of culture to enable responses to the lived ideas of human rights that tend to appropriate notions of human moral values from both the ‘classical’, ‘informal’ and ‘legal courts’\textsuperscript{37}. The epistemic discontinuity between \textit{wananchi} (common citizens) and the ‘elite’ notion of human rights is illustrated as formenting a crisis of representation (affecting both NGOs and state) and invigorating a quest to get other languages through which the indignity of \textit{wananchi} can be made intelligible.

Chapter Five presents findings from the radio programmes in Radio Lake Victoria and Ramogi FM. Both stations broadcast in \textit{Dholuo} and have dedicated programmes on Luo values and moral systems. Recordings and personal participation \textit{Dholuo} FM Radio stations are analyzed as the instruments of this authentication of culture, performance and meaning-‘fixing’. The programmes claim to reconstruct and ascertain the past Luo cosmo-vision in the present times. The result of this discussion is a renewed discussion of modernity in ‘our times’ that is understood from a space of conjectures, skepticisms and opportunities. The chapter demonstrates how subjects of human rights are produced and thus how liberal ideologies of rights and citizenship are in constant conversation in Kenya’s body politics.

Affirming this notion of liberalism that takes human life into consideration, Chapter Six illustrates how \textit{wananchi} as well as local and state elites draw on ‘traditional’ forms of honor, authority and power to claim citizenship and recognition in 21\textsuperscript{st} century Kenya. The cultural festivals are therefore moments for emphasizing particularity as well as leveraging rights from the state. I suggest from my participation in the cultural festivals that cultural festivals are more than anything else, forums that promote the interests of the political class and negotiations for \textit{maendeleo} (development). For politicians, the cultural festival is where they reiterate their place as ‘natural community’ leaders. Just as was the case in radio programmes, the cultural

\textsuperscript{37} I have put these categories in inverted commas because none of them exists in any pure form: rather, they are in most occasions sub-sets of one another.
festivals are more of spaces of encounter between various modernities rather than arenas for the enactment of authentic ‘Luo culture’ as claimed by their organizers.

However, there is no doubt that the cultural festivals are the major instruments of this authentication of culture, performance and meaning-‘fixing’. To this extent, the cultural festivals tend to be particularized performances of the context of human rights modernity. The civil society and agencies like the Federation of Kenya Women Lawyers-(FIDA-K) and human rights institutions like Kenya National Commission on Human Rights who regard themselves as agents of human rights which is ‘modern’ and ‘universal’ are often left out of this process of the practice of ‘alternative’ notions of rights in Kenya.

Chapter Seven is about the synthesis of ‘Traditional’ and ‘Modern’ categories in the practice of human rights in 21st century Kenya. This chapter details some glaring limits and opportunities in the practice of dominant notions of human rights in the present Kenya. By opening up the question of the present, the chapter demonstrates how FIDA-K, KNCHR and other social actors have had to transcend the dominant state-centric notions of human rights in order to deliver on immediate demands for dignity and justice. The findings documented here are also testimony to the limits of the idea of the contemporary female citizen as a rational, right-bearing being with no connection with what dominant discourse of rights regards as an oppressive patriarchal past. Its ethnography demonstrates links in the colonial and postcolonial episteme of customs as promoted by the state in juxtaposition to the open model as practiced by institutions like the Kenya National Commission on Human Rights, FIDA-K and KELIN.

In locating this work, this dissertation like many of contemporary anthropology, has learnt from the crisis of representation (Marcus and Fischer 1999) that developed from the discipline’s intensive self-critique. Therefore, this dissertation pays attention to the national and international contexts as important in developing theoretical understanding of local situation. This chapter demonstrates how reporting of human rights practice in Kenya tends to ignore local social phenomena that impact on the practice of human rights. In this chapter, I argue that in international United Nations fora, human rights discourse has retained the legal model by ignoring local social phenomenon that are becoming increasing important in theorizing the nature of local human rights phenomenon. The final chapter is Chapter Nine, which interweaves threads of the social life of human rights in contemporary western Kenya.
CHAPTER TWO

HISTORIES AND PRACTICAL MANIFESTATIONS OF HUMAN RIGHTS

2.1 Introduction

In September 2010, the then International Criminal Court (ICC) prosecutor, Moreno Ocampo, issued the summons against six Kenyans suspected to bear the greatest responsibility for horrendous crimes and violence committed in Kenya after the bungled 2007 presidential elections. Competition during the 2007 General Elections was mainly between political allies who had turned into archrivals: Mwai Kibaki of the Party of National Unity (PNU) and Raila Odinga of the Orange Democratic Movement. In the end Mwai Kibaki was declared the winner under controversial circumstances thus provoking violence on December 30, 2007 in Kenya’s capital City of Nairobi, Rift Valley Town of Eldoret and the Luo Nyanza city of Kisumu. For six weeks, there were street battles involving supporters of Raila Odinga and those of Mwai Kibaki. About 1,500 Kenyans were killed while some 250,000 others were displaced and forced to live in tents as internally displaced people (IDPs). Property worth millions of dollars was also destroyed.

Because Kenya is a signatory to the International Criminal Court Treaty, the International Criminal Court undertook investigations to establish whether this violence was pre-planned and whether its perpetrators targeted a specific ethnic group for elimination or extermination. In the end, six main suspects were named. On Ocampo’s list, prime suspects were: Francis Karimi Muthaura, Permanent Secretary in the Office of the President and Head of Civil Service, Uhuru Muigai Kenyatta, Deputy Prime Minister and leader of Kenya African National Union (KANU), Mohammed Hussein Ali, Police Commissioner, William Ruto, Deputy Party Leader of the Orange Democratic Movement (ODM), Henry Kosgey, Chairman, Orange Democratic Party (ODM) and Joshua Sang’, radio presenter, Kass FM. Although submissions by the prosecution have gone through various commentaries and adjustments at the pre-trial chambers, it is the issuing of a summons that has made a firm statement about the instrumentalist (Riles 2006) meaning of the era of human rights. That is that human rights are

38 For analysis on state power, social power and other contestations that characterized the elections see Akoth, (2010).

39 Established in 1998, the ICC is based in The Hague, The Netherlands. It has a mandate of prosecuting acts of crime classified as crimes against humanity.
an acceptable instrument of cross-border relations. Reactions from the six suspects (commonly known as the ‘Ocampo Six’) opened a debate on universalistic commitments to human rights and the creative expression of historicized and situated identities.

Kenya’s media, public rallies, prayer meetings and common parlance showed that there is no conflict as such between cultural recognition and implementation of international commitment to human rights. The Ocampo Six and the ‘communities’ that they mobilized responded to the charges against them by engaging lawyers to counter the prosecutors’ claims against them in the Hague; intervention of Councils of Elders; political rallies and public barazas. It illustrates that although the economy of interest deployed in the quest for cultural recognition and international human rights instruments may be different, their objectives are not necessarily incompatible.

This chapter focuses on the complex issues emerging from the recent attempts to apply human rights in the postcolonial era. By focusing on the Ocampo Six in Kenya, I discuss problems of addressing histories of human rights that engage with both the pedigree of post-European enlightenment on the one hand, and political thought and situated practices of postcolonial concerns on the other. In any case, a serious problem confronting human rights scholarship in Kenya today is that of showing recognition for practical manifestations while at the same time attending to the philosophical origins, the discourse and international framework of human rights discourse. My approach is an integrated acknowledgment of the particularity of human rights history in dominant liberal norms on the one hand, and the contextualized and non-abstract personhood modes of subjectivity emerging in 21st century Kenya on the other. Taking this approach, the chapter provides an account of how local concerns in postcolonial Kenya shape how universal categories of rights are implemented, resisted and transformed. These local concerns and engagement with human rights drawn from Kenya and Rwanda are also useful in clarifying distinctions between rights, human rights and a human rights project.

I respond to this problem by presenting both a political-legal framework as well as an anthropological formulation of human rights. Rather than develop these competing economies

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40 The ‘Ocampo six’ have since been reduced to ‘Ocampo Four’ after the ICC exonerated Kosgey and Ali of any wrong doing.

41 While I shall use three categories in this chapter, I am aware that various authors have used several others. In demonstrating an indigenous concept of human rights in Haiti, Sibi Grovogui (2006) for instance has talked about the institutes and human rights institutions. Grovogui (2006:184) has argued that although human rights institutes may be related to human rights institutions, their trajectories are not identical. Human rights institutes emerge continually across regions and cultures as a product of localized imaginations of the essential needs, faculties and capacities of persons. These institutes are then incorporated into legal instruments through political or ideological processes to create institutions.
of knowledge as binaries, I suggest that by looking at practical manifestations of human rights in its critical orientation to practices, the chapter provides a fresh perspective for reading histories and manifestations of human rights. An integration of these concerns results in three possible political and intellectual narrations of contemporary movements of human rights. These contemporary movements support the role of domesticated agency as a conceptual framework for understanding different components of subjects and practices of human rights. In this perspective, the subjects of human rights in postcolonial Kenya demonstrate autonomous functioning (under the aegis of cultural recognition) as well as commitment to universalistic human rights values and codes.

The chapter therefore provides an opportunity for rethinking narratives that erroneously present human rights discourse as a completely coherent, uniform and timeless corpus with a ‘sacred’ history. When human rights history is presented as inflexible truths, it tends to ignore its manifestations under particular conditions such as those seen in postcolonial Kenya. To avoid a single and linear narration of human rights emerging from the pedigree of Western history and political practice, the chapter attempts to present a narrative around practices of human rights in postcolonial Kenya. With this approach, the chapter avoids the problem emanating from regarding the two schools as antagonistic.

2.2 Human Rights, Postcolonialism and the Ocampo Six

Measuring human rights in Kenya

The debate around the Ocampo Six both at the ICC in The Netherlands and in Kenya, have drawn attention to various myths in human rights history. While there has been pressure for African states like Kenya to embrace the United Nations-based international human rights, these discussions have opened for scrutiny many assumptions that underlie moves towards a universal commitment to human rights. When the case of Kenya’s post-election violence was referred to the ICC, the first question was not whether there was crime and violence committed but rather whether the threshold of these violations merited the attention of the ICC. Some Kenyans and at least Judge Hans-Peter Kaul of the ICC have claimed that the post-election violence does not merit the attention of the ICC. Judge Kaul was serving on a panel with two other judges who ruled that Kenya’s case had met the threshold to be considered as crimes against humanity and that the evidence adduced by the prosecutor was valid and ‘objective’

The notion builds from Edward Said’s (1984) distinction of secular and sacred criticisms in his introduction to “The World, the text and the Critic”. In historicizing human rights, I take secular criticism as a position from which to engage beyond the singular and often evolutionary narratives of human rights. In this way, I have increased my chances to reflect forms of knowledge that escape and subvert ethnocentric methodological leanings common in most narratives of human rights.
enough to sustain a full trial. In his dissenting opinion to Kenya’s case at The Hague, Judge Hans-Peter Kaul clarified that:

There are in law and in the existing systems of criminal justice in this world, essentially two different categories of crimes which are crucial in the present case. There are on the one side, international crimes that are of concern to the international community as a whole, in particular; genocide, crimes against humanity and war crimes pursuance of articles 6, 7 and 8 of the statute. There are on the other side, common crimes albeit of a serious nature, prosecuted by a national criminal justice system, such as that of the Republic of Kenya... (Kaul 2011, paras. 131, 190)

Judge Kaul’s opinion raises numerous questions consistent with his previous arguments. His central questions are about what demarcates the jurisdiction of the ICC against that of the state as well as how to "measure" the threshold of what needs the attention of the state and what requires the attention of ICC. This dilemma offers a significant critique to the common assumption that human rights are a complete "whole" universalistic commitment that can apply across the board with ease. In particular, it is of interest that this is a contradiction ‘within’ the human rights discourse.

Ocampo and the ICC’s claims of post-election atrocities draw most of their evidence from publications produced by national and international human rights organizations in Kenya. Key among these ‘objective reports’ were published by the state-funded Kenya National Commission on Human Rights, a leading Non-Governmental Organization in Kenya, the Kenya Human Rights Commission, London based Amnesty International and New York based Human Rights Watch. Funded mainly by international agencies, these human rights organizations have positioned themselves as defenders, monitors or advocates of human rights. The underlying link in all their modes of operation however, is the belief in the ‘objectivity’ of human rights. That is, the presumed existence of a universal criterion around which an audit can be done and ‘report card’ on human rights performance produced.

43 Judge Kaul is interested in affirming a clear category of what should be dealt with by the various jurisdictions. He sees the role of the individual states on the one hand and that of international community on the other hand as distinct and clear cut. For me, this debate demonstrates how fluid such thresholds of state and international community jurisdictions manifest themselves. In my subsequent discussion I suggest that human rights are better engaged as an ongoing practice rather than reified category.


Under these circumstances the question that is now contested is: What human rights are the six Kenyans being accused to have violated? Where and by whom can the Ocampo Six be held to account? And if these human rights are contested, are there other genres of rights produced and practiced in postcolonial Kenya? The controversy provoked by the ICC analysis, however, tends to question this notion of an ‘objective’ human rights assessment while opening debate on the role of the state in postcolonial Africa. We are left with lingering questions: How does one read human rights records of a country like Kenya? Can there be a single report agreeable to all actors as a complete representation of human rights? Although these are matters that we shall return to as I review the Kenya ICC process after September 2011, the question of ‘scientific measurability’ of human rights often promoted by national and transnational human rights movements is unavoidable.

This later assertion is useful in pursuing the first question of this chapter which is: What becomes the role of the state in the era of human rights? Although for different reasons 47, the clarification made by Kaul that “There are on the one side, international crimes that are of concern to international community as a whole, in particular; genocide, crimes against humanity and war crimes pursuance of articles 6, 7 and 8 of the statute” (Kaul 2009: 30) provides the first point of entry. This question of relationship between national sovereign power and juridical order suggests that human rights are neither immutable nor are their character and sphere of operations inflexibly defined. Rather, what we observe in Judge Kaul’s clarification and contribution from scholars like Preis (1996) is that human rights are always ‘at work’, reformulating and repositioning themselves.

The Liberal human rights scholar Michael Igatief (2002) has recently asserted that the kind of atrocities such as September 11 (and indeed Kenya’s 2007-8 post elections violence) is an indication of an end of the ‘era of human rights’. Kenya’s controversy over whether the charges against the Ocampo Six are admissible in the ICC or not, provides a crisis not necessarily around whether postcolonial Kenya is able to embrace human rights or not, but rather around evidence of paralysis within the discourse of human rights itself.

47 Judge Kaul is interested in affirming a clear category of what should be dealt with by the various jurisdictions. He sees the role of the individual states on the one hand and that of International community on the other hand as distinct and clear cut. For me, this debate demonstrates how fluid such thresholds of state and international community jurisdictions manifest themselves. In my subsequent discussion I suggest that human rights is better engaged as an ongoing practice rather than reified category.
I read this claim to mean that in postcolonial Africa, human rights boundaries tend to no longer focus on cultural difference but rather on jurisdictional capacity. While the meanings of ‘jurisdictional capacity’ are multiple and open to contestation, Kaul’s ruling suggests that culture has lost meaning as a borderline, paving way for very different criteria to be used in demarcating ‘here’ and ‘there’. In his opinion, the ‘era of human rights’ and its accompanying notion of what Immanuel Kant (1795 as translated in Nisbet 1970) called ‘cosmopolitan citizens’, cannot be used to completely erase the place of the state as a juridical (not cultural) actor. This emphasis on the role of the state is a critique to the recent assertion by some scholars (see Appadurai 1996) on the receding role of the state. As the findings in this thesis demonstrate, the postcolonial state may have weaknesses but it is certainly not weak.

Reactions from the Ocampo Six

In the wake of reports that the case of the six Kenyans would be admissible to the ICC, the six suspects (of whom three are from the larger Kalenjin ethnic community), showed a flurry of reactions. Besides denying the claims, they all hired the best possible legal minds to put forth their case at The Hague and refute the ICC prosecutor’s claims. Some parliamentarians in Kenya argued (appropriating the anti-colonial and imperialist discourse) that the country should withdraw from the Rome Statute as it allegedly undermines the country’s sovereignty. The ICC was described by some Kenyan politicians as an imperialist institution. However, it is the way the Ocampo Six engaged with the otherwise individual responsibility of being named as suspects that interests my study of the practice of human rights in postcolonial Kenya.

On December, 16, 2010, just a few days after a heated debate in Kenya’s parliament, the Kalenjin Council of Elders, under the leadership of its chairman, retired army major John Seii, convened a press conference in Nairobi where the Council declared that: ‘The withdrawal of the cases from the ICC at this point is not possible. And therefore, we stand behind our

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48 State weakness is evident in incapacity and structural limits in governance and harnessing its relationships with the citizens. This is both a product and evidence of the collapse of developmentalist initiatives such as Africanization.


50 William Ruto has retained the services of three lawyers: Mr David Hooper (British), Prof. Kithure Kindiki (Kenyan), and Katwa Kigen (Kenyan). Henry Kosgey retained two lawyers: Nairobi based lawyer George Odinga Oraro and Julius Kemboi. Uhuru Kenyatta has three British lawyers: Steven Kay, Gillian Kay and Higgins, the latter who defended Slobodan Milosevic. Mohammed Ali was represented by Gershom Otachi; Muthaura has retained the services of Mr Essa Faal and Karim Khan.
sons as they prepare their defense; we believe that the truth shall prevail’ (Nation Television [NTV], 2010).

This tenor of ‘our sons’ dominated the period between December 2010 and April 2011, when the Ocampo Six made their first appearance at the ICC court in The Hague and has culminated in the election of Uhuru Kenyatta as the president of Kenya with William Ruto as his deputy in the March 2013 general elections. To further their defense, the Ocampo Six and more so politicians William Ruto, Uhuru Kenyatta and Radio Journalist Sang, convened rallies and ‘prayer meetings’ around the country asking ‘their people’ to stand with them during the moment of ‘trial’\(^{51}\). On the last day of these public meetings, April, 5, 2011, a solid conjecture and agency of some of the suspects would become clearer. Mama Ngina Kenyatta, the mother to Uhuru Kenyatta, laid her hand on her son and William Ruto (who were both kneeling), prayed for them in silence and then declared “God shall protect our children”\(^{52}\).

In contrast, as Agikuyu and the Kalenjin Councils of Elders prayed for the Ocampo Six as their ‘sons’, Ocampo’s seismic effect was widespread in Luo Nyanza. Restaurants were named ‘The Hague’ while children born in December 2010 were named Ocampo. I visited at least one home in Gem Akala where a couple had named their twins Ocampo I and Ocampo II to demonstrate their support for the prosecution of the Ocampo Six. International human rights systems in post 2007 violence Kenya have thus been appropriated as imageries, metaphors and representations of justice and peace.

The problem from a postcolonial perspective is the universalist language in which human rights manifestations are frequently reported and understood. Rather than engaging Emanuel Kant’s kind of universal cosmopolitanism, postcolonialism focuses on the entanglement of modern, liberal discourses with situated notions of personhood as witnessed in the reactions of the Ocampo Six. While they have engaged leading international lawyers, the Ocampo Six defy the image of the liberal human rights subject that the Comaroffs (1999:3) have criticized as being presumably rights bearing, an uncompromising individualism, physically discrete, moneymarket driven and materially inviolate. This idea of an abstract and decontextualized personhood is problematic from a postcolonial perspective. Further, it blurs the intelligibility

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\(^{51}\) Trial here was formulated in both a theological sense which refers to temptation of spiritual position and judicial appearance in a court of law as a suspect.

\(^{52}\) Wakahiu James, ’Mama Ngina Prays for Kenyatta, Ruto’ The Nairobi Star, April 5, 2011.
of human rights manifestations. The rallies by the Ocampo Six for instance, were moments of pulling together various forms of symbolic capital (Bourdieu 1991) by those who were now simply referred to as the ‘Ocampo Six’, acting as civic citizens, cultural citizens, Christians and global citizens all at the same time.

To mitigate these limits in liberal and legalistic discourse of human rights, I propose a reading that historicizes and situates human rights in life-worlds that are often rendered invisible or relegated to the margins by the pre-dominant meta-narratives (Gardner 2004:233) and enlightenment genealogy of human rights. I argue like Cowan et al. (2001:1), Appadurai (1996), Englund and Nyamnjoh (2004), An-Na’im (1992) and Wilson (1997, 2001) for a postcolonial genealogy of human rights that engages with conceptual, empirical as well as a contextual process through which rights and its subjects are produced.

2.3 Universal Human Rights Commitments and a Return to Indignity

The intervention by the ICC in Kenya is not the first of its kind in postcolonial Africa. The Rwanda Genocide\textsuperscript{53} that occurred in 1994 led to the establishment of the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania. The ICTR or Rwanda Tribunal as it is commonly called was established to facilitate investigation and prosecution of those considered the masterminds of the 1994 Rwanda Genocide (United Nations: 1994)\textsuperscript{54}.

It has most recently been stated that the Rwanda Tribunal is not just successful in responding to crimes against humanity, but is also a key driver in ‘expanding’ the discourse and practice of human rights in postcolonial Rwanda (Human Rights Watch, 2010). In a report, \textit{Genocide, War Crimes and Crimes Against Humanity: A Digest of the Case Law of the International Criminal Tribunal for Rwanda}, Human Rights Watch provides details of legal, sociological and anthropological interpretations and implications of the Rwanda violence. Rather than reflect on the limits of human rights that have been evident throughout the work of the tribunal, the HRW (itself a multinational NGO with a $44 million annual budget) report is an analysis of the numerous precedents set by the ICTR. As a ‘digest of case law’ it seems more


\textsuperscript{54} See also United Nations Security Council Resolution 955 S-RES-955(1994) on November 8, 1994 (retrieved July 23, 2008). Commentators like Chris Maina Peter, Associate Professor at the Faculty of Law, University of Dar es Salaam, Tanzania have argued that The International Criminal Tribunal for Rwanda is not the first of its kind. In fact, it is almost a branch of the International Criminal Tribunal for the Former Yugoslavia, established in 1993 [4]. The two Tribunals share certain facilities and officers; in particular, they have the same Chief Prosecutor and Appeals Chamber. That is why some commentators have argued that the Rwanda Tribunal was grafted onto the Yugoslavia Tribunal.
interested in taking forward the legal model of human rights and corresponding precedent rather than to learn from the incompleteness of human rights discourse. The HRW’s report was written in a context where the Rwanda government itself had disputed the ICTR process and approach to justice (Sosnov 2008). In a position paper authored in 1998, the Rwanda government criticized the ICTR for what it termed:

…Poor organization, personnel problems, lack of prosecutorial and investigation strategy, poor conduct of investigations, failure to investigate some of the areas where the worst atrocities were committed and poor prosecutorial conduct (Cited in Sosnov 2008: 129).

Besides, by September 2004 (ten years after beginning its investigations), the Rwanda Tribunal had only resolved twenty three cases (Sosnov 2008: 127). Under these circumstances, the Rwanda Tribunal, as in the case with the Truth Justice and Reconciliation Commission in South Africa 55 (Wilson 2001), was considered inadequate in responding to the question of human rights and justice in post–genocide Rwanda. In October 2012, twelve cases of Rwanda Genocide suspects had been tried in Belgium, The Netherlands, Finland and Switzerland.

Four other strategies have since been deployed as part of a mechanism for seeking justice for victims of the Rwanda genocide and to forestall any such future possibility. The four responses include: Domestic Criminal Courts, The Military Tribunal of Rwanda, Foreign Tribunals of universal jurisdiction and the Gacaca Courts. In total, there have been five dominant mechanisms for seeking human rights and justice in post-genocide Rwanda.

While the first four appear ordinary within the gamut of ‘era of human rights’, the Gacaca courts stand out as both innovative and ‘unique’ in the middle of the legalistic model of human rights. The Inkiko-Gacaca is said to be based on a traditional Rwanda form of community conflict resolution named gacaca after settling disputes while seated together “on the grass” (Sosnov 2008: 125). Unlike common courts or the Rwanda Tribunal, the Gacaca is said to be an open system that allows public participation in the selection of judges amongst inyangamugayo (persons of integrity) (Meierhenrich 2002: 2).

What is useful to note in this quest for human rights and justice in post-genocide Rwanda is the co-existence of various systems of justice in an era referred to as the era of human rights. On the one hand, one encounters the Rwanda Tribunal in Arusha and the ability of countries

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55 Although the TJRC in South Africa had a background from the apartheid regime, the use of TJRC has recently become integral part of Africa’s postcolonial legal modernity.
like Switzerland to use their jurisdiction to prosecute offences that occurred in Rwanda. This affirms Judge Kaul’s point about ‘international crimes’. Then on the other hand are the Military Tribunal and ordinary courts in Rwanda, and finally the Gacaca.

The entangled rather than bifurcated co-existence between Gacaca and liberal criminal justice models based on ‘different’ concepts of justice is of particular interest. Even in Kenya, there has often been talk of a local tribunal\(^{56}\) as an alternative to the ICC. What this means is that in the postcolonial era, Kenyans just like Rwandese people, therefore live their experience of human rights as both ‘citizens’ and ‘subjects’ (Mamdani 1996; 1998). They ‘marry’ almost all options in their quest for justice. This kind of marriage reflects the contradictions that are produced and that reproduce both human rights and subjectivity in postcolonial Africa.

The era of human rights is therefore ridden with anxiety where suspects can be put on trial outside their juristic countries (like Kenyans being taken to The Hague in The Netherlands and Rwandese being tried in Arusha or Geneva) and mechanisms like Gacaca being used alongside courts of common laws. What this combination suggests is that the era of human rights is not about interventions from ‘out there’, but rather one where central ideas of human rights are expressed within various historical and cultural contexts.

As shall be demonstrated in this thesis, although the era of human rights is essentially about the belief in the instrumentalist function of international human rights law, it is the failure of these very international human rights laws to restore rights and dignity to postcolonial societies like Rwanda (Grosvogui 2006: 180) that has led to a resurgence of institutions like Gacaca. The implication is that the various notions of human rights cannot be engaged as binaries but rather as part of a complete whole. This intellectual strategy has implications in narrating genealogies of human rights. It means that while it is important to understand the genealogy of human rights notions that have given rise to the ICC and the Rwanda Tribunal, their day to day operations cannot be understood without including debate of the Gacaca courts in Rwanda.

It seems to me that for one to engage with the idea and practice of human rights in the post colony, attention must be paid to scholarships on genealogies of human rights as ongoing theorization and production. To enable this, this thesis treats human rights not as a tool for

\(^{56}\) The Bill proposing the formation of local tribunals was debated by Kenya’s National Assembly and defeated on February 11, 2011. See www.kenyalaw.org
advocacy on behalf of some victims in Kenya. Rather, I engage human rights as a subject of ethnographic research as has been done by anthropologists such as Wilson (1997; 2001), Merry (2005) and Riles (2000). Such reading provides an opportunity to understand the dialectical practices of human rights in the postcolonial moment such as those apparent in the contested meanings and objectivity of human rights reporting and the inter-phase between Gacaca, legal redress institutions being enforced in Rwanda and experiences in Kenya’s postcolonial quest for human rights.

2.4. The Political and Legal Framing of Human Rights Discourse

Today, to use Michael Ignatieff’s (2002) expression, we live in an ‘era of human rights’ or what Louis Henkin (1990) described of the 1950s as the “age of human rights”. The triumphant claims were made after the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) on the 10\textsuperscript{th} of December 1948. A Chinese scholar, Zhao Tingyang, has responded to this triumphant claim by suggesting that:

There is no doubt that human rights are products of civilization, so they are endowed by culture rather than nature. They are not natural facts but cultural requirements, so they insist that people enjoying the rights be one in accordance with standards of morality and civilization (cited in UNESCO 1998: 138).

Tingyang’s assertion is an important aid in understanding the history of human rights as a product of a rather specific historical thought. What has remained unresolved in these narrations of human rights is clarity on the genealogy of human rights as understood in 21\textsuperscript{st} century modernity. Samuel Moyn, a professor of history at Colombia University, has been the latest to enter this fray. In his book, The Last Utopia (2010), Moyn argues that contemporary human rights discourse is more of a 1970s utopia rather than a project of Enlightenment (Moyn 2010: 39). The historian suggests that the universal ideas of rights gained currency during the presidency of Jimmy Carter in the US. In a sense, the idea of universal rights thrived by displacing the previous utopias like communism and hopes for collective self-determination.

His central thesis is that this idea of rights can only endure if it keeps to the utopic universal appeal which allows it to deal with ‘barbarisms’ such as genocide. While his invitation to take non-linear history more seriously is engaging, I found Moyn’s framework of thought rather restrictive and starved of contemporary ethnography.
In the end Moyn’s work opens a debate on the contemporary uses of human rights as an embodiment of global imperialism (Ibid.). I agree with analysts such as those that de-link human rights from “sacred modes of narrative” (Moyn 2010: 39) that is often written as church history. But to claim that the cradle of dominant discourse of human rights is a 1970s phenomenon is to deny its longer genealogy in Western thought, structural attitude and the West’s own project of becoming. Such denials may undermine our own focus of engaging postcolonial ‘epistemic dominance’ (Mudimbe 1994) and order of things imposed by the dominant notion of human rights.

Italian born political theorist Norberto Bobbio (1996) has organized the history of politico-legal history of human rights into three stages. These stages offer a lineage associated with the idea of rationality, neutrality and individualism as enveloped in notions of the European Enlightenment (Langlois 2001). Because this is a particular notion for human rights widely used in the 21st century and persists in state reports and United Nations language, I will refer to it in this thesis as the dominant notion of human rights.

Using Bobbio’s narration of rights, what was called human rights in the 1948 declaration is of the same lineage with the rights of man in the tradition of philosopher Thomas Hobbes (1588-1679), natural rights in the works of John Locke (1632-1704), God given rights in the works of St. Augustine (Odhiambo (1994 [1999]) and rights of citizens in the 1776 American Declaration of Independence and the Declaration of the Rights of Man and Citizens at the end of the 1789 French Revolution. Annex 2.1 has key historical moments often associated with the United Nations-centered human rights instruments and the various stages proposed by Bobbio (1996).

As histories of the above philosophical works would attest, the twinning of rights production and state formations were themselves not a natural occurrence in Europe and North America. Rather they had much to do with the fragmentation and persistent conflict that characterized the era of Western Christendom (Held 1995). Key amongst conceptual innovations that gained prominence in this process was the idea of individual autonomy and freedoms. The formation of modern European states was therefore to be based on the idea of rights that imported three elements namely: Hobbes’ idea of contract (seen through national constitutions); Locke’s idea

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57 There is an ongoing debate between the secular and sacred footprints of human rights see, Mahoney (2007), Orend, (2002)
58 The state in this context is understood from instrumentalist attempts to set fixed administrative institutions that operate and claim legitimacy of control over bonded boundaries (Chiweza 2005: 4).
of inalienable natural rights (seen through the link of rights with freedom and self-determination) and an abstract subject of human rights. Under these circumstances, assertions in post-enlightenment nation-state would no longer be a merely noble idealized demand. And so to return to Bobbio one can conclude that:

While it is true that the universality of human nature is an ancient concept, which suddenly appeared in Western history with the advent of Christianity, the transformation of this philosophic idea of the universality of human nature into a political institution, into different and in a sense revolutionary ways of regulating relationships between governments and the governed, only occurs in the modern age, through the theory of natural law, and it found its first significant expression in the declarations of rights at the end of the eighteenth century (Bobbio 1996: 66).

In this epoch, a dialectical relationship would emerge featuring the state which on one hand was considered the major threat to the rights of citizens (reading Locke) while at the same time the major guarantor (reading Hobbes) of rights hinged on the very notion of freedom and equity. This movement of natural rights and its idea of liberalism can also be found in writs associated with an English tradition such as the Magna Carta that was signed in England in 1215, The Petition of Rights in 1689 and Bill of Rights also in 1689 and habeas corpus (Villa-Vicencio 1992: 117). The discussion above shows that a genealogy of human rights based on European and North America political thoughts is one of displacement rather than some linear trajectory (Spivak 2004: 530). As with many genealogies, this history of modernity of Western notion of human rights is often a ‘messy’ political project with numerous political silences (Trouillot 1995).

In the 21st century, the Universal Declaration of Human Rights (UDHR) has been complemented by various human rights declarations and conventions fronting for human rights on numerous themes, interests and identity groups. As the UDHR was nothing beyond a broad statement of intent (although it has now become part of international customary law), members of the United Nations soon adopted two other conventions that were binding. These were the Covenant of Civil and Political Rights adopted in 1966 and came into operation on 16 December 1976, and the International Covenant on Economic, Social and Cultural Rights adopted in 1966 and put into operation from January 3, 1976.


60 This doctrine declares that if the government arrests someone, it is the government's responsibility to inform the person why they are being jailed. But most recent precedents in the US supreme courts seem to suggest that the doctrine can be used not just to make claims of individuals’ liberty but also a writ that can be used by the U.S. Supreme Court to enforce its right to proclaim the law; see Steven Semeraro, “A Critical Perspective on Habeas Corpus History,” http://ssrn.com/abstract=599141
The demarcation of the two conventions was by no means any natural flow of history. Rather it was a manifestation of historical and post-World War II rivalry between the United States (seen as the *de facto* leader of the “Western bloc”) and the Soviet Union and China known as the “Eastern Bloc”. In the eyes of Chinese scholars (a view shared by Soviet Union scholars at the time):

…civil/political rights and economic/social and cultural rights are interrelated and interactive, but the latter should be accorded (practical) priority over the former since the victory of socialist revolution has basically resolved the question of civil and political rights; their further development can wait until basic economic, social and cultural rights are secured (UNESCO 2008: 132).

The US and its Western allies contested this view and argued for the prioritization of civil/political rights which liberal legal scholars called first generation rights. The economic, social and cultural rights were then called second generation rights after 1975 while the right to development and environmental conservation which emerged last became third generation rights after the 1980s development and environmental movements. But there was yet another twist from the late 1960s that created another impetus for more specification of rights.

The grand claims stipulated in the UDHR and the two conventions were increasingly found lacking in articulating or sometimes reconciling the competing interests among the rights claiming groups. Identity politics and protest against asymmetrical conditions and power relations in national and global settings called for a sphere of rights that was more specific. Generational rights such as those focusing on youths, children and the elderly were developed. Then gender related rights led to the development of the Convention on the Elimination of All Forms of Violence Against Women (CEDAW).

The category of cultural rights and rights of the indigenous people has also endured. Within the United Nations system, this category of rights has been in development since the 1957 Convention on Indigenous and Tribal Populations. It is, however, in the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) that the indigenous and minority movements discussed by Dorothy Hodgson (2011) found an acclaim. This convention is often presented by human rights activists in Kenya such as those who work under the Centre for Minority Rights (CEMIRID) as the key reference point on the right to culture. The convention benefits from the many years of work by the United Nations Educational, Scientific and Cultural Organization (UNESCO) which has facilitated most debate on the right to culture. To make their case, UNESCO followed the success of another UN based commission the World
Commission on Environment and Development—and put together the World Commission on Culture and Development. The World Commission on Culture and Development’s *Our Common Diversity* (1995) report prepared by the World Commission on Culture and Development supported the ideas of the indigenous movements that have called for “mutual respect for and understanding of other cultures” (World Commission on Culture and Development, 1995: 9).

Numerous human rights conventions and instruments have since been proclaimed by the United Nations and regional bodies like the African Commission on Human and People’s Rights. As illustrated in Annex 2.2, most of these institutions have been accompanied by others specifically designed to ensure accountability and measure progress in realizing their list of pre-defined rights.

There is, however, one other bold step in making human rights a ‘currency’ for justice in the globalizing society. This has been the introduction of optional protocols as mechanisms for ensuring universal citizenship. Optional protocols to human rights treaties are treaties in their own right and thus open to signature, accession or ratification by state parties. Often, they have surrogate linkage to specific human rights treaties. Besides the role of clarifying procedure in the application of a treaty, optional protocols do guide UN institutions’ mandates to monitor various treaties in receiving complaints on violation of specific treaties. Of significance is that they provide an opportunity for citizens from state parties: “... the right to petition or the right to complain about violations of rights. Under all procedures, the complaints must be in writing”61. The optional protocols have therefore become yet another avenue for expanding the universalization of human rights. It is indeed this universalization that completed the last phase in the formulation of human rights.

The upsurge, hegemonic spread and establishment of the above idea of human rights is what some scholars have called the ‘human rights project’ (Makau 2002). As we shall see in chapter three, this spread is not just a post 1948 phenomenon. Chapter Three shows that British colonial administration working under the aegis of creating ‘responsibilized native citizens’, evoked notions of natural rights and natural justice to govern. There is no doubt, however, that the period between the 1990s to date has witnessed an upsurge in this ‘spreading the good news’ of human rights. Often, this spread has been read as uni-directional (in the classical center-versus-periphery relationship) thus evoking unprecedented reactions from observers and scholars of

different disciplinary backgrounds writing from Africa, Asia and Middle East. Of course the categories ‘Western’ and ‘non-Western’ have often been used in these discussions. I have avoided them here and where used, put in inverted commas to show that they are problematic. It seems to me that beyond their limiting bifurcation, these concepts tend to embody a particular conceptualization of culture as physically concrete and quantitatively measurable entity from which I distant myself. Where used in the subsequent sections, I would like to clarify that the divide is more about ideological locations and epistemic competition.

Makau (2002) has described this through a metaphor of ‘the victims’ (mostly in Africa and Asia); ‘Savages’ (mostly some governments in Africa and Asia) and ‘Saviours’ (mostly NGOs and governments in North America and Western Europe). Galtung’s work, *Human Rights: Another Key Word* (1994) also demonstrates the same genealogy of human rights. Like Makau, Galtung shows how the contemporary discourse of rights has been effective in ‘othering places’ using three focal points of a center, which is the west, a periphery, mainly the so-called third world countries, and Islamic countries (Galtung 1994: 13).

### 2.5 The Foot Prints School

In response to the human rights project surge to create a hegemonic global presence and singular claim of the West, a group of scholars has suggested that human rights have had a long history of existence in other civilizations and creeds. Through painstaking ethnography, these scholars suggest that ideas from Western societies can be found in 21st century human rights discourse or, at the very worst, in ‘non-Western’ societies which had equal ideas of rights. At the forefront of this strategy in seeking “African foot prints” (to use a term coined by Makau Mutua 2002) in human rights have been Makau (2002); Deng (2004) and Wiredu (2004). The project undertaken by Makau (2002); Deng (2004) and Wiredu (2004) (though politically sound to the extent that it aims to demystify the idea of Africa as a people without a history and the notion that their moral scripts are subordinate to those from Western societies) is evidence of how non-Western scholarships tend to justify their own traditions in the rights language of the dominant Western tradition.

Irrespective of one’s conclusions about justice and contemporary political thought, it must be recognized that the value systems from which human rights standards and instruments

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62 In the 1990s before and after the 1993 world conference on human rights it was the issue of Asian perspective of human rights as opposed to the Western perspective that deeply problematized the notion of a single list of universal rights. For detailed discussion on this debate see Langlois (2001).
dominant in the 21st century are drawn from Western political thought. As Chesternman correctly states, “…this dominance of human rights discourse operates in one of two ways: excluding Western political constructs as antithetical to ‘Other’ conceptions of human nature, or selectively including aspects of them, as in the case of fetishisation of development under the aegis of modernization” (Chesternman 1998: 1). For this reason, the political commitment to human rights grew after 1948 and even escalated at the end of the Cold War. National policies, international relations, religious creeds and beliefs, have all come to be evaluated and couched in the language of rights. To this extent human rights in our times have become the idiom and oxymoron that serves to give an aura of nobility to Western modernism.

Whereas most earlier works depicted a rigidly legalistic and immutable notion of human rights that left no room for ethnographies of the particular and a situated reading of human rights, thereby relegating located appropriation of rights language to inchoate, pre-modern ‘distortions’, 21st century scholarship work such as those of legal scholars, Bonny Ibhawoh (2006) and Makau Mutua (2002) insist that non-Western people like the Kamba, Igo, Akan and Nuer have footprints63 in human rights, even if informally. While there is value in this work that traces ‘African foot prints’ in human rights discourse, I think that the path is itself limiting as it tends to elevate human rights as the centre of any other possible moral value system. Rather than look for ‘foot prints’ of human rights in Luo scripts of personhood, this thesis pays attention to the discursive inter-phase such as those demonstrated here by the case of the Ocampo Six. With this approach, I engage with councils of elders and subjectivity practices like those displayed by the Ocampo Six as a network of ethical sources from which the reinterpretation of dominant notions of human rights might proceed.

While I find this scholarship that draws consonance with human rights discourse as developed in Western political thought a useful mechanism for self-determination, this thesis does not find it necessary to take a project of searching for possible consonance of ideas of European modernity in the postcolonial state. Rather, my interest is to engage the political philosophy of human rights within its unique history by documenting its manifestation in the much different postcolonial times and conditions.

63 The idea at one time tends to borrow from the idea of Kwame Appiah’s idea that human cultures have always been in contact. This position means that one cannot speak of human rights as a ‘pure Western’ idea. At a second level, the idea means that various other civilizations have notions of human rights that have consonance to the 21st century idea of human rights. Legal scholars who have tried to make this point include Francis Deng’s A Cultural Approach on Human Rights Among the Dinka (2001) and philosopher Kwasi Wiredu’s An Akan Perspective on Human Rights (1990).
2.6 Human Rights and Situated Personhoods

As postcolonial scholarship on human rights opens up deeper meanings of manifestations of human rights through notions such as Francis Nyamnjoh’s ‘domesticated agency’ and Sally Falk Moore’s (1992) ‘obligatory partnerships’, my project is a sum focus on questioning the mythical purity of either indigenous or so called Western values in defining the term human rights. To achieve this, this dissertation suggests that much time should be spent responding to the question of what the functions of human rights are rather than what the definition of human rights is. ‘What are the functions of human rights?’ is an ontological question that raises a deeper ontological inquiry into what makes cross-cultural communication possible (An-Na’im, 1992, 2002).

To keep this intelligibility, I suggest that we describe human rights as scripts of personhood meaning that they define who a person is (relational) and what the society ought to do (obligations) to accord them that status. Such intellectual strategy allows us to explore vocabularies that represent scripts of personhood in societies that are outside the Western world view. It also appreciates that scripts of personhood are often fluid, particular and situated.

Our readings of histories and manifestations of human rights then, become possible within an entangled location of emphasis that may look oppositional but as we have seen in the case of the Ocampo Six, provides opportunity for what Kymlicka (1995:62) has called “rich and secure cultural identity”. The dominant discourse of human rights ignores this multicultural context and presents its subject from a Eurocentric standpoint. From the Eurocentric standpoint the subject of human rights is a victim who is autonomous, legally conscious, rights claiming and atomistic (Makau Mutua 2002). Africanists like Wiredu (2004) have on the other hand expressed what they refer to as African political thought and a value system in terms of care, duty consciousness and characterized with conviviality. I do not find it meaningful to maintain these rather essentialist binaries or even to examine whether human rights as defined by the European criteria of value systems can be found in postcolonial Kenya. Rather, if one is to keep to the question: What is the function of human rights? The situated scripts of personhood that become manifest attest to a category of human rights subjectivity that transverses any single political thought.

This particular and situated script of personhood in postcoloniality has been described by Francis Nyamnjoh (2002: 112-13) as domesticated agency that has no fixed boundary between
self and other. Individuals and groups are more than contingent hybrids and self is defined against interconnectedness of persons. Also present in this subjectivity is a ‘vital force’ that is described by Temples in his *Bantu Philosophy* (1959). While Nyamnjoh’s work is based on fieldwork in Cameroon, similar findings have been established in this ethnography of Luos in western Kenya and by Sally Falk Moore in Tanzania from where she speaks of “Obligatory partnerships” (Moore, 1992: 14). Among Luo people this ‘vital force’ that embodies being and force is called *jok* (see Chapter Five of this thesis).

Engaging with this script of personhood in postcolonial Africa requires a cautious discussion. On the one hand, these discussions cannot be presented in terms of binaries between a ‘Western worldview’ versus a ‘non-Western worldview’. This is because such an approach would be denial of the conflicts and violent histories that have shaped postcolonial identities (Hall 1996) or the ever changing forms of scripts of personhood. On the other hand, we have to confront the critical question: Is there black intellect? (Ogot 2003). Confronting this question enables us to engage with the presumed primordiality and universal charter of human rights (Englund and Nyamnjoh, 2004: 103).

These are questions that benefit from middle grounds such as those suggested by Preis (1996). Rather than a hard stand taken by those who insist on binaries of the West versus non-Western or even those such as Kwame Appiah who have rejected the idea of black philosophy upfront (Ogot 2003:582), to engage with the notion of personhood, identities and production of human rights in the postcolonial, the character of the postcolonial (as a present that bears on the past as well as reflecting on the future) must be understood. Achille Mbembe has argued that:

>The notion “postcolony” identifies specifically a given historical trajectory – that of societies recently emerging from the experience of colonization and the violence which the colonial relationship involves. To be sure, the postcolony is chaotically pluralistic; it has nonetheless an internal coherence. It is a specific system of signs, a particular way of fabricating simulacra or reforming stereotypes (Mbembe 2001:102)

In its ethnography of human rights, this thesis takes into consideration such uses of postcolonial thought as well as those of feminisms (Mullally 2006) and cultural studies by Hall (1996). So the question remains, why has the Western modernity of human rights claimed the

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64 My reading is based on the English version that was translated in 1959. There has been far reaching criticism of Temples’ work for not being qualitative and its Eurocentric attitude. But Temples was not a philosopher. Rather he was a Catholic priest in the Congo who put together descriptions that others have called ‘African culture’ while others read it as ‘ethno-philosophy’. Whatever the limitation, Temples’ work (which I do not use much in this thesis) was useful in igniting debate on multiple genres of philosophy.
place of the most pervasive and celebrated notion? From our discussion in Chapter One, it seems that this is more of a political than legal or philosophical position (though of course the two support politics). And its politics seems centered on the project *consensus omnium gentium* evident in the works of Western philosophy giants like Habermas, Kant and Rawls who have worked towards establishing an ‘Archimedean point’ of universal rational foundations for both generalizable and cross-culturally intelligible norms that resulted in universality. This universalization process has been gradual but by no means linear and keeps being produced by processes such as the ICC.

### 2.7 Anthropological Formulations of Human Rights

Responding to a demand for a universal and cosmopolitan language, human rights has been presented by 21st century scholarship in legal studies as the foundation of the modern society (Langlois 2001, Agamben, 1998). As I have shown, the dominant discourse of human rights often displays a genealogy that is closely linked to the emergence of the post-enlightenment nation-state in Western civilization (Cowan et al., eds., 2001). The spread of this dominant notion of human rights is often expressed within dualities such as ‘us’ (referring to Western) and ‘them’ (referring to non-Western).

Indeed in 1947, just when the campaign for a universal declaration of human rights was at its highest point, Anthropology’s fraternity through the American Anthropologists Association (AAA) issued a statement warning against the hegemonic structure of UDHR and its potential to further imperialism (AAA 1947: 539). Karen Engle, a law professor, has talked about how this 1947 statement which was interpreted as a rejection of a universal notion of human rights has brought ‘shame’ to the discipline of Anthropology. In essence, the statement seems to have taken too far Franz Boaz’s concept of cultural relativism. The general fear by cultural relativists was that endorsing a universalizing concept would lead to renewed colonization and domination of non-Western societies under the guise of implementing human rights.

But as early as the 20th century, conceptual analyses based on dualities like Western/non-Western, culture/human rights, traditional/modern, object/subject and many others came under heavy critique (Bhabha 2004, Butler 1997, Chanock 1985). As a response, entangled

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65 Although this injunction which subordinates ‘them’ from ‘us’ is as old as the history of European knowledge, it has been re-affirmed in the war against terror declared by the 43rd President of the United States, George Bush, after the September 11 attacks on the Twin Towers.
concepts such as ‘nature-culture’, ‘hybrids’, ‘hyphenated identities’, ‘halfies’ and ‘creoles’ are deployed by Bhabha (2004), Caglar (2001), Abu-Lughod, (1991) and Butler (1997) to move analysis beyond these dichotomies.

The above authors engage the conventional nature and political effects of dichotomies which tend to perpetuate hierarchies and asymmetrical power relations created by social science scholarship and Eurocentric modernity like the United Nations-based human rights discourse. It is worth noting that while judicial actors like Judge Kaul (in the Ocampo Six) see the “gravity of crime” as demarcating that which is universal and particular, everyday practices still treat culture as the borderline. For anthropology, it was the now obsolete dichotomy between ‘culture’ and ‘rights’ that for long demarcated how the discipline engaged with both the practice and discourse of rights (see Mamdani 2000). Mamdani’s work and essays in the volume Beyond Culture and Human Rights Talk (2000), is useful in moving beyond the kind of notions that presumes that ‘culture’ on the one hand and ‘rights’ on the other hand are clear categories with fixed contents often used to create boundaries such as those between culture and human rights. Mamdani and other contributors to this volume observed that such presumed dichotomies between ‘culture’ and ‘rights’ are often fictional or situational acts of resistance to hegemony. The central argument in the book is that both culture and rights are moving targets such that ‘rights talk’ in the context of struggle is, like ‘culture talk’. This discursive ambiguity (Crenshaw 2000) evident in the way the Ocampo Six responded to sermons in the Hague has generated renewed engagement between anthropology and human rights.

The late 1990s however, has seen a major trend that constitutes a break with the dominant view of earlier literature and practice of human rights in postcolonial Africa. On the one hand, there is the emergence of scholarship that engage with both human rights (as a subject of legal and political studies) and as culture (as a subject of anthropology) (see Wilson 2001; Englund and Nyamnjoh 2004; Becker 1995 and Merry 1997). On the other hand there is the emphasis on instrumentalist use of human rights in popular protest and on the subaltern as a political actor that often appropriate and remake human rights discourse to respond and make intelligible different situations, contexts and positions such as the ICC case against the ‘Ocampo Six’. Most notable here is the indigenous and minorities’ rights movement (see Hodgson 2011) where ‘minoritization’ deploys essentialist notions of both human rights and

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66 Human rights in this sense is used to advocate for rights of ‘victims’ and is a template for writing reports for national and trans-national audiences. In this perspective human rights is evaluated according to its usefulness in solving actual problems of digression from ‘the norm’.

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culture (Cowan 2001: 157).

In anthropology, this rethinking of 20th century liberalism dates back to the revised response to human rights by the American Anthropologists Association in 1998. Unlike their 1947 statement where the president of the Association, Melville Herskovitz (1947) (influenced by Franz Boas’ thoughts dominating American anthropology at the time) challenged the universal claim of the Universal Declarations of Human Rights (AAA 1947: 539), there were numerous discussions in 20th century disputing this tension between human rights and culture (Engle 2001). Later in 1998, the AAA released yet another statement to express its relationship with human rights. The 1998 statement was more open to endorsing international human rights standards and emphasized that the concern of the AAA was that human differences should not form the basis of denial of basic human rights nor should the idea of rights ignore the totality of ‘the human’ that includes the cultural, social, linguistic, psychological and biological (Anthropology Newsletter, September 1998:9).

The emergence of ‘multiculturalism’ and the ‘politics of recognition’ perhaps has been the most pressing invitation for anthropologists to engage more on the subject of human rights. Research by numerous scholars like Will Kymlicka (1989, 2007), John and Jean Comaroff (2001), Terence Turner (1993), Francis Nyamnjoh (2002, 2004), Peter Geschiere (2009) and cultural critic Stuart Hall (1996) have expanded the concept of culture and uncovered debate about rights, culture and citizenship in previously unexamined spaces and perspectives of Postcolonialism.

The result has been the opening of postcolonial scholarship that departs from the formulation of oppositions between ‘culture’ and ‘rights’ to one in which human rights is itself pursued as a cultural process which manifests in its located subjects and subjectivities in multiple and contradictory ways (Cowan et. al 2001: 3 and Mamdani 2000). In an edited volume Culture and Rights: anthropological perspectives (1997), Richard Wilson and numerous contributors detail particular ethnographies that illustrate the malleability and diversity of both rights discourses and practices and their implications for the realization of justice and peace in the postcolony.

67 This statement was widely influenced by Melville Herskovitz's understanding of both culture and relativism at the time. Culture was widely perceived as characteristic of small, bounded people who had been conquered by America. See Sally Merry, Changing Rights, Changing Culture (2001).
The authors suggest the contribution of anthropology as a discipline and practice to the discourse of human rights as restoring local subjectivities, values, memories and wider global social processes and human–life worlds (Wilson 1997b: 157). This invitation to take human life worlds seriously has become a major tenor in both the study of culture as well as human rights in the 21st century. Its contributors include Fabian (1983); Bhabha (2004); Cowan, Dembour and Wilson (eds.) (2001); Englund and Nyamnjoh (2004); Becker (1995); Merry (2003) and many others. This research is a further contribution to the scholarship that takes life worlds more seriously in representation of human rights.

2.8 Human Rights Movements in the Postcolonial Era

The postcolonial practice of human rights developed in this thesis is seen in the images such as those of Madote in Chapter One and the ICC narratives discussed at the beginning of this chapter. It suggests that in exercising their domesticated agency, postcolonial subjects tend to mobilize their multiple identities not to emphasize distinctions such as ‘rights’ and ‘culture’ but rather to increase their threshold for justifying claims. Having realized that their cultural, civic citizenship, religious and other social narratives are mutually implicated, subjects of human rights in postcolonial Kenya question and work against pre-conceived distinctions such as ‘culture’ and ‘rights’. Such questioning of boundaries is crucial in promoting a situated reading and narration of practical manifestations of human rights in the post colonial era.

Articulating a universalistic standard through institutions like the ICC then involves shifting our theoretical focus from standardized ‘measurement systems’. I focus instead on how through domesticated agency, subjects of human rights not only create novel re-signification, but also present and enable a review of human rights in its situated location and resulting power relations. As anthropologist, Ann Belinda Preis (1996) has observed in her work in Botswana, the postcolonial is characterized by disagreements on both ‘human rights performance’ and ‘the culture of human rights (its meanings, practices and symbols)’ (Preis 1996: 309). This means that just as anthropologists have abandoned the ‘old’ perspective of culture as ‘something out there’ that is often bounded, static and homogenous (see Cohen 1974, Macdonald 1993, Morley and Chen 1996), human rights scholars and observers must now pay attention to a similar malleability that characterizes human rights in the postcolony. I develop this later by suggesting three strands around which a history and critical practices of human rights in the postcolonial era can be organized.
These strands are not a refutation of the pedigree of dominant notions of human rights in Western epistemology and political thought. Rather it is both an intellectual and political attempt at organizing and making intelligible postcolonial manifestations of human rights identified in literature and everyday practices. The three are the pluralism movement, anti-imperialist movements and postcolonial identity movements. I must clarify upfront that my selection of these three movements to which anthropologists have offered most empirical and analytical arguments (Englund and Nyamnjoh 2004: 5) is by no means a return to an era of name calling (Ibid.:4) and labeling. On the contrary, it is an effort to appreciate the various strands, perspectives, situations, inter-subjectivities and sometimes standpoints from which the idea and practice of human rights has been engaged in colonial and postcolonial Africa. Moreover, underwriting genealogies of human rights from postcolonial categories is an attempt to shape human rights from our own location and uncover political silences in vocabularies of modernity.

2.8.1 The Pluralism Movement

Proponents of the pluralism movement argue that there are numerous context specific notions of social institutions such as religion, law, politics as well as value systems. The movement gained root under the epoch of liberalism which in the academy found expression through cultural relativism (Clifford 1986). The pluralism movement was perhaps amongst the first to critically engage with the ‘arrival’ of human rights in Africa. As already noted (and shall be emphasized more in Chapter Three), the human rights idea whether introduced by missionaries, new converts or the 21st century NGOs, has often been accompanied by certain notions of ‘cultural superiority’ (Said 1993). Of course such notions of ‘Western cultural superiority’ and attempts at cultural universalizations are not absent in the so called non-Western societies themselves. This has been well demonstrated by philosopher Kwame Appiah’s Cosmopolitanism: Ethics in the World of Strangers (2006). Appiah invites us to engage with cultures as systems that have enormous internal competition and energy for cross collaborations rather than the common image of antagonistic relationships (Appiah 2006: 90). But the dominant thinking in Anthropology during colonial times informed by British

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68 Competition for academic division of labour and perspectives has often led to development of various schools of thought more so in paradigm disciplines for instance- see Barrett (1988: 54). Although anthropology is not a paradigm discipline, it has had perspectives so strong that there are moments that some practitioners are referred to as functionalists, evolutionists or relativists. An inter-disciplinary and sometimes trans-disciplinary tradition have recently made such labeling unnecessary as one desires to capture a holistic picture of a research question.
functionalism was that ‘cultural contact’ would undermine the pristine ways of life by the ‘natives’ and their social systems (Kapur 1987 2006, Stocking 1985).

Anthropologists therefore undertook ethnography to present these particularized ways of the natives’ social and political systems (see Fortes and Evans-Pritchard 1940) to demonstrate that the natives’ world view and modus operandi was as rational as the colonial legal, political, and social models and that the civilizing agenda was nothing more than imperial hegemony. Functionalism wanted the ‘tribal’ ways preserved through documentations and ‘protection of culture’. In extreme cases like South Africa, this functionalist notion was implemented through the political project of apartheid (Bennett 1995: 23).

Much detailed ethnography that has informed this movement was undertaken in parts of Southern Africa with Max Gluckman (1969a, 1969b) and the Manchester School as the pioneer. Gluckman posed questions such as: Do non-Western societies have laws? Is the Law certain? Is rationality universal? Bophuthatswana (currently Botswana) seems to have been some sort of ‘experimental house for this movement’. Max Gluckman, who lived in Botswana between 1940 and 1947 and undertook studies amongst the Lozi developed detailed discussions that demonstrate the existence of a Lozi legal system.

Gluckman spent time around kuta (the heads of the Lozi court) and documented sixty-five selected cases that demonstrate the feasible and competent courts among the Lozi people. After extensive fieldwork, he organized the results of his work into two major volumes: The Ideas of Lozi Jurisprudence (1969) and The politics, law and ritual in tribal society (1965). Apart from an elaborate demonstration of how the Barotse legal and rights regime is organized, the volume suggests that some of the key concepts in ‘Western’ legal jurisprudence can be found among the Barotse (Gluckman 1955). These are the concepts of ‘Natural Justice’ and the ‘Reasonable Man’. In separate essays, Gluckman further developed the two concepts and in Natural Justice in Africa (1964) argues that:

Africans always had some idea of natural justice and of a rule of law that bound their kings even if they had not developed these concepts in abstract terms. Their failure to do so is accounted for by

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69 Paul Kegan International, in association with the International African Institute have reissued a paperback version of Myers Fortes' and E.E. Evans Pritchard's African Political Systems. First published in 1940, the original work brought together Britain's most prominent social anthropologists, each writing on a single indigenous African political system. Contributors included Myers Fortes, writing on the Tallensi, E.E. Evans-Pritchard, writing on the Nuer, Max Gluckman, writing on the Zulu, and Audrey Richards, writing on the Bemba. Ian Schapera added a chapter on the Ngwato, K. Oberg on the Ankole, S.F. Nadel on the Kede, and Gunther Wagner on the Kavirondo. Radcliffe-Brown contributed the preface, while Fortes and Evans Pritchard wrote the introductory chapter. See http://findarticles.com/p/articles/mi_qa3821/is_199710/ai_n8762850/

70 See also: Bibliography Tswana http://www.everyculture.com/Africa Middle East/Tswana Bibliography.
their lack of writing; a written language is to a certain extent necessary if people are to elaborate conceptions into some kind of theory (Gluckman 1964: 33).

After studying arguments and verdicts given by *Kuta* in most cases, Gluckman further concluded that rather than seek to declare who was right or wrong, the courts undertook an approach of restitution and restoration of social relationships (Gluckman 1964). Judgments by *Kuta* stressed the importance of Lozi people living together in loving kindness, generous, helpful and reciprocal relations. To develop the concept of the Reasonable Man on the other hand, Max Gluckman makes reference to his involvement with the Zulu and Lozi. The concept ‘reasonable’ is indeed a central register in measuring ‘normal’ humanness in the discourse of European political philosophy. It is considered as a pre-social concept and Article 1 of the Universal Declaration for Human Rights states that “All human beings are born free and in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”. Gluckman has used the case of *Mutebele vs. Saywa* commonly referred to as ‘The case of the violent Councilor’ to illustrate the notion of ‘reasonable man’. In an essay analyzing the case, Gluckman (1942) illustrates how the idea of reasonable man among Lozi people becomes evident in both cross examination and judgment, depending on the social position of the parties.

The question therefore (based on the case of the violent councilor) becomes, not just whether Saywa and his children committed the alleged assault but, also, did Saywa conform to the norms of his office? To these propositions, Gluckman concludes that:

Wherever he did not, his departure from institutionalized behavior counted against him and helped discharge the complainant’s burden of proof...customs which are not legal rules, the sense that *Kuta* will enforce conformity to them or penalizes the failure to observe them, becomes this way indirectly enforceable at law (Gluckman 1955: 94).

The importation from the findings by Gluckman is that Lozi people hold that there are certain expectations which are customarily incumbent of particular social positions and identities. This kind of explanation in Loziland then begs the question: ‘Was Saywa a reasonable *Induna*-chief?’ The implication of this kind of question is that one can sustain a legitimate claim that there exists an idea of what is the right thing to do depending on one’s social position and situation in Loziland.

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72 *Mutebele Vs. Saywa* ( R 27), Saa-Katengo Kuta at Lialui, August 27, 1942
Note should be taken however that the subject of debate here is not just what is right. Gluckman demonstrated through the court cases that the critical subject in Loziland is also about what each Lozi person is entitled to because other members of their society have certain obligations. With this kind of ethnographic strategy, Gluckman was successful in demonstrating that ontological strategies that characterize notions of law and morality in Western discourse and jurisprudence can also be found in non-Western societies.

A similar strategy of demonstrating parallel ‘legal and rights’ discourse is evident in Isaac Shapera’s work among Kgalain of Botswana. Apart from the acclaim of creating ‘the Tswana’ as homogenous and a bounded category of study, Shapera, right from his doctoral research in the 1920s, confronted the missionary and colonial anthropologists’ idea of ‘evolution and diffusion of culture’ through nuanced work which demonstrated that particularized and rational ideas of order and moral codes can also be found in non-Western societies.

The results of Shapera’s work were later published in A Handbook of Tswana Law and Customs (1938) that is widely used by administrators, judicial officers as well as anthropologists. Years later, Shapera’s student, John Comaroff, would take the same pluralism strategy in his doctoral dissertation and published ethnography, Rules and Rulers (1978). In East Africa, colonial administration (learning from these early trends) commissioned sociologists and legal practitioners to develop Customary Law handbooks parallel to European common laws that became useful in implementing indirect rule. Examples in Kenya include Eugene Contran’s The Law of Marriage and Divorce, vol. 1 (1968), The Law of Succession, vol. 2, and Restatement of African Law: Kenya (1969).

In postcolonial Africa, the pluralism movement has been given impetus by the upsurge of neo-liberalisms. The movement has had two missions. First, it has problematized the universalism of the language in which moral codes and value system debate is frequently

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73 This distinction between ‘what is right’ and ‘human rights’ is useful. Human rights are about power relationships while ‘what is right’ just makes reference to what is appropriate.

74 This notion of particular is influenced by the thinking of Franz Boaz’s theory of historical particularism. Boaz argued that the assumptions that cultures could be scaled necessarily carried within it the idea of superiority and inferiority. He posited that to the contrary, no culture was better or worse than the other (see Barrett 1984: 41).

75 The initial focus of multiple egal jurisprudence was exploring notions such as reasonable man and rationality in non-Western traditions. The movement on legal pluralism that has emerged most recently has paid attention to decentering the idea of law from the state. They argue that law is not simply a product of state decree but rather a product of social interactions and everyday contestations. See Nader, Laura. The Life of the Law: Anthropological Projects (2002).
conducted. Postcolonialism as we see in the response of the Kalenjin Council of Elders to the case of the Ocampo Six has focused on entanglements of dominant discourse of human rights with situated notions of personhood. The second focus of postcolonial thinkers in the pluralism movement has been its tolerance for parallel co-existence of modernities. As a political project, neo-liberalism is tolerant and accommodative to multiple images and practices of identity. More important, uncertainty of the postcolonial has opened numerous other frontiers (moving beyond distinct ‘culture’ and ethnic identities) that claim recognition in the ever contested postcolonial state and neoliberal times (Geschiere 2009, Kymlicka 2007). Claims such as those of minority groups, indigenous communities, gender, and class amongst many others continue to call attention to a both specialized and situated genre of rights.

These have been covered in detail in Rights and the Politics of Recognition in Africa (2004) edited by England and Nyamnjoh. Most recently, anthropologist Dorothy L. Hodgson’s work among the Maasai of Tanzania has resulted in a detailed ethnography, Being Maasai, Becoming Indigenous (2011). Hodgson (2011) illustrates how contemporary politics of recognition is being practiced through the indigenous people’s movement that has wide support from both Tanzania-based NGOs and international human rights organizations. Like feminisms, the indigenous rights movement has sometimes called for a ‘new’ list of rights for indigenous people while other times they have called for the existing list of rights to apply to their unique character and situations. Despite its limit of ignoring multiple identity affiliations and perpetuating often mythical distinctions such as that between ‘insiders’ and ‘outsiders’, pluralism movements and feminisms produce a different genre of rights in the postcolonial.

The pluralism movement must be merited for its efforts in creating an understanding of human rights in both colonial and postcolonial Africa that is differentiated and situated (Mullally 2006). Indeed it has acted as a buffer between the often hegemonic and totalizing nature and multiple notions of human rights practices. More recently, the movement (as we shall see in the discussion of the inter-subjectivity movement) has tended to abandon its dichotomous outlook (Wilson 2001: 125). Some of its pioneer members like John Comaroff are now adherent

76 This does not mean that the pre-colonial or colonial moment were more certain. It is nevertheless the tensions of reading the present through the past and the past in the present and ever changing economy of knowledge about Africa that has become more glaring. For a detailed account of these dialectical snares in the politics of knowledge production and dialectics of certainty and uncertainty, see Cohen and Odhiambo (1990) while for in-depth discussions on postcolonial uncertainties see Werbner Richard’s Postcolonial Subjectivities in Africa (2002).

77 Liberal feminisms are concerned with issues of multiple opportunities rather than radical feminisms which are more concerned with structure and power that has tended to take this path. See Karen Engle (1992). Female Subjects of Public International Law: Human Rights and the Exotic Other Female. New England Law Review 26(1509) 1513–15.
supporters of a perspective that pays attention to the complex relationships between human rights and notions of personhood, values and morality that exist in societies such as that of the Lozi people.

2.8.2 The Anti-Imperialist Movement

The human rights idea that I call anti-imperialist movement is explicitly stated by legal scholar Bonny Ibhawoh in his book, *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History* (2006). Amidst frequent claims to link 21st century human rights and 19th century natural justice and rights language with imperial rule (constructing an antagonistic relationship between ‘West’ and ‘Africa’) (Ibhawoh 2006), this relationship has been more oscillatory than unidirectional. Ibhawoh underlines the need not only to see human rights as constitutive of contemporary states and Western influence, but also as a language that has been used in the anti-imperialist movements from 20th century Africa. We shall see in Chapter Three that the use of rights language for imperialist rule and as rhetoric of anti-imperialist movements is not mutually exclusive. The place of human rights in Africa is mediated with various modes and economies of knowledge production.

The language of rights has at one time been used to dominate and to ‘other’ Africa while at other times it has been appropriated and recreated by the ‘othered’ to wrestle state and social power. In colonial Kenya, rights language was used to colonize as illustrated in the writings of colonial lawyer, Arthur Phillips (1944). In 1943, the British Colonial Chief Secretary in London appointed Phillips, Crown Counsel78 to investigate the workings of the Native Tribunal system in Kenya. In his report after the 1943 extensive tour of Central Kavirondo, Arthur Phillips cited the memorandum submitted to him during the said tour by C. H. Williams, District Officer (DO) of Central Kavirondo. The memorandum focused on the changes required to make the Native Tribunals meet the colonialist standards. Pressing for urgent reforms of the Native Tribunals, Williams submitted:

> I see no alternative to the tribunal system at the present time. But I am not satisfied that the personnel is as good as it might be. I should like to see more really educated natives amongst them, capable of attending and absorbing a simple course of criminal law and procedure, and the law of evidence...I would consider this the first step in the appointment of African magistrates who must, in the course of time, supersede the tribunals. The whole matter is of some importance and urgency, in view of the fact that at the end of the war, much travelled askaris (meaning African

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78 Phillip was later appointed as Judicial Advisor in 1948 a role from where he oversaw the implementation of most of the ideas in his report.
soldiers) will be returning, who will bring new viewpoints and intelligence to their litigation (Cited in Phillips 1944: 27-8).

The anxiety expressed by Williams above, confirms Martin Chanock’s (1985) observation of how England based laws and judicial structures in the rhetoric of natural justice were used as instruments of colonization. Arthur Phillips himself noted in the report he wrote after these extensive visits that in South Kavirondo, the Young Kavirondo Taxpayers Associations had petitioned him to allow for ‘Vakils’ (Lawyers) to represent natives at the tribunals (Ibid.: 15). Indeed in this period between the 1940 until 1960s colonial Kenya, the language of ‘natural rights’ and ‘natural justice’ had superseded the initial forms of ‘cultural resistance’ as the language of demanding an end to colonial domination and justice for the Africans.

The appropriation of the 1940s human rights discourse in Africa on the other hand is illustrated in Bonny Ihawoh’s discussion on the implication of the Atlantic Charter for the movement that spearheaded political reforms in the Nigerian colony. The eight points Charter was at its publication never meant to be anything beyond a press release at the end of a meeting between the British Prime Minister Churchill and the US President Roosevelt on August 14, 1941. Days after the statement was released its support for ‘sovereign rights’ inspired a quest for freedom by many colonized states (Ibhawoh 2006: 151). As events in the Kenya colony attested, it is not just the Charter that sparked anti-colonial movements.

The language of rights and its liberation potential was already well within the ‘toolkit’ of African elites. After all, even before the 1948 declaration, the notion of natural rights (as we shall see in the next chapter) had already been in use in Kenya by colonized Africans and European colonizers alike as was the case in many other colonies in Africa.

Yet in the immediate period after independence, the human rights discourse ceased to be part of the nationalist discourse in most African countries (Halsteen 2004: 103). The focus on the ‘national project’ or Kenyanization as it was labeled in Kenya, called for a return to African Culture (Nyong’o 2007; Hall 1980). These externalizations of human rights language after

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independence became the bastion from where human rights organizations (commonly known as civil society) later emerged (See Comaroffs 1999, Shivji, 2007). At that time (as we shall see in details in Chapter Four) human rights was not part of official state policy in Kenya.

Later from the mid 1980s onwards, the campaign by civil society organizations, academics and religious leaders in Kenya’s postcolonial state was that the state should adopt human rights and its dictum of ‘rule of law’ as its official modernity programme (Mutunga and Mazrui 2002). In the 1990s the genre of human rights, widely regarded by the state as subversive, had been produced to galvanize the middle class mainly in urban centers in their agitation for open government described as transparent, accountable, multiparty and free market.

This tide of human rights brought together trans-national human rights organizations such as Amnesty International and Human Rights Watch, local NGOs such as the Kenya Human Rights Commission and European countries (more so Scandinavian countries) (Schmitz 1999). Envisaging an eminent collapse of the cold war, the Bretton Woods institutions, were quick to seize the language of rights in demand for liberal democracy and economic liberalism alongside the transnational and national human rights advocates. In return, presidents of one party state who had until then maintained colonial, social and political organization, like president Daniel Toroitich Arap Moi of Kenya and Mobutu Sese Seko of Zaire, labeled the human rights idea alongside other IMF/WB reforms as imperialist (Makau 1996).

It is however in the 21st century postcolonial state that the association between human rights and imperialism has acquired multiple polemics. Critical legal scholars like Makau Mutua have drawn attention to the intrinsic link between the current (meaning in the uni-polar world) human rights discourse and power (Makau 2002). Predominantly, human rights has become both part of foreign policy of the United States of America and instruments used by International Civil Society Organizations from the ‘West’ (Makau 2002: 38).

While not calling for an undoing of human rights, Makau has argued that the dominant version of human rights in the 21st century has much flavor of the US foreign policy whose imperialist interest it perpetuates (Ibid.: 58). Postcolonial feminist scholar, Ratna Kapur, is more explicit in linking human rights discourse to imperialism. In her now widely circulated essay, Human Rights in the 21st Century: Taking a Walk on the Dark (2006), she asserts that

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81 Today Human Rights is part of state policy and a modernity programme in Kenya. Details on how this developed will be provided in Chapter Four.
human rights foundational claims as a progressive, forward looking, universal and commitment to liberal subject and security of sovereign states is based on its desire to ‘convert’ or ‘save’ the cultural ‘other’ (Ibid.: 675 ). This has become clear in the interventionist actions of the West and the US on the eve of an elusive and non-legal war on terror after September 11 (Ibid.681).

Kapur’s advice to scholars and advocates of human rights is to reflect on new imaginings and cosmologies that could inform and define the field of human rights (Ibid., 686). Similar observations have been made by anthropologist Lila Abu-Lughod in an article that poses the questions: Do Muslim Women Really Need Saving? (2002). Like Kapur, Abu-Lughod decries the kind of production of knowledge about Muslim women in Africa and the Arab world.

These images of Muslim women are widely based on orientalism, analogical history (Cohen 1998) and the othering machine inherent in human rights discourse. Abu-Lughod’s counsel is: “The reason why respect for difference should not be confused with cultural relativism is that it does not preclude asking how we, living in this privileged and powerful part of the world, might examine our own responsibilities for the situations in which others in distant places have found themselves” (2002:789).

While Kapur (2006) and Abu-Lughod (2002) speak of the need for ‘new’ imaginings and cosmologies of human rights, scholars like the Tanzanian scholar Issa Shivji (2007) have in the last two decades made contributions towards redefining human rights from a ‘class perspective’ to enable postcolonial struggles such as those of land redistribution in Tanzania. At the same time, those who were tortured and humiliated under colonial rule have developed new imagination of rights and used it to make claims against the former colonizers (Comaroff and Comaroff 2006). Perhaps it is the way this paradox is playing out in contemporary Kenya that best illustrates the multiple productions of human rights in what I have called the anti-imperialist movement.

On the one hand, when the Ocampo Six were charged by the ICC, the Government of Kenya


83 John and Jean Comaroff have called this ‘the heterodoxical paradox’. John and Jean Comaroff. 2006. Law and Disorder in the Postcolony: An Introduction. In Law and Disorder in the Postcolony (pp. 46 55)

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made energetic attempts to un-sign the Rome Statute so as to stop their trial (Ocampo Six) at the ICC in the year 2011. One reason given by members of parliament in support to un-sign was that the ‘ICC is “colonialist” and “imperialist”’. On the other hand, on July 21 2011, the High Court of the United Kingdom in London declared that the Mau Mau War Veterans had a case to sue the UK government for atrocities committed during the colonial rule. The Mau Mau representatives and their UK based lawyer, Martyn Day of Leigh Day and Co. Solicitors, later met with the Prime Minister of the Republic of Kenya on September 2 2011 who promised to ‘initiate serious consultations in Cabinet to ensure the government comes to the aid of the Mau Mau war veterans who are seeking compensation from the British’.

Fig 2.1. The four Kenyans who were given the go-ahead at the high court to sue the British Government over alleged colonial atrocities committed during the Mau Mau uprising. Photograph: Dominic Lipinski/PA

2.8.3. The Inter-subjectivity Movement

The inter-subjectivity movement refers to the literature and practices that offer situated and domesticated agency of human rights. It responds to recent questions on how human rights are experienced in the post colony. At a clearer formulation, the question has been: Who is the subject of human rights? In the background of the genealogy of human rights given earlier,

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84 See http://www.africa-confidential.com/article-preview/id/3796/ICC_has_Kenyan_politicians_on_the_run

85 The ‘Mau Mau’ organization had its epicenter in central Kenya. Its account and situatedness of the war which was intensive between 1952-56 varies. While most historians refer to it as ‘Mau Mau disturbance’ (see Anderson 2005: 238) to give its postcolonial meaning of subversive human rights and meaning in creating human rights, I shall refer to it as ‘Mau Mau rebellion’.

86 The [Mau Mau] claimants seek damages for personal injuries that they sustained. The proposed claims are based on the tort of negligence. It is alleged that the United Kingdom Government is liable not only because of the faults of the Colonial Administration in Kenya but directly for its own failure to take any or certainly any adequate steps to prevent the widespread use of torture that it plainly knew was being perpetrated in its name (see Letter of Claim addressed to The Secretary of State, Foreign and Commonwealth Office, dated October 11, 2006).

there can be no single response to this question. The concept ‘Right of Man’ as used by Rousseau and Locke (see Odhiambo 1994, 1999) for instance was more abstract and idealized than the ‘citizens’ rights and ‘rights of Man’ claimed in the post American and French Revolutions (Bobbio 1996).

Scholars and activists reading human rights from a position of historical materialism for instance, have suggested that the ‘human’ whose nature Locke was talking about was that of a bourgeois or merchant of the 13th century England (Said 1993). The UDHR which is a late comer in the rhetoric of rights is explicit on the notion of Reasonable Man. The subject of this idea of rights is an individual who is an atomistic unit of the society (Makau 2002). As John and Jean Comaroff (1999) have asserted, the dominant ideas of human rights in the 21st century tend to trumpet an uncompromising autonomy of the individual who is right bearing, physically discrete, market driven and materially inviolate. This idea of the subject of human rights has long been critiqued by observers and scholars. Feminists have argued that the dominant concept of human rights is not just ‘male’ but also male focused, centered and driven (Mullally 2006, Engle 1992: 12). Anthropologists, under the auspices of the American Anthropological Association’s (AAA) politically engaged statements in 1947 and 1999, had long posed a caution against a ‘universalized idea of human’ (AAA 1947, 1999).

It is, however, in the postcolonial era that the manifestation of the contemporary subject of human rights has become more apparent. Once again, it has been a situation of paradoxes where ‘the past’ and ‘the present’ are not deciphered and lived separately, but entangled into identities that are both autonomous and interconnected. Cameroon born anthropologist, Francis Nyamnjoh demonstrates this in his ethnography in Grassfields in Cameroon about which he wrote an article by the title, A Child is One Person’s Only in the Womb (2002) and on Bostwana’s otherwise flourishing liberal democracy in Reconciling ‘the Rhetoric of Rights’ with Competing Notions of Personhood and Agency In Botswana (2004).

Nyamnjoh’s findings in the Cameroonian Grassfields complement his earlier works where he questions the individualized and universalized notion of agency promoted by European political philosophy. Nyamnjoh demonstrates how the survival of the institution of fondo chieftainship has been made possible through a process of both traditionalization of modern institutions like parliament and modernization of the institutions of fondo (Nyamnjoh 2002: 111-145). It is, however, Nyamnjoh’s account of identity and subjectivity in the postcolonial that is most
profound. He speaks from his own standpoint of some sort of identity crisis. From that position, he demonstrates that identity in the postcolony is a manifestation of ‘modern’ and ‘traditional’, ‘citizen’ and ‘subject’ (Ibid.: 128-29). These negotiations demonstrate connections of ‘peoples, cultures, and communities’ (Nyamnjoh 2004: 36).

In the case of Botswana, Nyamnjoh (2004) demonstrates how although touted as a flourishing liberal democracy in Africa, the rhetoric of individual autonomy and rights is pursued side by side with contestations of who an authentic ‘Motswana’ is (Ibid.: 54). From Nyamnjoh’s ethnographies, solidarities and worldviews, often characterized by pre-colonial Africa therefore tend to manifest in equal measure within modern democracies in the post colonial era. In this regard, the agency of the subject of human rights in the post colonial era is manifest in interdependence and inter-subjectivity rather than dependence and independence (Nyamnjoh 2002:111).

Agency in this form of domesticated subjectivity that is in a never ending discussion is open to individuals and groups alike. Without denying the individual their place in society, the collective shares responsibility of success and the consequences of the individual’s action. Leaders and the elite tend to speak of ‘our people’ ‘my people’ and so on. And at the local level, the common citizens speak of ‘our son’ or ‘our daughter’. The inter-subjectivity movement has many outstanding contributors amongst them Jean and John Comaroff (2005) and their discussion of liberal democracy in post-apartheid South Africa, Richard Wilson’s (1997, 2001) eloquent contribution on the social life of human rights and Appadurai’s project on Modernity at Large (1996).

The case of the Ocampo Six in Kenya demonstrates how inter-subjectivity has produced yet another genre of human rights in postcolonial Kenya. Discussion of human rights in contemporary Kenya (as for most postcolonial states) calls for scrutiny of how multiple identities of the subject of human rights get activated by individuals and/or groups. Experiencing human rights as shown in the case of the Ocampo Six is both individual and

88 John Comaroff has since the 1990s changed his perspective from the initial work that seemed to look at various exercises of agency as isolated. His works thereafter offer a different analysis from the kind of narrative in his earlier work among Lozi people of Bostwan. For rich discussions of the South African case and contestations of abstract ideas of the liberal subject, see Comaroff, John L., and Comaroff, Jean. (2004); ‘Criminal Justice, Cultural Justice. The Limits of Liberalism and the Pragmatics of difference in the new south Africa, American Anthropologists 3(2):188-204.
collective. Going to the ICC court in The Hague required not just parliamentary debate and engaging top human rights lawyers, but it has also been about producing a genre of human rights between the suspect and communities to which they belong. Just like Nyamnjoh (2002) observed in the contemporary Grassfields in Cameroon, the Ocampo Six are both ‘subject’ and ‘citizens’; they use both ‘modern’ and ‘traditional’ methods of redress. This inter-subjective creativity and interdependence in the process of domesticating the subjects of human rights in the postcolony can no longer be assumed in genealogies of human rights.

2.9 Is the Human Rights Era Coming To an End?

It is apparent that the outcry by Michael Ignatief in the question: ‘is the human rights era coming to an end?’ is both a fallacious formulation as well as an indication of the polemics of the postcolonial moment that have recently opened new imaginations for human rights discourse. As an inadequate formulation, Ignatief’s query presumes a human rights discourse that is certain, with a clear subject and whose writing is complete.

The ‘measurement’ of these human rights is often ‘objective’, undertaken by United Nations-affiliated organization in either Geneva or New York with the support of either Western based or funded NGOs. This human rights has a single genealogy, single meaning (often legal), and a universal and standardized criteria of measuring its progress. Often, it is a rights dictum that can be used to rebuild states coming from war (as was the case in Eastern Europe) and from minority domination (as was the case in post-apartheid South Africa).

The future of this human rights discourse (just like its genealogy) follows a clear trajectory and where there is diversion, it is possible to return the subjects (whether states or individuals) to course often through international institutions such as the ICC, sanctions imposed by the UN and Western capitals or lately through military interventions such as the war on Iraq. However as a polemic question, Ignatief’s anxiety is not untrue.

The discussions above attest to not just uncertainty of the postcolony but also how uncertain human rights discourse and practice have become. Human rights business in the post colonial era is not only unfinished but it is highly contingent, appearing in at least three movements that I have used here. Its subjects are not idealized and abstract individuals. To bring all this together, let me introduce an important observation from Richard Wilson’s (2001) work on the Truth and Reconciliation Commission in South Africa. Drawing on interviews with ‘victims’ from Soweto who testified at the TRC, Wilson observes that:
Persons historically excluded from power in South Africa—women, the uneducated, the poor—often adopt a relational view of their own subjectivity and place themselves within social networks. Almost all the victims I heard spoke of the relationships between families of victims, and often between victims and perpetrators. There was very little room for this in the statement form or in the data processing, which de-contextualized by excluding community networks and complex social dynamics. The statement form only referred to the party, political or institutional allegiance of a victim or perpetrator. There was little room for including the immediate family and wider kinship networks which may not have been a political party but which were often central to the organization of disputes (Ibid.: 49-50).

The exclusion of social worlds of victims of human rights violations was also evident in the tools and methods used in collecting TRC related data. Wilson (2001) established that many complainants from Soweto who gave their statements often alleged that in the long run, they could not say many of the things they had wanted to say. And there were numerous reasons to this varying from the ‘testimony form’ not having enough space to the statement takers changing meanings of their statements (Wilson 2001: 49, 60).

I seek here to draw attention to the unfinished status of the production of human rights knowledge and its modus operandi. From Botswana, Rwanda, Cameroon, Zaire, South Africa and Kenya, what is evident is that narratives of human rights are contingent and controlled by many factors. Amongst them, the interventions by human rights organization, states exercise of power, international relations, and contestations of citizenship form the topography on which human rights narratives are constructed, dissolved and reconstructed in the postcolony

The same applies to the subject and agency in claiming and defending human rights. In Rwanda, it did not take long for the government to realize that their interest and idea of justice would not be fully accomplished by an international human rights instrument like the ICC and domestic courts of other countries. In response, the gacaca courts were established as a marriage between ‘modern’ and ‘traditional’ mechanisms of accessing justice. Legal and human rights scholar Jane Collier (1975) has referred to this as an indication of an era of legal pluralism.

But this is not just about plural institutions that exist in parallel; rather it is more of contemporary manifestations of neo-liberalism itself. What this means is that institutions like Gacaca, the Kalenjin Council of Elders and the Luo Council of Elders that we encounter in this thesis, may have as their base structure, attributes that some presume as time long customs but in their current form, they are part and parcel of the neo-liberal system. Besides the space
provided by ideas of liberalism such as autonomy and freedom, *Gacaca*, the Kalenjin Council of Elders and the Luo Council of Elders are also on the other hand responses to limitations or malfunctioning in the neo-liberal paradigms of justice.

In Kenya, individuals accused of instigating, organizing and executing post elections violence have not engaged the ICC courts as individuals. On the contrary, they have organized themselves as individuals and members of communities. The Ocampo Six have evoked their multiple identities as Christians, Muslims, majority ethnic groups or prominent politicians as a way of exercising their agency. As inter-subjective victims, the realization of their human rights is not just their business but that of a much larger constituency all with varying ideas of justice.

Yet human rights institutions and civil society organizations insist that the prosecution of the Ocampo Six at the ICC court in The Hague is a measure of Kenya’s adherence to its international human rights obligations. Genealogies of human rights and the debate for justice for the Ocampo Six and indeed victims of the 2007-8 post elections violence presents human rights in the postcolony as a process and not as a closure.

This reformulation of human rights does not just produce subjects and get produced along the way. Postcolonial governments have also taken their place in producing the ‘new’ genre of rights. Away from the legal model of rights that is adversarial and more concerned with relations between state and citizens, the inter-subjective movement calls for a return to the idea of human dignity, as a central objective in human rights. States like Kenya, Rwanda and South Africa have in the 21st century embraced human rights as a language of nation building. In this respect values such as helping, relatedness, restoration and fairness have been mobilized as the basis of realizing human rights. The TRC has been the major institution of expressing this postcolonial idea of human rights (Wilson 2001). Feminists have also emphasized that paying attention to the ‘relational’ aspect of human rights could perhaps accommodate more values than those singularly associated with ‘maleness’ (Holmes and Petersen 1981).

**2.10 Conclusion**

In this chapter I have suggested that although the history of dominant human rights discourse is located in the West’s political thought, the current practice of human rights in postcolonial Africa presents much more multilayered genealogies of rights that often ignore rich material in practical manifestations. Human rights have been understood not as a specific list of moral codes but as scripts of personhood that is enforced through political units. While the emergence of UN based language or rights pre-dates the neoliberal era, in the neo-liberal
discourse, the state is the unit which performs the same function as is done by other institutions. But history of state formation and global power imbalance has tended to generate dominance of a specific discourse of human rights. I have demonstrated two dimensions of this discourse.

First, that although it tends to be presented as a post World War II phenomenon, the dominant discourse of human rights has a longer pedigree which limits any attempt to narrate it in a linear manner as is often done with church history. I therefore suggest that history of human rights should be engaged as a narration of displacements. Second, the influential and dominant place expressed by this discourse is a matter of authority and power (often expressed in an ‘us’ vs. ‘them’ dichotomy) that has resulted in hegemony. I am proposing that in this debate the longstanding questions of what is universal gets a new meaning. It becomes not that which is hegemonic or dominant; rather it is the capability of all human societies to develop scripts of personhoods. While I am sympathetic towards scholars like Makau Mutua, Francis Deng and Kwasi Wiredu, I think that their essensializing premises is limiting and cannot capture the kind of entanglements at the center of this thesis.

Ethnographies of human rights in the post-colonial era are characterized by many challenges; most prominent being cases where experiences of infringements on dignity are not intelligible in the neo-liberal human rights language. This chapter has demonstrated that human rights rhetoric and discourse in the postcolony has to be engaged from the point of its ongoing production rather than its mere ‘travel’. This chapter has further demonstrated how uncertainty in the colonial and postcolony has presented conditions of producing a practical genre of human rights under various strands.

Works of anthropologists Francis Nyamnjoh and Richard Wilson have been useful in making the two points. Although these strands are not experienced in isolation, the emphasis of each of them seems to be contingent on ever changing material conditions, histories and contingencies. Rather than universalized subjects of human rights idealized as independent and market driven, the subject of human rights in the post-colonial era takes an imagination of interdependence and inter-subjectivity. The case of Kenyans who have been named by the ICC as culpable in executing 2007-8 post elections violence attest to this inter-subjectivity. Rather than just hire lawyers to defend them at the ICC court in The Hague, they exercise their agency by asking questions like: Why our community? Why us and not them? And so on.
These genealogies of human rights become manifest in various conditions and historical moments. Chapter three that follows opens discussion on the histories and conditions that have bearing on the kind of human rights evident in the 21st century postcolonial era.
CHAPTER THREE

KENYA AS A CULTURAL STATE AND THE MAKING OF CUSTOMARY LAW

3.1 Introduction

On a sunny mid-morning in December of 2008, as we ate Kuon (pounded maize meal) and akeyo (bitter spinach) at dala ka Riaga (the homestead of Riaga) in the Karachuonyo District of Kenya’s Nyanza Province\(^89\), Ker (Supreme Luo cultural elder) Meschack Riaga Ogalo explained to me the origins of the Luo people. Ker Riaga was installed as chair of the Luo Council of Elders in 2004 after a long period of absence of a substantive chair for the institution. Before that, Riaga had had a long career in kapango (urban areas) and later in local partisan politics. This profile, which includes serving as an employee with the Kenya-Uganda Railways\(^90\) (1962-1980), councilor of Sikri Ward (1997-2002) and East Kamagak Division Branch Chair of an opposition political party associated with Raila Odinga—the Liberal Democratic Party (2002-2006) has made him an actor in moments where ethnic identities are shown as malleable, historically contingent and tied to the broader politics of building an ‘imagined community’ (Anderson 1983) called the cultural state. At his home and among many Luo speakers, Ker Riaga commands enormous respect as someone who protects ‘traditional Luo culture’. After becoming ker, Riaga Ogalo has had lengthy involvements in various parts of the country promoting the idea of the Luo community.

I had gone to visit Ker in the company of my friend John Ogam (from Gem Anyiko) to explain my research\(^91\). As I understood it at the time, the research involved examining authentic notions of human rights among the Luo people. This was not the first time I was meeting Ker,

\(^89\) It is important to note that, under the country’s new Constitution promulgated in 2010, the administrative structure of the country has changed. The old Provincial Administration that divided the country into provinces has been abolished and replaced with the county system that is set to kick in immediately after the elections of March 2013.

\(^90\) The railway was called Kenya-Uganda railway during and after its construction in colonial times. After independence, it became East African Railways & Harbours, which was run by the East African Community until the community’s collapse in 1977. The Kenya Uganda Railway was a major project by the British colonial administration. Although its central aim was to link Uganda and the interior of East Africa to the Coast, the project turned out to be a major signifier of state power. Its construction offered a moment and space for large immigration by attracting workers from Africa, India and Europe. See Neera Kapila 2009. *Race, Rail and Society: Roots of Modern Kenya*. Nairobi: East Africa Educational Publishers.

\(^91\) Initially, my goals were to review the betwixt and hybrid version of human rights practiced in the contemporary Luo society following on works such as those of Ayse Caglar (1997) and Homi Bhabha (1994).
and neither was it the first time that he was hearing of my work. As it became clear during the numerous conversations that we shared, Ker knew me as a human rights activist and commentator on Luo culture. In these conversations it became apparent that Ker himself was not much of ‘an expert’ in Luo history and culture, but rather a leading figure in a protracted struggle to represent the Luo as a historically homogenous ethnic group that is also heterogeneous at the same time.

Our conversations in his verandah were mostly in Dholuo. Ker Riaga explained to me that in ancient times, Luos had migrated to the present day Luo Nyanza from South Sudan. His explanations were mainly based on Luo legends and the works of historians such as Professor Bethwel Alan Ogot, whose work I shall engage later in the chapter. Our discussions were punctuated by lamentations of how contemporary Luos had abandoned their culture and more so the Luo language. Citing a famous Luo harpist, Ogwang K’Okoth, Ker insisted that the pristine history of Luo people was also ‘sacred’.92

The dialogue with Ker Riaga as I opened my fieldwork became useful in my ethnographic attempt to understand the cultural and social habitus of the Luo and how this has played out at various historical moments and circumstances.

In my numerous conversations with Ker Riaga Ogalo as well as with many other people in Luoland and during the archival research, it was interesting to note how the production of self often goes hand in hand with the production of ‘the other’. Luo people have a long...

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92 As we shall see, this notion that Luos are exceptional is closely linked to the Hamitic theory of nation formation.
history of encounter with other language groups through long distance trade as well as European explorers and missionaries. It is however in appreciating these registers of production of knowledge at the moments of encounter that one can analyze and engage with the limited colonial archive. In this chapter I engage with the twin subjects of the historicity of the Luo as an ethnic group as well as attempts by ethnographers, state and everyday practitioner in representing a Luo nation. I provide an account of the never-ending construction of Luo ethnic identity at the moment of colonization and establishment of the Kenya colonial state. Several early colonial ethnographies and archival materials are explored for a record of how the colonial enterprise crafted Kenya and its people. Intertwined in this process of formation of Luo people and the colonial state is the development of customary rules or laws.

While customs refer to what is more or less regular behavior, customary law refers to behavior that is required by whichever political authority that exists. It is the ‘official’ customary law that became the medium and form of conversation between colonial subjects and the colonial state.

This chapter is an attempt to narrate both why and how customary law developed in colonial Kenya. Using the works of Africanist and cultural anthropologist V.Y. Mudimbe (1988, 1994), I argue that the colonial project and its language of expression such as ‘natural rights’ and ‘customary law’ must be engaged as part of an epistemological domination that was itself useful in the positioning of the European civilization. On the mechanisms of colonizing, the chapter suggests that the British colonizers and missionaries’ agenda for ‘social transformation’ to produce ‘responsibilized citizens’ in the Kenya Colony should provide an opportunity to engage with the colonial practice and its methods not as binaries but rather as ongoing encounters. I argue that notions such as colonial customary laws cannot be treated as pure constructs (much talked about by the ‘full stomach’ cultural relativists’ who create a binary between culture and rights). On the contrary, societies and cultural formations are identities that have always been in constant contact and interaction with various notions of norms, laws, and politics and so on. Even though it is not unusual for cultural formations to treat formations that do not bear the attributes (imagined or real) that they are familiar with as ‘the other’, there is often simulation or acquisition of ideas from these encounters.

93 This is based on my archival research undertaken at the Kenya National Archive and the Kew Gardens Public Records Office in the United Kingdom.

94 I borrowed this term from South African Anthropologist Steven Robins (2008a) who created it to describe Foucault’s idea of how state and other non-state actors attempt to reform human conduct. But the category soon achieved local meaning through the category of jonanga (plural of Jananga). The these notions are developed further in this thesis.
The Chapter is divided into two sections. The first section illustrates the spatial, bio-political and essentialist ideas of culture propagated by colonialists and missionaries that produced the political territory of Kenya. It puts into use the Memorandum on Native Policy in East Africa authored in 1930 for the British Parliament by Secretary of State for Colonies Lord Passfield (formerly Sidney Webb) and the proceedings of the Native Tribunals. As had been the case in the formation of modern European and North American states, it is within such territorial entities that moral values and criteria of inclusion and exclusion were developed. The second section demonstrates how colonial domination was simultaneously about territorial occupation and a cultural process (Ngugi 1986, 1993, Wiredu 2004) of production of ‘responsibilized citizens’ through education, missionary work, development of customary law and shaping of aspirations and value systems of the colonized. Three case scenarios are relied on for this purpose.

Following on this, the chapter engages with both how particularized rituals and colonial statecraft have been instrumental in the ‘creation of tribes’. As clearly attested in my conversations with Ker Riaga Ogalo in 21st century Kenya, Mudimbe’s two celebrated writings, *The Invention of Africa* (1988) and *Idea of Africa* (1994) show how these representations are both processes of production of knowledge and constitution of power. The findings of Mudimbe offer a useful account of how ‘the Western’ epistemological order influenced the colonial construct and images of Africa as ‘primitive’ and ‘savage’. This understanding of Western epistemology and its ordering effect is useful in re-reading the ‘invention of Kenya’ and the triumphalism associated with the 18th century Enlightenment philosophy that categorized non-Western expressions as inferior (evolving being).

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95 The parenthesis is an appreciation of the fact that, although we talk of the ‘West’, it is by no means a single undifferentiated bloc. When speaking about the West therefore, what I have in mind is the dominant notions that have gained prominence as representations of ideas, epistemology and sociological formations associated with both the idea and location of Europe and North America.
3.2. Part One: The Statecraft of the Kenya Colony

3.2.1. Making of Kenya Colony

Kenya\textsuperscript{96} was carved out from the British East African Protectorate in 1920. By the time the British Imperial administration was working to create Kenya Colony in early 19th century, they had had enormous experience in colonizing other parts of the globe. The most outstanding colonial enterprise at that time was India\textsuperscript{97}. To attest to the economic\textsuperscript{98} argument that motivated the British occupation, the territory of current Kenya was first occupied by the Imperial British East Africa Company (IBEACo)\textsuperscript{99} from 1880s. The IBEACo, like all other colonial companies, had discretion of engaging in commercial enterprise to cater for several expenses incurred in establishing and administering the colonies. It was not long before the IBEACo found the burden too onerous and handed over the British East African Protectorate to the government of His Majesty King George VI for those areas that are now part of Uganda in 1893, and for the remainder of what is now Kenya in 1895.

Once in occupation, and drawing from their extensive experiences\textsuperscript{100} elsewhere, the British colonial administration used varying methods and mechanisms to bring the vast part of the country under their control. Indeed, the methods used in consolidating the colony were so varied that it is not possible to develop a single narrative for Kenya’s colonization process. In his book, \textit{The Politics of Conquest: The British in Western Kenya, 1984-1908}, Lonsdale (1977)\textsuperscript{96}

There have been many explanations to the source of the name Kenya. The most consistent explanation seems to be that the name was taken from reference to Mt. Kirinyaga—which was later renamed Mt. Kenya. This is the tallest mountain situated in the middle of this territory. The Kikuyu-speaking people in this region named the mountain \textit{Kirinyaga} or \textit{Kerenyaga}, meaning ‘mountain of whiteness’ because of its snow-capped peak. Peter Firstbrook has further detailed that other communities living around the mountain such as the Embu call it \textit{Kirenia}, also meaning ‘the mountain of whiteness’ while the neighboring Kamba speakers call it \textit{Kinyua}, meaning ‘mountain of the ostrich’ in reference to the speckled ice and rock that resembled the tail fathers of a male ostrich (See Firstbrook 2010: 93)

In any case, as Edward Said has suggested, the East African colonial project had a lot to do with the British strategy of safeguarding their interest in the Indian sub-continent (Said 1993). Legal and administrative knowledge gained in managing these territories were useful in administering late colonies like the East African Protectorate.

This thesis of economic interest in the colonial projects in Africa has solid evidence. It is the reason why colonial projects and programs were prefaced by state incorporated companies, the most renowned of which were: Imperial British East Indian Company; United African Company and United Trading Company in West Africa; British South African Company, and Imperial British East Africa Company.

The Imperial British East Africa Company, founded by the Scottish ship-owner Sir William Mackinnon in 1887, was granted a Royal Charter in 1888. Land between Mombasa on the coast and Lake Victoria was leased from the Sultan of Zanzibar. The aim of the company seems to have been partly political, countering German, French and Italian influence in the area, but also partly commercial, though it never paid a dividend; again, it had certain philanthropic objectives, supporting the campaign to suppress the slave trade between East Africa and Arabia. See http://flagspot.net/flags/eaf-brit.html (Accessed on November 10, 2010)

Anderson and Killingray (1991: 5) have argued that the time the British acquired the Kenya Colony, the kind of law that they implemented in Kenya were a variety that had gone through several mutations when compared to similar legislations in England. They observe that colonial legislative codes were invariably hybrids, formed of parts from other colonies as well as from England, these being modeled by the local political and social environments into which they were placed.
provides details of the various strategies that were used towards the creation of the Kenya Colony. He suggests a temporal progression in the establishment of Kenya Colony as having included: coexistence, ascendancy, domination and control (Lonsdale 1977). Lonsdale’s central argument is that, from the initial contacts with the Europeans in 1880s, the British domination of Kenya was gradual and incremental.

The co-existence stage witnessed the visit to western Kenya by adventurers and explorers who were not necessarily emissaries of Western imperialism. Notable visitors in the period 1880-1895 include Joseph Thompson, in 1883, Bishop Hannington and Count Teleki in 1888. As we shall see in the rest of this chapter, the colonial officers and British Foreign Office in London relied on descriptions and notions about the natives as constructed by missionaries, anthropologists, colonial officers and the explorers, thus creating an administrative system that could best work for them while ostensibly serving the interests of the colonized.

It is however the 1890s imperialist scramble in Eastern Africa that pitted Germany and England in competition to control East Africa that propelled the shift in strategy from coexistence to ascendancy. Following the exemplar of the IBEACo, the British colonialists made ‘treaties’ to facilitate co-existence with most communities whom they encountered. Such ‘treaties’ were made with the Nabongo Mumia of Wanga and Atito of Kano (Maxon 1993). By the late 1890s, numerous factors amongst them harsh epidemiological and economic conditions had enabled the British to surge towards ascendancy. This was by all means influenced by an attitude that positioned the European as superior and thus fuelled the ‘civilizing mission’ to the African native.

While the account given by Lonsdale is very specific to the Luhya, Luo and Gusii of the Nyanza basin, it can equally be applied in many other regions of what constitutes contemporary Kenya (Maxon 1993). Lonsdale’s works also distrust the dominant narrative of the colonizer’s military strength and power to conquer the natives. On the one hand, it attests to absence of singular ‘tactics’ in colonization. On the other hand it is evident that even when there existed a “structure of attitude and reference” (Said 1993: 30) about the natives, the establishment of colonies did not follow a simple model of inferior race versus superior race. On the contrary, the establishment of the colony was riddled with contradictions shaped by European as well as

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101 Explorers who visited Luoland in the early 19th century has talked of major calamities that slowed them down physically and economically. The epidemics were so severe that they are often described to have been of biblical proportions. These included: smallpox, rinderpest and contagious bovine pleuro-neumonia. Besides, many Luos died from starvation and disease as did their livestock. This sparked a series of never ending conflicts for food and basic survival (see Firstbrook 2010: 116).
African initiative; by misconceptions as well as misunderstanding; and by immediate as well as great imperial designs and notions of human diversity (Maxon 1993: 43).

The Kavirondo102 Gulf (as the present Luo Nyanza was called then) first came under British rule after the famous ‘European war’ of 1899. Historian Margret Hay who undertook her work in Kowe, western Kenya in the early 1970s has reported this as a punitive expedition by the British in retaliation for alleged ‘outrageous’ acts that had been committed against them by some Luo of the Sakwa, Uyoma and Seme maximal lineages (Hay 1976: 90). Once under occupation, Luoland was integrated into the larger colonial state with a detailed pecking order.

At the apex of the governmental organization controlling the Kenya Colony (as was the case in neighbouring Uganda and Tanzania) was a Governor who was responsible to the Secretary of State in London for all aspects of government in the territory. It is the Secretary of State who responded to queries and made requests to the British parliament on issues concerning the colony and on request of the Governor. Some British statutes like the Married Women’s Property Act (1882) were applied in the colony, but, in the main, Indian legal codes dominated the statuses of the Kenya Colony until the 1930s.

Working with the Governor in the administration of the colony was the Legislative Council (LEGCO). Between 1906 and 1948, the LEGCO was dominated by government representatives essentially comprising European settler farmers and other business interests. It is only in the mid 1940s that missionaries were incorporated and in 1946 that a Commissioner of Native Affairs was recruited to represent the interests of the indigenous colonial subjects. But this disjuncture in representation of Africans was mitigated by the Local Native Councils that had been established through the Native Authority Ordinance (1942). The Local Native Councils drew its membership from local jodongo [clan elders] as well as colonial administrative officers. Section 23 of this Ordinance empowered Local Native Councils to pass by-laws related to whatever was considered necessary in promoting the welfare of the natives. These Local Native Councils worked very closely with the Native Tribunals that we shall be looking at later. The Local Native Councils became important instruments through which the colonial government gathered information on ‘native’ affairs. In their reporting, the colonial

102 The word Kavirondo (pronounced Kafirondo) probably appeared for the first time in the maps drawn by the colonial geographer, E. G. Raveinste. It is most likely that according that the word, which connotes to be styled, may have been used by traders from Central Kenya in reference to the inhabitants of Lake Victoria basin. During the colonial period, the region was inhabited mainly by Bantu speakers and Nilotic Dholuo speakers.
administration also represented the Councils as forums through which the natives could air their views.

Nevertheless, since the Local Native Councils amounted to little more than ‘harmless talk shops’ and the Secretary for Colonies was too lofty and removed to be involved in the day to day affairs of the colony, the Governor was more or less the absolute ruler of the colony. The Governor was in turn supported in his work by equally authoritarian civil servants. It is here that one found the Provincial Administration consisting of provincial commissioners, the district commissioners and their assistants. The Provincial administration was responsible for maintenance of the peace and good government, law and order, collection of taxes, efficient conduct of all government business and a host of statutory duties imposed on them by local legislation in their areas of jurisdiction.

More specifically, the District Commissioner (DC) was responsible for the ‘native administration’ in the district and the development of the Local Native Councils. Under the aegis of ‘indirect rule’ established by the Native Authority Amendment Ordinance No.14 of 1924, District Officers were given powers to closely supervise activities of the native courts or tribunals. The DC was also given powers to revise verdicts and listen to appeals such that although he (all were men) did not have any legal qualification, he was effectively the District magistrate. It is only cases that, in his opinion, were ‘most serious’ that he referred to the High Court in the capital city of Nairobi. To that extent, the DCs were part and parcel of the Judicial Department.

**Reporting**
The head of each Department in the colony was required to submit an annual report. It is on the basis of these reports that the Governor prepared the Colonial Annual Report for the territory. During my archival research I was interested in both specific Departmental and Colonial annual reports. More specifically, however, I followed the nuanced debate that demonstrates the negotiations and contested conversations of the various notions of customs and customary laws in the colony.

Although the colonial subjects were not in the ‘chain’ that wrote and submitted periodic reports to His Majesty King George VI and later Her Majesty the Queen in England, I encountered numerous petitions written by natives’ associations such as Kavirondo Tax Payers Association
and Ramogi African Welfare Association (RAWA)\textsuperscript{103}, the latter of which was a registered association that operated in the Kenya Colony until 1962. Its main activities involved enforcing what they regarded as ‘authentic Luo norms’. They wrote numerous petitions to the colonial administration contesting the implementation or interpretation of customary laws or appealing against rulings given by colonial officers on their behalf own and on behalf of what they regarded as ‘Luo community’. One such case was a letter dated July 31, 1946 written by the Secretary of RAWA to the Governor of Kenya colony. On behalf of RAWA, he complained that some of the colonial legislations being applied in the colony were inconsistent with Luo customs and traditions. These laws included; the Laws of Kenya (1930, part II: 701), Native Tribunal Ordinance section 13(a), the Laws of Kenya (volume X: 242), Native Christian Marriage and Divorce Ordinance 1931, section 10\textsuperscript{104}. This mechanism of petitions was seen as cheaper and less laborious compared to the Native Authority System (Shadle 2006).

Although not part of the official pecking order, the missionaries played a key role in the management of the colony. In any case, the colonial project has in most occasions been presented by the triad of ‘Commerce, Christianity and Civilization’ (Thomas 2003: 24). The missionaries’ work was guided by a vision of the natives as a ‘new personhood’ (Ogot 2003, Jacobs 2011). This ‘new’ native as a Christian would have all the character of the Christian brethren and only subordinate by race (Ibhawoh 2006). And so the missionaries were keen to ensure that the colonial administration provided an environment where the new Christians would now live in liberty and good conscience and enjoy natural justice. Besides the petitions that the missionaries regularly did in favour of their converts or in giving opinions on subjects or practices that they wanted declared repugnant, they prepared many reports and commentaries.

From 1899 to 1906, no less than 12 missionary societies had opened stations in Kenya. Preliminary review of archival materials point to the Church Missionary Society (CMS) as having opened a station in Maseno, western Kenya by 1910. A review of reports by this missionary group alongside others that must have come later such as the Catholic Church and Anglican Church amongst others further informed this research. Just as the case of petitions that seemed to ‘flow against the tide’, the missionary reports were read alongside other reviews and oral recollections of a number of nativistic, messianic and millenarian movements, break away sects and independent churches that appeared in western Kenya as a reaction or, in most

\textsuperscript{103} Kenya National Archive KNA/PC/NZA/3/1/316. General Correspondences, 1945
\textsuperscript{104} Ibid.
occasions, a resistance to the missionary ‘project’. Audrey Wipper (1975) reports that the earliest recorded independent movement in Luoland was Nomiya Luo Church which arose in 1912, followed by the Mumbo movement in 1913. By the time Kenya attained political independence in 1964, there were 54 such religious movements. There is no doubt that these movements provided space and room for interplay for certain notions of rights and personhood.

**What was the colonization strategy?**

This chapter suggests that such a reading can be realized by a cross reading of Mamdani’s *Citizens and Subjects* (1996) and Mudimbe’s *The Invention of Africa* (1988). Mudimbe explores the colonial organization strategy which encompassed not only economics but also art, history, science and anthropology. Like Mamdani, Mudimbe’s perspective starts from an analysis of colonial binaries like traditional vs. modern, oral vs. written, agrarian vs. urban, and subsistence vs. highly productive economies, among others. His review though, supersedes Mamdani’s by examining “…an intermediate and diffused space in which social and economic events define the extent of marginality” (Mudimbe 1988: 30). Mudimbe’s most innovative strategy however lies in his in-depth exploration of the epistemological basis of the colonial project as powerfully developed in his sequel to *The Invention of Africa* (1988) seminal (I am aware of the primordial and patriarchal problems of the ideas of ‘seminal’) appropriately titled *The Idea of Africa* (1994). The book explores the concept of Africa and their roots with reference to the Western tradition (Mudimbe 1994: xv). Using Mudimbe’s strategy is useful in understanding not just colonial attitudes but, most importantly, the ontological and epistemological framework used to formulate and constitute colonies. This is a subject that shall be expanded on later in the context of Michel Trouillot’s article ‘Anthropology and the Savage Slot: the Poetics and Politics of Otherness’.

Mamdani’s work on the other hand is useful in creating an understanding of how the colony works. His notions of ‘citizens’ and ‘subjects’ have been useful in creating an understanding of how the British administration governed Africa. Mamdani has argued that natives were regarded as subjects and were thus governed under customary law while British settlers and other races were regarded as citizens and governed under common law (Mamdani 1996). This binary (although not by any means immutable) is useful in understanding how the British colonialists constructed their subjects and governed colonies such as British East Africa and later on Kenya. To this extent Mamdani’s analysis in *Citizens and Subjects* (1996) could be
treated as an ontological construction\textsuperscript{105} rather than a factual presentation of the colonization project.

There is however a common thread between Mamdani’s and Mudimbe’s works on colonization and the colonial project. As is the case with most discussions about Africa’s colonial enterprise, both of them have a storyline of the colonial project as one based on modernization. That is, that the colonialists were interested in promoting—even if for rhetorical purposes only—liberal principles such as individual rights and rule of law. With their internal economy embodying binaries like traditional vs. modern and citizens vs. subject, the likes of Mamdani and Mudimbe seem to suggest that the anti-colonial movements in Africa were concerned with how power was used by the colonizers to include or exclude the colonized (Scott 1999: 25).

**British Colonial Project as Epistemological Domination**

Even if the economic interest were to be the major impetus for creating and maintaining colonies, this must have been aided by some conceptual perspectives of who is human and what rights and privileges come with it. For this dissertation, it is the rationale for this exploitative relationship that becomes important in understanding both colonial and post-uhuru Kenya. This kind of inquiry is even more important in the context of emancipatory rhetoric of the rights of man that had gained momentum at the time of colonization in the 19th century. The conceptual perspectives that aided colonization were expressed by, amongst others, Hegel in his book, *Philosophy of Rights* (1820) (Cited in Waldron 1984). Hegel asserts that the superiority of the white race allows it to expand European economies to the “virgin lands” of the world. It is in this attitude of European states and Europeans as ‘superior human variety’ that the colonial attitude can be understood. Michel Trouillot (1991) argues that this conceptual perspective of superior white and inferior ‘other’ is found in the genealogy of the West itself. The construction of the ‘West’ seems to have gone hand in hand with the construction of the other.

This project of understanding colonialism within its *thematique* has been done exceptionally by Mudimbe. To explain the internal logic in contemporary human sciences and more specifically anthropology and philosophy, Mudimbe (himself a cultural anthropologist and philosopher) has written about the *Invention of Africa* which is concerned with the ‘process of transformation of types of knowledge’ (Mudimbe 1988: x). Mudimbe undertakes an archeology of African

\textsuperscript{105}I think what Mamdani has done is to expand on Mudimbe’s idea of ‘Epistemology of Colonialism’ in *The Invention of Africa*. “Colonialism, and Colonialization,” states Mudimbe, “basically means organization and arrangement.”
gnosis\textsuperscript{106} as a system of knowledge. His work is an inquiry on the question: what makes African reality possible? It is only after such an archeological engagement, Mudimbe argues, that one can accept what is presented as African realities as ‘commentary of revelation, or restitution, of an African experience’ (Mudimbe 1988: x).

The findings of Mudimbe offer a useful account of how ‘the Western’\textsuperscript{107} epistemological order influenced the colonial construct and images of Africa. This understanding of the Western epistemological order and ordering effect is useful in re-reading the ‘invention of Kenya’ as it offers two important possibilities. First it demonstrates how the colonial imageries and nativity of indigenes influenced what constituted the final geographical terrain of Kenya. For the explorers, missionaries, traders and later imperialists, this demarcation of geography created the much important discretion of ‘home’ and ‘abroad’ (Said 1993: 72). Edward Said expands on this distinction:

\begin{quote}
England (as home) was surveyed, evaluated, made known, whereas, ‘abroad’ was only referred to or known briefly without the kind of presence or immediacy lavished on London, the countryside, or northern industrial centers such as Manchester or Birmingham (Said 1993: 72).
\end{quote}

The second use of Mudimbe’s analysis is its effect in enabling an understanding of how the triumphalism associated with the 18\textsuperscript{th} century enlightenment philosophy ‘invented’ a differential ‘Africa primitive’.

The two indexes above make it possible for us to understand perspectives that complimented or supplemented the explorers’ tales and the “philosophical interpretations about a hierarchy of civilizations” (Mudimbe 1988: 70). In reading Kenya from this perspective, this dissertation illustrates how the various conceptual systems and categories that were designed by the British colonial rule in Kenya depended on an epistemological order that was dominant ‘at home’ at that time.

The framework of production of Africa (and colonies like Kenya) is a trilogy of America as the promised land of utopia: the West as the certitude of formulation and the other as the savage (Trouillot 1991). It is also at this time of becoming Europe that the desire to know and manage these ‘utopia’ and the ‘others’ had increased (Ibid.).

\textsuperscript{106} Strictly speaking according to Mudimbe, ‘African traditional systems of thought’ do not include philosophy. Mudimbe has therefore used the concept of Gnosis, a Greek term meaning to know, to identify African traditional thought. Rather than spend time on philosophy or ideas about an invented Africa, Mudimbe’s project is essentially on what it means to be African and a philosopher today.

\textsuperscript{107} The parenthesis is in appreciation of the fact that although we talk of the West, it is by no means a single undifferentiated bloc. When speaking about the West therefore, what I have in mind is the dominant notions that have gained prominence as representations of ideas, epistemology and sociological formations associated with both the idea and location of Europe and North America.
But it is the works of novelists such as Joseph Conrad’s misguided *Heart of Darkness* (1902) that gives a narrative of the structured feeling of colonization. Conrad presents Africans who from Europe perspective is abroad as “savages, the wilderness, even the surface folly of popping shells into a vast continent all which re-accentuate the need to place the colonies on the imperial map” (cited in Said 1993: 164). The bulwark of colonial thinking in Africa, Fredrick Lugard, was even more explicit. Lord Lugard’s analysis in *Dual Mandate* captured the commonplace Europeans’ perspective of the subject of the colony concisely:

In character and temperament, the typical African of this race-type is a happy, thriftless, excitable person, lacking in self-control, discipline, and foresight. Naturally courageous, and naturally courteous and polite, full of personal vanity, with little sense of veracity, fond of music and loving weapons as an oriental loves jewelry. His thoughts are concentrated on the events and feelings of the moment, and he suffers little from the apprehension for the future or grief for the past. His mind is far nearer to the animal world than that of the European or Asiatic, and exhibits something of the animals’ placidity and want of desire to rise beyond the state he has reached (Lugard 1926 1922:70).

Lugard’s description convincingly illustrates how the discourse of European ‘same’ and the primitive ‘other’ is expounded. As Mudimbe (1988) has advised, it is the works of writers and political administrators like Condrad and Lugard that demonstrate the project and aim of colonization. This calls for attention to how knowledge gets produced in the design and implementation of the colonial project, writing of historical narratives and classification of colonial archives (Mudimbe 1988, Trouillot 1991).

### 3.2.2 Colonial ethnographies

This underlying attitude is evident in the kind of ethnographic classification system and ethnographies that developed in colonial Kenya. To develop an aid to govern the native societies variously referred to as ‘tribes’, the British colonial administration and missionaries started an elaborate process of documenting customs, languages and traditions. Numerous ethnographic descriptions and pictorials were developed. Charles W. Hobley, a well-known British anthropologist in colonial Kenya, wrote *Ethnography on Bantu Beliefs and Magic* in 1938. His discussion focused on different Agikuyu shield patterns with an emphasis on those used by young boys during circumcision ceremonies. Hobley and his contemporaries who Ogot (1976) has referred to as ‘amateur anthropologists’ include H.E. Lambert’s *The Systems of Land Tenure in the Agikuyu Land Unit* (1949) and *Agikuyu Social and Political Institutions* (1956), J. A. Massam’s *The Cliff-dwellers of Kenya: Ethnography of the Elgeyo* (1927), Ode

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108 This term has also been used by James Frazer to refer to untrained enthographers who sent data to the metropolitan theoreticians who were also known as armchair anthropologists. See Campbell (2006).
Browne’s *Vanishing Tribes of Kenya* (1925), Routledge’s *With a Prehistoric People* (1910) and Elspeth Huxley’s *Red Strangers* (1939). These works were undertaken without the tacit support of the Kenya colonial officials although the reports were later used by the officials for designing and governing the Kenya colony. The native commissioner reports written in the period between 1930 and 1950s show an over reliance on these reports to describe the ‘tribes’ and their ‘uses’ to the colony (see Hailey 1942).

The second category of colonial ethnographies consisted of commissioned works and administrative reports written by the Governor\(^{109}\). These reports had sections such as those that described the attitudes of the natives and their progress in embracing European modernity. In his report *On Native Tribunals* (1944), Arthur Phillips suggested that ‘tribes’ that had advanced judicial systems such as the Luo people should have their systems apply to smaller ‘tribes’ like the Kisii. This is illustrative of how ‘the tribes’ were constantly produced in relationship to each other and to the colonizers.

The third wave of British colonial ethnographies in Kenya consisted mainly of works undertaken by missionaries. These include Archbishop Owen and Fr. Cagnolo’s *The Agikuyu-Their Customs, Traditions and Folklore* (1933), Fr. Herman Hartmann’s *Some Customs of the Luwo (or Nilotic Kavirondo) Living in South Kavirondo* (1928) and K. C. Shaw’s *Some Preliminary Notes on Luo Marriage Customs* (1932). The Fourth group of discourses comprised works by professionally-trained anthropologists such as G. Lindblom’s *Akamba in British East Africa* (1920), John Peristiany’s *The Social Institutions of the Kispisgis* (1939), Gunter Wagner’s *The Bantu of North Kavirondo* (1956), Adriaan Prins’ *The Costal Tribes of North-Eastern Bantu* (1952), John Middleton’s *The Agikuyu and Akamba of Kenya* (1953) and E. Evans-Pritchard’s *Luo Tribes and Clans* (1949).

The common characteristic of most of these ethnographies was their use of the ideas of the functionalist school of thought as a basis of constituting and describing the ‘tribes’ in the colonial society. Typical of their time\(^{110}\), the accounts by these professional anthropologists are not contextualized within the political and historical reality of the groups that they studied

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\(^{109}\) The head of each Department in the colony was required to submit an annual report. It is on the basis of these reports that the Governor prepared the Colonial Annual Report for the territory.

\(^{110}\) Ronald Cohen and John Middleton (1970: 4) have argued that this era was characterized by an epistemological basis for ethnic stability. Although non-anthropologists have argued that this reflected political the conservatism of the anthropologist, the two writers have argued that it was necessary for the comparative analysis and theory building within the discipline.
at that time. Theirs is a literalist approach, reflected partly in unproblematic transcriptions of an account onto paper that ignores the social context in which it is transmitted (Campbell 2006: 84).

As Marcus and Fischer (1999: 20) have noted, this literalist approach gives an ahistorical and conservative cast. Ogot (1976) has listed amongst its limitations the fact that these ethnographies whether by trained anthropologists, commissioned reports or missionaries—were engulfed in a ‘fallacy of the ethnographic present’ (cited in Rajan 1996: 54) which blinded them from engaging with the malleable and historical nature of the colonial societies. Evident in all of them is their Eurocentric nature and colonial modernity as the orbit of knowledge (Mudimbe 1988). Of course, the colonial anthropologists were themselves not wholesomely homogeneous. George Huntingford’s *The Nandi of Kenya: Tribal Control in a Pastoral Society* (1953) for instance explains the open-ended deity and beliefs among Nandi people as being due to absence of ‘written literature’ rather than primitivism (1953: 123).

It did not take long before the newly trained African converts and scholars started producing knowledge and imageries of the ‘tribes’ to dispute the colonial ethnographies. While some of these ethnographies did not distance themselves enough from colonial stereotypes and representations, ethnographic works by African scholars embodied imageries and representations that subverted the presumed dominant colonial order of things. In Luo Nyanza, Christian converts like Paul Mboya wrote texts such as *Luo Kitgi gi Timbegi* ([1986]1938) and *Richo ema kelo chira* (1978). Then trained anthropologists such as Jomo Kenyatta wrote *Facing Mount Kenya* ([1948] 1938), *My People, Agikuyu* and *The Life of Chief Wangombe* (1944). That era also saw the emergence of young intellectuals trained in history who re-wrote the ethnographies of ‘tribes’ such as the Luo, Kikuyu and Luhya. Outstanding among these works include Bethwel Ogot, *History of the Southern Luo* (1967); Gideon Were, *A History of the Abaluhya of Western Kenya* (1967); and Godfrey Muriuki, *A History of the Agikuyu* (1974).

These intellectuals as I shall demonstrate later through the works of Bethwel Ogot, contributed to a ‘new’ invention of Kenya by challenging the colonial ethnographies and its construction of ethnic and Kenyan identities. Their shared common node was not just refutation of the euro-centered universe in developing the idea and peopling of Kenya but also their questioning of the authority of the non-Africans writing about Africa.

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111 Formerly known as Johnston Kamau.
In the background of these outlays of ethnographies, we now return to a review of how the colonial discourse relied on its various ethnographies to construct and produce Kenya. What is outstanding in the subsequent section though is that the narrative of formation of Kenya and the Luo nation when told in contemporary Kenya cannot be presented in the categories or trajectory above. Today, the ethnography of colonial Kenya is written in a much more entangled manner that draws together intellectual discourse such as those by Ogot as well as everyday myths and oral histories as told by ordinary people.

**Figure 3.1: Kenya’s cultural and political boundaries**

![Map of Kenya's cultural and political boundaries](source)


**Figure 3.2: A map of the sub-groups in Central Nyanza**

![Map of sub-groups in Central Nyanza](source)
3.2.3. The Memorandum on Native Policy in East Africa

As the British consolidated their control over the Kenya Colony, they instituted a system of administration where the relationship between the colonizers and the colonized was such an important subject within the colony that, as early as 1930, Secretary of State for Colonies Lord Passfield (formerly Sidney Webb), prepared and submitted to the British Parliament a Memorandum on Native Policy in East Africa (hereafter cited as 1930 Memoranda). The 1930 Memorandum draws closely from the Commission on Closer Union in East African Dependencies (Cmd. 3234), the decision made by Lord Elgin in 1908 and Devonshire White Paper of 1923 (1930 memorandum: 11). In total, the 1930 Memorandum has 15 pages divided into four sections namely; the preamble, social, economic and political. The preamble appreciates that the principles proposed therein were influenced to a large extent by the practices that were in use in other parts of the British Empire. To this extent, the authors of the memorandum tend to suggest that the document, much like it is with another memorandum for the case of Tanganyika (the 1957 Local Government Memoranda No. 2 (Local Courts) that Sally Folk Moore has discussed intensively is nothing less than “justificatory representation of the ideology of control” (Moore 1992: 13). The rest of the 1930 Memorandum appears in three major parts that speaks on social, economic and political perspectives at the level of individual cultural political formations and the colonial state. Although the 1930 memorandum was a broad directive, its discussions in this Chapter are centered on Central and Southern Kavirondo or Luo Country as the British administration called it.

But a reading of the 1930 Memorandum must also appreciate the ever-changing circumstances of the colonial enterprise. The Memorandum was written at a time of significant geo-political changes that took place from 1885-1939 which required the British to take a firm control of Kenya. A colonial historian at the time noted:

The Kenya colony itself is being transformed into a Boston of empire; it is the site of new headquarters base for all the British armed forces in Middle Eastern area. Plans are now afoot for the fusion of the East African dependencies into a new dominion of Capricorn Africa (Gerland Parker 1950: 439).

These changing moments often led to constant shifts in the rationale for colonization (Scott 1999). In his Refashioning Futures: Criticism after Postcoloniality (1999), David Scott has offered a different reading of the colonial architecture that can enable a deeper understanding of the 1930 Memorandum.

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112 I became aware of this document through reviews of various publications on formation of colonial Kenya at the School of Oriental and African Studies in London in June 2009. For some reason, this document is not available in the Kenya National Archives. Getting it from the School of Oriental and African Studies in London makes the 1930 Memorandum a gem of some sort.

113 As the name suggests, the Committee of Closer Union was established with the aim of developing closer links with certain governments of other territories under the British Empire in East Africa. The Committee was composed of both Houses of Parliament.
Scott has argued that what informed the colonial architecture was “political rationalities of colonial power” (Scott 1999: 25). By this he means “...those ways in which colonial power is organized as an activity designed to produce effects of rule” (ibid.). To undertake this, Scott argues that the colonial administration had clear targets of colonial power, that is, its object(s) or aims, and the means and instrumentalities it deployed in pursuit of these targets points to its field of operation. The intellectual strategy proposed by Scott (1999) is useful in enabling a re-reading of the colonial experience as a heterogeneous encounter, thus enabling the intelligibility of particularized “practices, modalities and projects through which the various forms of its insertion into the lives of the colonized were constructed and organized” (Scott 1999: 26).

Within the colony, the Memorandum was required to offer mechanisms for the practical implementation of the ideas of Fredrick Lugard. That is, the colony needed to be organized to ‘protect’ the natives from the encroaching settlers and put the former into the path of ‘progress’. In its core communication, the Memorandum offered a basis of developing political boundaries of Kenya as shown on Figure 3.1. Through the Memorandum, both the Luo nation and country were delineated and integrated into the Kenya Colony. Ironically, the Memorandum also emphasized the need to ensure that the natives’ interests were paramount in the context of competing entrenchment by white settlers and Indian immigrants in the colony.

3.2.4. The Luo Nation

The production of the Luo nation by literature, colonial administration, missionaries and leading Luo personalities has been done in two ways. On the one hand, it has been about presenting Dholuo (Luo language) speakers as a united population through history, blood and language. Second, it has been about developing a narrative that links Luo people to a particular culture, customs, tradition and land. Like the leading Luo historian Bethwell Ogot (1967), Ker Riaga Ogalo insists that the most significant story about the origin of Luo people of Kenya is their character as a Nilotic language group found alongside river bank regions in Kenya, Uganda and Sudan. These efforts appreciate the fact that while most people who speak Dholuo had some shared commonality like language, symbols, rituals and belief systems, ‘the Luo’ did not exist as a single, coherent unit as is currently used to describe ‘tribes’ or ‘ethnic’ groups in Kenya prior to British colonization. There has indeed been controversy over the origins of both the name and category ‘Luo’ (Harries 2007: 9). In dholuo, luo (as a word) means ‘to follow’; it is likely that the name could be in reference to the people who followed the Nile

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114 Language groups are widely referred to as ethnic groups in contemporary Kenya. Factors such as shared history, language and belief systems have often been used to describe these groups as homogeneous and primordial. In colonial and most 19th century literature, categories of population that share these commonalities whether imagined real are commonly referred to as ‘tribes’. Gerd Baumann (1996) has referred to this as bioligism; see Contesting Culture (1998 [1996]).
River South beyond Sudan (Oruka 1991). Indeed everyday life in the period after immigration into western Kenya suggests that the various Luo maximal lineages and clans were in frequent competition that often resulted in open fights (Cohen and Odhiambo 1989).

‘Luo tribe’ or country referred to in the colonial literature consists of 12 maximals as shown in Figure 1.1. These are Nyakach, Kano, Kisumu, Kajulu, Seme, Asembo, Gem, Sakwa, Yimbo, Uyoma, Alego and Ugenya. The unique character of most of these maximals that shall be evident in this thesis, seem to have been ignored in numerous 20th century attempts by missionaries, anthropologists and historians to collect and collate a single history of the Luo. Much of these ethnographies were based on oral testimonies and mythologies. The most cited of these are the earlier works of Fr. Herman Hartmann such as *Some Customs of the Luwo (or Nilotic Kavirondo)Living in South Kavirondo* (1928), K. C. Shaw, *Some Preliminary Notes on Luo Marriage Customs* (1932); E. E. Evans-Pritchard, *Luo Tribes and Clans* (1949) and Paul Mboya’s *Luo Kitgi Gi Timbegi* (1938).

It is however the works of the historian from Gem, Bethwell Alan Ogot, that seems to have revolutionized the account of formation of the Luo nation. In his now seminal book, *History of the Southern Luo: Volume I, Migration and Settlement, 1500-1900* (1967), Ogot has offered a detailed account of immigration routes and dates providing perhaps the most reliable information on Luo people. But as Derek R. Peterson and Giacomo Macola show in the edited volume *Recasting the Past: History Writing and Political Work in Modern Africa* (2009), the role taken by Ogot’s book and its displacement of homespun histories of Luo people perhaps speaks to the asymmetrical power relationships in the ‘Making of African History’.

In everyday life in western Kenya, the debate about the ‘origin’ of Luo people is narrated at any available opportunity. Radio stations that broadcast in Dholuo like Radio Lake Victoria and Radio Nam Lolwe (*Nam Lolwe* is the Luo name for the Lake Victoria) refer to Luo people as Nyikwa Ramogi (the descendants of Ramogi). This image of Luo people as a homogeneous is nevertheless disrupted by historical narratives such as that presented by Ogot (1967).

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115 I am of the K’aeger which is a dominant clan in Ugenya. Other main clans in Ugenya include Teg, Nywa, Puny and Boro.

116 Ogot is known as one of the first East African historians to develop a distinctive approach to history production in collaboration with the locals. Most importantly, his study sought to vindicate, historicize and liberate through re-presenting the idea of ‘Africa’.

117 In their introduction to the volume, Derek R. Peterson and Giacomo Macola have argued against the marginalization of ‘homespun’ history such as that in the works of Paul Mboya and other local elites whose works are much visible in the early efforts to translate the Bible into local dialects. This complaint is also evident in the works of Okot P’Bitek who has accused colonial and African intellectuals who have opted to perceive and present the ‘Luo’ deity as omniscient and omnipresent in the sense of Western rationality as ‘intellectual smugglers’; see Samuel. O. Imbo, “Okot P’Bitek’s Critique of Western Scholarship on African Religion” (2004).
Ogot (1967) narrates that this category of River-Lake Nilotes arrived in Kenya in three significant groups namely: *Joka Jok* (‘the people of God’), *Joka Owiny* (the people of Owiny) and later *Joka Omolo* (the people of Omolo). *Joka* is a Luo word for ‘the people of’. These narrations of immigration whether by historians, missionaries, anthropologists or local sages are however mediated by myths about never-ending interventions by ‘invisible forces’ either as *juok* (witchcraft) *juogi* (ancestors) or Satan (the devil). For Luo people, discussions of immigration and formation of their nation is often from a patrilineal perspective that encapsulates myths, historical facts and anthropological constructions. Nonetheless, the movement of the Luo people to their current predominant settlement in western Kenya was characterized with conflicts, separation and migration (Ogot 1967).

Cultural studies indicate that the early migration would have taken place some 7,000 -10,000 years ago. At that time it may have been difficult to identify any particular group as ‘the Luo’ as we know them today (Ocholla-Ayayo 1980). Mythology has it that Ramogi (*Ker*, or leader), led the Luo people into the Yimbo area on the shores of Lake Victoria, sometime in the late medieval period. Ramogi died in Yimbo (‘Got Ramogi’ in Yimbo is a symbol of his historic role), having achieved the feat of settling his people at a permanent location (Firstbrook 2010). It is from Yimbo that the Luo people spread out by clans, and today occupy all the neighbouring territories in what is now the Siaya, Kisumu and South Nyanza districts, and spreading even into the Lake District of Tanzania. This notion of the Luo nation as a pure and homogenous category remains problematic to date.

The works of Ogot (1967) have disapproved the above theory of ‘pure group’ by elaborating how the Southern Luo communities contained not only people from different clans and lineages but also people of non-Luo origin. This fact is also attested by Annual Reports about the Kavirondo Country (see KNA/DC/Ksm1/18/30). Also disapproved by Ogot (1967) and my archival findings is colonial-era ethnography by Evans-Pritchard (1936) which presents the ethnic composition of the Luo as “pure”.

Equally, the work of Ocholla-Ayayo (1976), have clarified that during their trek from Bahr el Gazal in Sudan, the Luo encountered many ethnic nations along the way, most of whom they sought to

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118 In the ordinary cosmology of the Luo, these forces relate to the living as an integral part of the society. Their presence is both determinant and influential. But this has changed with the advent of Christianity where in the 19th century, *Jachien* which in Dholuo literally means ‘the one who haunts’ is now taken to be synonymous to the Christian idea of the Devil.

119 The report provides evidence of Bantu influence in naming of places in Luo land. A common prefix for Bantu places names begins with the syllable ‘bu’ and there is evidence of Bantu names being Luoized by dropping the ‘b’. This is evident in the names of places like Uyoma that comes from *Buyoma* and Ulafu that comes from *Bulafu*.

120 Evans Pritchard undertook a nine months field work amongst Dholuo speakers who were settled in Alego (Central Kavirondo) in 1936. Although Pritchard’s undertaking was cut short by illness, his account provides a useful account. His most useful publications for this purpose have been “Luo Tribes and Clans” published in Rhodes-Livingstone Journal in 1949 and “Marriage Customs of the Luo of Kenya” published by Journal of the International African Institute in 1950.
conquer. There is evidence of major warfare such as the conquest of the Kombe-Kombe people and the battle with Jolango’ (Kalenjin) (Ogot 1967: 78). These encounters were of multiple dimensions and attests to why Dholuo speakers share several language vocabularies, symbols as well as concepts of personhood and justice with neighboring communities such as Luhyas, Kisii and Kalenjin people.

Looking inwards among Luo people, there are numerous oral accounts that attempt to explain the distinctiveness of the various maximals. However, my field observations and accounts by historians, missionaries and anthropologists who have done work in Luoland have shown no evidence to suggest that there have existed a system of territorial or military units for the various maximals. Ogot (1967) and Ocholla-Ayayo (1976) seem to suggest that ogai or Dhoot (which refers to patrilineal clans) were the largest pre-colonial territorial units among the Luo.

Beyond the mythologies discussed above, the notion of Luo nation also seems to be a product of colonial state craft. For the colonial government, each dominant ‘tribe’ was recognized as a population, mappable by a territory, bestowed with a government and accorded recognition by the state and other ‘tribal countries’. Colonial ethnographies come in handy to demarcate cultural boundaries around which political boundaries were designed. The result was a cultural state based on the colonialists’ notions of what constituted ‘cultural groups’. In western Kenya, three cultural regions were proclaimed as administrative units based on their perceived homogeneity. These were: North Kavirondo, which was mainly inhabited by Bantu speakers such as the Luhyas sub-groups of Wanga and Bunyore; Central Kavirondo, which was inhabited by Dholuo speakers, and, South Kavirondo, which was inhabited by Luos in its lower areas and Kisii people in the highlands (Kenya Colony and Protectorate, 1931).

The system of land allocation and creation of native reserves were also based more on pre-existing geographical occupancy. It was also assumed that the natives (as is evident in the case of Ol le Njogo and others v. Attorney General of the East African Protectorate (1914) commonly known as the Maasai case) had their own customary mechanisms of land ownership and management. Although this Maasai case shall not be reviewed as part of the case studies here, its ruling affirmed that for the

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121 The dominant groups that were counted were 42. Indeed most Kenyan text books still talk of Kenya as a country of 42 tribes. Equally for quite a long time, the country had 42 districts, most of which were aligned to the so-called tribes of Kenya.

122 As South African legal scholar, T.W. Bennett, has noted, Functionalism has unquestionably used culture to define their unit of study. These units (mostly based around language groups) were depicted as discrete, primordial and static social groups. See Bennett (2004).
British Empire, the ethnic nations were considered to have some sort of power of limited sovereignty which at least nominally would endure as long as the various language groups existed as a race.\(^{123}\)

According to my informants, the Luo country established by the colonial administration had numerous internal boundaries, some of which were widely recognized while many others were imaginary. The most recognized of the administrative boundaries were often aligned to the maximal or sign posts by missionary stations. Often, these boundaries tended to traverse the ‘cultural boundaries’ (Ogot 2003). There were however numerous rituals and judicial purposes that were shared within the ‘Luo Nation’ and with neighbors such as the Abaluyia (Bantu Kavirondo). Even within the broader Luo country, the inhabitants of each section were often recognized on the basis of certain section-specific and cultural practices. For example, the Ugenya people usually intermarry within their maximal while Seme people do not intermarry (Owino 2011:70).

These culturally defined variations commonly known as *kido* (there is common talk of *Kit gi*- their way of doing things) formed imagined boundaries. Kenyan scholar, Ocholla-Ayayo (1976) has given a detailed account of how each territorial section was divided among the Luo from various *Gweng’e* (villages). In his work, Ocholla has also offered discussions of lineage and political leadership from *Gweng* to level of *Ogai* (nation) that I often find rather problematic. Ocholla suggests that the Luo people had a supreme leader of *Ogai* and *Ogulmama* (standing army). My fieldwork and indeed the works of Ogot (1967) seem to suggest that it is *Dala* and *Dho-ot at village level* that performed functions that Ocholla associates with the ‘nation’. The villages are geographically and socially defined entities, whose boundaries are always delineated by physical features such as streams, rocks and vegetation. In the village there are various *dala* (in plur. *Mier*) (homesteads). *Dala* is a patrilineal settlement that can only be established by a married man. This defines *dala* as a central unit in ownership, personhood and management of resources. *Dala* is both a residential area as well as space for secure land tenure, social relationships and source of livelihoods.

In any case, I established as Mboya (1938) has suggested that being a Luo autochthon (to borrow from Geschiere 2009) is described through two major vocabularies of *thur* and *dho-ot*. * Thur*\(^{124}\) refers to the ridge that rises between two steams and is often identified with a clan, while *dho-ot* literally means door and in this context is the “mouth of the house” from ‘dhok’ ‘mouth’, and ‘ot’, ‘house’.\(^{125}\) It seems to me that Ocholla-Ayayo (1976) may have trapped himself by attempting to use the European

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124 The word may also have a deeper meaning. It may refer to an eruption, issuing or coming forth such as through birth or descent but with particular affinity to a certain geographical territory, hence including sacred ties of blood and earth.

125 *Dho-ot* also has important relations to blood and birth and is sometimes used by Luo people to refer to the womb, whose door is the birth canal.
enlightenment models of some universal reason and rationality to understand and describe dholuo speakers, their values systems and society.

These uses of dho-ot can be seen at ethnic community (meta) and maximal level. At the meta-level the language spoken by Luo people is dholuo meaning ‘mouth of the Luo’. Most Luo people refer to each other as jadho-ot meaning ‘a person of the same house’. This notion of house is also used in marriage where in polite terms a man or a woman would refer to each other as jaoda meaning ‘a person of my house’. At the maximal level, the various Luo clans are regarded as distinct dho-ot (Dho-udi in plural). This use of a house as either a metaphor or symbol has also been noted amongst other Nilotic groups (Ogot 1967).

Jodongo (elders) who presided over most economic, judicial and military functions seem to have been based on dala and dho-ot which makes the kind of nation discussed by Ocholla- Ayayo (1976) rather distant. The convening of jodongo seems to have been rather episodic and on a needs basis. The usual meeting place of Jodongo was in abila (a private house or kraal used by the head of a homestead) or in the middle of the homestead near kund dhok (cow pen). The most common unit of Jodongo that held meetings to deliberate on matters of dala and dho-ot was based on clan affiliation. But there were also numerous moments that required convening across clans such as during marriage ceremonies and peacemaking between various dho-udi (plural of dho-ot). At these sessions, Jodongo were selected based on age group and ‘social’ links.

It is therefore possible to conclude that the gweng (village), the residential dho-ot and the libamba (lineage) are all co-operative groups, and decisions concerning matters of mutual interests are made by a group of functionally convened Jodongo. From oral legends, myths and narratives, there does not appear to have existed a formalized body of elders with an appointed leader such as the contemporary Luo Council of Elders to manage the affairs of ‘the Luo’ nation. The shared narrations of immigration and myths such as the significance of Got Ramogi could be what resulted to a common reference to the maximal as a ‘single nation’. As a ‘nation’, explorers and traders in pre-colonial and early twentieth century commonly referred to Luo people as the Kavirondo people (Firstbrook 2010). Even then, relationships between the maximals were often characterized by intermarriages as well as persistent feuds and warfare between maximals and clans.

Away from these primordial notions of Luo nation, uncertainties of colonialism that escalated through the rapid immigration to the urban areas enabled further development of Luo-ness. Mathew Carotenuto (2006) has documented how Luo identity developed amongst the diverse Luo speakers in the 1930s. He argues that it is mainly the dispersal of Luo people (to urban centers to offer labour) from their
western Kenya homelands (Hay 1976; Cohen and Odhiambo 1989) that led to rigorous mobilization to consolidate Luo identity (Carotenuto 2006: 54).

A major instrument for this movement of ‘building Luo-ness’ was the Ramogi African Welfare Association (which I shall discuss later) and the Luo Union, which defined itself as a non-political self-help group that brought together all Luos (Luo Union 1930). According to its key leaders like Jaramogi Oginga Odinga (the father of Prime Minister of the Republic of Kenya, Raila Odinga), the motive of the Luo Union was ‘to promote mutual understanding and unity among the Luo as an ethnic group’ (Carotenuto 2006: 65). The Union adopted its rallying call as Riwruok e teko (unity is strength)—a clarion call that was useful in creating esprit de corps among the Dholuo speakers. Although the Luo Union described itself as non-political, records of the 1960s struggle for independence give an account of the role played by the organization as a ‘political base’ for Luo politicians, especially Jaramogi Oginga Odinga (Odinge Odera 2010, Odhiambo and Lonsdale 2003). The place of the Luo Union in galvanizing Luo identity can therefore be said to have been enabled by fluidity of ethnicity as a practice.

But efforts to present Dholuo speaking people as a nation have persisted with the most recent being by philosopher Odera Oruka (1991). Oruka’s discussion about Luo sages (that shall be engaged in details in this chapter) illustrates a narrative of coherence to match Luo history. It is obvious that such narratives are a rather uncertain claim of ‘imagined community’ (Anderson 1991). Contestations of Luo nation persists to-date. For instance, during my fieldwork, I often encountered discussions where Luos from Uyoma despised Luos from Ugenya for being too ritualistic while those from Gem were generally despised as being violent. More recent scholarship such as those by David Cohen and Atieno Odhiambo tend to present surprising multi-layered analysis of the contested nature of the Luo nation. While the two authors have produced a plethora of publications on Luo people and what is commonly known as Luoland, it is Siaya: the historical anthropology of an African landscape (1989) that illustrates the history and contemporary presentation of Luo Nation.

126 There is much evidence that prior to the Luo unions, Luo people tended to describe themselves using their clans and the twelve maximalis of Nyakach, Kano, Kisumu, Kajulu, Seme, Asembo, Gem, Sakwa, Yimbo, Uyoma, Alego and Ugenya. Thus rather than refer themselves as Joluo (The Luo people), there were more descriptions which were specific to maxims like Ja Ugenya (from Ugenya), Ja Gem (from Gem) and so on.

127 Jaramogi Ajuma Oginga Odinga (1912-1994) was one of the leaders of the African political organizations which secured Kenya’s independence. He is from the Luo ethnic group and whose bid to become president is said to have failed because his opponents were against a Luo ascending to the presidency. See Encyclopedia of Biography http://www.answers.com/topic/ajuma-jaramogi-oginga-odinga#
3.2.5 The Luo Country

Werbner (2002) has clarified that while a nation is a presumed organic and almost primordial unit, a country is often a juridical production. The country in the colonial discourse was essentially understood as the set of fixed administrative institutions that were governed by specialized bureaucracies by norms of law and reason (Werbner 2002: 54). It is clear from the summary of the becoming of the Luo nation above that even a nation is never as ‘natural’ as often presented. After the 1896 war with the British, the colonial administration established boundaries within Luoland which followed those of the lineages. These boundaries have now come to be accepted and are seen as both lineage and local administration boundaries. The rationale for these boundaries have been summed up in the 1930 Memorandum:

The natives’ interest is to be interpreted in the sense that the creation and preservation of a field for the full development of native life is a first stage....This obligation which is plainly involved in the trusteeship must be regarded as in no way incompatible with the common duty of any government to promote the development of its resources, of its territory and the prosperity of its inhabitants (1930: 5).

To protect these natives’ interest was an elaborate administrative structure with an indigenous chief as the point man (they were all men) between the community and the colonizers. Margret Hay (1982) has noted that Luo Nyanza did not feature the presence of chiefs with large jurisdictions. Rather, the British administrators and missionaries re-formulated the fluid structures of social relations (such as *dho-ot* and role of *jodongo*) to develop a system that would match the indirect rule strategy. Second, some traditional rulers were designated “Sole Native Authorities” with absolute powers over local administration only subject to the supervision of the colonial Resident District Commissioner. These tensions seemed to have been argued as competition amongst the various normative systems and contests for political supremacy. Archival materials also seem to suggest that the appointment of the ‘chief’ was made by the Provincial Commissioner using a method that varied from place to place. Sir Harry Johnston has detailed that:

In the South and Central Kavirono districts, the candidates for the vacant chiefship are heard by provincial commissioner, often at great length. The eligible candidates are then placed at different spots, and their supporters stand behind them. Supporters of the candidates who are clearly not in the running are told to distribute themselves behind other candidates. All tax payers may vote. If the candidate who receives most support in the *baraza* is not acceptable to the government, the Provincial Commissioner appoints someone else. There are some cases in which a tribal policeman or the previous chief’s son are reported to have been appointed without taking the people into consultation. In North Kavirono, it is said that the administration endeavored to appoint persons in lineages of leadership (1910: 204-205).

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128 Margaret Hay (1976) has reported this as a punitive exhibition by the British in an alleged retaliation for ‘outrageous’ acts that had allegedly been committed against them by some Luo of the Sakwa, Uyoma and Seme maximal lineages.
3.2.6 The Institutionalization of Luo Country and Production of Luo Nation

The creation of Luo country (as a political unit) by the colonial administration therefore went hand in hand with the production of ‘culture’ and knowledge about a Luo Nation. Practices among ‘natives’ even when just for a specific function tended to be reified to create structures for governance. To sustain the idea of Luo Country, the colonial administration commissioned various research projects to produce knowledge about Luos and demarcate Luoland for governance. It is perhaps these actions that best evidence Mudimbe’s argument about one of the functions of the colonial project as being the production of knowledge and ordering of things (Mudimbe 1988: 45).

Documentations of the Luo were mostly around jurisdictional and moral values. In the initial years most of these included communication in the annual reports by District Commissioners, Native Officers and missionaries who wrote back to their home stations. Precedents from the court rulings and submissions by plaintiffs and defendants were equally useful in developing what the colonial administration presented as the natives ‘customs’. The idea of customs tolerated by the courts were both accommodative of ‘old pre-colonial traditions’ as well as keen to imbibe into them ‘Western values’ and the register of what justice is (Chanock 1985:76).

The most commonly used documentations of Luo country are those by South African sociologist Gordon Wilson and Greek legal scholar, Eugene Contran. Gordon Wilson, who was employed by the colonial government to work amongst the Luo in the 1950s did painstaking work to demarcate cultural boundaries leading to his publication of *Luo Customary Law and Marriage Laws* (1961). Most of it was based on earlier works by explorers, traders, missionaries and anthropologists who were sometimes supported by colonial administrators and, at other times, supported by Luo elders such as Ker.

In 1958, Contran was a research officer in African law at the School of Oriental and African Studies (SOAS) at the University of London. It is under this portfolio that he was assigned by the colonial administration to travel to Kenya and undertake a research project that would re-state African Customary Laws (*This Week in Palestine No. 166*, December 2007). In undertaking his work, Contran relied on cultural boundaries that had been developed by the colonial administration. The British colonial project of demarcating cultural boundaries as political and later on legal boundaries as demonstrated in the works of Eugene Contran was in any case part of the larger gamut of colonial ethnographies.

In some sense, the works of Contran and Wilson may be presented as mere documentations of anthropological facts of the natives as they were at the time. However, they were more than that. Customary law scripted by the colonial administration and its cottiers attempted to create what scholars cited as a ‘new identity’ through certain customary laws (Chanock 1985, Carotenuto 2006).
These positivist projects were aimed at developing a list of what constitutes ‘African culture’. In mapping this ‘culture’ they both followed the political boundaries as illustrated in Figure 3.1. The publications by Wilson (1961) and Contran (1968, 1969, and 1989) are widely referenced in Kenyan courts to-date in cases that require inter-phase between customs and common law. This shall become evident in chapters four, six and seven.

There was however another movement in building Luo country which is sometimes called ‘African moralists’ (Peterson and Macola 2009:5). This movement brought together jodongo and jonanga—educated Luo people who had been converted to Christianity. The proponents of this movement were concerned that Gik ma ndalogi (modern things or things of today) was corrupting Luo ways of life. This movement blamed all the bad things that were inflicting Luo people especially in the mid-20th century with the adoption of mzungu things (Mzungu refers to white man or those from the West) by Luo people. It is apparent that some of these claims were premised on tension that existed between ‘Tradition’ and ‘Modernity’ in the course of evangelization in Luoland at the time129. One of the renowned jonanga was Paul Mboya.

Paul Mboya, himself a convert to the Seventh Day Adventist, has stood out as one of the frontline advocates in this moralist movement. Mboya has written both as a Luo and as a Christian. His most cited publication as Luo is Luo Kitgi gi Timbegi (1938). The book provides a catalogue of some of the most important moments in the life of a Luo. Its theme is to guide ‘Luo people’ on how to do things in the ‘Luo way’ so as to avoid chira (a curse). Its chapter outline details the following: To establish a homestead or dala; mother and children; matters of marriage; death of a senior elder; community pleasure; the Council of Elders; fishing; magical practitioners and bad ways to die. Mboya gives a list of dos and don’t on each of these headings.

Mboya’s book is often used by Luo people in everyday social cycles. During my fieldwork, I met several Luo and non-Luo people who had either read or heard of this publication. I purchased my copy at a second hand street vendor along Oginga Odinga Street in Kisumu City. This circulation of Mboya’s book among ordinary Luos is contrary to the fate of the works of Contran and Wilson. It speaks of a latent and sometimes open power struggle that existed between the colonial writers and African writers like Mboya. The historical formation and transformation of both Luo nation and country must therefore be read not in a parallel system of state law on the one side and customary law

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129 Harries (2007) has argued that in these initial days there is often a common tendency to associate ‘the evil one’ with the modern world.
on the other, but as a conjectural negotiation and contest (Chanock 1985:66). Similar observations have been made by Sally Moore (1989: 280) in her work on Kilimanjaro courts in Tanzania.

The other major publication by Mboya (this time with much influence from Christianity) is *Richo Ema Kelo Chira* (1978) (Sinning is what causes curse). In this publication, Mboya argues that it is the sinful nature and practices of the Luo people that cause *chira* (curse) among them. Unlike the initial publication of *Luo Kitgi Gi Timbegi*, in this publication, *chira* comes from breaking both the Christian commandments and the Luo Customary Law. At the same time, Mboya tells the Luo people that “Nitie moko ma joma oyie YesuKristo ok nyal tiyogo nikelch Yesu Kristo ema osechungo kar manyasi mahosogi” (1978 pg. IV) (There are others (interventions to cleanse *chira*) that those who believe in Jesus Christ cannot use because Jesus has already stood in the place of *Manyasi* (cleansing medicine) to purify them (translation by Harris 2007:117).

The work of Mboya and many others who have picked up from him is useful in understanding the kind of interactions that created Luo Nation, Luo Country and customary law. It is this fluidity of customs that must have attracted the British colonial administration to start the project of developing written versions of ‘customs’. The written version of what come to be known as ‘customary law’ was expected to generate certainty and constituency while retaining the claim of primordial antiquity (Chanock 1985). This English jurisprudence and quest for consistency assumes that customary rules have no contradictions (Gluckman1974: 241). In the perspective of the colonial law it is a general understanding that:

Custom must be certain, definite and established, it must attach to a group or category of persons, it must not be contrary to statues or established principles of law, it must be reasonable and moral; and preferably it should be graced with antiquity (Gluckman 1974: 244).

There is no doubt that this version of so-called customs (seen in the works of Mboya (1938); Wilson (1961); Contran (1968)) is a reinterpretation of malleable customs and traditions practiced among groups such as Luo people in western Kenya. The limitations of customary law in the Kenya Colony must therefore be understood as originating from an attempt to impose a European centre from where the African customs were written and understood. Once more, the production of customary law is evidence of the certitude of European jurisprudence and attention to protecting the dominant interest in pre-colonial societies in defining notions of the moral code and scripts of personhood.

130 While feminists have often presented these dominant interests as those of male members of the pre-colonial society, a re-reading of early ethnography such as those by Hay (1976) and Thomas (2003) tends to suggest that even older women in some societies benefited from the reified customs. During my fieldwork, this was certainly evident.
From the discussions above, customary law and ideas of moral values and justice were ‘products’ of interactions that involved many actors at various standpoints. At one time, it appeared as an engagement just between the state and the subjects (through production of knowledge and ordering as presented by Mudimbe (1994) or citizens and subjects as presented by Mamdani (1996). But its nuanced reading illustrates the participation of missionaries and the jonanga like Mboya and scholars like Wilson and Contran. While this production of knowledge (which as I have demonstrated involves an ongoing interplay between state law and subject’s discourse of power and control) is the central theme in this thesis, one can’t ignore how these entanglements affect state formation and legitimates its new forms of authority. This is the matter that shall be examined in the second part of the chapter.

3.2.7. Contemporary Luo
In the 21st century a description of ‘the Luo’ and Luoland becomes much more problematic just like it has been in the past\(^{131}\). The colonial period was characterized by unprecedented movement of Luo people (mostly men). Because of the upsurge of the Mau Mau struggle in the 1940s, there was a general preference of the Luo people to provide labour in settler farms and urban areas (CD/5/183, KNA; CD/5/233, KNA). Margaret Hay (1982) has narrated how these movements caused significant reorientation in cultural practices and gender relations in most parts of Luo Nyanza.

In Siaya, Cohen and Odhiambo have offered similar narrations of how immigration has occasioned a ‘new’ political economy in Luo Nyanza. Siaya is the name of a Luo-speaking area of western Kenya. Using stories about everyday life, Cohen and Odhiambo demonstrate how for the Luo, what constitutes culture, correct behaviour and history are subjects of never-ending arguments and contests. The accounts such as those of Hay (1982), Cohen and Odhiambo (1989) and my own observations in K’Ogelo Akoth (2011) and other parts of Luoland present a compelling case of how the Luo Country has now become organized around spaces of Luoland and diaspora. Luo country is therefore presented as multiple spaces with different cultural meanings. On the one hand it is dala (home) which now means not patrilineal affiliation but ‘social’ filiations and link to Luoland. It is perhaps these movements between dala and kapango that has led to Luoland being labeled as ‘home’.

As home, Luoland is the place of blood, family and land. It is where Luos enjoy their autochthony\(^{132}\). On the other hand there is kapango (urban residential areas) where Luos are allogenes. This practice of

\(^{131}\) Of course as I have demonstrated above, the notion of the Luo people as a homogenous category has always been more of an imagined construct than a matter of fact.

\(^{132}\) Peter Geschiere has done extensive research on the fluid categories of allogenes and autochthons in Cameroon. The former refers to ‘foreign’ while the latter means a primal form of belonging based on a special tie to the soil (See Geschiere, Peter (2009), *The Perils of Belonging: Autochthony, Citizenship, and Exclusion in Africa & Europe*. Chicago, University of Chicago Press.

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the divide between ‘home’ and ‘residence’ is a common theme in this thesis. In the 1980s Kenya, its perspectives were manifested best in the case of SM Otieno, a Luo criminal lawyer whose death triggered a major tussle on where he ought to have been buried. His Umira Ka’Ger clan, who won the case\textsuperscript{133}, insisted that as a proper Luo, Otieno had to be buried in his Nyalgunga home in accordance with Luo customs and not in the outskirts of Nairobi (Cohen and Odhiambo 1992).

But even then, there are intricate political, economic and social connections between kapango and dala. During my fieldwork, I observed how the use of mobile money transfer services (popularly known as M-pesa) is important at K’Ogelo (Akoth 2011). This remittance economy has also been observed by Cohen and Odhiambo (1989) in Boro, also part of Siaya District. In fact, statistics from the Millennium Village Project suggest that monies received from remittances are the highest source of income for many households in Siaya District (Millennium Village Project 2005:6). This attests to the never-ending interface between dala and kapango and indeed ‘traditional’ and ‘modern’. As shall be seen in this thesis, SM Otieno, like many Luos in post-colonial Kenya could have been both ‘modern’ and ‘traditional’. Most narratives of Luo people in contemporary Kenya however seem to focus not quite on immigration and cultural practices but on Luo people as an exceptional ‘tribe’\textsuperscript{134}.

In Kenyan politics, this discourse of exceptionality has often put Luo people at loggerheads with authorities and made them repeated victims of political assassination\textsuperscript{135}. Socially, they are pace setters’, jonanga, closest to what is modern! In social Internet sites such as www.jaluo.com and www.masada.com, debate has been rife on: who is a Luo? Annex 3.2 illustrates how a response to this question raises the issue of exceptionality and how Luo people in dala and kapango are producing new identities and meanings of their homeland and residential spaces. Most recently, this debate about Luo Country has manifested itself around the persona and identity of the 44th President of the United States, Barack Obama. A question has therefore been posed, is Obama a Luo? I posed this question to some residents of K’Ogelo during this study. I now want to go back to this question based on the logic of Luo formation outlined above and responses that were given during my fieldwork.

\textsuperscript{133} In the midst of all these though, their central theme is that of the contest between “traditional” and “modern”. The counsel for the widow (Virginia Judith Wambui Otieno) worked towards demolishing the Luo custom as backward, lazy, half-witted, obdurate, uncivil and not befitting of “a cultured man” of the status of Silvano Melea Otieno. Richard Kwach representing Joash Ochieng’ Ougo and Omolo Siranga on the other hand constructed tradition as part of order that defines the identity for any one born Luo and binds all members of the Luo Nation, SM not being an exception.

\textsuperscript{134} Although the term has been discarded in academic discourse, it persists in public parlance, political discourse and every day descriptions.

\textsuperscript{135} See Cohen and Odhiambo (2004). In 1990 one of the leading Kenyan journalists penned an article where he gave a list of 16 Luo people who have been assassinated since independence. See Opanga Kwendo. 1990. Assassinations Since Independence, Daily Nation, February 17
3.2.8 Is Obama a Luo?

At the time of my fieldwork in 2008 and 2009, the United States of America had just elected Barack Obama as its 44th president. The election of Obama who has kith and kin in Kenya ushered in fresh debate on who is a Luo (Obama 2009, Mazrui 2008). Ali Mazrui, a renowned political scholar, had in fact treated this matter as a given when in 2007, which was coincidentally electioneering time for both Kenya and the US, he posed the question; who shall be the first Luo to be President between Barack Obama and Raila Odinga? Obama would later win the elections and ascend to office on February 20, 2009 much to the joy of Kenyans and more so Luo Nyanza (Akoth 2011).

Obama himself talks about his African parentage with pride and inspiration (Obama 1995, 2008, Akoth 2011a; Akoth 2011b). Yet the problematic question is: is “Obama a Luo?” To answer “yes” or “no”, one would first have to understand a Luo. On an account of legal citizenship, this question may seem settled by the fact that Obama enjoys US citizenship. But even in the US this was not an obvious matter as in October 2008, the Pennsylvania Democrat, Phil Berg, instituted a lawsuit against Barack Obama demanding that he present his original birth certificate to verify that he is indeed an American citizen (Metzinger 2008).

An intellectual strategy for understanding who a Luo is offers at least two possibilities for engaging with the question of Obama’s cultural nationality. On the one hand, there is what Dholuo speakers imagine as their blood heritage while, on the other hand, is the character and customs that describe who a Luo is and what it means to be Luo. Detailed presentations of these customs and character that constitute some sort of common web amongst the Dholuo speakers have been captured by amongst others Paul Mboya in his Luo Kitgi Gi Timbegi and Ocholla-Ayayo (1976).

Luo by Blood Heritage

Let me start with the index of blood heritage—lineage and descent. Under this index, Obama is Luo. His father Barack Hussein Obama was Luo from Alego K’Ogelo, his great grandfather Opiyo moved to Kendu Bay and later in 1943 Hussein Onyango (Obama’s grandfather) moved back to Alego K’Ogelo (Firstbrook 2010). It is common belief that like many other agnatic lineages, the senior Obama was part of the Joka Owiny lineage. This genealogical account has been given in Ogot’s

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136 This matter is captured in Mazrui’s personal blog (www.alimazrui.com) and was later a lead story in leading newspapers such as the Daily Nation in Kenya.

137 Customs are defined as ‘usual practice’ mostly with ethical behavior for which there is expectation that one would follow (Concise Oxford Dictionary: 295). The word is commonly used by anthropologists to describe standardized behavior of a particular group (Gluckman 1969a: 356). The Luo people speak of Kit joluo. This is what Paul Mboya attempted to capture in his Luo Kitgi Gi Timbegi (1938).
History of the Southern Luo (1967). For that reason Obama just like Bethwel Ogot is a Jaka Owiny (“descendant of Owiny”).

There is no doubt that the genealogy of Luo people shall always be contested and continuously negotiated based on interests and emerging knowledge. But this ‘blood link’ is a predominant certitude of Obama’s identity. Obama himself stated when on a state visit to Ghana that, “I have the blood of Africa within me” (Obama 2009). Earlier in August 2009 his chief diplomat, Hillary Clinton, while appealing to Kenyans to heed the path of reforms endorsed by the Obama Administration called out at a public lecture: “Let me begin with greetings and good wishes from President Obama to the people of his ancestral homeland. “Love him [Obama], listen to him,” Clinton said. “He is your son” (Africa Focus, 2009).

The claim of Obama’s link to Kenya on the basis of blood connection is premised on two matters of practice. The first is patriarchy and patrilineage that is practiced among Luo people. The notion of being Luo is thus constructed based on link from the father. This is a practice that seems to have influenced Obama’s own construction of self as evidenced in his tracing of his father’s dream in the now seminal work, Dreams from My Father (1995). The second matter of practice is the imagination that there is some ‘pure Luo blood’. This is an assumption which was promoted by colonial administrators to fuel ethnic rivalry to benefit their own rule (Mamdani 2002; Lonsdale 2008). In practice however, there is abundant evidence that speaks against the grain of the notion of ‘pure Luo’. Looking at the patterns of movements and the formation of the so called Luo nation, it is evident that Dholuo speakers and its various maximals are a product of ongoing encounters which have included inter-marriage and assimilation (Ogot 1967; Cohen and Middleton 1970).

**Luo by Character and Customs**

The second segment of what makes a Luo is character and customs. This notion as expressed by Mboya and Ayayo amongst others is reminiscent of the argument by Tylor (1958(1871):4) that “Culture is that complex whole which includes knowledge, belief, art, morals, law, customs and other capabilities and habits acquired by man as a member of society” (cited in Sardar and Loon 1973: 53). Tylor’s definition inspired the classical American concept of culture as the worldview and ethos of particular group of people. Luo maximal is primarily patriarchal. This means that the offspring belong to the father’s clan or maximal. As already noted in the foregoing discussion, being a Luo autochthon is described through two major vocabularies of thur and dho-ot. Obama is therefore of dho-od Luo ‘a person of the Luo house’. Most Luo people in K’Ogelo think he is a Jananga, but do not agree with his decision to invite his mother-in-law to reside in the White House as it is not an approved way of how a Luo man should relate to mother in law (Personal Communication, June 2009).
**Luo by accomplishments**

At the third level of responding to the question of whether Obama is a Luo, reference is often made to an understanding of Luo people from their accomplishments. It is in the accomplishments that both Luo and non-Luo people are often invited to understand the character of Luo people. Legends with quasi-divine powers starting with Ramogi Ajwang’ to others like Owiny’, Lwanda Magere, Joseph Mboya, Jaramogi Oginga Odinga and other Luo heroes are all acclaimed because they were exceptional- which conceptually means that they are of a ‘supirior race’.

This index of examining Luos’ character is further reinforced by historical myths that associate Luo people with the Hamitic Hypothesis. After all, narratives of formation of the Luo as an ethnic group and even their encounter with colonial modernity are often told from the perspective of Luos as exceptional people (Akoth 2011). Although linked to Judaic and Christian myths of the Bible (Mamdani 1996: 80), the Hamitic Hypothesis though more of a fiction than Hypothesis, has been used widely by colonialists, missionaries and historians like Hugh Trevor-Roper (1959 cited in Mwenda et al 2006:30).

But the fact that this notion of Luo exceptionalism has persisted is evidence of how popular discourse influences scholarship (Haugerud 1993). Most recently scholars insisting on taking forward the idea of Luo exceptionalism have suggested that the Luo of Kenya are of the same lineage as the ‘Black Pharaohs’ (Donde 2013, Forthcoming).

Even though explicit expressions of Hamitic Hypothesis have receded, there is yet another notion of what it means to be a Luo that still persists. The notion of exceptionalism is part of Luo character and customs (Akoth 2011, Firstbrook 2010). This imagined notion of Luo exceptionalism was evident in the way Luo people in Kenya and more so K’Ogelo marked the election of Obama as both presidential candidate for the Democratic Party (in 2008) and as President of the United States (in November 2009) (Akoth 2010).

It is also interesting that Obama’s most recent essentialist critics have created a reverse of the notion of exceptionalism (that is, that Obama is actually of an inferior racial extraction) to express their resistance to his presidency (Ibid). To conclude this discussion on the claim of Obama as Luo or not, it is clear that neither the production of Luo nation nor Luo country is complete. Most important however is

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138 The Hamitic Hypothesis which has largely been discredited was central to the attempt to deny black Africans any role in their own history by postulating that migratory white tribes, known as Hamites, were wholly responsible for spreading civilized practices throughout Africa. In regard to Luo-ness, this racist notion is often used to argue that Luo people claim linkage to Ham’s genealogy. The salient claims is that they- Luos are Hamites and therefore superior to other Africans.
how the construction of Luo identity is entangled in state craft at the colonial and postcolonial moment. Running through this identity, politics is a persistent ‘othering machine’. At one point it is the colonial state and, at other times, it is the converts or customary law. The underlying structural attitude however, seems to be some sort of struggle to become, based on elusive criteria of humanness. It is this underlying attitude, which Mudimbe (1988) sees as based on Western epistemology that explains practices in governing the colony and Luo country in particular.

3.2.9 Institutionalization of the Luo Council of Elders

The production of the institution of elders takes not much of a different mode from that which produces chike (the customary ways of performing everyday practices from planting and cooking to daily interactions), Kwero (taboo), and the Luo nation and country. I have already clarified that one becomes a jaduong’ among Luo people when he has his own dala. The neo-traditional movement of the 20th and 21st century has however influenced a ‘new’ narrative of the institution of elders in Luo Nyanza. In the recent past, Ocholla- Ayayo (1979, 1980) attempted to argue that there was always some council of elders uniting all Luo people from dala to piny (Luo nation). Indeed there were language groups which have for long had some standing committee of elders. The Kiama among Kikuyu, the Meru’s Njuri Ncheke and the Borana’s Gada system have been expressed as being part of oral tradition from time immemorial.

Evidence from my fieldwork and contemporary practices in Luoland and discussions with Ogara Taifa tend to dispute this notion of some homogenous and all-inclusive Luo Council of Elders. As has been demonstrated in this chapter, you are a Luo elder once you have dala and often elders convene to deal with issues of common concern such as arranging marriage, planning and participating in funerals and resolving disputes.

Also, oral histories of the Luo Council of Elders often create a distinction between the institution of Ker and the Council of Elders. Ker is a revered leader who has both political and spiritual responsibilities and functions best associated with the founders of ‘Luo tribe’. According to Ker Riaga Ogalo, the first Ker of the Luo people was Ramogi Ajwang’ often described as the founder of the ‘Luo nation’. Ajwang’ is said to have led Luo people at about 1425 until they reached the East African region, precisely at the location currently called Uganda.

Folk lore, riddles and songs that I encountered during the cultural festivals and at the various radio station often refer to Luo people as Nyikwa Ramogi Ajwang’ (descendants of Ramogi Ajwang’).

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139 This refers to social and cultural register.
Although there is scant evidence, the same mythology tends to suggest that Ramogi Ajwang’ worked with a council of elders. The split of Luos in Uganda created four factions i.e., *Joka Jok*, Padhola, *Joka Owiny* and *Joka Omolo*.

The idea of a council of elders is so inspiring to the idea of Luo nation that the Luo Union (originally operating as Luo Thrift and Trading Corporation until 1953) formed in 1945 cultivated its rationale and *raison d’être* around the pursuit of consolidating the Luo people. In 1951, Oginga Odinga undertook to follow in the legacy of *Ker* Ramogi Ajwang’. Oginga Odinga started a campaign to rejuvenate and consolidate Luo people in Kenya, Uganda and Tanzania, under the East Africa Union Luo Council (Ogot 2003). His initiative was a response to a colonial moment that had devoured and undignified Luo people, accelerated asymmetries and undermined the unity of the Luo Nation.

After the end the World War I, the conflicts between Luos more so returnees from the Kings African Rifles and the ‘new’ local elites who had become chiefs and converts weakened the Luo nation and identity further. Besides, there had been large numbers of Luo people who had immigrated to Nairobi, Mombasa, Kampala and Jinja to seek employment and ‘opportunities’\textsuperscript{140}. After three years, the East Africa Luo Union was replaced with the Luo Union which was centred in Kenya but inspired to cater for all Luo people in the region. Although described as non-political, the work of the Union was mainly to front for the interest of the Luo people in the colonial state and represent Luo as a nation among others contesting more recognition by the colonial state. However, it was also inward looking with a mandate to encourage adherence to Luo norms and create unity among Luo people under the call, *Riwruok E Teko* (Unity is Strength) (Ogot 1963: 270-271).

For his efforts, Oginga Odinga was made Luo *Ker* in 1954 and served until 1958. Oginga’s resignation as *Ker* was a strategic move by the Luo Union. In 1958, Oginga declared interest to engage in active political contest against the colonial state. The Union had earlier made a decision that none of its leadership would engage in such active political contest (Carotenuto 2006). *Ker* Ouko Reru who took over from Oginga Odinga was however less charismatic and is said to have abandoned office later in the same year. It is Omer from Karachuonyo who led the institution for over three decades. A former primary school teacher, Omer was a low profiled leader but who offered the Luo Union as a ‘space’ for sanctioning political actions and consolidating Luo people. However in 1981, President Moi, who had flourished in practicing ethnicization of politics and politicization of ethnicity in Kenya, slapped a ban on all ‘ethnic organizations’ (Carotenuto 2006) bringing to a halt the operations of the Luo Union and its football team that was equally called Luo Union.

\textsuperscript{140} While no numbers have been provided, celebrated Luo harpist Ogwang’ K’Okoth and short stories writer Grace Ogot have narrated how Luos moved in significant numbers to ‘make wealth’ in faraway places. See Grace Ogot, *Land Without Thunder: Short Stories* (1968).
The multiparty politics and call for liberalization of African politics, economy and social space ushered in a desire to rejuvenate ethno-organizations. Geschiere (2009: 90) describes this trend as “politics of belonging”141 and observed that throughout the continent of Africa it became important to decide who voted where, who could be a candidate and from which ‘tribe’ the leaders of political parties came. As the effect of this liberalization movement began to be experienced in Kenya in the 1990s, the new organization, the Luo Council of Elders, got registered under the Societies Act, CAP 108 of the Laws of Kenya. It developed a leadership structure consisting of a national committee composed of the eight elected office bearers making a total of thirty. Below this came the district councils with the same structure of leadership. The former is the highest decision making organ of the council, while the latter is the lowest level of leadership.

Then Adala Otuko was elected as chair. A former civil servant, he served between 1998 until 2001 when he died. Thereafter, Koyo Pien, known for his cattle business in Luoland took over the reins on an interim capacity until 2004 when elections were held for a substantive Ker. The 2004 elections held at Ofafa Hall in Kisumu brought together delegates from all the Luo maximal districts of Migori, Homa Bay, Rachuonyo, Nyando, Kisumu, Siaya and Bondo. Also included was Suba, whose status as a Luo District continues to be ambivalent. In total there were 146 delegates. Riaga Ogalo was elected as Ker, a position that in theory one holds for a lifetime. Other officials elected for a tenure of five years to work with him were: Vice-Chairman, Willis Opiyo; Secretary-General, Professor Gilbert Ogutu; Deputy Secretary General, Adera Osawa; Organizing Secretary, Stephen Othoo Deya; Deputy Organizing Secretary, Jim Onundu; Treasurer, Thomas Adongo Onuko and Deputy Treasurer, Ogwel Ayodo. Unlike previous Ker whose installation often went unnoticed, the installation of Ker Riaga was witnessed by Raila Oginga (son of Jaramogi Oginga Odinga) and a host of Members of Parliament from Luo Nyanza.

While each of the members of the Luo Council of Elders was elected as a representative of their specific region, it is not quite the criteria of ‘an old wise man of culture’ that was used. All of them are individuals who had a history as either school teachers, railways workers or had lived most of their lives in kapinga. At the same time, the Luo Council of Elders was established by statute under the Societies Act, CAP 108, such that even though its leadership claimed heritage rooted in ‘the origin’ of Luo people, its place in Luoland and among Luos has always been contested. As we shall see in Chapter Seven, the Luo Council of Elders has had to contend with other Luo Councils of elders in Luoland as well as state requirement for its internal accountability.

141 This movement is much more spread beyond just Africa as documented by Geschiere and Nyamnjoh (2000) and Geschiere, The Perils of Belonging (2009).
However, even with a clear constitution that is approved by the government, the matter of “who is a Luo Elder?” came up in several meetings that I held with Ker Riaga Ogalo and other members of the Luo Council of Elders. Ker Riaga is rather open about this matter. Before being elected as an elder, he was a businessman. He had also worked with the Kenya Railways. Ker Riaga often argued that, “As an elder I am conversant with what is required of a Luo, but am also able to communicate in English and to write out our decisions” (Interview with Riaga Ogalo, June, 4, 2010). The profiles of other elders in the Council are not much different. One of the most active members of the Luo Council is James Oyugi Gari.

Gari was born in 1943 in Uriri, Rongo District in South Nyanza. At the time of my fieldwork he was resident of Kamgudho Village at Dala Ka’ Ranjira. He is a member of the 7th Day Adventist Church. He has been involved in public life in various capacities. He was a postal officer at the Kenya Post and Telecommunications Corporation in the period 1966-1971. In 1972, he left the Postal Corporation for the private sector and worked with the Metal Box Company Limited as a production controller in their Nairobi and Thika offices until 1975. Thereafter, he moved to Unga Group Limited as a Branch Manager. There, he served until 1978 from where he joined Rift Valley Bottlers Ltd in Eldoret in 1984. He has been a businessman since 1985 and has served at the Luo Council of Elders for over five years. In his period of service and in his engagement with the Luo Council of Elders, what he considers to be the most outstanding interventions taken by the Luo Council of Elders are: participation in major consultative meetings between Kenyan communities; creating awareness amongst various communities and assisting orphans and widows in Luo Nyanza.

It is therefore apparent that just as was the case in colonial Kenya, formal education is influential in engaging with the category of an elder whether from the Luo Council of Elders, radio programmes in vernacular radio stations such as Radio Ramogi and Radio Lake Victoria or in the various local institutions like clans and families. Rather than just looking at ‘traditional’ knowledge, ‘modern’ knowledge and history are important for one to become an elder. Biographies of elders who we shall encounter in chapter five in Radio Victoria’s Galamoro Mar chike, Ramogi Radio’s Abich Jodongo as well as in Luo Councils of Elders tend to suggest that biological age is not the most important criteria anymore. Other factors such as literacy skills, formal and historical knowledge of one’s society and interests that they stand for are important criteria when a decision of who is an elder gets to be made.

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142 ‘Active’ here is in reference to interest in attending meetings and giving advice to various groupings on what Luo values or notions of human rights are.
To enable a proper appreciation and acceptance of these ‘modern elders’, there are never ending efforts to link the elders with what is regarded as the authentic history of the institution of Luo elders. This history is often told in different versions. The various versions though share in their attempt to link the institution of elders with the institute of *chike*, *kwer* and *kido* (variety). Although the Luo Council of Elders often claim to be the ‘authentic’ and supreme organ of Luo people, Luo eldership is publicly exercised by elders in *Abich Jodongo* and *Galamoro Mar chike* without reference to the Luo Council of Elders. I also heard *Ker* Riaga complaining at a meeting in Ofafa Hall in Kisumu of how there are too many individuals and institutions calling themselves elders.

Philosophers like Odera Oruka and legal scholars such as Makau Mutua have made reference to these so-called ‘elders’ as sages and authentic representatives of moral script of their ethnic groups. Odera Oruka coined the term “Philosophic sagacity” (Oruka 1990, Oruka 1991) to explain a method and genre of philosophy. The silence on the questions of ‘who is a sage?’ was partly due to the central intellectual concern that promoted Oruka’s work. That was a defense against Euro-American skeptics who insisted that ‘Africans’ were incapable of philosophizing (Oruka (1991: 20). Oruka himself concluded:

> Philosophy is a perspective of the whole or part of the whole human predicament and insightful suggestions.... This sort of perspective can be found in anybody (white, black, yellow, female or male) (Oruka (1991: 20).

### 3.2.10 Multiple Institutions of Elders in Western Kenya

When I went to Nyakach at the invitation of the Kenya National Commission on Human Rights and Kenya Legal Network (KELIN) in December 2009, it was disclosed to me that not all elders’ groups are under the auspices of the Luo Council of Elders. In Nyakach, I was hosted by the Nyakach Council of Elders. The Nyakach Council of Elders has based its structure on *dho-ot*. Nyakach has eleven *dho-udi* (sing. *Dho-ot*) namely (In order of the largest to smallest): Kajimbo, Kandaria, Kadiangá, Kabodho, Jimo, Koguta, Kasaye, Wasare, Ramogi, Agoro and Gem Rae. These *dho-udi* come together to form the Nyakach Luo Council of Elders.

Although being an elder is often associated with advanced age, there are numerous perspectives from which councils of elders get convened in Luoland. These elders represent the institution of elderhood as a social and cultural category thus granting them claim for respect for their knowledge (Aguilar 1998). As mediators between the ‘these days’ and ‘those days’ as well as with the spirits of the departed Luos, the elders also tend to exercise lots of power and influence among Luo people and certainly elsewhere in Africa. This notion of ‘these days’ and ‘those days’ that I shall discuss in details in chapter five is commonly used by ordinary citizens in colonial and post colonial Kenya to critique modernity.
Another category of elders by affiliation are the elders recognized under the Land Dispute Tribunal Act No. 18 of 1990. The Act opened room for creation of District Land Tribunals. The tribunals that comprised village elders were created to settle land disputes on the understanding that they were knowledgeable about local issues such as those involving kinship and land inheritance. The Act describes elders as:

Persons in the country or communities to which the parties by whom the issue is raised belong, who are recognized by the customs in the community or communities as being by virtue of age, experience or otherwise, competent to resolve issues between parties. Where there are no such elders, the law defines an elder as meaning such person as the District Commissioner appoints (Wanjala, 1990).

In the long run, although Ker Riaga Ogalo and the Luo Council of Elders are regarded in public parlance as ‘The’ Council of Elders, the notion of who is a Luo elder remains as open as there are uses of ‘elders’. Ogara Taifa and others in his radio programme also claim their rights as elders. To take forward the discussion in this thesis therefore, the focus is not only The Luo Council of Elders but rather on Luo Councils of Elders as they manifest themselves in everyday efforts to give meaning to the place of Luo people in unfolding realities in both Luoland, kapango and the globalizing world. The common node between these councils of elders is their attempt to bring together ideas and debates which Luos express about their past and their present in an attempt to respond to questions such as, what is Luo culture? What is the correct behaviour for a Luo? What is Luo history? And what is the place of Luo people in contemporary Kenya and the globe?

3.2.11 ‘Modernizing’ Luo Councils of Elders

Most recently, the Luo Council of Elders has had to work to shed the image that it is a patriarchal institution and exclusive ‘club’ of men. On July 9, 2009 Phoebe Asiyo, a prominent Luo from South Nyanza was installed as the first woman elder with the Luo Council of Elders. Incorporating Phoebe Asiyo was a response to the resistance to the institution of elders in contemporary Kenya. It can also be read as yet another effort to ‘modernize’ the Luo Council of Elders as has been observed by Becker (2006) of a similar institution in Namibia.

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143 In the 1990s, organizations such as FIDA-K have critiqued the absence of women councils of elders as an indicator of patriarchal practices.
The idea of ‘modernizing’ the Luo Council of elders through participation of a woman like Phoebe Asiyo arose from two major perspectives. First is that progress towards democratization and creation of modern states in the 21st century is often described according to the extent in which institutions of the state and other social formations become inclusive of both men and women. The United Nations Development Programme (UNDP) has been leading in developing indicators for pro-poor governance. The most recent of these publications is the ‘Measuring Democratic Governance: A framework for selecting pro-poor and gender sensitive indicators’ (2006). This publication asserts that:

…some interventions are designed to strengthen women’s capacity to access resources and opportunities in order to overcome a historical backlog of discrimination and exclusion. Monitoring such policies tracks changes in women’s empowerment. Indicators of female empowerment might include government spending per head of female population on programmes to reduce discrimination against women, and the proportion of national Parliamentary seats (UNDP 2006:206-14).

Going by this explanation from UNDP, admitting women members to the council of elders is synonymous with ‘modernizing’ the council. The second element of this ‘modernization’ initiative is on the basis of Phoebe Asiyo’s profile. The Centre for Development and Population Activities where Phoebe Asiyo served as a Board member has given her profile as follows:

The Honorable Phoebe M. Asiyo is the commissioner of the Constitution of Kenya Review Commission; the chairperson of Kenya’s Caucus for Women’s Leadership, a member of ‘Parliamentarians for Global Action’ and serves as a goodwill ambassador for the United Nations Development Fund for Women. Hon. Asiyo served as a member of parliament in Kenya representing Karachuonyo from 1979 to 1997. During her tenure, she was a vocal and ardent supporter of the extension of rights to women and advocated for full political participation of women. From 1970 to

(http://www.cedpa.org/section/aboutus/board#Asiyo).

There is no doubt that Asiyo has had an elegant career. But one notes that her selection to the Luo Council of Elders is not quite because she has demonstrated knowledge and practice of ‘Luo Culture’, rather it is because her achievement supersedes the common notion of a Luo woman. It is also evidence of a narrow perspective which sees gender in terms of numerical presence.

**3.3 Part Two: The Governmentality of the Kenya Colony**

As has been demonstrated above, the project of colonial state building was pursued through numerous mechanisms. The cultural state that resulted from blending imagined cultural and political boundaries was widely managed alongside the lines of Frederick Lugard’s idea of the Dual Mandate. This mandate (implemented through indirect rule and imposed chiefs) had both a component of controlling and ‘civilizing’ the natives. The expected result was a native who could ultimately be a rational and reasonable citizen. In other words, governing the colony was also a project of universalizing European value systems and models of rationality. The missionaries, colonial administrators and judicial institutions were thus used to ‘create’ ‘responsibilized citizens’. Among the basis of creating ‘responsibilized citizens’ was a Western legal model embedded in Judeo-Christian doctrines and values.

While the Kenya-Uganda Railway commonly known as ‘the lunatic express’ was a major colonial economic project, it went hand in hand with a project for ‘social transformation’ which, like the human rights project in the 21st century, was meant to produce ‘responsibilized citizens’. All the black population in the colony was classified as natives who were ‘undeveloped’. Their life chances and those of their progenies would be ‘improved’ by civilizing them and perhaps preparing them to be self-governing. It is through such paternalistic perspectives that the colonialists arrogated to themselves the role of civilizing and transforming the Africans in the colony to responsible citizens. While there was resistance to colonial domination, the project of ‘social transformation’ to produce responsibilized citizens within the colony had support from some Luos. In Luoland, a term jonanga (literally, ‘people of the cloth’) was used to describe those who had been ‘transformed’. *Jonanga*, dressed like the white missionaries, used soap, paid taxes, spoke English and were often Christians. *Jonanga* was therefore a local metaphor for describing ‘responsibilized citizen’ even though such apparent trappings of ‘civilization’ were often based on mimicry than social transformation.
In discussing the subject of representation, the 1930 Memorandum has highlighted the ‘improvement’ of the natives as a central objective of colonization. The idea of ‘improvement’ embodied more than mere attainment of some higher realization in attitude, outlook or well being. In the manner of its expression in the 1930 Memorandum and the practice of colonization elsewhere, the improvement being referred to here was ethnocentric and a statement of the underlying colonizer’s attitude. This is the colonial project which was to produce ‘new subjects’. Section 8(b) of the Memorandum states in part that:

Her Majesty’s government regards the objective to be achieved as general improvement in the standard of the natives’ life; alike in economic conditions, in home circumstances and in physical health of men, women and children, together with the spread of education in its widest sense. Such education should not be regarded as applicable only to children at school or youths under technical instructions, but must include such measures of adult education as may from time to time be applicable.

But the process was not unidirectional. Institutions such as the native tribunal, native councils and missionaries that were established to govern and ‘transform’ the natives were themselves informed by everyday life in the colony. As much as the bench at the native tribunals was an effective instrument in moderating what could be practiced as customary law, it also created a register of what the law expected of a ‘responsible native’. The missionaries ran schools and evangelization which were appropriated by the local converts through the laini villages. When it came to creating a native who owns land through individual tenure, the colonial administration was faced with contestations as well. The demand by the Luo people to revert to the ‘old days’ disrupted the almost linear teleological plan presumed by the missionary schools and Native Judiciary. I now want to use three cases to illustrate this.

**3.3.1. Case I: The Native Tribunals**

In his influential publication, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (1985), legal historian Martin Chanock (1985) demonstrated that the generalized political models and representations of customs and customary laws in the colony were a result of a conjuncture of the European and African ideological needs rather than some pristine traditions from immemorial times (1985: 34). As shall be demonstrated in this section, the design and operation of the Native Tribunal was such that what passed as acceptable law was decided based on standards held by the colonial District Commissioners. Far from the idea that customary law was part of a continuity of pre-colonial systems and functions, my archival research has confirmed Martin Chanock’s (1985) observation that customary law was part of a larger project of grafting the natives into the colonial gamut and transforming pre-colonial African institutions.

The native judicial structure in the colony was designed for numerous purposes. In the opinion of the colonial administration, the British Civil Laws were too complicated and expensive for the
‘uneducated savage’ (1952 CD/5/233, KNA). Although designed as a distinct framework from that which regulated the settler races, the two systems worked in constant engagement and not static binaries as is often presented. In everyday governance of the colony, the native’s judicial structure worked hand in hand with the native administration system. For the purpose of administration, there were Native Councils that were mainly made up of the Council of Elders cobbled up by the colonizers. The compositions of Native Councils constituted of a District Commissioner as president, the District Officers and representatives of the natives nominated by the government or elected through an open baraza.

Among the Luo where there were no formal or permanent elders, such structure had been established by 1911 (1952 CD/5/233, KNA). In the initial years in the colony, the Native Council also performed tribunal functions. The Kisumu District Quarterly Report for 1917-18 states that:

> The Council of Elders having assembled at the village of the chief would sit down near the gate of the village with the chief in their midst. The plaintiff would then come forward and, sitting down near the chief, would state his case. Having heard what he had to say the defendant would be called in for his statement and witnesses having been called to either side the chief would give his decision and, if the Elders concurred, such decision would be carried into effect (KNA 1918: 37)

In these initial stages, all cases settled by the chief and headmen would have to be sanctioned by the District Commissioner (DC). The DC and Provincial Commissioners (PCs) were also the avenues of appeal in the event parties to a dispute were not satisfied. This Provincial administration continued to be the link between English common law and what was called customary law (Chanock 1985: 40). Over the years, the Native Tribunal developed into a formidable system of administration of justice. Annex 3.0 shows the development of the structures of the native tribunal.

From the 1930s, the British administration created a new emphasis on the Native Tribunals. Rather than picking elders sitting on the tribunal on the basis of advanced age and seniority in Libamba, gweng’ or dala, the colonial administration started inviting those who it characterised as ‘modern’ to join the Tribunals’ bench. In other words, it was only the ‘responsibilized citizens’ who got to serve as elders in the Native Tribunals (Phillips 1944). In Luoland, it is perhaps Paul Mboya who demonstrates the place that gets to be occupied by ‘responsibilized citizens’. By 1950s, Mboya was the President of the Native Court. Mboya had endeared himself among both colonial government administrators and the missionaries. For the latter, he was a committed convert and in the late 1920s,

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144 The Natives’ Council was established through the Native Authority Ordinance 1924.

145 Barazas are public assemblies that are usually held outdoors. The practice of these assemblies is however an appropriation from a practice by the Swahili society in Kenya’s Coastal region. In Post-colonial Kenya, barazas have become spaces for political rhetoric. As they tend to be the space where governance and state practice are discussed, the barazas in postcolonial Kenya are individually licensed by the state.
helped missionaries translate the biblical book of Genesis into the Luo language. For the colonial administrators his 1938 book, *Luo Kitgi gi Timbegi*, had made him an authority on Luo Customary Law. Mboya believed in the integrity of a Luo nation that he claimed to be possible if Luo people kept their *chike* and *kwero*. Using the Biblical narrative of the Babylonian captivity of Israel, Mboya warned readers in *Luo Kitgi gi Timbegi* that “people who have no respect for their society’s customs and practices . . . are scattered all over the earth, and people refer to them as *jo dak* [tenants, vagrants]. (Perteson and Macola 2009: 5-6).

It is therefore apparent that the Natives Court and the entire judicial system established by the colonial state was more about creating a ‘responsibilized citizen’ as much as it pursued the functions of creating and maintaining law and order. This explains why over time, the ‘old elders’ were replaced by ‘educated elders’ (Shadle 2006: 181). Besides, my archival study reveals how the idea of natural justice and the doctrine of repugnancy became part of the central register of producing ‘responsibilized citizens’. The two notions were used as measures of acceptability of customs and other practices associated with the natives. Through the courts, the idea of natural justice and repugnancy defined that which was acceptable as part of the colonial moral register. Below are two cases that were reported and went through the three stages of the colonial civil justice system. They illustrate the social life of human values in the colonial epoch.

**Doctrine of natural justice**

The powers of the British administrators to change customary law was spelt out by the District Officer’s Court in a 1953 case, *Momanyi Nyaberi v. Onwongo Nyaboge*. Both the appellant and defendant were from the Gusii ethnic group in southern Kavirondo. In this case, the applicant’s husband with whom she had one child died in 1953 and upon his death the applicant went through forced *ter* (‘widow-inheritance’) by the respondent who was a brother of her deceased husband. The union was an unhappy one and the applicant sought a divorce. The applicant’s father consented to the divorce and also to her marriage with another man whom she claimed was the father of her second child. The father was also willing to repay the bride price he had received from the deceased brother to the respondent. But the respondent refused to grant her divorce. When the case was taken before the Native Tribunal in Kisumu, it was held that it was repugnant to natural justice to refuse a divorce to a woman who had been ‘inherited’ against her will. Custody of the child of her first marriage was given to the respondent but with regard to the second child the custody was given to the Applicant (The Court of Review No. 15 of 1955).146

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**Doctrine of Repugnancy**

The notion of repugnancy was first introduced to Kenya in 1889 with the adoption of East Africa Order in Council. It is the same order that introduced European jurisprudence and judicial structure in Kenya. It authorized the courts to qualify any application of native law or custom that was considered repugnant to justice, good conscience or equality (Ibhawoh 2006: 57). It meant that any customs, traditions or practice or what was called customary law was invalid if it was in contradiction or inconsistent with the British legal and rights tradition.

The repugnancy doctrine thus had the purpose of ensuring that indigenous customary rules applied in Africa and colonial courts were consistent with the ideals of morality and justice as conceptualized and formulated in the colonizers’ legal and value system or tradition (Ibhawoh 2006, Chanock 1985). The notion of repugnancy was also used as an effective mechanism of juxtaposing what the colonialist regarded as a ‘rational’ rights-based system of Western origin against the ‘backward’ local customs which required civilization (Chanock 1985). Thus while the natives’ courts had jurisdiction (under the aegis of customary law), their rulings had to pass the ‘repugnancy test’. The 1957 case of *Maurono Ochoke v. Kerebi d/o Ondieki* which I shall examine here is highly significant in understanding how the ‘test of repugnancy’ was used in the context of British Colonial Kenya.

In this case, Ochoke and Kerebi had been married according to customary law since 1940. Thereafter Kerebi, left Ochoke and entered into other unions and in 1945 went to live with one Onuong’a in a rather longer union. At the time of the case she had three surviving children with Onuong’a. In 1956, the African Court of Appeal granted Kerebi divorce from Ochoke but granted custody of all her children to Ochoke. This decision was supposedly under customary law which provides that: “… the children of any irregular union between the wife and a man other than the husband, as well as children of the marriage, belong to the husband of the regular union” (The Court of Review No.29 of 1955). Kerebi appealed to the District Officer who reviewed the orders and granted her custody of the three children.

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147 English law consisted of (in order of priority) Acts of Parliament (also called statutory law), common law (also called case law), and rules of equity and statutes of general application (see 1873 Judicature Act).

148 The notion of repugnancy was not in itself without debate. As a construct, it was generated in different narratives by colonial administrators and missionaries. The colonial administration on the one hand tended to script repugnancy within a bifurcation of what is ‘traditional’ and that which is ‘modern’. Missionaries on the other hand spoke about that which was ‘Christian’ against the other which was ‘pagan’. That which is ‘pagan’ and ‘traditional’ tended to be regarded as repugnant. This formulation of repugnancy therefore existed side by side with much of the rubric of customary law which regarded ‘tradition’ as the repository of values. It went ahead to demarcate categories of good tradition and bad tradition. For discussions on the concept of ‘tradition’, see Jean and John Comaroff, (1999).
In 1957, Ochoke appealed against the decision to grant custody of the children to Kerebi. He stated his reason for this appeal as being his entitlement to the bride price coming from the children. The chair of the appellant body, Clive Salter, and the panel that comprised; P. G. Tait (representing the Chief Native Commissioner), J. B. Carson (African Courts Officer) and Shadrack Malo (a Luo Elder) castigated the conduct of Ochoke. They observed that Ochoke had waited for 13 years after their separation. At the time of making his claim, he knew that Kerebi had borne children who he now wanted ‘to claim for his own profit’ (The Court of Review No. 42 of 1957). With this background the bench argued that:

… an abuse of the customary law and, moreover, repugnant to natural justice. In saying this, we in no way interfere with the well-established custom… in the present case, the conduct of the applicant amounts to an abuse of customary law and is repugnant to natural justice (Ibid.).

The bench therefore ruled that the children remain with Kerebi and Onuong’a. This ruling is typical of the ethnocentric attitude as it is informed by the notion of natural justice (where European rationalist thought and ideas of justice are presented as natural) that presumes that children should be with their biological mothers that characterized colonial judicial process. Therefore, the effect of the colonial justice system when dealing with the so called customary law was a disruption of strict boundaries such as those of natives v. citizens suggested most eloquently by Mamdani (1996). Rather than distinct binaries, the use of indexes such as natural justice and repugnancy tests to decide what belongs and what doesn’t belong present colonial governmentality as more of an encounter of conjunctures rather than distinct experiences. Many practices associated with pre-colonial beliefs, practices, traditions and customs failed the repugnancy test and as such the British officials decided those cases based on their own notions of rights and justice (Ibhawoh 2006: 60).

Although widely used within the judiciary in contemporary Kenya, the notion of repugnancy was a common index at the colonial missionary institutions such as schools and the church. In their pedagogy, the missionaries who almost solely organized and managed schools in Kenya until 1917 expected their African students to abandon their customs and practices which the missionaries viewed as backward and repugnant (Anderson 2005). In effect therefore, what was repugnant was that which was inconsistent with the colonial vision of reasonable and rational citizen. And there were no better mechanisms than the courts to ‘re-orient’ the natives to see reasonability from the Euro-perspective.

From the foregoing, it is useful to revisit the question of how ‘traditional’ the Native Tribunals were the and whether they had other future functions beyond the British Government’s rhetoric of ‘native paramountcy’. A preliminary response to these questions is found in the report by Mr. Arthur Phillips

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who was appointed as the first Judicial Adviser\textsuperscript{150} to the Kenya Colony on April 2, 1943. As part of his mandate, Phillips undertook a nationwide travel to “investigate into the working and procedures of the native tribunals and make recommendations to the government regarding the duties and functions to be attached to the post of judicial advisor” (Phillips 1944: 10). When he visited the Kavirondo District, he observed that:

The changes which are shaping the African society in Kenya are nowhere more in evidence than in the Kavirondo districts. The influence of education has been widespread, and there has been real economic progress, especially during the past ten or twelve years (Phillips 1944: 16).

In his subsequent account, these ‘changes’ become evident in the operations of the Native Tribunals in at least three levels. First, over the said period of time, there had been an increase in the number of Luo people taking cases to the tribunals, none of which operated in any way similar to the pre-colonial indigenous judicial systems. Phillips makes observations of a tribunal session that he attended in Kisumu where the president of the Tribunal dominated\textsuperscript{151} discussions and often gave verdict without discussion with the other ‘elders’ in the bench.

He concludes that the above is a practice which is not consistent with the “normal African method of settling disputes by means of discussions” where jodongo would discuss a matter before giving a verdict (Phillips 1944: 25). Thus while the colonial officials still thought of the tribunals as based on some ‘list of time-old cultural practices’, in actual fact there was an ongoing appropriation of power based on the dominant methods of governance within the colony itself.

The second subject encountered by Phillips was that of truth telling. Consistent with the British Judicial System, a Bible and Quran were introduced in the tribunal halls to administer oaths to both plaintiffs and defendants. But Luo people who were ‘pagans’ (meaning those who were not converts to either Christianity or Islam) were in need of a Luo-based oath. To respond to this problem, Chief Paul Mboya (author of Luo Kitgi gi Timbegi), ‘invented’ an oath practice known as mbira which, although it had never been part of Luo customs and tradition, was considered one at the time of Phillips’ visit in 1944. Phillips explains:

All the Central Kavirondo tribunals which I visited appear to make frequent use of the Mbira oath, and on one or two occasions, I was able to observe the method of administering it. The members of the tribunal adjourn to a spot adjacent to the court house where a small space is kept marked out with stones to represent (fictitiously) a grave. The person to be sworn holds a pitcher of water on his head with one hand, while with the other he grasps a bunch of dried herbs. He repeats the words of the oath after the president and then steps or jumps over the pile of stones. I was informed by the elders that the majority of people (even many of the younger and more sophisticated type) have a great respect for the solemnity of

\textsuperscript{150} At the time of his appointment, a similar position had already been established by the British in the Uganda Colony. In Uganda, the position provided an appellate avenue for the natives beyond the Provincial Commissioner. The adviser had been conferred with wide powers of revision of ruling and inspection of the Native Courts. See Phillips 1944: p.3.

\textsuperscript{151} This practice seems to follow from the era before 1930 when the colonial administrative chief served as chairmen of the tribunals.
the oath and instances were cited of persons who had died in consequence (it was thought) for [falsely] swearing themselves upon it (Phillips 1944: 25-26).

Mbira oath was never an ancient Luo observance but rather an ‘invention’ made to align the tribunals (which were by all means based on the colonial idea of administration of justice) to perspectives of justice among Luo people.

The final observation by Phillips in both Central and Southern Kavirondo was in regard to literacy and record keeping at the tribunals. As early as the 1920s, the colonial administration had introduced clerks to the tribunals. Most of the clerks were young educated converts who also served as translators for the DC and PC. But there were also associations such as the Kavirondo Taxpayers’ Welfare Association that put forward explicit demands of what they wanted of the tribunals. In a memorandum that had been sent to the Chief Secretary, the Association demanded among others that:

A larger proportion of well-educated men should be appointed to the tribunal, and the president, in particular, should be capable of reading and understanding Ordinances, etc., in English and of making proper written record of the proceedings. Native Vakils (lawyers) should be recognized and allowed to represent parties in the native tribunal cases including appeals (Phillips 1944:34).

Similar issues such as those raised by the Kavirondo Taxpayer’s Welfare Association were raised when Phillips visited South Kavirondo. Here, representatives of Luo people demanded that customary law should be properly recorded (following the precedent set by Paul Mboya) and a method of appealing Native Law put in place. In practice, the composition of ‘who is an elder’ had started to take into account some of these concerns in South Kavirondo. The elders on the bench (which the colonial administration often called ‘Council of Elders’) for instance included “some elders of the old-fashioned illiterate class and others of the modern educated type”. Phillips was later to discover that some of the elders in South Kavirondo were ex- Jeanes School teachers (Phillips 1944: 32).

It is therefore impossible to engage with the native tribunals as a system in a binary of ‘traditional’ vs ‘modern’. Rather it seems that after 1902 (see annex 3.3) the tribunal operated as part and parcel of the colonial justice system that allowed for ongoing conversation among the various notions of justice within it. The tribunals in Central and South Kavirondo cannot be characterized as autonomous institutions of practicing ‘Luo Law’. Rather evidence seems to suggest that they were part of the broader colonial (and later post-uhuru) intervention. As colonial institutions of creating ‘responsibilized citizens’, the native tribunals were used by both the ‘natives’ whether through associations like Kavirondo Taxpayer’s Welfare Association or elites like Paul Mboya as well as colonial missionaries.
3.3.2. Case II: Role of Missionary Education in Creating ‘Responsibilized Citizens’

The use of colonial education to create ‘responsibilized citizens’ in Kenya is widely documented (see Schilling 1979, Thomas 2003). Up to 1917, both elementary and secondary education within the Kenya Colony was provided by the missionaries (Musandu 2006: 18). This dominance is often associated with the missionaries’ administrative and fiscal efficiency. But there is also evidence of irrefutable convergence between underlying worldview, intervention strategy and anticipated outcomes by the colonial administration and missionary groups.

Missionaries such as the Church Missionary Society (CMS) that had a large presence in western Kenya presented promotion of good citizenship as part of their mandate (Jacobs 2011). The missionaries’ approach of branding belief systems, customs and values of Luo people as ‘backward’ and ‘evil’ was also a substitute to the overt coercion often used to implement the colonial administration. On the other hand, the missionaries through the Gospel of Christianity and its associated ‘new’ status for converts, created an escape route for Luo people who found adherence to certain cultural practices and rituals economically and socially overbearing. Those who found reprieve from ‘culture’ were mainly women, educated youths and elders who were of a lower rung in their clans and lineage. As demonstrated in the account of New Alara below, several practices were therefore either initiated or developed organically to demonstrate that Christianity ‘converted’ people into something ‘new’ that was perhaps more desirable.

One such set of rituals from which most Luo men had desired to escape is the one related to goyo dala (building a new home). Ayany (1976) has documented how laini villages were evidence of enthusiasm with which the Luo people had appropriated Christianity. These new villages were established under the rhetoric Yesu oloyo (Jesus is able). The Laini were villages where new Christian converts stayed together. As brethren, the residents in Laini shared not clan or lineage but the gospel of Jesus Christ (Ogot 2003).

These Christian converts were therefore easier to govern as Christianity itself demanded a ‘new’ form of self-governance. Bethwel Ogot’s father, Japuonj (Teacher) Paulo Opiche Nyatieng’ is one of the

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152 When presented by state, colonialists, missionaries or colonial ethnographers, culture is seen as some ‘fork’ from which people need to be freed. In this sense, those who joined Christianity related to their society as those who had been freed from the bondage of culture. The missionary discourse of culture was however much more contested with talk of ‘good culture’ and ‘pagan culture’ being used in making selective choices. See Thomas (2003).

153 As seen in chapter one, this ritual that signify some sort of autochthony is elaborate but significant in Luo culture.

154 The name laini comes from Swahili word for a continuous line. It describes houses built in rows in departure from the typical round architecture of a Luo dala.
converts who established a *Laini* village. The *Laini* village associated with *Japuonj* Paulo was known as New Alara village in Gem. In his autobiography, Ogot (2003) narrates how the *Laini* villages were places for the living out of practices, beliefs and norms that were distant from the ‘typical’ Luo practices. As this passage explains the formation and practices in the *Laini* in great details, I cite Ogot at length in order to illustrate how Christianity through the *Laini* villages were part and parcel of the colonial initiative to create responsibilized citizens out of the natives.

... My father, on completing his training at Maseno founded the Lwanda Anglican Church in 1920. Next to the church was established a New Alara, a *Laini* which was built about a mile away from the old Alara on the Dudi-Legega road. Families who moved to the New Alara left other possessions like domestic animals (such as cattle, goats and sheep) and granaries for storing grains in the old village because it was believed they would create unhygienic conditions in a Christian home that was supposed to be clean. Watchdogs were unnecessary in the New Alara because Christ was the best shield and protector. It was for the same reason that a *laini* village never had lockable gates. In the case of the New Alara, cattle, sheep and goats were kept in a new home called ‘Omwonyore’ that had been established by Muthene Agina, an elder brother to my father.

Besides my father, the other Christians who moved with their families to the New Alara were: Isaya Oloo, his step brother, Jeremiah Chiedo, a cousin, Justo Kinyany Agina, and Zakaria Adero, a foreigner from Ugenya who according to Luo customs should not have been allowed to live in that village, because his family could inter-marry with the others. Right in the centre of the village was a big house in which all girls from the families slept. Obadiah Oloo took roll call at 6 pm, and a prayer service was held at 7 pm. Children who were late for meals or prayers when the bell rang were punished.

A day at the New Alara started with a waking bell rung at 6 am. A prayer service was held before the adults went to work in the farms. Lunch was served at twelve noon, after which men would go out to teach or evangelize while the women went to fetch water or firewood. Everybody would then bathe before attending evening service to which people from outside the village were invited. The diet in *Laini* consisted of boiled Bananas, *ugali* made from maize or finger millet flour, ground *simsim*, groundnuts, sweet potatoes, cassava, fish, chicken, meat, beans and a variety of vegetables and fruits. All foods were neatly and well prepared and dished out in China plates. Hands were washed with warm water before meals. They ate from tables and clean, boiled drinking water was provided and drank from glasses. Forks, knives and spoons were available, but more often than not, they were only used when distinguished guests were around. Members of this Christian community learnt quite early eating from their own plates than from common plates which was the traditional way. Women ate such foods as chicken and eggs which customs had denied them. These Christians were also *jonanga* (literally meaning people of the cloth), with everybody dressing properly. On formal occasions, men were on suites and shoes, while the ladies wore all kinds of long Victorian dresses, with headscarves and shoes (Ogot 2003: 16-18).

The description of the New Alara village attests that Luo people who converted into Christianity embraced ‘new’ value systems and relationships. While they still spoke *Dholuo*, they tended to adopt personhoods and relational characters that were more consistent with both the missionary and colonial ‘Civilization’ project. Christianity, just like the colonial project, was an intervention that at one time essensialized the colonized as ‘traditional’ but at another level enabled (as in the case of *Laini* village) practices that were aimed at transforming the native into a ‘new subject’.

The ‘new’ Christian subject was also expected to be more responsive to colonial policies and judicial systems. Paying taxes for instance was seen as part of the virtue of Christianity reinforced by dictums
such as ‘give Ceasar what belongs to Ceasar’ (Mathew 22: 18). Alara village provided this new place of ‘freedom’ from culture and space where resposibilized citizenship could be demonstrated.

Beyond education in Church, the missionaries owned and managed formal schools. Here education was deeply engendered under the influence of Victorian gender norms dominant in England at the time. While the male students were trained and encouraged to take part in public life, female students were often trained to remain in the domestic scene (Temu 1972). In most education centres, including those in western Kenya, male students were taught writing, arithmetic, scripture, map drawing, grammar, English and needle work while for the girls the emphasis was on sewing and handcraft.

In essence, a responsible woman was seen in the perspective of Victorian England (Kanogo 1993). That is, girls were to be prepared for marriage, child-bearing and rearing. This notion got solace in the Luo people’s own domestic economy (to borrow from descriptions by Meillassoux 1982) that required girls to remain at home as a source of labour. There was also a sense of benevolence from the missionaries who were informed by the engendered Victorian worldview and experience. Colonial explorer, Elspeth Huxley described how the African men were unkind to their women. In a 1940 letter to one Margery Perham, she states:

> Enlightenment brought us up to believe that women were scarcely able to open a door for themselves. We are really upset at the spectacle of native women bent low under tremendous weight of firewood or grain, while their husband stalked along carrying nothing heavier than a spear (Huxley and Perham 1956: 93).

Huxley’s condescending mode (expressed officially as trusteeship) of imagination and engagement would later become even more evident in the mid-20th century. By 1945 for instance, the number of native Africans assuming leadership positions and employment as clerks and office assistants was on the increase. Men from Luo Nyanza had got most of these positions for among other reasons their embrace of Christianity and the ‘white man’s ways’ but also because Africans from Central Kenya were associated with the Mau Mau insurgency at the time (Macgoye 2000).

It was therefore the decision of the colonial administration that as the male members of the native society were taking more public responsibilities, it would be necessary to train their wives to become more responsible. In any case the wives of most colonial officers were already forming and joining ‘women clubs’ (Ndeda 2002:13). Among other social welfare functions, the women clubs

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155 In an eulogy at her death in 1997, the New York Times described her as a ‘witty and energetic journalist and author of more than 30 books, including memoirs, biographies, crime stories and novels, many inspired by her childhood in colonial Kenya’

156 The notion of the African woman in colonial and post-uhuru as a ‘beast of burden’ is a widely discussed stereotype. See Kinsman (1983).
provided opportunities for its members to share knowledge and tactics of hosting the numerous colonial guests that their husbands brought home for evening tea or dinner (Macgoye 2000: 40).

To respond to the need of training native women to be responsible wives and citizens, Jeanes schools were established more as intermediaries of creating responsible citizens in the colony. The schools were managed by new missionary converts and their wives with the support of the colonial officers. The women clubs worked through the Department of Community Development and Rehabilitation to support the Jeanes schools, which were seen as an avenue of the ‘social transformation’ envisioned by the Christian missionaries and the colonial government authorities (Mwiandi 2006). The first of the Jeanes School Centres was in Kabete, Central Kenya in 1925. Unfortunately Jeanes schools are often omitted in the narration of colonial history (perhaps because they interrupt the common binaries and are dominated by rather uncommon actors).

As was the general genre of the colonial pedagogy at the time, the dominant Victorian model of gender relations influenced the kind of training that was given to men and women. African women were trained (mainly by the wives of Jeanes School teachers and members of colonialisit wives clubs) in skills such as those of health, diet, clothing, shelter, and craft (Ogot 2003: 493). After the World War II, and more so with the call for freedom instigated by the signing of the Atlantic Charter in 1943, the British colonial administration decided to make more investment in African women (East African Standard, Sunday March 24, 1945). This was pursued mainly through expansion of the Jeanes schools.

As part of this expansion of the Jeanes schools, the Maseno Jeanes School was established in Luoland in 1955 to offer middle level courses to personnel in public service and contribute to ‘social transformation’ of Luo women in western Kenya (Ogot 2003: 493). Like many others of its kind, the stated objective of the organization was to promote better living conditions, to awaken the women to the need for good health and hygienic habits, to teach and encourage them to fully make use of the food and the materials which they had close at hand to guide them in fulfilling their roles as wives and mothers in the progress of their communities (East African Standard, 1952 cited in Ndeda 2002: 13).

It is therefore apparent that while the underlying structure in the design and government the Kenya Colony was that of racial hierarchy, cultural and epistemological encounters in the colony created a terrain that is not of simple binaries. The goal of creating ‘responsibleized citizens’ which was a central expectation in colonial policy and missionary work, tended to create subjects who could maneuver and negotiate multiple terrains. On one hand, these subjects as we see in the New Alara Village have social and cultural relations that influence their norms and personhood while, on the other hand, there is the allure and power of colonial administration and missionaries to ‘transform’ a Luo into a citizen and a Christian in the colony.
The colonial administration’s political boundaries (that presumably aligned to cultural boundaries) become intelligible as spaces of conjuncture rather than ‘cultural homelands’. At the same time, the essentialist descriptions of ‘The Luo’ for instance become unstable and unattainable. What we have instead are various modes of becoming and being Luo. In any case both the missionaries and colonial administrators through their project of ‘social transformation’ are desirous of a ‘resposibilized Luo’.

3.3.3 Case III: The Kenya Land Commission and Making of Land Owning Citizens

While there has been a plethora of literature on the land question in central Kenya during the colonial period, very little attention has been paid to the same question in western Kenya. There have even been suggestions that the land question never existed amongst the people of Kavirondo. However, submissions and debate at the Kenya Land Commission (KLC) (or the Carter Commission as it is commonly known) during its sittings in western Kenya seem to dispute this dominant narrative. As already stated, the Kavirondo area was not suitable for European habitation. It was therefore the general colonial policy of reorganizing the colonial mode of production that generated the conflicts in the area (Ochieng’ 2002).

The Carter Commission was established in April 1932 as the culmination of long-standing debate that had raged between the 1920s and 1930s about colonial modernity (Ochieng’ 2002:110). It was charged with the task of soliciting views and reaching a lasting solution to African grievances borne of colonial land alienation policies in colonial Kenya. Its objectives were stated as “to receive complaints arising from earlier disposition of land, whether by omission or commission to communities, bodies, or individual natives, [whether] tribal or detribalized” KLC (1893: IV). In essence they were expected to discuss and determine matters of natives’ requirements and rights.

The colonial administration had focused on altering indigenous production systems and institutions so as to pave way for the penetration of alien norms and institutions and their subsequent entrenchment in contemporary political economic life. No doubt, land was at the centre of Kenya Colony politics and colonial modernity in 1920 and 30s. KLC’s mandate was premised on the understanding that the imperial government in London was the ultimate protector (trustee) of the African’s rights in the Kenya Colony (Shilaro 2002: 110).

157 Land relations such as were structured in colonial Kenya persists and in some cases the post-colonial administration have even expanded the scope of colonial land policy and law (Okoth- Ogendo 2000).

The chair to KLC was Sir Morris Carter (and hence reference of KLC as the Carter Commission) who had chaired the Southern Rhodesian Land Commission in 1925. The other members of the Commission were Rupert W. Hemsted, a retired Kenya Provincial Commissioner and Frank O’Brien Wilson, a settler farmer in Machakos District. The secretary to the Commission was S.H Fahazan, the District Commissioner of Kiambu District. The Commission found itself in a major crisis of legitimacy from the very beginning. According to Historian, William Ochieng’:

First, members of the commission were not impartial. Carter had recommended racial segregation in land ownership in the 1925 Southern Rhodesian case, and during his tenure in East Africa, Carter was criticized for being pro-settler. Second, the other two members, Wilson and Hemsted, were settlers with stakes in the highlands. Third, the appointment of an all-European commission was also a source of distrust and criticism. Fourth and most notable was that the terms of reference as they related to the highlands circumscribed the concerns and recommendations of the Commission (Ochieng’ 2002: 111).

In spite of these limitations, the Commission started its work by convening public hearings across the colony with sessions in Kavirondo region in the month of September 1932. At the end of its country-wide tour, the Commission had interviewed 736 witnesses, 487 of whom were Africans in forty-two places throughout Kenya. They also received submissions of 400 letters, 212 written statements and 507 memoranda (Shilaro 2000: 125).

For the Luo natives, a session of the Commission was held on September 9, 1932 at the Marenyu Central Kavirondo District. Appearing before the Carter Commission were men who had leadership roles in the Luo society. Those on record as having appeared to give evidence included serving and former chiefs, village headmen, clan elders, representatives of the Kavirondo Tax Payers Association, the Native Chamber of Commerce, colonial officials, administrators, settlers, missionaries, Asians, and Native Catholic Union (KLC 1933: 2167-77). There were also non-natives like Rev. Monsignor Brandsama, who then served as Prefect Apostolic of Kavirondo (Ibid.). While Kenya had only been a colony for close to a decade, testimonies given at the Commission attested to the massive organization of power and relationship that the colonial rule had achieved by that time. The pleas by African petitioners were that they wanted to stay as they did in ‘the old days’. : “Under the Baganda,” said Chief John Aram of Sagam, “we had no fear; nowadays Shauris are consequently cropping up and we live in fear” (KLC 1933: 2166).

Shauris was a common term used to make reference to colonial laws. The most contested Shauri during the Commission sessions was the Crown Lands Ordinance of 1915. The Ordinance had been promulgated in the interwar period and the natives who lost their kin during the war had long complained that all that they got for fighting for the British was encroachment on their lands. This argument of preference for the ‘old days’ was evident in numerous other submissions.
The arguments in support of the so called ‘old days’ was centered around the twin issues of registration of land (as a private property) and registration of persons for pass (commonly known as Kipande) for all natives. It is perhaps Chief John Aram of Sagam who captured the concern most lucidly as he testified to the Commission. He asserted:

When I hear about Land, there is always one thing I hear which is wrong, that the land is not ours. Before that, we heard Government say the land is ours. In these days, we hear the talk about a register. For what? If the Land is ours, who is going to take it away from us? I want the opinion of the Commission as skilled judges, if they think it is a good thing they should tell us. Government has much more experience, and we may be sorry either way. I have my register which is my Kipande (KLC 1933: 2166).

As has been noted, between 1902 and 1930, the colonial administration had changed its Land policy thrice. Aram’s lament is that at one point, they had been told that the land belonged to the ‘Crown’; then they were assured that native land (trust land) belonged to the Africans; later, they were told that all land shall be registered. Evidently, the colonial modernity as seen through reformulation of land relations and modes of production had caused more anxiety than a sense of optimism. In other words, the sense of enlightenment envisaged in Immanuel Kant’s vision of universal cosmopolitan norms had collapsed. Colonial modernity of land ownership, modes of access and relationships was radically different and unconvincing as a vision of ‘betterment’. For this modernity, objections came at the Carter Commission’s hearing. Also objecting was the Native Catholic Union. Represented by Antonio Okulo, they retorted:

…[on] the question of existing boundaries, we don’t want any alteration in the existing practice. We don’t see the good of a register. The second point is giving land to strangers who are not of this tribe. We don’t know those people whether white or black, we don’t believe that there are such people as detribalized natives. Arabs, Europeans and Swahili have their own lands… Why? We take an interest in our custom. When we increased, was to push out the people ahead of us (sic). Now we want to know where to go next; in the old days we might have made a fresh swarm of bees (KLC 1933: 2167).

This nostalgic claim and assertion was also made by Zablon Aduse while speaking for the Chamber of Commerce. Alongside the written memorandum that he submitted to the Commission on behalf of the Chamber of Commerce, during his appearance, Zablon stated:

We are traders among the community. We want the country our fathers and grandfathers enjoyed. We are afraid of being squeezed. We think in ten to fifteen years, reserves will be full, and we will have no room to cultivate or live. We have many people with ploughs and shops. As there is a crowd here, so is the crowd in the reserves. The spare land is very small and we don’t want to change in the old ways; we are content with it (KLC 1933: 2168).

It is evident that submissions at the Carter Commission largely rejected the proposed registration of land for individual titles and demanded for, among other things: return of and compensation for alienated land; repeal of the Crown Lands Ordinance of 1915; a clarification of the Native Land Trust of 1930 which had espoused the inviolability of African reserves, and; control of land to be put within the jurisdiction of District Land Tribunals (Ochieng’ 2002: 111). Besides the foregoing,
individuals and groups demanded a return of alienated land. These complaints were directed at institutions as well as individual settlers. In his submission, Dwasi Wasuna from Sagam lamented:

I have complained about Maseno. When Bishop Willis first wanted Maseno, he wanted a small plot to build a school. This was in the days before the Local Native Council. When the industrial part was shut down, we were told we would get it back. We did not (KLC 1933: 2172).

There were similar complaints made at the Commission against a mission in Ojola, settlers of Indian origin in Kisian and settlers of British origin in Ugenya. From these views, the symbolic and material significance of land in the colony is apparent. In addition, land reforms and relations as an emblem of colonial modernity appear to have presented a monumental disruption among Luo people. The response to this modernity is reminiscent of what we have experienced in the 21st century.

In Chapter Five, I shall return to this subject using the works of Partha Chartejee on “Our Modernity” (Chatterjee 1997). Of significance to note at this point is how the people of Kavirondo responded to the colonial modernity of transforming them into responsibilized land owners. Rather than use the contradictions of the present to reflect on the future as has been the case in 21st century Kenya, they have used their present to recall their past, which is presented to have been a space of harmony, predictability and fairness. During submissions to the Commission, the past was idealized, written, or legislated to read the present.

But the colonial administration was obsessed with an orderly built environment and responsibilized colonial citizens who could exercise individual land ownership and use. Insisting that the African natives must own land on the basis of registered individual land tenure, this was crafted to ensure that the natives become individual rational actors who would like to maximize individual benefit through participation in the market (Robins 2008b). This orientation worked hand in hand with the already existing system of taxation and religious teachings that emphasized the individual as the atomic unit of society. The second effect of the decision by the KLC was the removal of land from being a social property (that had influenced cultural and social connections) to a market commodity.

It is on this question of land therefore that the notion of “Trusteeship and the Paramountcy” of the natives espoused in the 1930 Memorandum gets ‘tested’. The debate and contestation on the subject of land illustrates the shallow nature of the paternalistic attitude in colonial governance in Kenya. The Memoranda, more so those related to the cases of land registration and displacements of Africans by among others missionary societies, attest to the self-fulfilling and preservationist nature of colonial policy in Kenya. It only added to fears that residents of Kavirondo region had had before the establishment of colonial rule that it would disrupt their ‘normal ways’.
Local Africans had been concerned that colonial rule would deprive them of their property (more so land) and that the influx of Europeans would cause a breakdown of social norms. These internal contradictions within colonial policies would later offer a fertile ground for intercultural contestations and oppositional dialectics. Coincidently it is these colonial ideas of liberal rights (claimable by rational individual actors) that were used decades later in the demand for political independence. These changes in the quotidian habits of Luos, the reformulations of their rituals, the alterations in their perceptions and attempts to define themselves represents the ever-shifting Luo *habitus* in Bourdieuan (1991) terms.

### 3.4 Conclusion

This chapter has demonstrated that the onset of colonialism in western Kenya was a gradual defining processes that took place in the context of social, economic and political registration around which the Kenya state and Luo *habitus* and nation continues to unfold. It is however grounded in continuities in practice, structures of knowledge production and contemporary practices of engaging the present on the premise of the past and unmet current expectations.

The chapter is a historical account of the making of Luo nation (as a distinctive cultural group), Luo country (as socio-political groups) and uncertain ambiguities around which modernity is produced. In describing this account as a making, I do not mean that the images and identity representations evident in Luoland and among Luo people are mere inventions. Rather, the chapter demonstrates how the social and linguistic distinctiveness and the idea of ‘The Luo’ are contested and continues to be recast in multiple and fluid situations.

The central aim of this chapter has been to provide a background to the creation of Kenya within an underlying structural attitude of an ‘other’. This underlying attitude (that is useful in colonial and postcolonial Kenya) enables us to decipher major processes such as the idea of Kenya, the creation of Luo country, the production of Luo nation and the colonial project of creating ‘responsibilized citizens’. Ultimately the chapter demonstrates that although the colony’s architecture and structure of governance was developed within dichotomized categories such as ‘traditional’ versus ‘modern’, ‘tribes’ versus ‘races’, and ‘urban’ versus ‘rural’, the practice in the colony was that of enmeshed entanglement. The chapter does not outrightly reject dualities such as Mamdani’s (1996) citizens (who enjoy rights) and subjects (who practice the so-called customary law). Rather, through the practices of the Native Tribunal, sessions of the National Land Commission and the missionary education and Christianization, I demonstrate that both citizens and subjects co-exist in the same colonial social world, thus creating inter-subjectivities and a modernity that is an assemblage of both ‘traditional’ and ‘modern’. As we shall see in Chapter four, this process of developing Kenya and
Luo nation is ongoing. Chapter four is about the postcolonial processes that demonstrate continuities and contestations in the production and circulation of human rights discourse.
CHAPTER FOUR

PRODUCTION OF DOMINANT NOTIONS OF HUMAN RIGHTS IN POSTCOLONIAL KENYA

4.1 Introduction

Alice Ojwang’ was pensive; this was her fourth visit to the Federation of Women Lawyers in Kenya (FIDA-K) offices in Kisumu. She was a resident of Nyalenda, a non-planned settlement that borders Milimani Estate, Kisumu. Her complaints to FIDA-K were against a co-wife whom she accused of carving off the entire plot of land that had been left behind by their late husband. The co-wife had also alleged that Alice Ojwang’ was not married to their late husband as no dowry had been paid to seal the union. Rather than go back to her pre-nuptial home in Sakwa, Alice Ojwang’ chose to come to Kisumu and trade at the Kibuye Market. Through Radio Victoria, she had heard news of FIDA-K’s work and sought their intervention. When I asked Alice Ojwang’ why she had chosen to come to FIDA-K’s offices instead of seeking redress through jodongo, her reply was emphatic: “Sani wan gi haki” —now we have rights!

We sat on the white chairs in a tent next to the gate. Among the women waiting on benches that faced us was Owiri nyar Kano whom I had met at a human rights workshop in 2003. I went to greet her and after talking about the many days since we last met and the scorching tropical heat of Kisumu, she told me as I excused myself to return to my seat, “jo FIDA tinde okelo tiegruok mar human rights ok mar golo Moi, en mar rito mon” (the FIDA people have now brought human rights awareness not for removing Moi (referring to the immediate former president of Kenya) but for protecting women).

It is always revealing to follow how human rights discourse and language has changed in Kenya. Whenever I went for cultural festivals in Luoland or when in various meetings convened by NGOs in Nairobi, Luos and non-Luos alike expressed a sense of surprise at how the language and practice of human rights was changing in their location and among the general public. The founders of FIDA-K led by Lillian Mwaura, whom I met in 2009, expressed equal dismay at how the legal model of human rights and their vision for FIDA-K had changed so rapidly. Lillian Mwaura and her collaborators had seen the role of FIDA-K not as an institution of pursuing political contests against the state, but rather as a place where the law could be used to pursue the realization of women’s aspirations. Beyond fulfillments brought through implementation of human rights standards, the language of rights has also enabled the posing of questions for which intelligible language lacked before. Yet, apparently people like Alice thought the main aim of human rights in Kenya was to contest the Moi regime.

Forty-nine years after flag independence, how is the independence promise of inclusive citizenship
experienced by the *wananchi* (common Kenyans)? Through which mediums do the *wananchi* experience *maendeleo*? Indeed, how is the idea of a national project or the ‘modernist nation’ (Comaroff and Comaroff 2004:190) experienced in Kenya’s post-*uhuru* moment where the unity of the state remains an illusion? These are the questions that unfold for those who want to understand how and why human rights have become such an everyday language for ‘common’ women going to FIDA-K as ‘clients’, as much as they are for state functionaries, NGO elites and university professors in Kenya.

In 2008, when I encountered Alice Ojwang’ and other women, FIDA-K had maintained offices in Kisumu for a period of eight years. The office stood in an exclusive upper market palatial house in the Milimani Estate in Kisumu. Kisumu is the central administrative and commercial headquarters of what was once Nyanza Province. The name Kisumu means a place to look for food in *dholuo*. The city now occupies a rocky ridge around the Africa’s biggest fresh water lake, Lake Victoria, known locally as Nam Lolwe. Although it took root as an urban centre during World War I when it served as fueling point for the British and Allied armies, its potential had been long noted by colonial administrator Charles Hobley who when exploring British colonial interest in Uganda in 1990 named the lakeside settlement Port Florence, after his wife, Florence Preston (Hobley 1970).

Most land in Kisumu is still owned by the indigenous Kanyakwar clan thus providing a never-ending challenge to the city authorities’ efforts to replace the customary land tenure system with the common law tenure of absolute individual land ownership. Every Monday and Tuesday, the FIDA- K office in this lake side city is abuzz with activities as ‘clients’, mainly women, visit the office seeking legal intervention or counsel on cases that are often about the never-ending contestation between common law, customary law and customs.

The initial FIDA-K offices were in Nyalenda, one of Kisumu’s shanty areas, but these were razed down by rioters during the post-election violence in December 2007. The rioters claimed that FIDA-K does not support families and Luo culture (anonymous interview, June 2009). The image of Kisumu as a city where the local government authorities is determined to have land ownership transferred from customary ownership to freehold tenure and women who go to FIDA-K as clients of human rights

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159 Essentially a strategy for more equitable appropriation of productive forces at the local, continental and global levels

160 *Uhuru* means independence in Swahili. The post-*uhuru* moment refers to the period after flag independence until 1978.

161 This is a common description assigned to those who seek legal services from lawyers and human rights organizations. But its intrinsic meaning is problematic as at one point it gives an impression of a pathological state of those whose legal or human rights have been violated while at another level it is a negation of the agency of those who seek legal and human rights support from agencies like FIDA-K.
violations stuck in my mind as a symbol of the multiple images and entanglements that characterize Kenya’s *post-uhuru* and postcolonial eras. The optimisms and expectations of Alice Ojwang’ while waiting at FIDA-K offices is shared by many women in Kisumu who go to FIDA-K offices, many of whom live in shanty areas of Obunga, Manyatta, Nyalenda and Otonglo in Kisumu and in the urban and rural areas of Kenya.

In this chapter, I demonstrate that “surrogate mothers” (As Lillian Mwaura calls founding members of FIDA-K) of FIDA-K like Lillian Mwaura along with ordinary women like Alice Ojwang’ and legal practitioners use human rights as a language of pursuing unfulfilled promises and expectations of *uhuru* for *wananchi* and more so women. The process, as we shall see, has involved numerous appropriations and reformulations of human rights discourse. The subjects of human rights like Alice Ojwang’ have also appropriated human rights as a discursive space and sought to engage it not much in its universalist form but more so in the context of localized language and perspective. The kind of domesticated agency demonstrated in active discursive forums, clients coming to FIDA-K and by Lillian and her collaborators attest that *wananchi* in Kenya are what Partha Chatterjee has called “critical subjects” as opposed to Agamben’s description of “bare life” (1995). As critical subjects, *wananchi* and ‘clients’ like Alice who go to FIDA-K seek to construct a ‘new normal’. The development of FIDA-K as a space for critical subjects has been possible through efforts of women such as Lillian Mwaura.

### 4.2 FIDA-K: In the Footprints of Lillian Mwaura

Lillian Mwaura who graduated from the University of Nairobi with a law degree in 1975 was one of the few women who pursued professional courses in *post-uhuru* Kenya. Indeed, the number of women pursuing professional courses such as law, architecture, and planning and science subjects remains very dismal in *post- uhuru* Kenya. Lillian had gotten married in 1972 as she joined the university. As a newly married woman, she had a unique experience at the university. Each year she had a baby (Personal Interview, 13 June, 2011).

Life in the university was therefore that of becoming a mother, wife and a lawyer all at the same time. At the time of her graduation in October 1975, Lillian who at the time was known as Mrs. Kinyanjui was pregnant with her fourth born. But she had successfully completed her law degree and was looking forward to taking up a position as a public trustee. As fate would define it, a nephew to the then president of Kenya, Jomo Kenyatta, was also interested in the job. So, although qualified, Mrs. Kinyanjui was pregnant with her fourth born. But she had successfully completed her law degree and was looking forward to taking up a position as a public trustee. As fate would define it, a nephew to the then president of Kenya, Jomo Kenyatta, was also interested in the job. So, although qualified, Mrs.

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162 The office of the Public Trustee is a public service position created under the Public Trustee Act Cap 168 of the Laws of Kenya. It has a major role in ensuring that during succession more so in cases where there is no will, all legitimate dependents of the deceased get their appropriate portions of the estate left behind. The public trustee effectively takes charge as the administrator of property of the deceased person until final inheritance settlements are made.
Kinyanjui missed out.

Her next attempt was an interview in November 1975 with a state corporation, the Kenya National Assurance. She went through the interview with zeal and succeeded, but when she went to collect her letter of appointment in December 1975, she was denied the job. “They just told me that the letter of appointment was not ready and asked that I allow them to get in touch with me” (Personal Interview, 13 June, 2011). Later that day, the managing director of the Kenya National Assurance called her husband, Kinyanjui (who was a lecturer at the University of Nairobi at the time) and informed him that as Lillian was pregnant, they could not offer her the job.

Lillian was frustrated about the rejection in both the public sector and the private sector. At this point her younger brother Kirumba Mwaura (also a trained lawyer) invited her to join up with him in opening a new law firm which they named K. Mwaura and Co. Advocates. The firm would later open its offices at Agip House outside the Nairobi Central Business District. Unhappy at the way she had been treated as a mother and a female lawyer, Mrs. Kinyanjui joined her brother in 1979 at the law firm. She was a novitiate in private legal practice and disappointed at how law did not protect women. She told me of her numerous encounters with women who had been dis-inherited or denied professional positions as had happened to her. She had felt discriminated against and with no effective recourse (Personal Interview, 13, July 2011). There were other women of her age who dotted the male-dominated legal practice at that time. One of them, Hayanga, established a successful law firm, Hayanga and company advocates while, by early 1990s two had risen to become judges; Lady Justice Khaminwa (currently a judge of the high court) and Lady Justice Jean Wanjiku Gacheche, Judge of the Court of Appeal.

Although Mrs. Kinyanjui was already disturbed by Kenya’s public life that discriminated and marginalized women, it is the case of Rufus v Rufus that shaped her perspective of law and justice in a manner that has been irreversible. When I met with Lillian (as she abandoned the name Mrs. Kinyanjui in 1983) she spoke to me about this case of Rufus v Rufus. But I could not get the details of the case immediately. In her generosity, she sent me an extract below with a cover message, “You can Google about the case from Kenya Law Reports. Anyway hereunder find an extract from my manuscript”:

In 1977 in the case of Rufus Ngethe Munyuua (Dec’d) and Florence I represented the second wife of the deceased who had been married under Kikuyu Customary Law and had eight children while the first wife married under the Christian Marriage Act and had one grown up daughter. This practice of many African men marrying under Statutory Law which is strictly monogamous and later marrying a second wife under African customary law before the dissolution of the first marriage is very common even today. Despite the fact that many men commit bigamy, which is punishable under the Penal Code Section-171,
women do not prosecute such wayward men due to cultural and traditional beliefs that polygamy is accepted in many African societies. Women fear the repercussions from the in-laws. Anyway, the first wife challenged the will on the basis that it did not provide a trustee. The deceased had distributed a big chunk of his estate to the second wife and her children. The first wife considered herself and her daughter as the sole beneficiaries having been married under the statute. If the will was declared null and void then she could exercise her rights as the legal wife. The case involved issues of customary laws vs the written law (Personal Communication, 14, July 2011).

The case of *Rufus v Rufus* is not only widely cited, but has also been used as precedent on how cases of succession in polygamy get determined in contemporary Kenya. The material facts in this case are that the deceased, who was an elderly Kikuyu man, married two wives. On the March 2, 1974, he was admitted to the Heptulla Wing of the Kenyatta National Hospital, Nairobi. A few days after admission to the hospital, he sent word to a friend named Samuel Kinyanjui Waiganjo to see him in the hospital.

Waiganjo visited him on the evening of the March 5, 1974. On that evening, Rufus told Waiganjo how he wished his property to be dealt with after his death. He suggested that the matrimonial home which was on a large ranch in Kiambu should go to his first wife (Esther Njoki) with her daughter. For the rest of the ranch however, he suggested that it should be subdivided equally to all members of his family which meant his two wives and the children that he had sired with each of them. Also present that evening were other members of Rufus’ family. Waiganjo wrote the instructions given by Rufus in Kikuyu and signed it. Rufus died on the March 8, 1974 leaving behind Florence Wambui (his second wife) with whom he had eight children, five being below the age of 18 at the time of his death and Esther Njoki with whom he had one child.

Among the issues that the court had to decide was whether the instructions given to Waiganjo could be considered as a valid will under the Kikuyu Customary Law. So far as statute law is concerned, the son of the deceased had signed the will in the presence of the testator and by his direction in this respect was in compliance with section 50 of the Indian succession Act (that was applicable in Kenya since colonial rule) but his signature came after that of the witness. For this reason, his signature was never witnessed which makes it legally contestable. On the other hand, if one was to go by the Kikuyu Customary Law as documented in Contran’s *Restatement of African Laws: Kenya II*, the will was a valid oral instruction.

The second matter that the Court was required to decide on was on inheritance rights of Florence Wambui who was the second wife of the deceased. The first wife, Esther Njoki had contested that Florence was only a ‘mistress’ to the late Rufus as she (Esther) was legally married and had a marriage

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163 This is currently know as the private wing.
certificate under the Christian Marriage Act. Lillian, who was the attorney for Florence told me that she was saddened by how an African woman knowing very well that her co-wife was rightfully married and that any blame lay squarely on their late husband could now turn around and claim to disinherit the other woman. On the July 11, 1977, the presiding Judge, Justice Harris, upheld that the oral will by Rufus was valid and should be followed.

Lillian found herself with a split psyche at the end of this case. At one point when cross-examining the plaintiff (Esther Njoki) the plaintiff burst into tears in the court room. At this moment, Lillian also found herself crying (Personal Communication, 15 July, 2011). She was a lawyer in the public sphere but she had also realized that the law ‘outlawed’ women’s everyday life in Kenya. Because though she was a mother and a lawyer, she thought that another struggle was important. That was to align the law with justice for women. She believed that it is only when this is accomplished that she could become whole again. From 1977 to 1985, Lillian would have to battle with her divided self. During the day, she would work with her brother at Mwaura and Company Advocates but later in the evening and during the weekends, she went to the rural parts of the country and the shanty areas of Mathare and Huruma in Eastern Nairobi where she met poor women incandescent in their quest for dignity and justice. But the sessions with the women were never sad. Rather, they were often animated by deep laughter and stories of maneuvers and tricks that women deploy to get justice.

These women in the rural parts of the country and the shanty areas of Mathare and Huruma in Eastern Nairobi did not know about the statutes, legal jurisprudence or international human rights instruments that were much talked about by clients who went to the private law firms like K. Mwaura and Company Advocates. It was a case such as that which a former Judge in the Supreme Court of South Africa, Albie Sachs (2009) has observed in apartheid South Africa and described as “…two worlds in the same city yet totally apart, joined by pain rather than by hope, and did not live completely in either” (Sachs 2009: 2).

The case of Florence Wambui had literally removed Lillian from her legal routine. What was unfolding in her life was a ‘new’ palpable passion that was distant from abstract law. In the months and years that followed, she was able to gain the sympathy of many other women lawyers like Mrs. Kwaminwa, Mrs. Hayanga and Jean Gacheche. Through their non-formal network, women were taught about the law, its practice and their rights. This initiative resulted in a booklet, A Guide to Women and the Law. The guide is one of the first paralegal materials ever produced in Kenya with details of how women can realize their legal rights. Soon Lillian found herself giving presentations in churches and county halls in Nairobi and Central Kenya on questions of women and the law. The
central question was how law can assist women out of oppressive relationships with men, the state and the market. Although distancing her from the abstract pursuance of law, Lillian and her colleagues saw in law an instrument that would change Kenya and the situation of women. Soon, Lillian’s efforts were recognized beyond Kenya and she received invitations not just from local churches but also to international fora and United Nations (UN).

4.3 The Nairobi Conference and Beginnings of FIDA-K
June, 15, 1985 shall forever remain a memorable day in the lives of the ‘common’ women and human rights movements but more particularly to Lillian Mwaura. On that day, Lillian Mwaura had led women in Kenya to seize the opportunity of the United Nations International Women’s Conference in Nairobi to ‘sow’ the seeds of human rights in 21st century Kenya. Adjacent to the main event organized by the UN, she and her non-formal network of women professionals organized discussion groups and exhibitions for ‘ordinary’ women to demonstrate their everyday struggle and express their imaginations of emancipation and *uhuru* (Swahili word for freedom or independence). As Lillian marked a decade (1975-1985) since the commencement of her practice as a lawyer, women all over the world were also marking a decade of the campaign for the advancement of women.

*Figure 4.1: The Kenya women's guide to the law and the 1997 FIDA Conference*
Keeping the June 15, 1985 moment in mind, I will travel the period between 1980s and 2010 to show how legal practitioners and activists like Lillian Mwaura contributed to a legitimatization of human rights as the ‘new’ language of *maendeleo* in post-uhuru Kenya. I also demonstrate the numerous life worlds that have been traversed by the human rights discourse and instruments for them to gain their contemporary status as language of *maendeleo* in Kenya. Despite everyday contestations such as those evident in Lillian’s work, the legal model of human rights continue to operate as if it is some technology destined to bring change. Legal scholar Riles (2006:55) has called this kind of positivist legal dominance Legal technism. In precepts of legal technism, modernity is described through terms such as rule of law, constitutionalism, and democracy. In this rubric of modernity, lawfulness is increasingly described as being synonymous with justice and human rights (Comaroff and Comaroff, 2004).

Yet, it was the emerging practice of legal technism and contradictions in post-uhuru *barazas*\(^{164}\) that made the UN Conference significant. Internal contradictions in legal technism provided an opportunity for Lillian and her colleagues to explore the use of law to grant justice to women in post-uhuru Kenya. The conference was convened by the United Nations to mark the beginning of a campaign for women’s advancement that had been launched at the first World Conference on the Status of Women held in Mexico City in 1975.

The second such conference had been held in Copenhagen, Denmark in 1980. The Denmark Conference was monumental; coming just one year after the United Nations General Assembly adopted the 1979 Convention on the Elimination of All forms Discrimination Against Women (CEDAW), that is widely read as “International Bill of Rights for Women” (UN 1996:2). As it marked the end of the Women’s Decade, the Nairobi Conference gathered women from varying political, social and cultural backgrounds. Delegates at the conference dedicated their energy on reviewing progress made in the struggle for advancement of women’s equality, rights and development between 1975 and 1985.

Although United Nations official records suggest that the Nairobi Conference had many women from the ‘grassroots’ (UN 1996:7), Lillian and her colleagues convened what they called the ‘Nairobi 85 NGO Forum’. It is this session that brought together women of more marginal social and political levels. This parallel forum focused on everyday experiences of women. It was about women in polygamous marriages, those who have been dispossessed at the death of their husbands, who toiled

\(^{164}\) I shall give detailed explanation on *baraza* shortly.
but didn’t gain from their farm produce and women who were role models as teachers, farmers and academics.

The ‘Nairobi 85 Forum’ brought together about 15,000 participants most of whom were Kenyans. One evening in the week of the conference, the then Ambassador of Sweden to Kenya convened an evening dinner to which he invited Lillian, a few Kenyan women lawyers who had convened for ‘Nairobi 85 Forum’ and the then International president of Federecion International De Abogadas (FIDA)\(^3\), Caren Decker. FIDA is an international body established in 1944 in Mexico by women lawyers whose aim was to promote women’s rights globally\(^4\).

It is at this dinner that Decker explained to the Kenyan women lawyers about FIDA and its potential to bring change to women in Kenya. At the end of the conference, Lillian decided to convene yet another dinner for officials of FIDA International who had come for the conference at her home in Loreto, Nairobi. In those days, said Lillian during our interview, “…there was no concept of outside catering, so we spent the whole day cooking. Later in the evening we had a very filling meal. But most importantly, we agreed during the dinner that alongside the other women lawyers present at the dinner, we were going to form a branch of FIDA in Kenya” (Personal Interview, July, 13, 2011). Although FIDA-K’s history is often written in various forms and with many ‘surrogate mothers’ (Interview with Lillian Mwaura, 14, July 2011), Lillian claims that it was on this day that FIDA-K was formed.

At the end of the Nairobi Conference and the numerous consultations around it, a branch of FIDA International responsible for Africa and the Middle East was established. This is the Federecion International De Abogadas of Kenya, abbreviated as FIDA-K. Federecion International De Abogadas was established by a group of women lawyers from Cuba, El Salvador, Mexico, Puerto Rico and the USA during an interventional women’s convention in Mexico. Today Kenya is among the 79 countries where FIDA is active.

A council of twelve women lawyers, mostly Lillian’s peers and urban-based women lawyers, was established to steer FIDA-K. The members were: Christina Hayanga, Abida Ali, Grace Githaiga, Ann Mutua, Caroline Sarmons, Sally Githare, Jane Michuki, Ann Kimani, Sureit Kapila, Rachael Omamo, Ann Kariuki and Lillian Mwaura. By this time, the Law Society of Kenya had long been established as the sole statutory association representing lawyers in the country. Many lawyers (both male and female) therefore contested the rationale behind FIDA-K. In fact, there were

\(^3\) The Spanish name for the Federation of International Women Lawyers

concerns that such an association was tantamount to dividing the lawyers’ fraternity in the country. For Lillian Mwaura and other founders, FIDA-K’s mandate was to facilitate the creation of a society where everyone had equal opportunity and was governed by non-discriminatory laws.

The timing of the United Nations International Women Conference in Nairobi converged with numerous national and international processes. At the national level, the failed promises of *uhuru* had become the subject of contestations of both the state and meanings of citizenship. Nationalism which had been mobilized and supported at the time of *uhuru* was fractured. The state leadership had since turned to repression and “divide and rule” as mechanisms of retaining state power. This failure of the “national project” which was hereto the representational language for *post-uhuru maendeleo* fermented into crisis at numerous levels. Most notable were: mistrust between the governors and the governed; fracture of the collective dream for *maendeleo*, and a deficiency of language to communicate ‘new’ aspirations and expectations of *maendeleo*.

FIDA-K therefore organized its work as pursuing legal reforms and civic education. The argument was that the legislation and judicial process have primacy as instruments of social reconstruction, development, nation building and realization of ‘new’ social order. This is a strategy mostly used by activists who pursue gender justice from the thesis of law as the key instrument in the so-called social engineering and realization of equity (Kapur 2006: 679). This approach is what I call legal technism. Under this strategy, the law is like a piece of “…technology and legal scholars as scientifically informed technicians” (Kronstein 1949: 486 cited in Riles 2006: 2). Feminist legal scholar, Ratna Kapur (2006: 688) has argued that legal technism sees the law as a wholesome technical solution. It forgets the limitation of law in bringing about social change.

There is no doubt that the formative stages of FIDA-K were influenced by the prevailing feminist thinking of the time. This discourse pursued a broader vision of equality for women found in the context of liberal feminism by arguing that equality can be achieved through mere reform of the law and enforcement (Kapur 2006: 673). Such feminism begins from the basic premises of liberal theory, individualism and equality. Accordingly, the focus of liberal feminism has been on women as individuals—in particular, the extent to which women have been denied the status of individuals and the liberal goal of equality (Kapur 2006: 670).

At the international level, the World Bank and the International Monetary Fund (IMF) had positioned themselves as “ambassadors of good governance”. With increasing mistrust of the state as a broker of national development and international integration, the civil society organizations in form of Non-Governmental Organizations received more recognition and support to drive the next agenda of *post-
uhuru maendeleo. Most Scandinavian countries as well as the United States changed their channel of bilateral aid from state to the non-state actors. The “moral currency” of this movement was offered by the 39th President of the United States, Jimmy Carter, who adopted human rights discourse as a major cornerstone of America’s foreign policy (Makau 2003).

The aspirations of the women who endure long waits sitting on the benches and plastic chairs at FIDA-K’s office in the 21st century are located in both Kenya’s colonial history as well as contemporary neo-liberal economic and political policies. It is therefore appropriate to conclude that the practice of human rights in post-uhuru Kenya is influenced by not just local factors but also histories, geo-politics and rhetoric.

4.4 Kenya’s Post- Uhuru modernities

While there was much talk about re-organizing the structure of the state and citizenship after Kenya’s flag independence in 1963, much of the colonial state mechanisms and medium of social relations remained intact. Mamdani (1996) has given a detailed account of these continuities, most notably the divide between “territorial” and “homeland” tenure systems and citizenship (Mamdani 2007:2). Franz Fanon calls this continuity of colonial structure and modes of organizing the “betrayal of the national bourgeoisie” (Fanon 1968). Renowned Kenyan author and literature scholar, Ngugi wa Thing’o has described this ‘betrayal’ in his numerous writings where he decries the inattention by the ‘ruling class’ to the core demands for uhuru- which he describes as cultural liberation (Ngugi 1986). In Decolonizing the Mind (1986), Ngugi explains the real aim of colonialism to have been the control of native people’s wealth that is “…what they produced, how they produced it, and how it was distributed; to control, in other words, the entire realm of the language of the real life” (1981: 16).

But this continuity of colonial economic structure and citizenship is not solely a Kenyan phenomenon. François Bayart, in his 1989 book L’État en Afrique: La politique du ventre [The State in Africa: Politics of the Belly], has narrated a useful interpretation of African politics. He deploys as his analytical framework a Cameroonian idiom La politique du ventre (Politics of the Belly) to explain the never-ending situation of hunger in Africa in the midst of a political leadership that is always well-fed. This ‘good feeding’ is often presented in public parlance as a sign of power. Politics in much of sub-Saharan Africa, Bayart argues, is often symbolized by how much and what different people eat. Those who ‘eat’ are said to be in power (Bayart 1996: 54).

This idiom of politics of the belly has influenced not just Ngugi wa Thiongo’s work such as Decolonizing the Mind (1981). The historian Lynn Thomas undertook a study of sexuality and politics in Meru, central Kenya (1920’s and 1930’s) in British colonial Kenya and put together her work in a
book *The Politics of the Womb* (2003). More recently, the same notion of the politics of the belly has been used in an account of corruption in Kenya in a book, *It's our Turn to Eat* (2009) written by journalist Michaela Wrong. The ‘belly’ in Kenya is about the ethnicization of politics, universalizing what in practice is a man’s stomach, and the politicization of ethnicity. In this political practice, ascendancy or access to political state political power is often associated with ethnicity.

While I do not develop further this notion of politics of the womb in this thesis, an awareness of its existence enables the reader to understand how domesticated agency and manifestation of human rights in *post-uhuru* Kenya are discussed and negotiated. In this idiom of eating, what is important for this thesis is the kind of vertical relationship envisaged between those ‘who eat’ and others ‘who do not’. It is in the midst of these hierarchical relationships that the notion of human rights is produced in *post-uhuru* Kenya. Categories such as *wananchi* and FIDA-K’s ‘clients’ refer to those ‘who do not eat’ and when they do, their ‘eating’, as Michaela Wrong has shown, is often related to a patron-client relationship with those in power. Deploying the notion of politics of the belly in Kenya is useful in understanding how the category of subjects of human rights is constituted as well as engaging the political history around which human rights has acquired dominance as universalizing the language of *maendeleo* as well as the culture of politics in modern Kenya.

### 4.5 The Culture of Politics in Modern Kenya

A reading of *The Culture of Politics in Modern Kenya* (1997) by anthropologist Angelique Haugerud demonstrates that far from the common meta-narrative, Kenya's *post-uhuru* modernity (that is still under production) has been vexed and characterized by struggles for influence by multiple actors. Through a study situated in Meru region of central Kenya, Haugerud (1997) demonstrates that state politicians, *wananchi* (common or ordinary citizens), religious institutions as well as national and international political economies have influenced ‘Kenya’s political culture’ (the politics of the stomach).

Owing to the personified leadership dominant in the imagination of modernity in Kenya, this history is best presented through the reigns of Kenya’s two first post-independence presidents namely, Jomo Kenyatta (1963-78) and Daniel Arap Moi (1978-2002). Just as was the case during colonial rule the state and the presidency during the reigns of Kenyatta and Moi were so entangled that access to the president and his immediate circle opened the possibility to shift public policy, alter or stop careers, sack adversaries, promote cronies, restore status, and literally deal in life-and-death issues.

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167 As was demonstrated in Chapter Three, this mode of benevolent authoritarianism is characterized by efforts to 'produce' authentic tribal and civilized citizens as well as control everyday relations between citizens and the state under the dictum of law and order (Also see Mamdani 1996).
(Cohen and Odhiambo 2004: 158-9). In their practice of politics the entanglement played out in *barazas*.

Haugerud (1997) uses *barazas* “as an entry point into Kenyan politics and social life” (Haugerud 1997:3). The *barazas* are public theatres where politicians often display their patronage. The practice of convening a *baraza* comes from pre-colonial models of consultations between the leaders and members of clans or territorial communities in much of Africa (Phillips 1944: 27-8). The word *baraza* has its origin in the Kiswahili language and practice in coastal Kenya. It entails a convening of the residents who often sit in a circular manner. The leadership then sits at the centre. When the session starts, it is the citizens who speak first, explaining to the leaders’ matters that they want resolved. Sometimes, the *barazas* are also used to pledge allegiance to the leaders. But it is usually the leaders who speak last. In the speech, the leader responds to matters raised or sometimes simply gives ‘decrees’ on what they want done. During both the Kenyatta and Moi presidencies, *barazas* were accompanied with the commissioning of numerous World Bank-funded ‘development initiatives’.

Such World Bank-funded initiatives like the construction of roads, rural electrification, housing, infrastructure development and agriculture during the post-*uhuru*168 years between the 1960s and the late 1990s was often described as “beacon[s] of success, and an economic miracle” (Haugerud 1997 10). While most of this was possible through the guarded continuity of the colonial economic structure, Kenya’s acclaim was “enhanced by the absence of a successful coup d’etat during the country’s first quarter-century of independence” (Ibid., 5). This image of a cohesive Kenya on the path to *maendeleo* (moving ahead or economic progress) was performed in *barazas*, state-controlled media (Ibid.,4) and school curricula (Rajan 1996). Its rhetoric was both anti-imperialist and Africanist and was perhaps best expressed in the rhetoric of Sessional Paper No. 10 of 1965 on *African Socialism and its Application to Planning in Kenya*. Although details in the 1965 policy paper have been rather the flavor in the mouth, the central theme of Sessional Paper No. 10 (as it is popularly known by policy makers in Kenya) was to ‘re-root’ or more appropriately seek the ‘route’ of Kenya as a post-colony169 in its ‘original’ past. In everyday politics Sessional Paper No. 10 was the rhetoric of both President Kenyatta and Moi just as Vision 2030 has been Kibaki’s defining rhetoric, especially in his second term.

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168 This is in reference to the immediate period after independence which is different from the central register of the postcolonial from where the narrative of this thesis flows.

169 African socialism was seen as the ideology of choice of several post-colonial states while some like Mozambique, Zambia and Tanzania formulated detailed political and economic programmes to enforce the practice of its ideals. For a detailed account see Shivji (2007).
Haugerud (1997) presents with eloquence contradictory images at barazas that characterized Kenya’s post-uhuru modernity. On the one hand, there are the dominant speeches and rhetoric by the local political elite, international media, the World Bank and scholars of Kenya as an “exceptional Third World country” (Ibid., 4). On the other hand, wananchi protests—that it is only a few Kenyans who are ‘eating’ were expressed through songs and remarks often made before the leader speaks. Haugerud (1997) argues that these competing images (which were the breeding ground for organizations like FIDA-K) played out in both the Kenyatta and Moi eras.

The era of President Kenyatta’s Modernity (1964-1978) was built on the Sessional Paper No. 10 and on his earlier essentialist book, Facing Mount Kenya (1938) that had exalted ‘African values’. It was President Kenyatta’s argument that these ‘African values’ had been ‘corrupted’ by colonialism (Kenyatta 1948:90). The rhetoric of ‘a black’ exploited person versus ‘white’ mabepari (imperialists) is a common theme in Kenyatta’s post-uhuru speeches. The speeches now form a body of Kenyatta’s so called nationalist literature that guided government’s policy objectives and strategies between 1963 and 1978 and were often performed at barazas (Rajan 1996: 57). In the practice of citizenship, there were distinct imaginary borders of ‘citizens’ and ‘subjects’. In law, customary and common laws continued to exist in hierarchies developed in the colonial era. Also unfettered was the idea of homeland in the country-side versus national territory in kapango (urban areas).

The ‘eating’ ethnic kleptocratic class that had developed as part of Kenyatta’s modernity was soon fractured. Oginga Odinga, a prominent politician from Luo Nyanza resigned as vice president amidst claims that his Luo people were not benefiting from the post-uhuru government. He later on published a book that was critical of Kenya’s modernity at the time that apparently made ‘eating’ the exclusive privilege of a few related ethnic groups. The book was appropriately titled, Not Yet Uhuru (1967) (Not yet Independence). At the climax of these perceived ethnic animosities, one of the most prominent Luo politicians and a close ally of President Kenyatta, Thomas Mboya, was assassinated in the streets of Nairobi on July 5, 1969.

The death of Mboya galvanized not just the Luo nation but also heightened unprecedented ethnic

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170 The various speeches and public declarations by Kenyatta are organized into three book collections. Suffering Without Bitterness (1968), The Challenge of Uhuru (1971) and Harambee (1964).

171 In the 1970s the ‘club’ of courtiers around Kenyatta soon got to be called ‘The Kiambu Mafia’ in reference to Kiambu in central Kenya where most of Kenyatta’s inner cabinet members hailed from. This phrase was widely used in the 1970s (Nyong’o 2007).
consciousness among Kenyans (Ogot 2003, Macgoye 1986 [2000]). The national and regional politics in barazas in the period that followed raised questions like: Who belongs to Kenya? Who did not belong? Who was eating? And who was not eating? As both ‘citizens’ and ‘subjects’ (in the formulation of Mamdani (1996)) and at the same time part of the ‘moral economy’, wananchi (and more so those who felt marginalized by the state) engaged the state while the political elite remained fluid, malleable and ‘shifty’. Perhaps the polemics of this modernity were best captured by J.M. Kariuki’s (a politician from Nyandarua who was brutally murdered in 1975) claim that “…Kenyatta created a nation of ten millionaires and ten million beggars at a time when Kenya’s Gross Domestic Product (GDP) was growing at the rate of 7% per year” (Nyongo’ 2007: 90).

Then there were the changing international relationships and market economy that were experienced at numerous levels. The declining prices of Kenya’s main foreign export—coffee—and the state’s apparent neglect of cotton farming were played out in barazas. In western Kenya where cotton is grown, the locals complained of neglect and decided to form the Ramogi Institute of Advanced Technology (RIAT) as an agent for regional cohesion and economic investment. The acronym RIAT in Dholuo means pulling together. Between 1971 and 1976, leaders of RIAT traveled in all major urban areas of Kisumu, Nairobi, Mombasa, Nakuru and Kericho promoting this as an institution of Luo ‘development’ and ‘nationalism in post-colonial Kenya (Ogot 2003: 250). In all their meetings, RIAT officials were accompanied by Ker Paul Mboya and members of the Luo Council of Elders. This form of ethnic nationalism that existed side by side with the images of cohesive and united Kenya in public barazas was also played out around formation of a football team named after Luo legend Gor Mahia. Although the fan base of Gor Mahia is now multi-ethnic and multi-layered, the team remains largely associated with Luo nationalism in contemporary Kenya

In 1978, the first president of independent Kenya, Jomo Kenyatta died in office. His vice president, Daniel Arap Moi who had been embattled by Kenyatta’s cronies and allies that had come to be referred to as ‘Kiambu Mafia’, took over office. As part of a strategy of existence and pragmatism, Moi assured Kenyans that he was going to follow Kenyatta’s nyayo (nyayo is a Kiswahili word for footprints) (Haugerud 1997: 82). Within a short time, nyayo became the rhetoric that would define Moi’s political, economic and social modernity. By the 1980s there was already talk of the Nyayo Philosophy of Peace, Love and Unity as the embodiment of Kenya’s modernity (Godia 1984; Moi 1986). Educationist Atieno Oluoch has observed that:

True to its operative philosophy, the Nyayo regime inherited, intact, the infrastructure of state power. Oyugi (1994:174) has noted that ‘whatever changes one can get are style rather than substance’. These include provincial administration, which is the power base of the executive. As Moi consolidated his power, Nyayoism expanded to acquire ideological functions. It gradually became a blanket ideology under which various ideologies were encompassed. Ogut (1995:135) lists these as constitutional democracy, African socialism, Christian and Islamic morality, nationalism, patriotism, anti-tribalism and other positive ideas (Oluoch 2006:9).

As Nyayo became the modernity of Nyayoism, it changed the meaning of following Kenyatta’s footsteps to President Moi himself demanding that Kenyans should follow his own footsteps (Haugerud 1997: 82). In 1986, Moi gave the Nyayo Philosophy yet another interpretation by insisting that by asking Kenyans to follow footsteps, he was referring neither to those of Kenyatta nor his own, but rather those of Kenya’s ancestors (ibid).

In his book Kenya African Nationalism: Nyayo Philosophy and Principles (1986), Moi insisted that Africans have always kept in touch with their ancestors and therefore keeping in touch with the African forefathers was fundamental for the post-colonial state. Just like Kenyanization, the Nyayo modernity in its various forms was a meta-prescription offered by the ruling class. Eventually anyone who acted against Nyayo philosophy was perceived and treated as an enemy of the government (Oluoch 2006: 9).

It is in this context of a modernity characterized by ethnic nationalism, asymmetrical power relationships between the state and citizens, continuities of colonial knowledge systems and symbols as well as contested images of Kenya that human rights and the rule of law were proposed. The language of rights as an expression of Kenya’s modernity first took root in the mid-1990s.

As a counterpoint to these claims made by politicians at public barazas, Haugerud (1997) presents images of the asymmetrical power relationships among wananchi and between them and the state’s political elites. Factors like regional location, ethnicity, religion, level of economic income are cleavages that make wananchi non-monolithic. She argues that both the Kenyatta modernity and that of President Moi who came after him retained social structures and state physique in its colonial design (Haugerud 1997: 102). Competing with the narrative of Kenya as cohesive (under Kenyatta’s ‘Harambee’ slogan and Moi’s ideology of ‘Peace, Love and Unity’) as told by the state, media and scholars were interplays between what Comaroff and Comaroff have called “structural constraints and situational contingency” (2001:131). That is, while the national elite had developed and fronted a narrative of a homogeneous and competitive Kenya state, everyday situations were

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173 Ngugi wa Thiong'o has suggested in his book, Decolonizing the Mind (1981), that the academy in the period after independence was divided among those who were ‘thinkers of the state’ and others who were ‘thinkers for resistance’.

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telling a completely different story. *Wananchi* were demanding recognition in the new state and representation in the structures of power. The small scale farmers wanted higher returns for their coffee, rice and sugarcane. Alongside them were the new brand of African scholars (mostly in literature and history)\(^{174}\), arguing that complete independence required “…a movement from the West’s culture” (Ngugi 1986: 50).

In the perception of the World Bank and IMF, *Nyayo* and its ideology of Nyayoism had excluded *wananchi* from the state. The Breton Woods institutions demanded that states should be held more accountable and citizens’ participation should be entrenched in the mode of governance (World Bank 1989). This call by the World Bank and IMF coincided with the call by NGOs and intellectuals in Kenya for political liberalisms and state accountability. Just like these intellectuals and NGOs (see Mutunga and Mazrui 2002: 23) the World Bank had indeed attributed the development problems of the 1980s and 90s in countries like Kenya to a ‘crisis of governance’ and demanded that;

> …Leaders must become more accountable to their people. Transactions must become more transparent, and funds must be seen to be properly administered, with audit reports made public and procurement procedures overhauled (World Bank 1989: 60).

The World Bank and the IMF in their new rhetoric of ‘good governance’ ignored the historical role that they had played in supporting Moi and his Nyayo Philosophy. Rather, they demanded that beneficiaries of their grants must entrench the language of good governance which had close resonance with that of the human rights discourse that the United Nations and Western powers were zealously promoting. In his critique of human rights activism and international enforcement of this 1970s and 80s period, Kenyan legal scholar Makau Mutua has demonstrated how the administration of U.S. President Jimmy Carter crafted this rights discourse as the language of American foreign policy between 1977 and 1980 (Makau 2002). Also using human rights to re-orient and socialize state-citizen relationship was the international human rights institutions, more so Amnesty International and Human Rights Watch (see Human Rights Watch 1997a, 1997b and Amnesty International 1987). For the Kenyan NGOs and intellectuals, the human rights discourse provided a language that could be used to demand popular participation in state affairs and entrench rule of law as a means to check on an arbitrary and capricious exercise of power by the Moi government.

### 4.6 The Women Question in Kenya’s Modernity

Embedded in the grand narratives of Kenyan modernity (Kenyatta’s Harambee and Moi’s Nyayo) has been the question of women. Kenyatta and Moi’s modernities were not alone in the negation and silencing of women as a category. Since colonial times, an imagery of women as victims of male

\(^{174}\) One of the leading minds of this scholarship is Ngugi wa Thiong’o.
dominance and exclusion has been central in defining modernity and nationalism in Kenya. Olga Watkins¹⁷⁵ who was a member of the Kenya Legislative Council (KLC) in the 1950s described the “pre-capitalist patriarchal relations” (cited in Ndeda 2006: 5) in the colony as some form of ‘slavery’ of the ‘African reserves’. Typical of what Spivak (1999) has described as colonial feminism¹⁷⁶, Watkins argued that African men were acting in cohort to drag African women into some sort of slavery.

‘...The most disgusting site was to see women with babies strapped on their backs and probably in the advanced stages of pregnancy doing all the work on the farms’ (Cited in Ndeda 2006: 9).

Watkins’ appeal was that the colonial administration should intervene and reverse this situation. This description of the situation of African women presumed to be homogeneous, hapless, ahistorical victims¹⁷⁷ without agency is not uncommon in postcolonial Kenya. But there are also abundant narratives that tell a counter-story of historical and contemporary agency of Kenyan women in both colonial and post-uhuru Kenya. Indeed the narratives about Kenyan women have never been constant. After the decline of developmentalist discourse of women in development in the 1980s, the 1990s ushered in an academic movement whose major research objective was to demonstrate that women participated as active actors in various struggles including Kenya’s struggle for independence. One of the publications that come from this intellectual movement was Cora Presley’s Kikuyu Women, the Mau Mau Rebellion and Social Change in Kenya (1992). As the human rights language took root as the language for national and international politics, discussions have moved to whether women should benefit from the reparations movement. The reparations movement has put to use the same human rights language that was used to justify ‘civilization’ in making claims against the former British colonizers. The most recent publications of this genre is Harvard historian Caroline Elkins’s Britain’s Gulag: The Brutal End of Empire in Kenya (2005). Lately, there have been publications by Kenyan women who have been part of struggles to gain legal authority for gender equality and broad political and economic empowerment. Wangari Mathai’s Unbowed one Woman’s Story (2006) can be considered as belonging in this category.

These publications attest to the key role women played in the Mau Mau rebellion and the broader struggle for Kenya’s political independence. These recent publications are in addition to legends that

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¹⁷⁵ Olga Baillie-Grohman was thrice married, each time by a member of the white community in Kenya. Her first marriage was with a settler soldier and later with a member of the colonial bureaucracy. Details of her life and work in Kenya have been captured in a biography of her written by her daughter. See Elizabeth Watkins (2005).

¹⁷⁶ This genre of feminism that is often used in the construction of ‘Third world Women, Chakravorty Spivak (1999) has cynically put it thus: white men and women saving brown women from brown men.

¹⁷⁷ This is not to say that women are not marginalized by the current economic, social and cultural moment. Indeed statistics and everyday practices attest to multiple marginalization of women. What seems to be in question is the unproblematized and homogenizing nature of these assertions.
are well known by most ordinary Kenyans such as Mekatilili wa Menza at the Kenya Coast who rallied her Giriama ‘community’ against British rule in the 1920s (Wamwere 2002); Mary Nyanjiru who got so enraged by the actions of the British colonialist of detaining Harry Thuku in 1952 that she took off her clothes in an action of *Gutaramira ng’ania* (stripping) to curse the British (Wamwere 2002, Akoth 2010), and; the legend of Moraa Moka Ngiti, a traditional healer and diviner from Gusii-land in western Kenya who mobilized her Abagusii sub-clan against the British colonialists (Musandu 2006: 63).

Despite these precedents of women’s situated agency, interventions to ‘save’ the African woman were not uncommon in colonial and postcolonial Kenya. Equally intriguing is the continuity that these colonial pasts tend to show in the *post-uhuru* present. Nancy Shepherd (commonly known by her peers and benefactors as Nancy), the Assistant Commissioner for Community Development who headed the programme for Community Development and Rehabilitation to promote the advancement of African women and to raise their standards between 1951 and 1960 is perhaps the most known amongst the colonial interventionists.

The benevolent work of Nancy resulted in the establishment of the women’s movement, *Maendeleo ya Wanawake* (a Kiswahili phrase meaning women’s development) in the 1950s. While the problems facing womenfolk and Kenyans at large in colonial and post-*uhuru* state have been complex and contradictory, *Maendeleo ya Wanawake* have insisted on focusing on welfare issues, by condemning women’s dissent and facilitating its own co-option to the state (Wipper 1975: 122). It is this colonial benevolence that would later form the embryo for the *post-uhuru* women’s movement in Kenya as well as an ‘incubator’ for many postcolonial human rights advocates like Lillian Mwaura, Wangari Mathai, and Phoebe Asiyo (see Chapter Three). That however did not stop narratives that persistently presented women in Kenya as victims of modernity. There were many debates in the 1980s ranging from moral claims of customary versus common law, opportunities and limitations for women in public life and ethnic and civil citizenship to the ever-changing positions taken by leaders on public issues. The 21st century context illustrates that indeed gender perspectives and women discourse by the *post-uhuru* endogenous activists and developmentalist discourse is not any different from colonial discourse of African women as ‘beast of burden’. This context described above offered materials and vigor with which FIDA-K would in the late 1990s be turned from an association of well-meaning women lawyers into a human rights institution in Kenya.

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4.7 Institutionalization and Programming at FIDA-K

As the chair of the Council which later became the Board of Directors, Lillian presided over the institutionalization of FIDA-K. During the first phase (1985-1995) of its development, FIDA-K’s secretariat and leadership adopted an argument that *maendeleo* for women in Kenya meant abolishing ‘archaic culture’ and promoting a legal regime in Kenya that was in resonance with the international human rights instruments (FIDA-K 2006). At the time, the imagery of Kenya’s women was presented as those who were victims of poverty, patriarchy and an undemocratic regime (Haugerud 1997:82). The major interventions that were adopted by the organization were empowering women through legal education, proposing new legislations as well agitating for the protection of institutions of democracy, mainly parliament, the judiciary and other state institutions (FIDA-K 2009).

In the mid-1990s, FIDA-K joined hands with other nascent human rights organizations to demand the rule of law, the repeal of repressive and colonial laws such as The Married Women’s Property Act 1882 (FIDA-K and IWHRC 2008: 20) as well as the enactment of new legislations and a new Constitution of Kenya. At the time, the same language of rights was being used by the World Bank and IMF as well to demand economic and political accountability. Locally, opposition parties demanded better political representation and competitive politics using the language of rights.

In developing their work, Lillian and her colleagues at the FIDA-K Board of Directors and Secretariat maintained a strong network with international human rights organizations, especially Amnesty International and UN institutions. These connections are attested by the 1987 convening of the FIDA conference for Middle East and Africa Region. The organizing of the conference was mainly done by Lillian and the Board members with generous funding from The Royal Netherlands Embassy in Nairobi (Interview with Lillian Mwaura June 3, 2011)

The second phase of FIDA-K (1996-2007) built on the first phase. Human rights work hitherto had been located at the office in Nairobi and focused on intervening on behalf of victims of human rights violations. Now, FIDA-K developed a process of systematically documenting human rights violations. ‘Community’ members were recruited and trained to monitor and report violations of civil and political rights. As the Comaroffs have documented in the case of post-apartheid South Africa, there were also human rights ‘clinics’ in rural areas to “spread the good news of human rights”

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179 In this period, FIDA-K suggested about 8 new legislations. These include: Marriage bill of 2007; Matrimonial Property Bill 2007; Equal Opportunities Bill; Reproductive Health and Rights Bill (FIDA-K drafted this); Sexual Offences Act (FIDA-K was involved in the initiatives of formulating the Act); Criminal Law Amendment Bill of 2001; Equality Bill 2001 and Special Tribunal Bill (Interview with Patricia Nyaundi, August 2009).
In one of the most significant initiatives for the second phase, FIDA-K established off-site projects and offices. The first was the Kangemi Women Empowerment Centre, located in the sprawling Kangemi informal settlements in western Nairobi. The Centre was opened in 1999. During its most active times in 2000-2003, the Kangemi Women Empowerment Centre (hereafter referred to as ‘The Centre’) had the reputation for defending women’s rights, promoting income generating activities and protecting girls against sexual violence. The Centre provided space for one of the first legal clinics by FIDA-K outside their Nairobi office.

Rather than go to the FIDA-K headquarter offices, clients were attended to at the Centre which hosted monthly legal clinics. The outcome of FIDA-K intervention in Kangemi didn’t take long to manifest itself. A section of women from Kangemi destroyed ‘dens’ (or Shebeens in the South African context) used as selling and consumption points of illicit homemade brews (East African Standard January 21, 1999). These women claimed that as their male folk spent most of their time ‘filling their belly’ with the illegal liquor, they and their children had been left impoverished and bore the brunt of escalated rates of domestic violence meted out by men under the influence of the brew. Actions by these women demonstrated how human rights can be used to mobilize and legitimize action on practical issues in a framework that is integrated and indivisible. But it was also about producing ‘new’ meanings of human rights in particular historical moments and contexts.

A situated human rights intervention had become important for FIDA-K. In the year 2000 the organization therefore opened its Kisumu branch. This initiative was explained by the FIDA-K leadership as a response to the persistence of cultural practices that discriminated against women in Luo Nyanza (Interview with Judith Okal, September 4, 2009, Kisumu). As discussed in Chapter Three, the imageries of Luo people are often given as that of a people who take pride in contemporary symbols of progress and claim adherence to ‘tradition’ at the same time. For FIDA-K, the Kisumu office was therefore designated as the place of conversation between ‘culture’ and ‘rights’. The period also witnessed increased partnerships between FIDA-K and its international partners like the Georgetown University’s International Women’s Human Rights Clinic. Many young students from

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180 The two terms have been italized as they are rather problematic. Client is a concept which although widely used in the legal sector has appeared to offer a rather unidirectional control. Most often it is not the client who is in charge. The term clinic is also problematic to the extent that it seems to represent what I prefer to see as space of helplessness. In any case it is these fluid categories that have hindered the effectiveness and level of accountability from civil society organizations who offer legal aid.

181 At the time of my fieldwork, she was an advocate of the high court in her early 30s and serving as regional manager for the FIDA-K Kisumu office.
North American universities came to FIDA-K Kisumu office as interns.

It was also this period of the mid-1990s that witnessed a major change in the human rights landscape in Kenya. There was a sudden surge in the number of human rights institutions in the country. The young intellectuals who had been forced into exile by the Moi-KANU administration in the 1980s had returned and re-organized. Most of them had completed their university degrees in the University of Dar es Salaam and Makerere University in neighbouring Tanzania and Uganda respectively. Makau Mutua, who had been expelled from the University of Nairobi and completed his law degree at University of Dar es Salaam and Willy Mutunga, who was dismissed from the same university as a Law Tutor in 1989 and later completed his doctorate in law in Canada established the Kenya Human Rights Commission (KHRC) as an NGO based in Kenya. With the emergence of the KHRC, even legal rights institutions that had been established much earlier adopted an approach of using the language of human rights not to support clients or change archaic culture but rather to demand political reforms from the state. The idea of modern Kenya and its relationship with human rights was thus defined within the rubrics of the rule of law\textsuperscript{182}, respect for human rights and electoral democracy (See Mutunga and Mazrui 2002; Makau 2009). The Non-Governmental Organizations (NGOs) that put the language of rights to use in demanding state reforms and the creation of a modern Kenya came to be known as human rights institutions (Makau 2009). Most notable legal and human rights institutions at the time were the International Commission of Jurists (ICJ), \textit{Kituo Cha Sheria} (Legal Advice Centre) and international organizations such as Amnesty International and Human Rights Watch (Makau 2009). Although diverse, all these organizations converged in their emphasis of the legal model of human rights. In the approach of these NGOs, human rights were treated as the central instrument of realizing modern Kenya. Mutunga and Mazrui have captured this conviction with their comments on the Kenya Human Rights Commission (KHRC) in the early 1990s. They noted that:

The slogan “Rule of Law” was emphasized while colonial and neo-colonial repressive and draconian laws were condemned as immoral and consequently earmarked for repeal. The constitution making process as the social contract that would guarantee multi-party democracy became an important project for the civil society and opposition political parties (Mutunga and Mazrui 2002: 23).

Scholars like Wily Mutunga, Makau Mutua and others who joined them later, like law professor, Kivutha Kibwana shared this use of human rights language with the organized political opposition. Early 1990s, some of them were overtly supportive of the political parties which opposed Moi while others such as Kivutha Kibwana joined the opposition and became members of parliament.

\textsuperscript{182} Although political democracy was emphasized as the fulcrum of reforming the state, over time, military rulers and the new national bourgeoisie were able to manipulate it and retain power through illegitimate mechanisms. The rhetoric of the rule of law was therefore adopted as an instrument to inform discussions of how power could be organized, shared and executed (Makau 2009:3)
Yet the development of this oppositional discourse of human rights that was commonly used by intellectuals and activists in the 1980s and 1990s cannot be taken for granted. It seems that the common node shared by intellectuals like Willy Mutunga, Makau Mutua and activists like Maina Kiai who were the first officials of the KHRC for instance was their displacement from Kenya by the Moi-KANU regime. It is during their life in exile in Tanzania and later in the United States that they developed an oppositional discourse of human rights. As already noted above, theirs was an importation of meaning at two levels. First, they used human rights to develop the notion of rule of law as developed in the Western European tradition. Mamdani has clarified that: “Whereas in Western Europe the rule of law was seen as a check on arbitrary and capricious royal power, in American tradition it emerged really as a limitation to popular sovereignty” (1990: 362 ). The idea of human rights as a practice of opposition was indeed part and parcel of holding in check the arbitrary and capricious Moi- KANU regime.

The second explanation is that the oppositional discourse of human rights can also be read as part of a broader discourse of exile and displacement. In reading Edward Said, particularly his essay on Out of Place and Reflections on Exile and Other Essays (2000), one is often awakened by the peculiar position that the exile holds in relation to writing. This experience of being ‘shut out’ as Said called it seems to have informed the kind of meaning of human rights that was ‘developed’ by Mutunga and his contemporaries. To them, human rights become a mechanism of overcoming being ‘shut out’; it was oppositional.

Besides, the position of FIDA-K in the international community also became more prominent as they have become parties to writing and submitting reports on state of human rights in Kenya to the International Covenant on Civil and Political Rights (ICCPR)183, the International Covenant on Economic, Social and Cultural Rights (ICESCR)184 and the African [Banjul] Charter on Human and Peoples’ Rights (ACHPR)185. This period also witnessed an upsurge of many other human rights organizations in Kenya. At the same time, Amnesty International and Human Rights Watch and other members of international human rights movement emphasized that adherence to international human rights instruments was fundamental as part of Kenya’s democratization process. Political Science scholars like Peter Schmitz who has conducted research in East Africa have suggested that this process

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183 Adopted and opened for signature, ratification and accession by UN General Assembly resolution 2200A (XXI) of December 16, 1966 entry into force March 23, 1976, in accordance with Article 49. Kenya has ratified the ICCPR (1976) and the two optional protocols (1976 and 1991 respectively) entry into force January 3, 1976, in accordance with article 27.


of socializing Kenya to adopt legal human rights as a mode of its modernity included: instrumental adaptation and strategic bargaining; moral consciousness raising, argumentation, dialogue and persuasion; institutionalization and habitualization (Schmitz 1999: 39-77). Indeed it is during this phase of FIDA-K’s work that an almost complete discourse of human rights unfolded in Kenya. Before going to phase three of FIDA-K’s work, it may be appropriate to just summarize the appropriations and representations of human rights in the period 2000-2008.

4.8 Human Rights Talk and Modernity in Kenya

4.8.1 Deflection of Human Rights Talk

Once the United States had become a unipolar military and ideological power after the end of the Cold War in the early 1990s, the transitional human rights movement and the United Nations changed tact globally. Rather than continue to engage in human rights as an external intervention (mainly from the West to non-Western countries), the language of domestication started to gain roots in Kenya and internationally amongst human rights NGOs. The call for domestication focused on the demand on post-uhuru states to adopt an effective bill of rights in their constitution and establish effective human rights institutions at a national level (Schmitz 1999).

The United Nations Commission on Human Rights convened numerous meetings to agree on the most appropriate institutional structure to promote human rights at the national level. Numerous discussions had occurred at the UN Commission on Human Rights since 1986 on the need to have national human rights institutions186. In the period October 7-9 1993, these discussions were convened in Paris, France and developed guidelines that came to be called the ‘Paris Principles’.

The principles were defined during the first International Workshop of National Institutions for the promotion and protection of Human Rights held in Paris on October 7-9, 1991. Participants were mainly human rights actors from Europe and the US who later secured a resolution from the United Nations thus to make the principles the authority on status and functioning of national institutions for the protection and promotion of human rights. The Paris Principles were followed by yet another UN meeting in Vienna Austria in 1993, which recommended that all state members of the UN should develop National Action Plans on Human Rights187. It is however on the basis of the Paris Principle that states and international human rights community started to engage with human rights as a


187 Part II, paragraph 71 of the 1993 Vienna Declaration recommended that each State considers the desirability of drawing up a national action plan identifying steps whereby that State would improve the promotion and protection of human rights.
mechanism of state building. Human rights discourse was expected to replace ‘pre-political nationalism’\(^\text{188}\) (Wilson 2000: 394) and usher in a ‘state of rights’.

On account of the principles of accountability, participation, rule of law, non-discrimination and equality, authoritarian states such as Kenya under President Moi were averse to the formation of institutions of human rights. To circumvent it, President Daniel Arap Moi established\(^\text{189}\) the Standing Committee on Human Rights (hereafter referred to as the Committee) that was answerable to him (Personal Communication, Lawrence Mute June 4, 2009). While the Committee met most of the tenets of the Paris Principles, it was widely dismissed by National and International human rights organizations for being too close to the presidency and distant from the non-governmental human rights groups and sections of\(^\text{wananchi}\) (Amnesty International 2002, Human Rights Watch 2002).

Although the Committee registered moderate success in its work (Ideke 2004), it did not match or engage in human rights talk that was promoted by civil society organizations like FIDA-K at the time. This was made no better by the Committee’s attack on human rights NGOs whom it accused of “being overzealous and misinforming” (Standing Committee on Human Rights 1998 cited in Ideke (2004: 49)). In the long run, the Standing Committee on Human Rights was nothing more than a liminal institution. At the end of 2000, the Standing Committee on Human Rights was discarded and its version of human rights dismissed by national and international human rights agencies for being deflectory and pro-KANU and the Moi state (see KHRC 2002, HRW 2004).

4.8.2 Kenya National Commission on Human Rights

With the discrediting of the Standing Committee on Human Rights, the path was freed for a state human rights institution of a different kind. In 2002, Kenya’s multiparty parliament, emboldened by the sunset days of Moi’s presidency, passed a motion for the establishment of the Kenya National Commission on Human Rights (KNCHR). The Kenya National Commission on Human Rights (KNCHR) Act 2002 was the new legal instrument that domesticated the Paris Principles and paved the way for the instrumentalization and habitualization of human rights. The Kenya National Commission on Human Rights Act 2002, states that the KNCHR was formed with the objective of “providing for better promotion and protection of human rights…” Further, in Sec 21 (2) it requires the Commission to submit an annual report that ‘shall include an overall assessment by the Commission of the

\(^{188}\) Here Wilson refers to nationalism that Edward Said calls ‘cultural resistance’ that is often based on ideology of autochthony. Examples are resistance such as those from legendary Kikuyu leader Wangu wa Makeri and Mijikenda leader Mekatilili wa Menza. Most political scientists writing on human rights and constitutionalism often create rather rigid dichotomy between ‘state of rights’ and ‘ethno-nationalist’ versions of culture.

\(^{189}\) The Standing Committee on Human Rights came by way of a Presidential Order. It was subsequently gazetted by President Moi’s government.

Of these programmes, best known to the public are the Complaints and Investigations Programmes. A burgeoning number of citizens excluded from judicial processes by corruption among judges and high cost of filing cases generally referred to as ‘clients’ swamp the KNCHR’s complaints desk to seek legal redress or protection from vicious individual or corporate violators of human rights standards. The same trend of increased reporting of human rights violations has been witnessed by FIDA-K among other non-governmental human rights organizations like the KHRC and Kituo cha Sheria. It is these kinds of programmes that enable the KNCHR to undertake regular ‘audit’ of Government’s human rights performance and trainings for government officials as well as wananchi. At the time of fieldwork for this thesis, the KNCHR invited me to review their third human rights report. Because of this function of ‘auditing human rights progress’, the KNCHR regards itself as occupying the same position on human rights as that which an auditor general occupies in relation to state finances (KNCHR, 2010).

My argument is that the work and method of the Kenya National Commission on Human Rights is not much different from the interventions undertaken by international human rights institutions like Human Rights Watch, Amnesty International or the International Commission of Jurists. From reading its annual reports, although the work of the KNCHR has attempted to get enmeshed in Kenyan NGOs and intellectuals’ historical, cultural and political discourse, much attention seems to have been taken by promoting notions of universal and neutral human rights discourse. Indeed because even the personnel at the KNCHR are largely former employees of NGOs, the KNCHR and NGOs such as KHRC tends to share a lot in common which has sometimes led to rivalry and conflict.

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192 The Office of the Auditor General draws its mandate from the Constitution of Kenya, Chapter 12. The core function of the Auditor-General is to audit and report, in respect to each financial year.

193 See http://www.hrw.org/en

194 http://www.amnesty.org/

195 http://www.icj.org/
However, as a statutory body, it was the establishment of the Kenya National Commission on Human Rights that enabled enmeshment of human rights in Kenya’s *maendeleo* project. Only that this idea of *maendeleo* tends to go beyond modernization-oriented project and speaks about embrace of human rights value and standards. Indeed one of the most outstanding accomplishments in the eight years of the KNCHR’s work was the writing of the *National Human Rights Action Plan* that is a national road map for implementing international human rights standards in Kenya. Unlike in 1987 when Lillian and her colleagues could only approach foreign funders for human rights work, the state allocates an annual budget to the KNCHR and for the development of the *National Human Rights Action Plan*.

During Kenya’s constitution-writing conference of 2002-2003 and the later constitutional referendum in 2010, human rights language emerged as a unifying vocabulary and pragmatic compromise in the background of what Rothschild (1981) has called the politicization of ethnicity and ethnicization of politics. All actors during the debate for a new Constitution of Kenya agreed that a strong Bill of Rights would provide better opportunity for an inclusive Kenya. Unlike the 1980s and 90s when the rights language was seen as subversive and oppositional, human rights in the era of the KNCHR and the constitution-making debate in Kenya became the equalizing language of principles, dealing with the past atrocities and building a ‘human rights state’.

Once human rights was adopted as the new idiom of *maendeleo*, NGOs, state and *wananchi* engaged in human rights talk as the bulwark against ethnicity and identity politics in Kenya. This was evident at a FIDA-K function which I attended on December 14, 2008 at the Imperial Hotel, Kisumu. The function was an official launch of a report that had been commissioned by FIDA-K on commercial sex workers. The chief guest was the Minister of Medical Services, Prof Peter Anyang Nyongo’. He asserted that:

> The universality of human rights is based on the belief that everybody including sex workers, all over the world, from the day he or she is born is entitled to live in dignity; that the government must guarantee these rights and that citizens deserve to be protected from abuses by the government (Government of Kenya 2008).

During public protests in western Kenya and other parts of the country, it has become common to hear chants of *Haki yetu, haki yetu* (Our rights! Our rights!) This use of language of rights in negotiating civil and economic rights is a relatively new occurrence in Kenya. It is however evidence of how the language of human rights has replaced *uhuru* nationalism in conversations between

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196 Scholars still hold no consensus over a working meaning or model of formation of what should be recognized as a Human Rights State. Some of the most notable works on this subject include: Makau Mutua (2002), *Human Rights: A Cultural and Political Critique*. Wily Mutunga and Alamin Mazrui have also written various unpublished essays on the subject.

197 Although these discussions seem to have captured public imagination and media debate after the 2007-8, debate on ethnicity and politics of ethnicity in Kenya are as old as colonial rule. See (Ajul 2002).
wananchi and the state. Similar observations of the use of human rights language has been made by Wilson (2001) on the uses of human rights language in post-apartheid South Africa.

It is in this context of habitualization of the language of human rights in Kenya that FIDA-K has ushered in its third phase. The third phase of FIDA-K has been demarcated as 2008-2013. In its strategic plan, this phase retains the overall strategy of legal technism but with four major shifts. First, an office was opened in Mombasa, Kenya’s Islamic coastal city, to engage with the role of Islam in giving opportunities and offer redress to the barriers hindering access to women’s rights. Second, FIDA-K expanded its legal clinics and opened collaboration with churches and other faith-based institutions and civil society organizations. The third shift was the “empowerment of women to self represent themselves in courts” (FIDA-K 2008: 5).

The idea of self-representation is a critical departure that must also be read as a critic of the existing logic of legal representation and ‘victim’-centered human rights methods. At the very least, it is a response to the all-too evident ‘crisis of representation’ and “epistemic discontinuity” (Spivak 2004: 547) that characterized the relationship between mostly Nairobi-based human rights NGOs and wananchi who live in slums areas or unplanned urban settlements like Nyalenda in Kisumu. The fourth recent shift in FIDA-K’s strategy involved collaborations with ‘traditional cultural institutions’ like the Luo Council of Elders. This fourth strategy was influenced by research whose aim was “...to study traditional justice systems in the selected communities and come up with recommendations for legal reform that would result in the mainstreaming of traditional justice institutions into the Kenyan justice system, with a view to promoting access to justice by vulnerable groups, particularly women” (FIDA-K, 2008:1). FIDA-K had commissioned the study in 2008 in Mombasa, Kilifi, Kwale, Kinangop and Tana River. The findings are presented in a report: Traditional Justice systems in Kenya: A study of Communities in Coast Province, Kenya (2008). Although the report from the study is scant in ethnographic details, its analysis attest to the persistence of ‘traditional’ justice systems in an environment of ‘zealous promotion’ of classical legal and human

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198 At the beginning of this section I engaged with the issue of victims. It is this image of victims that is an emblem of the contemporary logic in Law and human rights.

199 A question has been posed whether the civil society in Kenya can articulate and represent the interest of the ‘down trodden’. Many have argued that most CSOs actors are self-seekers who tend to serve their own interests. It is this disputation of the position of the CSOs organizations to represent that I have called ‘crisis of representation’.

200 While they purport to be ‘traditional’ institutions, most of these are often imagined structures that respond to contemporary issues (Meyer 2005). Although these are ‘neo-traditional’ institutions, the concern of FIDA-K and many other organizations that work with them is more on access to justice rather than the politically controversial practice of restitution of ‘traditional’ structure of authority, such as has been claimed by the Wanga Kingdom in western Kenya.

201 This promotion of human rights is what Michael Ignatieff (2004) has referred to as the era of human rights.
rights-centered justice system. Amongst the reasons cited by the report for this persistence are: 1) The incomplete reach of the state’s legal structures due to the weak nature of most African states; 2) Legal fees paid to the Court of Law as filing fees and advocates fees which accounts for the high cost of litigation; 3) The long delays, cumbersome procedures and technicalities of legal proceedings, coupled with legal illiteracy that exacerbate the alienation of the population from the court process; 4) In addition, state systems have perpetuated the authoritarian colonial “law and order” orientation, which does not focus on meeting the needs of the people for substantive justice (Ibid).

4.9 Is Legal Intervention Enough?

While there is no hierarchy among the four points above, the last point talks to the need for conversations between the various notions of justice. These conversations have lately informed and been informed by the opening of FIDA-K offices outside Kenya’s capital city of Nairobi and the development of perspectives that move beyond ordinary legal programming. When FIDA-K opened an office in Kisumu, there was general resentment because of the perception that legal rights (and indeed human rights) were an affront to ‘Luo culture’. Over time, the opening of doors to clients at their up-market Milimani Estate in Kisumu opened space for a more discursive encounter. Those going to the FIDA-K offices as clients come along with their own understanding of justice. Their claims therefore are not of some de-contextualized abstract subjects. Rather, they negotiated their subjectivity and use of law. To FIDA-K, these Kisumu encounters offer an opportunity to move from the abstracted and idealized subjects of human rights to that which Francis Nyamnjoh has described in his notion of “domesticated agency”. During discussions with Executive Director of FIDA-K, Patricia Nyaundi in October 19, 2009, she narrated one such incident she encountered when working at the Kisumu office in 2007.

A woman client came to our office seeking representation to the family court. She claimed that her husband (with whom she were married according to Luo customs) and solemnized in church (Christian marriage), had deserted her and their children. According to the client, her husband took this action after they had a quarrel. Her husband, she claimed, had since moved away leaving her with four children whom she could not provide for on her own. Her prayers were for FIDA-K to file a case at the family court seeking maintenance for her and their four children. To commence the process, I wrote a letter to the client’s husband asking him to present himself before FIDA-K offices in Kisumu to respond to the charges. The husband appeared and confirmed that they had indeed quarreled. But he also claimed that it was not the quarrel that led to the separation. Rather, it is his wife (the FIDA-K client) who during the quarrel pronounced a curse on him while spanking her thighs. I asked the client whether she was aware of these customs and if so whether she was prepared to partake of them. She confirmed that she knew these cultural remedies and she was not averse to being part of them. On that basis, the case was

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202 Nyaundi previously served in the Kisumu office as the regional manager. She currently serves as the chief executive officer of the Truth, Justice and Reconciliation Commission.

203 It is common belief under Luo customs with which his wife was familiar that such an action is tantamount to divorce. No man can have further sexual knowledge with a woman who has hurled the said curse at him. The only way to reverse this was to bring in a jabilo (medicine man with divine power) to cleanse the couple so as to activate their sex life and thereafter pronounce normalcy between them.
never taken to court. The couple engaged the services of a *jabilo* (magician or ritual expert) who normalized their relationship and instructed them to have ritual sex as part of re-connection (Conversation with Patricia Nyaundi, Nairobi, 2009).

This case is testimony to the flexible and contextualized nature of justice and agency of human rights subjects. The upsurge of the dominant notion of human rights promoted by FIDA-K has lately been confronted with questions that dispute the universality of the subject of human rights. Nyaundi’s client and her husband (whom legal model of human rights would categorize as the perpetrator) were interested in justice from a world vision which is rather distinct from the modernist logic of legal model of rights. The intriguing thing is that they did not see such perspective as being inconsistent with their subjectivity in postcolonial Kenya. Rather than see the situation that was reported to FIDA-K as one that requires a straight-forward evocation of some human rights instrument, the debate was about how to reconnect with the self, the other and ancestors who are part and parcel of everyday life for most Luo people in western Kenya. The decision was therefore more about increasing the threshold of making claims rather than choosing between modernity and traditions or individual against collective.

This conviviality and discursive agency that Nyamnjoh (2002a) has called domesticated agency has become critical in understanding the production and practice of human rights in postcolonial Kenya. It is for this purpose that FIDA-K and other human rights organizations have resorted to working with the Luo Council of Elders in the 21st century. In working with some of the structures that it had dismissed earlier as relics of ‘patriarchal culture’, FIDA-K seems to be heedng the advice of Ugandan legal feminist, Silvia Tamale that “…‘culture’ and ‘rights’ are not in opposition but rather a creative reworking of traditional values and practices…creates a valuable avenue for gender transformations” (Tamale 2008: 68).

While retaining its capacity to access international human rights meetings, FIDA-K has published several booklets and pamphlets on human rights practice in Kenya and guidelines for its monitors and partner NGOs. From the sample of these materials in Annex 7.0, FIDA-K seems to have developed a legal model of human rights while opening up option of multiple perspectives and approaches in advancing human rights in Kenya. This strategy is evident through a 2006 incident where as part of an application to annul a marriage, FIDA-K bought cattle equal to the amount that had been paid by the defendant and returned them to him asking him in return to stop his claim for a woman who he was making claims to.

The history of FIDA-K represents the emergence of many other human rights organizations in Kenya.

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204 See the case of Judith Acheng’ Mwikoma Vs Joseph Mwikoma (1st Defendant), Didacus Monyo (2nd Defendants) (2006, in the authors file).
in the 1990s. Salient in these narratives is how knowledge and the dominant model of human rights discourse are produced as a mechanism of dealing with continuities of colonial episteme of law and authoritarian governance. Amidst the post-uhuru national elite that uses essentialist notions of ‘traditional’ and ‘modern’ (see Kenyatta’s Harambee and Moi’s Nyayo), FIDA-K reformulates the use of the law as a mechanism for realizing gender justice.

Women such as Nyaundi’s ‘client’ at the Kisumu’s FIDA-K office raise questions of epistemic foundations of human rights discourse that are presented by 21st century human rights NGOs in Kenya. In her narrative, it becomes evident that the legal model of human rights promoted by FIDA-K (and many other human rights NGOs) as well as the training of the human rights workers themselves is inconsistent with the episteme and notion of personhood practiced by wananchi. This disjoint between the workers of NGOs and those “whose rights have been wronged” (Spivak 2004: 526), has led to production of various varieties of human rights even in the practice by NGOs. Also defied in the history of FIDA-K is the notion of women as hapless victims. Rather, women who go to FIDA-K become actors in producing the rights they want to enjoy.

More recently, Kenya promulgated a new constitution on August 27, 2010 (hereafter referred to as the August 2010 constitution). The August 2010 constitution further entrenches the discourse of human rights as part of political culture. Chapter Three (Article 10) of the August 2010 constitution on national values and principles of government lists human dignity, equality, social justice, inclusiveness, human rights, non-discrimination and protection of the marginalized. This alongside a comprehensive Bill of Rights in Chapter Four positions human rights as the representational language for the state’s 21st century modernity.

These provisions are a departure from the Kenya of the 1980s when international instruments signed by Kenya would only come to application after being domesticated through national legislations. In any case as earlier noted, the state became a signatory to most of these conventions and instruments for publicity rather than out of any desire to make ‘progress’ on the human rights situation in the country. Signing to human rights treaties was (and still is) a register of inclusion and exclusion in international arena (Thee 1993).

It is therefore appropriate to argue that the legal discourse of human rights with a pedigree in Post-enlightenment discourse of rights that was discussed in Chapter Two is often displaced as it also attempts to displace many varieties of rights produced in the postcolony (at least in the official state

\[205\] The notion of domestication here refers to legal lingua meaning incorporation of an international human rights instrument in the local legislation.
and civil society register). Against a view of legal and human rights as a value free process, we shall see later how in state reporting and working of the United Nations, legal and human rights ideology is a form of both domination and hegemony in the Weberian and Gramscian senses respectively.

In its dominant form promoted by the United Nations and in state reporting, human rights tend to promote a myth of neutrality, acultural and ahistorical character. But even then, if the UN notion of human rights is aimed at creating some sort of equilibrium, it can only be a ‘moving equilibrium’. In this thesis, it is experiences such as that of Nyaundi’s client discussed above that counts. Here is an experience not of enactment of new laws, policies and conducting state accountability reports. Rather, it is that of conjecture between ‘tradition’ (represented by Luo notions of personhood expressed by Nyaundi’s client) and ‘modernity’ (represented by FIDA-K’s legal fetishism). What seems more convincing is the counsel by Richard Wilson that:

If we conceive law (and indeed human rights) as an ideological system through which power has historically been mediated and exercised, then in a society where power is organized around racial/ethnic and national identities, we can expect rights talks also to be ensnared by culturalist and nationalist discourses (Wilson 2001: 4).

In the 21st century, the government of Kenya has become socialized into the human rights discourse as a language of maendeleo and nation building. If one was to use the notion of hegemony in the perspective of the Italian political theorist, Antonio Gramsci, Kenya’s human rights modernity, similar to what I have illustrated for the case of colonial customary law, would be more of a ‘moving equilibrium’ (Bozzoli 1991: 3). Belinda Bozzoli has argued that examining dominant modernity as ‘moving equilibriums’ enables an analysis of the modernity’s effect upon its subjects and their assertive impact with and upon it (1991: 3).

4.10 Conclusion

In this chapter, I have shown that the work of FIDA-K in western Kenya results in new contestations of the often idealized subjects, meanings and forms of human rights with underlying questions, critiques and dichotomies such as; urban and rural, culture and human rights, the representational role of civil society organizations like the FIDA-K as well as human rights and rule of law in a multicultural society. This examination of modernity of human rights in contemporary Kenya attests to the persistent challenges of producing single human rights modernity in the postcolonial. It is a process characterized with efforts to discontinue Kenya with the past colonial modernity while maintaining the colonial register of morality and Euro-centric episteme (Haugerud 1997). Rather than be some static equilibrium, the hegemony of western model of rights is a moving equilibrium. It has shifting positions and its own position keeps shifting.

As I have shown here, the moment of the 1985 Nairobi Women’s Conference galvanized efforts that
contributed to development of legal and human rights discourse as a language of modernity in Kenya. The life and work of Lillian is typical of experiences of many Kenyan citizens in a post-independence era characterized by continuities in state’s intervention in constructing its citizens. I demonstrate how human rights developed in Kenya as a subversive and oppositional discourse and imagination. Later in the 1990s, this language was given impetus by international human rights organizations such as the Amnesty International and Human Rights Watch (HRW) as well as leading global neo-liberal institutions namely, International Monetary Fund (IMF) and the World Bank.

While the 1985 human rights talk by local human rights advocates like FIDA-K was widely viewed as oppositional, the place of human rights in 21st century Kenya has acquired a status of language of state modernity. The Kenyan state has made the language of human rights its official practice through habitualization and institutionalization (Schmitz 1999: 62). Institutions such as the Kenya National Commission on Human Rights established in 2003 and the National Gender and Development Commission established in 2006, have been in the forefront in promoting human rights under rhetoric such as ‘rule of law’, ‘good governance’, liberal democracy’, ‘multiparty politics’ and so on. The official language of rights is today spoken in Kenya’s parliament, something that never happened in the Kenyatta and Nyayo era.

The chapter also allowed rethinking of meanings and manifestation of human rights. “Victims” start being appreciated as active actors in generating and practicing the discourse of human rights. The dialogue between Patricia Nyaundi and her client in FIDA-K office in Kisumu demonstrates that even though human rights is still influenced by Western political ideology of progress, its vision of a liberal, atomized and litigious subjects is fiction. In turn, Nyaundi’s client demonstrates that the postcolonial Kenya is characterized by domesticated agency which when pursued goes hand in hand with conviviality. In this practice of domesticated agency, Nyaundi’s client shows that contrary to the claim by legal fetishism, human rights subjectivity is cultural and historical consciousness that is mobilized and performed in varying situations. This cultural and historical consciousness in exercising human rights agency shall become manifest in the rest of this thesis. In the subsequent two chapters, I shall explore how these varieties of subjectivities are produced and their circulation in Luoland and beyond.
CHAPTER FIVE

SPACES OF BETWIXT AND PRACTICES OF HUMAN RIGHTS IN KENYA: RADIO AND SUBJECTIVITIES

5.1 Introduction

In this chapter, I present a discussion of the radio programmes from Radio Lake Victoria and Ramogi FM. Both stations broadcast in Dholuo and have dedicated programmes on Luo values and moral systems. As I would soon establish during my fieldwork, those who listen and participate in some of the radio programmes are not different from the clients of FIDA-K. The two groups share an interest in engaging authorities who are ‘experts’ in particular value systems. Discussions from Dholuo FM Radio stations are analyzed as processes of seeking solutions to immediate problems, but they are also interested in the authentication of culture and performance. The listeners and callers to these programmes are thus involved in ‘fixing’ as well as developing postcolonial subjectivity. Amongst the most prominent presenters of these programmes is Jaduong’ Japheth Wara Odek who is widely known by his pseudonym, Ogara Taifa\textsuperscript{206}, of Radio Lake Victoria.

Although Ogara Taifa currently anchors his programme on Radio Lake Victoria, a privately owned station, he is famed to have initiated the programmes on Luo norms in the state-owned Kenya Broadcasting Corporation (KBC) in 1998 and then also the privately owned Radio Ramogi in 2001. When I met jaduong’ (singular for jodongo) Japheth Wara Odek at a popular restaurant in Kisumu City in June 2009, his description of ‘the Luo’ people was not different from what I had read about Evans-Pritchard’s description of the Azande or what Nyaundi heard from her client at the FIDA-K offices in Kisumu. Just as Evans-Pritchard had, Jaduong’ Odek insisted that Luos must be understood from Kitgi gi timbegi (their customs and traditions).

The ethnography of human rights is as much about what is the character (content) of human rights as it is about who is the subject of human rights. Twenty five years after human rights politics gained currency in Kenya under the aegis of the ‘era of human rights’, among questions that still linger include: How does the postcolonial subject of human rights defy the binaries of “modern” and “traditional”? Can the claim of humanity as identical, internally bounded and coherent speak to the

\textsuperscript{206} This pseudonym was first used in Luoland by a famous benga music maestro, John O’gara who hailed from Yimbo. Benga music is a hybrid of many genres of stringed music like Nyatiti and acoustic guitar styles from Congo. In the 1970s, John O’gara became so famous that he changed his name to Ogara Taifa. Taifa means republic in the Swahili language.
practices of human rights among Luo people? Do endogenous notions of personhood and agency disappear in favour of autonomous and modern individuals attuned to liberal democratic ideals of being? How does one explain the existence of the inter-play between the so called ‘modern’ and ‘traditional’ on one hand and the essentialist assertions that attempt to retain a difference between ‘African’ and ‘Western’ categories on the other hand?

While this chapter is not able to offer a conclusive response to these questions, the very formulation of the questions above and the ethnography provided here are a major pointer to how complex the issue of subjectivity and practice of human rights is in our times. This chapter features the radio as both a medium and a space around which conversations that produce personal and collective identities appear to be holding sway in Luoland and beyond. It is a discussion that enables us to engage with the alleged image and character of the subject of human rights as autonomous, market-driven and legalistic (Kapur 2006: 568).

I argue that the shifting identities and identifications should be read in a context of the ever accelerating flows and interactions of diverse cultures as a result of globalization, which poses yet another question: Does it make sense to make reference to individuals and groups as belonging to any fixed category, e.g. the Luos? Even those who make claims that we are living in an era of human rights concede to the fact that the characterisation of the subject of human rights remains incomplete. Indeed, the formation and representation of subjects of human rights is a major signifier for the meanings of human rights in post-colonial Kenya. This is more so in an era where the subjects of human rights are simultaneously characterized as being part of a large local and global diaspora. As I shall show in this and the next chapter, the production of subjectivity in the contexts of post-uhuru and the postcolony significantly bears on the meanings and practice of human rights.

The creation of a diaspora of Luo people especially among labour immigrants directed to industrial urban centres or plantation areas is not new. In the early 1920s and later in the 1940s most labour migrations were directed to railway works on the Kenyan Coast, Nairobi and Kisumu (Ogot 1966; 1968). Then in the 1950s, there was an upsurge of immigrants headed to neighbouring Tanzania and later, after flag independence in 1964, a significant number of Kenyans went to an array

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207 The idea of Diaspora has two meanings. On the one hand, it means the movement away from the place of nativity (in the original notion of Jewish Diaspora) as implied in the critique by (Gupta and Ferguson 1992) while, at another level, Diaspora is a postcolonial experience well discussed by Stuart Hall in his essay, When was the Post-Colonial? Thinking at the Limits (2004) and Edward Said’s Culture and Imperialism (1993: 336). This is diaspora both in terms of dispersal from place of family and origin e.g. Luoland as well as abandonment of what is otherwise perceived or presented as an authentic representation of cultural identity.
of countries in the northern hemisphere, generally referred to as “overseas”\textsuperscript{208} (Ogot 2003). However in this age of mobility, those away from ‘home’ desire to remain in touch with \textit{dala} (home) as a place of family and belonging\textsuperscript{209}. Being in touch with Luos and Luoland is also about attempting to remain an authentic Luo. From the 1980s, this quest for belonging has been expressed in the formation of associations such as the Siaya Funeral Association (Cohen and Odhiambo 1992); and regular ‘\textit{Salaam} programmes’\textsuperscript{210} on the government-owned Kenya Broadcasting Corporation (KBC).

The chapter shall also discuss how elders like Ogara Taifa animate the use of culture as a resource for signifying postcolonial anxieties (such as those of Nyaundi’s client in Chapter Four) and uncertainties among Luos in western Kenya. \textit{Jaduong}’ Ogara Taifa, as he is commonly known, is one of the contemporary moralists renowned for his unrelenting campaign for Luo notions of morality and ethics.

\section*{5.2 Radio and Production of Cultural Citizenship in Kenya}

With the liberalization of the airwaves\textsuperscript{211}, the mass media has become a central mode of mediating the connection between the Diaspora and \textit{dala} as well as a betwixt space where ideas of ‘the era of human rights’ are inter-phased with those of ‘culture’, resulting in moral codes that are situated and are generally seen among contemporary Luo as superior to any of these dichotomies. The relationships among Luos in the 21\textsuperscript{st} century has been extensively mediated by the radio and other electronic media thus making it more complicated than the urban/rural, modern/traditional and human rights/customary dichotomies allow.

At any rate, the proliferation of mass media stations broadcasting in African languages in addition to English and Swahili has re-positioned mass media in general and radio in particular not just as mediums of a state-crafted abstract nationalism but rather as spaces for cultural nationalism for the more than 60 language groups. In addition to encounters such as that between Nyaundi and her woman client that was discussed in Chapter Four, it is through these radio stations in local languages that the

\begin{itemize}
\item \textsuperscript{208} The movement overseas turned out to be very divisive in Kenya. There were many young Kenyans who went to the United Kingdom to take professional courses like nursing and law. But many others went to the US under the auspices of the famous airlift organized by the buoyant Kenya politician Tom Mboya (see Jacobs 2010) while another significant number went to the then Soviet Union (see Odinge 2010).
\item \textsuperscript{209} Although the contemporary practice and notion of household is evidently influenced by the colonial constructs of territory and homeland, there is a common belief that home is where a child’s placenta is buried.
\item \textsuperscript{210} \textit{Salam} is a Swahili word for greetings. These are radio programmes that were very common during the era when the state had monopoly on radio and television airwaves. The state run Radio station produced special greeting cards which listeners would use to provide details of those whom they wanted to be ‘greeted on air’.
\item \textsuperscript{211} As Ogara Taifa often insisted, it is not just a renaissance of values and moral systems but also that of institutions that are responsible for promotion and protection of the said values. The renaissance of Luo Councils of Elders is evidence of the attention given to this phenomenon.
\end{itemize}
conversations about contemporary personhood and human rights subjectivity takes place.

What one observes from these changes is a certain ambivalence on the state policy when it comes to the place of ‘culture’ in developing citizenship in post-uhuru Kenya. In the period after attaining flag independence, there was a rush towards embracing what was largely referred to as ‘modern culture’. Colonial restrictions in accessing schools and movement to urban areas as well as dress styles, language and life styles associated with European ideas of modernity were repealed. At political barazas (public meetings), church services and private meetings, there was concern that people would abandon ‘culture’. In Luo Nyanza, the rhetoric against ‘culture’ was a major public discourse because of numerous norms and values that tend to be associated with Luo way of life. ‘Wife inheritance’ and various probations and rituals such as those associated with planting, harvesting and building a new dala were often cited “as backward” by politicians, churches and NGOs and marked as part of what must come to an end. The aversion to ‘culture’ created ambiguity for the position of Jodongo (elders) as they were often associated with the maintenance of ‘culture’. Culture in this context is engaged at one point as a ‘fixed’ abstract list of do’s and don’ts and, in responding to questions from the radio listeners, the jodongo engaged ‘culture’ as malleable, morphing, growing and developing expansively, embracing all the facets of Luo people’s existence, thus constantly denying any fixed mark.

As already demonstrated, this aversion to ‘culture’ was by no means universally shared. Rather it happened side by side with various movements that claimed and demanded a return to the “roots” and “route”. In the Kenyan academy, this movement was led by Ngugi wa Thiong’o (1986) and Maina wa Kinyati, a well-known Kenyan writer and historian respectively. There was also a large religious movement that professed Christianity that had been laced with ‘Luo culture’. The Legio Maria church founded in 1963, the Nomiya Luo church founded by John Owalo in 1907 and Johera (people of love) (Groot 1980), took their places in western Kenya as Africanized Christian churches. Jodongo got a ‘special’ place in these churches both for their age and an attraction to their wealth of knowledge (Musandu 2006). There was an intricate conversation between the present and the past.

Today, the radio in Luoland is not merely used for news and entertainment, but is also an engendered mechanism of connecting to Luo people who are away from Luoland. Most recently, it has been used as a medium of Luo renaissance and connection with those in the diaspora. The renaissance has followed the tides of liberalization of the airwaves in Africa since 1991 (Hailemariam 2005), which has resulted in establishment of many radio stations that broadcast in native languages.

212 The root here refers to imagined or legendary ideas presented as being what makes an authentic Luo. Route on the other hand is usually the effort to trace the path followed by Luo people from their ancestral home in South Sudan to their present habitat.
During my fieldwork, I observed that unlike the 1980s uni-direction presentations by the state-controlled radio (which was all about crafting single nationalism and keeping in touch), current conversations, programming and music played in the radio stations that broadcast in Dholuo are more interested in allowing the listeners to play a role in crafting authentic images and representations of cultural identity and to participate in the discourse of ‘culture’. With the recent intensification of debates on authenticity and belonging, the stations that broadcast in vernaculars like Dholuo have also become spaces for articulation and discussion of the metaphysical cosmological vision\textsuperscript{213} that is appropriated by most Luos in the context of customs, ‘culture’, customary law, human rights and liberal law that seem to be mutually constituted. Discussions about becoming ‘modern’ and ‘progress’ are characterized more by reference to what has been lost rather than what would be gained by embracing ‘new’ lifestyles and technology. In most vernacular radio stations and social gatherings such as weddings, funerals and land tribunals in Luoland, there is a constant reference to ‘those days’ with nostalgia.

### 5.3 Towards Vernacular Radio in Kenya

In colonial Kenya and the immediate post-uhuru period, broadcasting in vernacular languages was always treated with caution. While the British colonial administration (1895-1963) treated the public use of the vernacular as subversion, the post-uhuru administrations took the approach of co-opting vernacular media outlets. By mid 1980s for instance, the state-owned Voice of Kenya (VoK) established regional media stations that aired programmes in vernacular languages. The language regions were the then eight administrative provinces\textsuperscript{214}. For each province the ethnic groups with larger numerical presence were given airtime in these regional stations\textsuperscript{215}. The broadcasts in vernacular languages focused on the exchange of greetings between those in the rural and urban areas, entertainment and announcements (mainly funeral announcements).

It is Kameme FM, a Kikuyu language station, which took the first move to defy state control of the media when it made a successful application for an operational license. The station went on air mainly with Kikuyu entertainment songs in 2000. This move sparked a prolonged national debate on the role of vernacular language in ‘modern’ and multiethnic Kenya. Most opponents to the

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\textsuperscript{213} Because of the importance of this issue of cosmological vision, it pre-occupied Evans Pritchard in his field work of the Azande. Pritchard (1937: 170) observed that not all people who speak Azande language or who reside among Azande people are regarded as Azande people or embody the acceptable relational principles.

\textsuperscript{214} Although these provinces were heterogeneous, often the most populous language group held sway in its naming. At the same time, its external and internal boundaries were drawn to reflect yet another convergence between cultural and political boundaries.

\textsuperscript{215} This promoted marginalization of minority ethnic groups and literally forced them to learn the language of the majority in their areas, so as to follow the radio programmes.
broadcasts in vernacular languages argued that this had the potential to stir ethnic conflicts. Indeed, the Kameme FM Radio was switched off the airwaves for about eight months between 2001 and 2002. Worse for Kameme, its founder was Rose Kimotho, a Kikuyu business magnate was at the time seen by the Moi regime as part of the ‘opposition’.

Kameme FM’s success in 1999 and increasing public education through media advertisements after 2001 triggered a rush to acquire broadcast licenses. Politicians and seasoned entrepreneurs invested in private radio stations as commercial ventures. By the end of 2003, numerous radio stations had been established targeting listeners from the main ethnic groups in the country namely: Luos, Kisii and Luhya in western; Kikuyus in Central Kenya, Kalenjins in the Rift valley and Kambas in South Eastern Kenya. As of 2010, there were 18 stations that broadcast or had a programme in Dholuo, but the best known are three: Radio Ramogi, Radio Lake Victoria and Nam Lolwe (also meaning Lake Victoria).

During the initial stages, the stations operated mainly as avenues of entertainment. They employed entertainers, popular personalities and disc jockeys (DJs) as main anchors. By mid 2003, there was increasing pressure for the stations to establish programmes that would inform and foster interactions amongst the radio listeners. At the same time, new research showed that 81 percent of Kenyans aged 15 years and above use a vernacular as their main mode of communication at home (Hailemariam 2005).

In a listenership survey conducted by a media research company, Synovate, under the Kenya Audience Research Foundation (KARF), it was established that there was more listenership of vernacular stations in rural areas where 89 percent of people spoke vernacular as compared to 52 per cent in urban areas. As they attract more listeners, vernacular stations have attracted many advertisers. It is this advertising revenue that is used to sustain many programmes that invent, perform or ‘preserve’ ‘Luo culture’ in the radio stations that broadcast in Dholuo.

5.4 Ramogi FM and Radio Lake Victoria

For Dholuo radio listeners, there are two major radio stations: Ramogi FM and Radio Lake Victoria. Ramogi FM is based in Nairobi while Radio Lake Victoria is based in Kisumu City. The menu of programmes in these stations includes a programme on ‘the Luo’ norms and customs. During an evening chat, my friend Ogam, who hails from Gem and lives in Kisumu, informed me of the various initiatives that he had initiated in a campaign to promote ‘Luo culture’. He said that after long reflection, he decided to have a discussion with the Kenya Broadcasting Corporation (KBC)
(formerly known as the Voice of Kenya (VoK) on the need to promote cultural norms. To him, ‘the Luo culture’ had offered the most resilient model of what needed to be done in different occasions by the Luo. The KBC agreed and so a programme called Aguch Luo (the Luo pot) was created.

After a year, he convinced the ‘elders’ who were the ‘experts’ for the programme to move with him to Ramogi Radio station for a similar programme. After another two years, he once more convinced the elders to move with him to Radio Lake Victoria which, although commercial, is based in Luo Nyando and has an editorial policy committed to promoting Luo identity. This seems to suggest that just as the entrepreneurs who establish the various stations, the ‘elders’ also seem to be engaged in the promotion of ‘culture’ for economic reasons. In this process, the radio stations have ‘produced’ elders who are celebrities and authorities on authentic Luo identity and norms as well as a reference point for reviewing what Luo is.

Radio Victoria’s programme on ‘Luo Norms’ is called Galamoro Mar Chike (meaning the assembly of norms (Monday 9.30 pm-12.00 midnight) while Radio Ramogi has a programme called Abich Jodongo\(^\text{216}\) (the kraal of the elders) (Monday 9.30 pm-12.00 midnight). The coinciding schedule attested to the competition between the stations in a struggle to claim and keep the loyalty of a similar group of audience or one that, by and large, shares the same interests and concerns. More still, the bitter rivalry could well be associated with the vexed ethnic relations at the return of multi-party politics in Kenya. The survey shown on Figure 3.6 below gives little mention of Radio Lake Victoria. As demonstrated on the graph below, it is the Radio Ramogi that stood out as the favourite radio station in Luoland.

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\(^{216}\) Abich Jodongo derives from abila mar jodongo, which denotes an informal council of elders.
Although in fierce competition, I soon discovered that Radio Ramogi217 ranked first with Radio Lake Victoria218 coming a close second as the most listened to dholuo radio station in Luoland. As I would later establish during my fieldwork, the two stations have almost consolidated a “virtual community” (Hurst 2005) around their various programmes. Charles Hurst (2005) has used the term “virtual community” to refer to communication created through a transnational spread of computer networks, emails and telephony. Consistent with Hurst’s (2005) claims, my work among Luo people in Luoland and Nairobi suggests that relationships created through involvement in radio call-in programmes may be just as meaningful and deep as those created in physical communities. Most people I spoke to at the markets, funerals, homesteads and cultural festivals confirmed that the most popular programmes in both stations are Radio Ramogi’s Abich Jodongo (meaning the kraal of elders) and Radio Lake Victoria’s Galamoro Mar Chike. More so, there were people who had not met with jodongo like Ogara Taifa but consider themselves as part of the ‘radio community’. I spoke to Bernard Oluoch Okello (a radio producer in one of Kenya’s leading radio stations and initiator of various programmes that discuss the idea of what it means to be Luo). Ben (as he is popularly known) opined that:

Many people know what the present is all about; they also see what ‘modern’ children do. These they don’t like. They think the ‘modern’ children are spoilt and lacking in direction. Because these modern ways that have spoilt our children are associated with ‘outsiders’, reference is then made to ‘those days’ before the outsiders came with their things and ways (Interview, June 30, 2010).

5.5 Programme Structure and Content

Despite the physical distance between Nairobi where Radio Ramogi is located and Kisumu where Radio Lake Victoria operates from, the program structure of Abich Jodongo and Galamoro Mar Chike are as identical as twins. Radio Ramogi which is based in Nairobi has a larger geographic coverage than Radio Lake Victoria, which is located in Luoland. Radio Lake Victoria, on the other hand, has built on its geographic location to claim a higher degree of authenticity in dholuo than Radio Ramogi. I therefore recorded the programme sessions from both stations. For over a year, I paid keen attention and followed deliberations in the two major radio programmes that are now renowned as useful for creating linkage and debate between ‘those days’ and ‘these days’. By ‘those days’ the radio presenters, elders and listeners often tend to construct a mythical past of pre-colonial customs, traditions and culture. Although some of the constructs are more fictitious than real, Abich Jodongo and Galamoro Mar Chike praise these pre-colonial (or, better still, pre-colonial modernity) times to have

217 The station is part of a larger media group owned by the Royal Media Services. Although broadcasting from Nairobi, it has a larger coverage. The other radio outlets by the Royal Media Services include, Malemba (Luhya Language), Chamgei (Kalenjin language), Egesa (Kisii language), Muuga Musyi (Kamba language), Wimwaro (Taita language), Bahari (Swahili language), and Hot 96 (which targets the youth and uses Sheng, a colloquial language).

218 The station is based in Kisumu and has a smaller radius of reach.
been peaceful, predictable and in some sort of equilibrium. ‘These days’ on the other hand are discussions of contemporary practices that are often associated with modern medicine, laws, systems of relationships and judicial practice. These contemporary practices are referred to as ‘these days’ and are often seen as the cause of increasing crime, diseases, conflicts and delinquencies.

In the studio is a programme anchor (an employee of the radio station). In Radio Lake Victoria, the anchor is Harrison Kuyo while in Ramogi Radio, the anchor is James Rabala. Then there are two ‘elders’. The elders in Radio Ramogi are Ocholla Ongudi and Otieno Muga while in Radio Lake Victoria the elders are Ogara Taifa and Ager Ataro. The biography of the elders in these stations is often scanty with the only emphasis being their claim to authentic command of Luo customs. While the anchors use English names associated with Christianity such as Harrison of Radio Lake Victoria and James of Radio Ramogi, the elders have all dropped their Christian names and have taken Luo names. These ‘Luo elders’ at the radio stations are not members of the Luo Council of Elders. They are elders because they have dala, are of advanced biological age and claim command of wisdom in Luo custom, history and culture.

The programmes generally start with *Dholuo* music. Lyrics chosen are most often on themes of harmony, predictability, sociability and good value systems associated with being Luo. It is rare that Milton Ongoro’s *Timbe Luo manene* (Luo ways of those days) is not played. Also dominating the preface of the programmes are *Nyatiti* tunes. *Nyatiti* is an eight-stringed wooden lyre commonly used during important ceremonies like funerals, marriage and *nak* (removal of six lower front teeth). Thereafter, the Luo elders make observations on issues encountered during the week. It is common that most of them would be about how they are mesmerized at Kenya’s everyday life when compared to the past.

Thereafter there is a musical break before the anchors start reading out letters from the programme listeners. The listeners often ask questions about personal matters which they want solved the way Luo people should solve them. At about 10.45 pm listeners are invited to make phone calls to ask questions, offer clarifications or opinions on the themes for discussion. During the six months (26 weeks) when I listened to or recorded the weekly programmes, I realized that there were several themes that kept recurring on both stations. I have summarized these themes below.

### Table 5.1: Themes in Radio Ramogi and Victoria FM

<table>
<thead>
<tr>
<th>THEME</th>
<th>RAMOGI</th>
<th>VICTORIA</th>
<th>TALLY</th>
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<tbody>
<tr>
<td>Home establishment</td>
<td>21</td>
<td>12</td>
<td>33</td>
<td>29%</td>
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<tr>
<td>Marriage</td>
<td>17</td>
<td>19</td>
<td>36</td>
<td>32%</td>
</tr>
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</table>
The results indicate that the most frequently asked questions in the discussions are about marriage that takes 32%, followed by questions on home establishment at 29% and the least discussed questions are related to food, diseases, and naming of a Luo child alongside the Luo laws and customs. Questions raised on marriage and the establishment of homes on Radio Ramogi FM and Victoria FM are mostly around issues of custody, access and ownership of land or succession. While those who ask questions seek counsel to resolve specific problems, there are also cases where questions seek clarity on what is ‘authentic culture’.

As noted in the history of FIDA-K (See Chapter Four), these are matters from which the law and human rights frameworks have tended to shy away. Rather than give explicit directions, human rights instruments have until the 1979 enactment of Convention on Elimination of All Forms of Discrimination Against women (CEDAW) drawn into what was traditionally marginalized as private realm (see detailed discussions in Chapter Seven). Even though feminists and advocacy organizations like FIDA-K have talked against this divide of ‘public’ and ‘private’, many personal cases of marriage were until recently (as was the case with customary law in colonial Kenya) personal matters that are widely left to ‘culture’. Although the idea of the radio programmes was generally that there exists a single, shared and homogeneous ‘cultural’ response to each of the queries raised at the radio station, conversations that ensued on various themes showed otherwise.

### 5.5.1 Goyo Dala (Establishing a Home)

During *Galamoro Mar Chike* on August 7, 2009, a listener wrote a letter opening conversation that proceeded as follows:

**Question (Q):** How do you establish a Luo home and can you do so if your wife has not given birth to a son?
Harrison: This is a very important question because a home is what makes you a Luo.

Ogara Taifa: Gero dala ema nene miyo ng’ato bedo jaluo, to kata nga’to onge nyathi, nene nyaka ogo dala, kanyo ema ibiro ike ka otho (building a home is what makes one a Luo and even if they have no child, one has to build a home as that is where one would finally be buried).

To-date goyo dala as presented by the radio elders and many listeners is not just about an individual person’s present but about connecting with their past and contributing to their future. What it means to be Luo is seen to have a bearing on goyo dala and personhood.

The radio elders therefore tend to emphasize that when you build dala in a proper manner, you invite good tidings and you shall have respect even in your death. On the absence of a boy child, Ogara posed: “But even Sarah the wife of Abraham had no child and waited upon God to give him one”. This use of Biblical script and Christianity in rituals related to goyo dala is common in contemporary Luo homeland. But as I observed, it is chike (norms) and kwero (taboo) that still form the basis for such negotiations. During various radio programmes and in my everyday interactions in Luo homeland, I observed that often chike are easily negotiated and substituted with Christian practices but not kwero. Kwero are often followed almost to the letter with the slightest diversions (out of ignorance or mere transgression) treated with horror and followed by immediate corrective measures.

The link between the proper establishment of dala and the relationship between the living and the dead was also apparent in Ogara’s response. This I also witnessed in December 2009 when a close friend of my brother died in Ugenya. I went to visit his chi liel in her dala so as ‘to be present’ and give chiwo (a contribution towards funeral expenses). The deceased had recently established a home and he is said to have done many wrong things in the process. First, he had established his home before his elder brother had done so, thus breaking the protocol of seniority. The second violation was that he erected rangach (a gate), which his father never did in his dala and thus he had barred his father and all his brothers from visiting him. Although my brothers’ friend was

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219 In contemporary practices of goyo dala, there are never-ending negotiations about what ‘Jesus can do’ (under Yesu Oloyo rhetoric), what customs can do and what the laws of the land do not allow. Often, the register for making decisions is whether an omission of a practice would cause grave harm to the community or offend the ancestors. An omission or commission that would offend the ancestors or harm the community is kwero and must be adhered to.

220 This idea of being present is very important among Luos and is often associated with the fear of the spirit of the departed. Even though I could not attend the actual burial, going to ‘see’ the widow and giving my chiwo was useful in building relational power of being. During my fieldwork, I often missed people I had wanted to speak to because they had gone to rito liel (keep watch on the funeral) Ogot (1968) and Harris (2007) have used the belief in jok to explain this importance given to keeping watch on the departed.

221 The violation was described in Dholu as ochamo chogo ma ok mare (he has eaten a bone that is not his portion).

222 So important is this function in dala that Mboya in Luo Kitgi Gi Timbegi (pg. 59) wrote a special prayer dedicated to erection of a gate.
a practising Catholic, he was warned that what he had done would cause *chira* (wasting away and dying as a result of breaking a *kwero*). When he died, it was widely rumoured that this was occasioned by violations of *chike Luo mag goyo dala* (Luo laws about establishing a homestead). His four brothers and his parent although in the neighboring *mier* (plural of homes) could not attend the burial for fear that further violations would result in more deaths.

Although *dala* belongs to an individual, it is a collective space from where relationships are defined and managed. *Dala* is also a place where relationships between the living and the dead are maintained. To promote harmony, livability and do away with death and bad omen, the rules of *dala* have been given detailed prescription in *Galamoro Mar Chike* and everyday life in Luoland.

In December 2009, we had gone with Ogara Taifa, John Ogam and other friends to an open cultural education day in Anyiko, Gem (see Figures 5.1 and 5.2). This was one of the many sessions of ‘cultural education’ that Ogara Taifa undertakes when he is not on radio. The session was open air (like a *baraza*) and those in attendance raised numerous questions about *dala*, *kend* (marriage), *ter* (levirate) and *doho* (polygamy).

At the end of the session Ogara gave a summary that captures the certitude of *dala*. He said “*Kata mana SM Otieno, nene ka otho, to nene oyike mana dala, ka nyako dwaro mondo ikende, nyaka odogi dala, ka wuoyi dwaro kendo nyaka odogi dala to kata ka iduong nadi ka ionge dala to ionge kom Luo*” [Even SM Otieno, when he died, he was buried at home, when a woman wants to get married, she has to go back home, when a young man wants to marry, he has to go back home, even if you are old (or prominent) if you don’t have a home then you do not have the Luo stool (meaning power and/or authority).

*Dala* is a profound place and space in Luoland and among Luo people. It is what affirms citizenship and locates a Luo person. The identification and allocation of a place is done using *dala* (plural, *mier*). Although named after the adult male (who is the head of the homestead) the adult female members (the senior wife of the head of the homestead) are often identified with the homestead as well. It is however the creation and maintenance of *dala* that defines its place as a principle of organizing for Luo people. This serves to testify that the conversations in the radio programmes are not mere “inventions of culture” (in the perspective of Hobsbawm and Ranger 1993). Rather, the radio programmes tend to inform and are informed by everyday life and practices in the Luo homeland.
5.5.2. Kend (Marriage)
The second important question arising in both Abich Jodongo and Galamoro Mar Chike was that of marriage. On September 11, 2009, I was in Nairobi and had invited two of my friends, a lawyer from Ugenya and an accountant from Gem to my house in Westlands for dinner. I had also asked that they join me in listening to the Abich Jodongo programme on Ramogi FM. After the usual preliminaries, John Rabala, the presenter came on air and opened a discussion:

Rabala: Kindly explain the difference between the old type of marriage and the current types of marriage. Can you briefly introduce us to the topic before we discuss it?

An elaborate response to this question was given by Jaduong’ Otieno Muga. I shall cite it in full:

Otieno Muga: The old marriage system was one that was planned. It was marriage that involved the mediator known as jagam. If jagam discovered or knew the character of the girl’s suitor and the girl also has been convinced by her in-laws, the prospective husband pays Ayie (this is the initial dowry paid to express interest in marrying a girl). Once you release Ayie, then be sure of the marriage’s success. Thereafter you were required to pay the agreed dowry in full then you can consider the girl yours. This would then be considered as kend mobidho re (a straight-forward marriage). On the other hand, today’s marriage is not worth it. We look at the wealth of the man before the release of daughters or even first consider the social and economic status of an individual before making a move: is he a director, doctor, businessman, or maybe a lawyer? The girl goes out with this man yet she hasn’t known him enough to decide whether she is worth getting into his hands. Maybe the girl is given some cash money so as the parent you are proud that your girl has got a real man, but that’s not marriage.

There were numerous calls by other listeners who supported the explanation given by the elders and asserted that the embrace of ‘modern romance’ was to blame for the dismal success rates in marriage. Amongst the three of us we thought that although the collective approach in marriage was useful, the functions performed by marriage at the time described by the elders were more economic than social-emotional fulfillment. Then I called the station to make a contribution to this debate:

Steve Ouma: I think that display of love has always been there in our society. What may have changed is how this is done, don’t you think so?

Otieno Muga: No. You are wrong. In Luo society, the man always kept his distance away from the woman. The process of marriage was such that what the partners felt about each other was their private secret.

When I called the radio station to express this view, four callers and elders alike disagreed with me (and us) and advised that the public display of romance common ‘these days’ should not be confused with ‘true love’. True love, they argued, exist where the wife does not belong to one man who lives with him but is married to the clan and the community. Often, the elders argued, we speak of chiwa (our wife) and even upon the demise of the man, the woman is expected to continue being part of the family. This assertion may well attest to the kind of conviviality that informs personhood among the
Luo. And yet, to talk of a ‘Luo Traditional Marriage’ is necessarily to indulge in a degree of ideological mystification because this was neither homogeneous nor consistent. It has always varied in geographical location, from one historical period to another and one social class/group to another. Its contradictory character was evident in the internal struggle that characterize debate in the radio programmes.

5.5.3 Ter or Lako (Levirate)

During the period when I consistently followed discussions in Abich Jodongo and Galamoro Mar Chike, there was no day when neither of the programmes ended without the issue of levirate coming up for discussion. During Radio Ramogi’s Abich Jodongo programme of December 7, 2009 a male caller called Onyango asked:

Onyango: A son to my brother has a bothering issue: this young man got married when at a tender age. He stayed with the wife for long until they established a home before his wife left him. Later on one of his brothers died and he got interested to tero his late brother’s wife, so he went ahead and ‘took’ the woman and she came to stay with him in his home. Later on he fell for another girl whom she wanted to marry by paying dowry. Later on she grew old (the ‘inherited’ one) and he established a home for the ‘real wife’ (the girl for whom he paid dowry). So the ‘inherited’ is still at the grandmother’s house, however he told his ‘real wife’ to come and stay closer to him.

Rabala: What I am asking you is that, did he establish a home with the woman who was ‘inherited’? Did he marry her?

Onyango: He had not married her by dowry. It is now he wants to do that.

Ochola: We let you know that the woman you have ‘inherited’ is not your wife. That means you are staying with somebody’s wife. Even the Bible states that once she leaves there she goes back to her husband’s home and even the children you get with her after the demise of her husband are not yours. If he was a clever man, he should not have gone back to simba. Well, but now that you have built simba, you shall have to stay there with her. We however advice that if you meet chi liel who has agreed to come in as your wife what you should do is to move ahead and build her dala. It is not advisable that you should go back to simba.

I understand the question well: the woman he established a home for walked out of the marriage and he got a wife to his late brother. This is why he is asking, ‘if he gets another woman can he establish a home with her?’ So we are telling you that the woman you have ‘inherited’ is not to be brought into another woman’s house. But you just build for her a house next to the other woman only if they agree in terms but if they disagree then build for her in her late husband’s land. So if this young man has another woman, he should build a dala for her because the ‘inherited’ woman is not his wife. Therefore tell your brother to establish and build a home for his wife.

Rabala: Thanks a lot…hello… I would like to know more about this woman he had established a home with: Did he marry her by paying the dowry or it was just marriage without proof…?

Otieno Muga: I understand this question: the woman he had established a home with left him, after which his brother died and he ‘inherited’ the wife to the deceased. So he is asking if she
can stay in his house where the first wife who had left used to live. So what I am telling you is that, if you desire to marry and you’ve got the lady to marry, just build for her own house where she will stay and also build for the ‘inherited’ wife her house separately. In case the other wife who left comes back, build for her her own house too. Let him build the house for his new wife; the ‘inherited’ wife is just a passing cloud because she has her husband.

**John Rabala** (interjecting): An ‘inherited’ wife has no right to stay in that home even if he gets children with her, the children will go back and look for their father. And where you have taken refuge, you don’t make the place like your home. Instead, you stay for the short defined period of time and vacate. So tell your brother to go ahead to marry and establish a home with his new wife.

Although read by proponents of modernity and liberal feminism as archaic customs that demean women (Agot 2005), questions around *ter* (levirate institution) commonly known as ‘wife inheritance’ constituted 9.1% and the third most discussed topic in the radio programmes. The subject of levirate institution is perhaps one that has persisted since the arrival of Christianity among Luos. Scholars and ethnographers who have written about this practice among Luo people have been at pains to explain the institution as that of social security rather than one that treats ‘widows as property’.

Father Michael Kirwen, a Catholic priest who served among Luo people in Tanzania has documented the tension that existed between the levirate institution and Western marriage customs at his parish (Kirwen, 1979). Kirwen is disappointed at how the dominant notion of morality and marriage in Christian traditions has hindered the practice of Christian faith from going hand in hand with Luo customs (Kirwen, 1979: 14). The category of a Levirate known as *chi liel* in Dholuo which literally means the ‘wife of the grave’ implies that the widow never gets remarried as such. Rather as Father Kirwen has explained, “…a widow who enters into a levirate union with a brother or male relative (known as *jater*) of her deceased spouse, takes him as a ‘surrogate’ (also described as ‘proxy’ or ‘substitute’) for her deceased husband” (Kirwen, 1979: 11).

The role of the *jater* is to facilitate the removal of *okola*\(^{223}\) so as to enable the woman free movement and reintegration into the society. If any homestead is to be built, it is preferable that one should build it on the land of the late husband of *chi liel*. Even where *chi liel* gets to receive *warruok* (Christian salvation) as is often the case in contemporary Luoland, the removal of *okola* is necessary for *chi liel* to become a member of the society.

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\(^{223}\) Death in Luoland is a bad omen and rarely happens without a reason. It could happen because certain things have not been done correctly: someone had jealously bewitched them, other things were omitted or the ancestors are unhappy. It therefore pollutes and keeps lingering around those who were most intimate with the dead. This is removed through levirate institution for a wife, shaving of children and wife and when the man dreams of her wife. Similar observations have been made by Martin Chanock in Malawi- See Chanock (1985:99).
5.6 Ogara Taifa: Making of a Media Celebrity and Everyday Life

The radio programmes on ‘Luo cultural norms’ have become significant mediums of linking ‘those days’ and ‘these days’. In this process, the radio stations have ‘produced’ elders who are celebrities and authorities in authentic Luo identity and norms as well as a reference point for reviewing the meaning of being Luo. One such elder is Ogara Taifa, who hails from Nyakach. Ogara embodies much of the common physical and social characteristics often used to describe Luo people. He is of a dark-black complexion, warm, friendly and emphatic that he is an authentic Luo. This emphasis on strong ethnic identity is part of what explains Odek’s commitment to Luo ethnic nationalism. After our first meeting in June 2009, I met Japheth Wara Odek five more times during my fieldwork. His dressing is spectacularly ‘modern’ and on one occasion when I met him he was putting on a tuxedo (see picture in Figure 5.1).

Odek was always very particular on greetings. With a strong handshake, he often greeted me in varying salutations depending on the time of our meeting. In the morning he said Oyawore (meaning it has opened up); in the afternoon it was osawore (meaning it has equalized), and in the late afternoon, oimore (meaning it is closing in). Whenever we met, the first forty minutes or so would all be about exchange of news. I would tell him about Nairobi, Cape Town and Obama. He on the other hand briefed me on local politics, the most sensational court case involving a Luo and the chances of Raila Odinga rising to be president of the Republic of Kenya. It is through elders like Japheth Wara Odek that Luo people, as subjects of human rights in postcolonial Kenya, get manifested.

Figure 5.1 Jaduong’Ogara Taifa

These subjects of human rights ‘create’ new spaces away from the workshops and seminars often used by human rights NGOs to present some universal human rights truth. Rathe, every opportunity in
everyday life is seized by many Luo people to produce and interpret moral values and systems in a manner that represents Luo people as both ‘modern’ and ‘traditional’. In so doing, the production and circulation of human rights is about numerous notions made possible by both the limits and opportunities of the neo-liberal political and economic policies rather than waiting to receive human rights as an instrument of emancipation. Chapter Four has demonstrated how contemporary institutions such as FIDA-K, other NGOs and the state-funded Kenya National Commission on Human Rights use a “model” that looks closely at the intersection of “modern”/“traditional”. But the legal model of human rights has now got new avenues of production in what Schmitz (1999: 39-77) calls state’s habitualization of human rights. This dominant notion of human rights became institutionalized and reached some levels of habitualization of human rights in the 21st century. Schmitz (1999:39-77) has explained habitualization as a process where the state takes on board ‘rituals’ of international human rights practice such as reporting and aligning their laws to match human rights standards.

However the habitualization of human rights in western Kenya, as we see from the everyday life of Ogara Taifa and many others, is not about routine court cases and using human rights manuals or reporting violations to human rights NGOs. Habitualization of human rights in postcolonial Kenya is about reformulating human rights in the context of Luo habitus (described in Chapter Three). This reformulation suggests that the practice of human rights in Kenya is not solely about the relationship with some static ‘savage’ state, but rather an ever-changing contestation and multiple interpretations of state programs, relationships among Luos and relationships between Luos and non-Luos.

Ogara Taifa, himself a radio presenter, is always listening to radio whenever he is at home. On one occasion I visited Ogara mid-morning when he was still tilling his land at his Nyakach home and found him with his radio in the field. During the week, many listeners write letters to Ogara Taifa asking questions or offering their own comments on various themes. While most of the listeners have never seen or met Ogara Taifa, it was apparent during my fieldwork that lots of discussions take place after the programmes. It is during these conversations that the negotiation and appropriation of numerous notions of human rights, Luo personhood, religion and identities become evident. On several occasions, I called and asked questions during the programmes of both Radio Ramogi and Radio Lake Victoria. It is however discussions that I held with Ogara Taifa that opened up for me the idea and practices of personhood and system of moral values among Luo people. These conversations were around a never-ending debate of the ‘traditional’ versus the ‘modern’.

5.7 Debate on the ‘Traditional’ and ‘Modern’ in Postcolonial Kenya

It was in the mid-1980s that Jodongo like Jaduong’ Ogara Taifa gained fame. As Ogara told
During this time, many things were happening which no one could explain. Medicine from hospitals was not working, there were increased disputes over land and lawyers wanted to be paid everything that one had. Deaths had increased and ter (levirate) was the only option. (Conversations with Ogara Taifa, August 2010).

Jaduong’ Ogara himself was often approached by residents of his Nyakach maximal in need of advice on numerous matters such as how to build dala and how to manage relationships in doho (polygamous families) (Personal Interview with Ogara Taifa, July 3, 2011).

It is during this time that elders ceased to be associated with ‘bad culture’ and retrogression. This was a period when the Government of Kenya started to embrace neo-liberal economic and political polices (see Chapter Four) which had a bearing on expenditures on legal aid, primary health care and primary education (World Bank: 1981). Consequently, a significant number of Kenyans who could not afford the financial costs or time required to access these services resorted to so-called traditional options like visiting local herbalists for medical care, engaging elders to resolve conflict and so on. They were now being associated with options useful in maneuvering out of the failed modernity. An even broader discussion ensued during this time. There was now open ‘competition’ between that which used to be called ‘modern’ and the other that was called ‘traditional’. People living with HIV for instance, would go to visit ajuoga (traditional medicine men) rather than government or missionary-managed clinics while those with cases involving land disputes, assault or succession would ask jodongo and not the courts to intervene.

Most interesting to Ogara was that even joma otiegore or jonanga (educated people) like lawyers and religious leaders started paying attention to how Luo people used to do things. By the 1990s, the movement to what was called Timbe Luo ma nene (Luo ways of those days) was public practice. At his own village of K’Okoth, Ogara intervened in numerous such cases and this is when he thought it would be wise to reach out to Luo people more so those in the Diaspora to educate them about Luo ways of life. Ogara also expressed fear that non-adherence to Luo morals and ethics was the explanation for the many calamities like drought and never-ending funerals that had now befallen the Luo people. This idea of engaging and explaining the present Luo society using the idea of some distant past is ingrained and requires some detailed discussion.

5.8 Modernity of ‘those days’ and ‘these days’

Whenever Ogara Taifa goes on air, he does not start his discussions without a musical interlude that speaks to the core theme of how ‘these days’ differ from ‘those days’. His favourite musicians for the
programme are Milton Ongoro, Ogwang K’Okoth and Onyi Papa Jey. Milton Ongoro of Jamnazi Band, a renowned musician from Karachuonyo in Luo Nyanza has captured some details of ‘those days’ in relations to norms, values and sociability amongst Luo in a song that was produced in 2003. To open discussions on practices of human rights in contemporary Kenya, I would like to put Ongoro’s lyrics to use as an ethnographic material that is useful in reconstructing memory, identity and experiences of encounters amongst models of modernity. Although some of Milton Ongoro’s claims of ‘those days’ may well be figments of his own imagination, cultural historian Hayden White’s work tends to suggest that the demarcation between fiction and history is no doubt very narrow (White 1973:6). Ongoro’s song is in any case one of the most common signposts that would hardly miss in events that are branded as being for ‘the Luo People’. Its lyrics tell a story of the ‘origin’ of Luo people and their immigration from South Sudan to founding ancestors of ‘the Luo people’.

Postcolonial Kenya has had no shortage of events branded as being for ‘the Luo People’. They come in brandings that attempt to claim as much of Luo authenticity as possible varying from ‘Luo Night’, ‘Ramogi Night’, ‘Migingo Night’, ‘Luo Cultural Festivals’ and ‘Aguch Luo’- the Luo pot. I have attended most of these events and there is none where Ongoro’s lyrics were not performed. In radio programmes and cultural festivals that I attended during this period, most participants sang along the lyrics of this song. For Radio Ramogi’s Aguch Luo, Ongoro’s lyrics have become the signature tune that comes on air before ‘Luo elders’ are ushered in. These lyrics capture the anxiety of modernity and the nostalgia for ‘old days’. Because of this significance, I find it useful that we should engage with the lyrics in Annex 5.1 at length.

Milton Ongoro’s lyrics focus on three major narrations. First is a tale of a history of the Luo people. This narrative is told both in terms of the cradle of Luo people in Southern Sudan and their genealogy. The history is narrated as a movement from Sudan and ends up in the current Luoland. The story is told with an emphasis on both movements from Sudan and the never-ending connection with Sudan through Ramogi (the ‘founding’ ancestor of all Kenya Luos). He states:

- We remember as Ramogi’s grandchildren how we left Juba
- We remember as Ramogi’s grandchildren how we left Sudan
- We remember as Ramogi’s grandchildren how we walked, alas!
- We remember as Ramogi’s grandchildren how we entered Kenya,
- We remember as Ramogi’s grandchildren how we entered Nyanza
- We remember as Ramogi’s grandchildren how we entered Kisumu

Ongoro’s tale of Luo migration is closely linked to narrations of migration and the final settlement of Luo people as told most eloquently by Bethwell Ogot (1967) (see Chapter Three). The genealogy in
Ongoro’s Lyrics has been captured in Chapter Three in the genealogy of Barack Obama as recently told by author and journalist, Peter Firstbrook (2010). This narration of Luos’ contemporary life in the context of their ‘route’ and ‘roots’ (Yon 2000) is a regular theme in everyday discourse in Luo society.

About the present home of Luo people, Ongoro’s mission here is for legitimating autochthony (to borrow from Geschiere 2009) of Dholuo speakers by asserting various parts of Luoland as their legitimate present homes. He does this by demarcating various parts of what constitutes current Luo Nyanza as belonging primordially to Luo people. He states:

Kisumu is our home, born fire our home,
Kisumu is our home, born fire our home,
Kisumu is our home, mama Alego; our home,
Kisumu is our home, born fire our home.

In making reference to the various maximals that constitute the construct of ‘Luo People’, Ongoro is keen to present Luo homogeneity and heterogeneity at the same time. Although he is evidently more interested in Luo homogeneity, Ongoro’s clarification is useful in understanding the everyday life in Luo society. Far from the totalizing ethnographies written in the 20th century about Luo Nyanza, Ongoro’s is a contestation coming not from a trained anthropologist or historian but from an actor in Luo public discourse.

Trained anthropologists such as Evans-Pritchard (1937) and moralists like Paul Mboya (1938, 1978) were never interested in documenting differentiations that exist among Luo speakers. Even the most explicit variations such as those of various maximals were enveloped under the category of ethnographies of ‘the Luo people’. This dissertation shows in contrast that there are numerous sub-distinctions among Luo people.

The other area of Ongoro’s interest is on sociability, customs and values with which Luo people are associated. Ongoro laments that Luo people have abandoned some of what he considers timbe Luo manene (Luo customs of those days). In his lamentation he poses:

Tero mon uweyo nangó? Why did you stop wife inheritance?
Ngádo lauk uwito nangó? Why did you abandon teeth removal?

In posing these questions, Ongoro seems to suggest that Luo people have lost important connections with their past and scripts of personhood (just like talking about human rights violations). Thus rather than see contemporary modernity as a triumph over an inefficient and backward past, he suggests that Luo people have lost enormously by abandoning the ‘past’. Ongoro’s is an expression of anxiety
about contemporary modernity. This is not the only lyric where Ongoro has cast doubt on contemporary modernity. In yet another popular lyric, *Usiku* in Annex 5.2, he has lamented that:

Night has been turned into daytime and daytime changed to night time, surely why?

You look for school fees during the night, rent too at night, you do much business during the night, tea and bread you sell at night, you roast maize too at night, worship services are offered at night, you visit Koinange Street at night, men and women work at night, you travel frequently during the night, all the business you do at night, I wonder why?

Here Ongoro expresses anxiety at the change of ‘normalcy’. In his reading there is a ‘new normal’ that is disruptive and dysfunctional. Thus ours (going by Ongoro’s experience) can be called modernity of anxiety. Building on his research in South Asia, Partha Chatterjee has offered a useful discussion on this anxiety associated with the postcolony. Chatterjee creates a distinction between modernity and ‘our modernity’. He notes that:

In making the distinction I am trying to point out that there might be modernities that are not ours, or, to put it another way, that there are certain peculiarities about our modernity. It could be the case that what others think of as modern, we have found unacceptable, whereas what we have cherished as valuable elements of our modernity, others do not consider being modern at all. Whether we should be proud of these differences or be embarrassed by them is a question I will take up later (Chatterjee 1997: 3).

The conclusion arrived at by Chatterjee is that the kind of uncertainty expressed in the postcolony finds its origin more from the colonial experience as well as contemporary neo-liberal globalization. The experience between the current postcolonial and modernity was dominantly that of ‘victims of modernity’. As a result, Chatterjee has stated that:

Our attitude to modernity, therefore, cannot but deeply be ambiguous. This is reflected in the way we have described our experiences with modernity in the last century and a half… but this ambiguity does not stem from any uncertainty about whether to be for or against modernity. Rather, the uncertainty is because we know that to fashion the forms of our modernity, we need to have the courage at times to reject the modernities established by others (Chatterjee 1997: 20).

The explanation by Chatterjee is befitting of the very use that Ogara applies Ongoro’s song. It is about defining some sort of ‘Luo modernity’ that blends ‘tradition’ with ‘modern’.

5.9. About ‘those days’

From the foregoing, it is evident that the Luos cherish their past and would want to establish and maintain continuity with it, a living discourse where the past continually influences and informs the present and the future of both the individual and the community. At the same time, however Luo people are renowned for their zeal in embracing Western models (see Chapter Three and Annex 3.0). Luo people speak of *gik ma ndaloni* (modern things), a good deal of which is certainly beneficial when it comes to areas like medicine, law, governance and morality. This ambivalence of rejection and embrace takes different forms in the ongoing appropriation of ‘these days’ and ‘those days’.

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224 This is the name of a popular red light district of Nairobi.
When I visited homesteads in many parts of Luoland, this mix of ‘these days’ and ‘those days’ was evident.

Most homesteads including that of Ogara Taifa and Ker Riaga Ogalo that I visited display these mixed characteristics. At Ogara Taifa’s homestead in Andingo Opga, Nyakach, there is one large house facing the main gate. On the left hand side is a kitchen and two small houses on both sides of the gate facing the middle. The house facing the main gate is made of wattle and mud and then cemented. Its roof is made of corrugated iron sheet. But the ones next to the gate occupied by his sons are made of wattle and mud with grass thatch.

At Ker Riaga Ogalo’s homestead, there are three houses whose doors face the main gate. Only one door is directly opposite the main gate. The house whose door faces the main gate is made of brick and cement with a corrugated iron roof. This house belongs to his eldest wife. The other two (that belong to his two other wives) are made of wattle and mud then cemented. On the lower side are three houses,
both facing the centre. These houses, of his sons, are roofed with corrugated iron sheets. The same principle of organizing homesteads was observed in many parts of Luoland with very little variations.

Besides the difference in housing technology, another thing that I often noted was the place of the bicycle, wheelbarrow and radio, the three most common pieces of technology in many Luo homesteads that I visited. During the three occasions that I went to Ker Riaga’s home, I found him sitting on his verandah listening to a radio set. The observations that I made at Ker Riaga’s home, radio programmes and conversations that I had with Ogara Taifa demonstrate the multi-layered results of the debate between “modern” and “tradition” in 21st century Luo society. It raises important questions about personhood, institutions for enforcing moral value systems and continuities and discontinuities of timbe ma nene among Luo people. It characterizes the way modernity gets customized among Luo people. In most mier that I went to, I observed what Francis Nyamnjoh (2002c) has called “traditionalization of the modern” and “modernization of the traditional”.

As the radio programmes rely heavily on Luo habitus as a resource for negotiating personhood and normative systems in postcolonial western Kenya, some elements are worth revisiting. In Luoland, kinda (determination) and dongruok (development or progress) are highly valued. Individuals are expected to apply themselves for success not of their own but that of their dala, mier, clan and community. The identity of Nyikwa Ramogi (grandchildren of Ramogi) or joka onagi (of the group that remove their teeth, although this is no longer in common practice) are often underlying currents in generating individual identification. What runs through discussions with Ogara Taifa and the radio program is the imagined and practiced connection and collectivity creating both collective and individual identity. Also present in this identification is the spirit of the ancestors through jok.

**5.10 Practices of Luo Personhood and Extra-human Agency**

Narrations and discussions at the radio programme show how scripts of personhood in Luoland are continuously unfolding and how they inform and are informed by contexts. Also at play in this unfolding of personhood and subjectivity are juogi. They are actually juogi, from the root word jok or juok, which connotes first and foremost deity (whether supreme or intermediate), and only secondarily witchcraft or ‘negative potency’.

Ogot (2003) has argued that the communion and interaction that characterize relationships among the Luos is perhaps linked to the concept of Jok. Jok is however a much more eclectic concept associated with River-Lake Nilotes of whom Luo people in Kenya are one such category (William Southall 1956). For Ogot (1961) jok or juok, also meaning mystical powers and spirits, underlies practically all aspects of life for the Luo people and indeed many other Nilotic groupings. Although the term jok is rarely
used among contemporary Luos, its notion of Supreme Being connected to nature and ancestors pervades ideas of personhood and is important for connections with the spirits of the ancestors in contemporary Luo cosmology. During my fieldwork and in discussions with Ogara Taifa, the notion of *juok* was always central and expressed caution that people had against speaking so much about their individual success as that would attract *jo-juok* (the witches).

At the same time, when one registers enormous personal success in a context where others do not enjoy the same benefits, it is often argued that such success is at the expense of others. These states of inequality often attract *nyiego* (jealousy) and people can go to *ja-juok* or Pentecostal churches\(^\text{225}\) to reverse such singular success. There is also talk of *juogi mari* (your personal spirit) who is a personal guardian often embedded in naming and appeased through memorials. The ancestors are asexual and it is not uncommon for a man in Luoland to be given a name that in ordinary taxonomy would be thought of as properly belonging to women. Then there is *ajuoga* (medicine man) who uses both his connection to the ancestors and knowledge of bio-medicine for psychosocial therapy. *Juok* (spirit), Ogot concludes (and I agree with him) can be both harmful and beneficial.

During the radio programmes, there were often discussions about parents whose children died in infancy. The reason given was that their *juok* was unhappy. Mboya (1938) speaks of a practice where in such instances when *juok* was unhappy, a child would often be left out in the open for a day to convince *juogi* (the spirits) to spare its life (Harris 2007). I often met adult males in Kisumu, Siaya and Ugunja areas of Luoland who had one of their ears pierced as a mechanism of marking them and beseeching *juok* to spare them from death. Such a practice was undertaken by some Luo people where there were continuous deaths of children in a family.

During the radio programmes of both *Abich Jodongo* and *Galamoro Mar Chike*, the reprimand given for violation of *Kwer* (taboo) was death. This reprimand was testimony to the ongoing relationship between the living and the dead (Ogot 1961:127). *Ketho kwero* (breaking taboos) is not just a problem for the culprit; neither is it punished by a group of elders. Rather, *Ketho kwero* severs relationships between the culprit and his or her person, her/his immediate relations, the wider clan and the ancestors. The case of my brother’s friend discussed earlier is such an example. *Chi liel* who has *okola* is another example. *Okola* is both a metaphor and a moment after the burial of a spouse. The surviving spouse is said to harbour the spirit of the departed. In that state, she/he is proscribed from social places like the market, shared kitchens, water points or holding infant children. The situation is

\(^{225}\)The Pentecostal churches are commonly known for *Loko dhoch* (reversing bad luck).
only reversed when the *okola* is removed. I often heard in public parlance that a *chi liel* who dies with *okola* would have to go through *ter* before she is buried. Thus the need to ensure reconnection is not just the role of the individual; rather it is the role of the entire *libamba* (lineage) and *gweng*’ (village).

Because of this worldview of connections between the living, the departed ancestors and the unborn, enforcement of *kwer and chike* is mainly undertaken by *juogi*. Several times I asked Ogara Taifa what would happen when certain *kwer* are broken and his answer was emphatic: ‘*Ok icham!*’ (You won’t eat (survive) it!)226. The worldview here is also manifest in the way *Dholuo* is used. Very rarely would you hear Luo people mention the word *tho* (death). Often the words used are ‘he has gone’, ‘he has slept’ and so on. Pronouncing the word *tho* can evoke the anger of the spirits or imply insensitivity to the grieving.

The force of the dead is however so strong in maintaining moral values and normative system among Luo people that even in Nairobi, most Luo welfare societies were for a long time concerned with burials and *rapar* (memory of the departed) than immediate concerns of the living (Harris 2007: 16). James Harris has observed from his research in Gem that: “Many church leaders are almost constantly pre-occupied with the care of the dead; alternative programmes being forced to fall by the wayside” (Harris 2007: 269). As such, the commitment to collective presence in funerals can’t be engaged in a binary of secular and religious. Rather it is instructed by a deeply embedded world view that instructs how Luo people embrace Christianity and other modernities such as legal and human rights.

The entanglements of ‘these days’ and ‘those days’ in Luo personhood were experienced during a widely debated case that was fought over the burial place of SM Otieno, a prominent Luo resident of Nairobi (Cohen and Odhiambo 1992). Several witnesses were cross-examined by the lawyers from both sides of the case during the hearings in order for the court to find a decision as to whether Otieno should be buried in Nyalgunga, western Kenya or upper Matasia in the suburbs of Nairobi. The extract of cross-examination of Ochieng’, the brother to the late SM Otieno by Virginia Wambui Otieno’s lawyer, Khaminwa, below illustrates the kind of conviviality between the living and departed in the Luo society:

**Khaminwa:** Can you tell us how you will be cursed if you let your brother be buried in Nairobi?

**Ochieng’:** Wherever I go, my clan people will spit on me and say I am *bure* (nothing).

    The spirit of the dead will follow the whole family of Jairo as he was head of the family.

**Khaminwa:** What will happen then?

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226 This doesn’t mean eating food but implies death.
Ochieng': I will not be able to sleep properly because wherever I go, there will be his ghost haunting me for having let my brother be buried elsewhere other than at home.

Khaminwa: Is it not strange that you as a Christian believe this?

Ochieng': No. This is because it is fitting with Christianity (cited in Cohen and Odhiambo 1992:62).

It is hard to resist thinking of this script of Luo personhood as analogous to contemporary human rights. Its idea of regulating relationships between the self, others and a larger cosmological order perform the same function as human rights discourse. However in producing norms and ethos, the notion of Luo personhood has interlinked subjectivity and agency. Ochieng’ was therefore not just claiming his ‘right’ to bury his brother, but rather he was performing a duty for the wider clan. Similarly as he stated, he did not see his claims based on Luo worldview as being inconsistent with his beliefs as a Christian. This is how the notions of ‘those days’ and ‘these days’ inter-phase and negotiate a ‘new’ consensus in postcolonial Kenya. This worldview has clear implications for the role of elders such as Ogara Taifa and the Luo councils of elders. Far from the rather instrumentalist role often used to describe elders in contemporary literature by UN-based organizations like the Food and Agriculture Organization (see FAO 2002), the institution of elders are more of agents of *jok* who interpret and guide the enforcement of norms and values among Luo people. In other words, the powers of the elders are not political or jural in the secular sense as understood in common law. Rather, their role is ritualistic (Chanock 1985: 100).

There are as many categories of elders as there are Luo people. In Luo society, *Jaduong’* (elder) (plural *Jodongo*-elders) is revered and treated as a source of authority and wisdom. It is not rare in Luo society for someone to claim respect just because they are elders. The notion of elders as ‘natural leaders’ (Baumann 1996: 45) seems to have taken root among Luos as in many other societies. During various communal events and rites of passage such as *nyombo* (marriage), elders play a central role both as animators and as a legitimate jury for the process.

The performance of these functions does not need subscription to any institution or structure. The ‘elders’ also perform other advisory functions for which their ‘age’ offers the sanction. One becomes227 an effective elder when they have *dala.* When visiting *mier* during my fieldwork, the nature of greetings often differed. In some homestead the owners (adult male and women) would insist on a prayer before shaking hands while in other homes there was no shaking of hands and in several others, I was only

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227 Here the scientific view that tends to present an elder as one with older biological age is faulted by cultural construction. I often engaged cases in Luoland of men and women who were regarded as culturally superior as others who were biological older. For detailed discussions, see Mario Aguilar (1998: 5).
met under a tree in the middle of the *dala* and never in the house. One common thing is that in all homesteads with a main house (the one facing the gate), there was always a chair facing the main gate reserved for the home elder.

Elders live the imaginations and imageries of the norms and values in their *dala* and are often called upon to guide and remind their clan and younger generations how Luo people do things. This is the place of values such as *luor* (respect) *hera* (love), and many others that Ocholla-Ayayo (1976, 197) has listed. While the elders are useful in outlining what the Luo ways of doing things are (objective conditions), they too rely on *jabilo* (diviner) and *ajuoga* (medicine man) who embody mystical powers of *jok*. The roles of *jabilo* or *ajuoga* are indeed more prominent, as they work with *jodongo* as intermediaries with *juogi*. In other words, the role of *jodongo* is to define what *kwer* and *chike* are while *jobilo* (plural of *jabilo*) and *ajuoke* (plural of *ajuoga*) are used to facilitate reconnection with *juogi*. It is *juogi* who can punish and not *jodongo*. Sometimes, the *ajuoga* or *jabilo* often use *manyasi* (special concoctions) as part of these reconnection rituals. The reason therefore why the radio programmes keep repeating what may seem obvious in the lives of most Luos is competition from other notions of personhood and subjectivity which often not only attempt to marginalize practices that I encountered in Luoland, but also produce them as ‘primitive’. As modern instruments, the radio programmes are mediums through which traditions gets to be represented.

The elders who advise in both *Abich Jodongo* and *Galamoro Mar Chike* give arguments on what they consider to be the authentic Luo *Chike* or *Kwero*. In the twenty-three radio programmes that I listened to, there were never attempts to produce a list of norms. Rather, the definition of norms and values were situational and pragmatically informed by existing power relations and world view informed by *Jok*. The emergence of instrumentalist listing of norms and pressure to demonstrate that African societies like the Luo have always been ‘rational’ often led to the temptation to develop some sort of comparable list of rights. This attempt is seen in Paul Mboya’s *Luo Kitgi* (1939) and Richo ema Kelo Chira (1978), Jacktone Keya Raringo’s *Chike Jaduong e Dalane* (2001) and Samuel Ayany’s *Kar Chakruok Mar Luo* (1989 [1959]). These productions are as situational as Gordon Wilson’s *Luo Customary Law* (1961) and Eugene Contran’s *Re-statement of African Law, Volume I and II*, (1969) and Casebook on *Kenya Customary Law* (1987) (See Chapter Three).

In fact, after listing 331 *kweche* and *chike*, Raringo (2001) suggests that there is no end to the list of *kweche* and *chike* among Luo people. I often found it very difficult to decipher which among the contemporary practices were pristine Luo and which ones were importations from Christianity and everyday statuses applied by the Kenyan state and administrators. Evidently there is the use of
customs, traditions and values (some real and others imagined) associated with Luo people as the base structure - just as Kenya’s judicial system put into use liberal laws and Western normative values as their base structure.

In its practice however, the genre of rights articulated here borrows from Christian theology, political discourse and the state’s idea of order. The result is what one could loosely call a betwixt or creole genre of rights. This is a genre of rights that we can’t turn away from as doing so would shut out a large number of Kenyans from modernity. This juxtaposition of the ‘old’ and the ‘new’ as Appadurai (1999) has suggested is an ongoing process that can’t be frozen by a simple listing of the do’s and don’ts; rather what is underlying is the principle of Luo personhood. This personhood is realized through what Nyamnjoh (2002:120) calls domesticated agency and mobilization of individual resources and agency to maintain connections with the community and ancestors. It is in this quest for connection with Jok (which also implies connection with the living and the departed) that Luo personhood, agency, subjectivity and ethos are produced and practiced.

5.11 Production of Subjectivity

Discussions in the radio programme and everyday life in Luo Nyanza pose critical questions about assumptions of unilateral and uniform subjects of human rights. The discussions above illustrate how Luo identities take new forms and meanings in changing circumstances, how pre-occupation with identities has sustained claims in ubiquitous binaries such as “those days” and “these days”, “modern” and “traditional” and “Christian” and “pagan”. The aim of these competing notions that are never dichotomies in practice is often “authenticity” in production of culture as well as how to “domesticate agency”. The persistence of these binaries is a discussion that I would like to return to shortly.

The radio programmes, the lyrics of the songs played by the stations and the discussions that I held with various Luo elders provide useful narratives that have escaped the attention of many contemporary scholars and activists of human rights. Three useful narratives develop in this chapter. At one level, the discussions here demonstrate how the institutes of human rights (that I have called scripts of personhood) manifest themselves among Luo people in western Kenya and the diaspora. The second level narrative is the ongoing conversations between these various institutes of human rights or scripts of personhood. It is these conversations that often produce what become dominant versions in specific contexts, histories and situations.

On the third and final level, as the chapter has illustrated, are the institutions that develop and ensure continuations of what are presented as Luo notions of human rights (I speak of what is presented as it
is clear that none of these notions is pure). These institutions are councils of elders which are themselves as variant as there are ideas of Luo-ness or scripts of Luo personhoods. It is useful to observe from the chapter how the structures of elders attempt to maintain balance between ‘continuity’ with the past and ‘modernization’. There is no doubt that most of what is characterized with ‘those days’ is ‘invented’ for the purpose of responding to contemporary issues (Meyer 1995). However, the way it is often expressed looks convincing even to a skeptical, Nairobi-raised intellectual like myself.

The nodal point in all the claims and counter claims as well as diagnosis and prescriptions of responses in the radio programmes tend to point to the production and exercising of subjectivity and agency through the radio programmes. While feminist anthropologist, Sherry Ortner has argued that the theme of subjectivity is no longer a common area of anthropological research, it seems to be the dominant theme in the multi-layered debate captured as “those days” and “these days”. Ortner herself has been undertaking significant studies on the theme of subjectivity since the 1980s. Her approach has called for some sort of rehabilitation of the Geertzian framework of ‘culture’ that identifies the systems of the public symbols that both represent the world to the Balinese and generate within them an orientation to the world (Mitchell 2007:90). In taking this strategy Ortner moves beyond the Foucauldian sense that has focused on the way discourses construct political subjects and roots for Raymond Williams’ terms such as ‘structure of feelings’ (Ortner 2005: 40). Ultimately, Sherry Ortner, in her article Subjectivity and Cultural Critique (2005), describes subjectivity as “…specifically cultural and historical consciousness” (Ortner 2005: 34).

This consciousness as we have seen in the radio programmes is present at both the micro (individual) as well as macro (collective) levels. What it implies is the reflexivity of the individuals and their ability to “penetrate” into the way they are formed by circumstances (Ortner 2005). The micro and macro distinction on the other hand is testimony to both the psychological sense of consciousness as developed by Sigmund Freud as well as the class meaning developed by Max Weber and Emile Durkheim (Durkheim, cited in Barrett 1988: 34).

It also makes some sense to clarify what I mean by “cultural consciousness” as well as “historical consciousness”. “Cultural consciousness” is a practice of inward and outward awareness of cultural identity. Media scholar, Jan Servaes has described cultural identity as an embodiment of two phenomena that complement each other. On the one hand is “…an inward sense of association or identification with specific culture or sub-culture and on the other hand … an outward tendency within a specific culture to share a sense of what it has in common with other cultures and what
distinguishes it from other cultures” (Servaes 1997:281). It is this context that the radio elders attempt to reconstruct some imagined or tradition-based pristine past as a basis of explaining the present and instructing Luo people to engage with the present. Ultimately, it is these distinctions between cultural identity and cultural consciousness that allows Luo people to critique the so called Luo Culture as they exercise their subjectivity.

In this debate of identity and cultural consciousness, it seems to me that it is the asymmetrical power relationship in post-uhuru Kenya that plays such a significant role on how subjectivity is practiced. Jok for instance is often evoked to favour those who by virtue of their position in Luo society are less likely to get justice. It is also in this area of intersection between power and subjectivity that the almost complete absence of women in production of culture can be understood. That is, that cultural consciousness and production of cultural subjectivity tends to be controlled by predominantly male sages like Ogara Taifa.

Historical consciousness is the other important character of subjectivity exercised through the radio programmes discussed in this chapter. Historical consciousness is about a sense of common origin. These discussions reinforce the central node in this thesis which has engaged with Luo people not as some primordial and natural group but rather as a category of both belonging and consciousness that grows out of anticipation or/response to ever changing political, social, economic and cultural forces. This is why the common form for understanding contemporary Luo people (at least through the radio programmes) has been presented in the debate of “these days” and “those days”. A similar dichotomy of understanding contemporary phenomenon has been observed by anthropologist, Birgit Meyer (1995) in her study of Pentecostalism in Ghana where ‘traditional’ and ‘modern’ tend to be mutually constituted in everyday practices.

But what is outstanding in this study is that while categories such as “those days” and “these days” just as “pagan” and “Christian” in Meyer’s context persist, the practice as shown in the radio programme, the everyday life of Ogara Taifa as well as Ochieng’s response to the advocate, Khaminwa is that the lived experiences of a Luo seems to be a synthesis of both the past and present, and cannot be classified as either “those days” or “these days”. The radio programme is thus influential in the shaping and revaluation of selected Luo norms and values. As we have seen, a significant number of Luos in the Diaspora and in Luoland have come to value “tradition” through the radio programmes, its elders and fear of jok.

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228 The notion of origin in this sense can be contrasted to beginning.
This trend by the radio ‘virtual community’ and other actors in Luoland of appropriating ‘those days’ and ‘these days’ is what anthropologist Francis Nyamnjoh has described as “domesticated agency”. Rather than the abstract subject of human rights who is presented as an autonomous and atomistic unit of the liberal democracy, the subject of human rights in post-colonial Kenya as shown above demonstrates interdependence and conviviality. The subject of human rights in post-uhuru and Kenya postcolony is produced through a negotiated process. What also stands out in this process is that identities are never constant but rather get renegotiated with new experiences and aspirations.

The experiences of Diaspora (within the two meanings suggested at the beginning of the chapter) are therefore at play in production of Luo identity in present-day Kenya. Although notions of primordial Luo stand out at the nodal point from where debate starts, the subjects produced and that which produces the radio programmes is not one who is natural, isolated and pristine. Rather, audience in the radio programme is produced out of intense and multi-layered interactions. So the question is: Why does the notion of singular identity as put forward by human rights discourse and sages in radio programmes persist? While this thesis is not able to offer a conclusive response to this question, I suggest that scholarship that is interested in engaging with the contemporary discourse beyond identity must be open to engage with the power registers around which subjectivity is produced.

In this context, it is impossible to ignore the gendered nature of discussions in the radio programmes. As sages (to use Odera Oruka’s term) like Ogara Taifa develop representations of Luos, their homogenising masculine notions are by all means aligned to very specific interests. Indeed the general narrative offered in the radio programmes tend to offer credence to Claude Meillassoux’s (1981) claim that institution of councils of elders tend to be more about control and regulation of women and younger men. This image and discourse has been of disfavour to the institute and institution of notions of rights presented by Luo elders. Most recently, the Luo Council of Elders has had to work to shed the image that it is a patriarchal institution and exclusive ‘club’ of men (see Chapter Three).

5.12. Conclusion
This chapter has narrated how images of human rights are produced in a ‘virtual community’ and different sets of elders as ‘sages’ of ‘culture’ in postcolonial Kenya. The dialogues from the debate are not just a challenge to the linear meta-narratives (like that of dominant notions of human rights) in the era of globalization, but also to how the new genre of ‘scripts of personhood’ that transcends dualities of ‘modern’ and ‘traditional’ is developed in the postcolonial Kenya. In the 21st century context of domesticated agency, human rights as officio lingo and increased migration of Luo people from
Luoland, the large diaspora of Luo people is vast and varied embodying an underlying worldview useful in understanding their moral value systems and ethos.

The concept of jok and the interlinked agency among Luo people forms the basis of understanding the arrival of modernities such as human rights and Christianity. Jok to Luo people is as central as witchcraft is to the Azande. It is this notion of jok that supplies the missing link in understanding how human rights practice is produced in postcolonial western Kenya. The doctrine of jok is not just about duties; rather it is about interconnected humanities where individuals and groups claim rights not because of their social location of some ‘fixed’ ascribed status but by the mere fact that they are Luos. Jok therefore embodies domestication of agency for Luo people. Avoiding ketho kwer and following chike therefore becomes the criteria of being a Luo. However, the worldview embodied in this notion of being Luo also requires connection between the living and the dead.

Thus while everyday life is characterized by claims such as that of ‘those days’ and ‘these days’, the principles of their thoughts from the radio programmes, court cases and situations such as those that I encountered illustrate an entangled relationship. The common factor in the way this thesis continues to engage with these spaces is the attention given to local subjectivities, values and memories (Wilson 1997b:157). In an era where human rights talk by state and civil society seem to focus on legal-technicalities at the expense of the 1990s talk of power and reforms or contemporary claims for cultural and class recognition, the radio programmes and elders mediate to produce a genre of rights that is far more useful than the bifurcated ‘cultural’ versus ‘civil’ rights. For the Luo people like Ochieng’ and Ogara Taifa, these rights debate has no contradiction with the Luo notion of jok; in fact as much as both of them are interested in humanity, there is no problem in a Christian for instance believing in spirits (jok). It shall be interesting to engage with how these forms of subjectivities and life philosophies are exercised in Luoland. This is evident in the cultural festivals that I discuss in Chapter Six.
CHAPTER SIX
CULTURAL FESTIVALS: POSITIONING AND RIGHT TO CULTURE IN POSTCOLONIAL KENYA

6.1 Introduction

Twentieth January has now become a permanent memorial day for the people of K’Ogelo in western Kenya. Its significance started in 2008 when the ‘community’ of K’Ogelo organized the first Barack Obama K’Ogelo Cultural Festival to mark the swearing in of Barack Obama as the 44th President of the United States of America with banners that exclaimed: “Our son: Our hope” amidst chants of Obama en marwa (Obama is ours) to coincide with Obama’s journey from Chicago to Washington DC (Akoth 2010:115). During the preparatory stages for the festivals, it was widely rumoured that the Prime Minister of Kenya, Raila Amollo Odinga who has also claimed a kinship relationship with President Obama would grace the culmination of the festivals. Odinga never appeared for the one week that I ‘pitched tent’ at K’Ogelo. However, each day had a ‘special guest of honour’ who sat on a special tent adorned with the Kenyan flag.

In this chapter, I will discuss the re-emergence of cultural festivals in western Kenya and the notion of the right to culture after 2010. I will first go back to the event of January 20, 2008, where I sat on a school bench at the Senator Barack Obama Primary School and followed the events of the Barack Obama K’Ogelo Cultural Festivals. This is a process that I have followed each year since then so as to understand the never-ending debate about “culture” and human rights in Kenya. I have also sat on red plastic chairs at the annual Migwena Cultural Festivals and numerous similar occasions.

As shown in the rest of the chapter, cultural festivals have become moments where specific ethnicized ethnographies are produced and used as a mechanism of positioning. A number of local elites, politicians and various interest groups use the cultural festivals as rehearsals of engaging with the Kenyan nation-state. The performance and speeches at the cultural festivals are shaped and also tend to shape ongoing societal processes such as political and economic liberalization, the contested maendeleo (progress) and the experiencing of citizenship.

After giving an account of the Barack Obama K’Ogelo Cultural Festivals, I shall revisit a short history of art and culture education, public sphere and ethnicized practice in Kenya. I will then elaborate on how cultural festivals are used for political positioning using materials from the Migwena Cultural Festivals. In turn I will illustrate how politics of culture have become influential in explaining
modernity and production of citizenship and agency in contemporary Kenya. Therein I attempt to respond to pertinent questions like: What is the ‘origin’ of cultural festivals? What is the function of cultural festivals in contemporary Kenya? Do cultural festivals have a role to play in the unfolding of Kenyan-ness and Luo-ness? How do cultural festivals at local levels of Luo Nyanza produce subjects of human rights for contemporary Kenya?

In the last section of this chapter, I will say more about the role of state institutions in institutionalizing culture and multiculturalism in Kenya after 2010. This influence and legitimation of culture as particularized characteristic of individuals or group of citizens has gone hand in hand with rapid commercialization and globalization of culture. The implications of the right to culture and politics of belonging in contemporary Kenya makes cultural festivals important spaces of reading the subject of human rights in western Kenya and the rest of the country.

6.2 Barack Obama K’Ogelo Cultural Festivals

Although there had been prior cultural events at the Senator Obama Primary School, the 2009 event was special. Learners at the school were asked to stay home for one week as classrooms were turned into makeshift kitchens, serving the best Luo delicacies like osuga (bitter vegetables), bude (dried fish), omena (fingerlings), kwon (solid meal made from cooked maize flour) and ring’o (meat). For each day of that week, events started with the hoisting of Kenya’s national flag. Soon thereafter, the Kenya national anthem was played, commencing the Obama K’Ogelo Cultural Festivals. The Master of Ceremonies, Okwir Polo, invited dancers, poets and numerous categories of presentations commonly known as ‘traditional performances’, most of them in Dholuo. The dances proved popular with the villagers, especially the elderly women, who jauntily demonstrated the best dancing steps to Luo tunes like Ohangla (rhythmic drums) and Nyatiti.

On the gateway towards the playground where the main dais was, traders spread their wares ranging from patterned shirts (commonly known as African shirts), foodstuff and an assortment of books like John Sibi-Okumu’s Tom Mboya, which was trading at Ksh 250 (£2.50). Next to the stand was pitched a fairly large tent with a banner proclaiming a pointed message: ‘Orange Democratic Movement Congratulates Barack Obama’. Nearby, a photographer sold framed portraits of Barack Obama, Jesus Christ and Kenyan Prime Minister Raila Odinga. On sale at the same stand were the ‘official’ festival t-shirts and calendars with Obama’s portrait.

Traders cashed in on various wares, including t-shirts, caps, key holders and badges. Orange t-shirts bearing Obama’s image and the message “Proudly from K’Ogelo” sold for Sh150 (£1.5).
I spent some time here and asked Okutho Owiyo, who managed the stand, about the significance of using the same orange colours of Raila Odinga’s Orange Democratic Party for the Obama t-shirts. He shot straight with his answer: “Obama en marwa!” (Obama is ours!)

Officials from the Ministry of Culture and Heritage and those from the Ministry of Tourism were present throughout the entire week. Although there was a special committee to organize the festivals, the officials from the two ministries and the Community Officer for Culture, Dorice Ondege, who had been posted to the area in the eve of the festivals, were the visible hosts to the state officials who came from Nairobi. January 20, 2008 which was the last day of the festivals, was graced by the presence of the Minister for Culture and National Heritage, Hon. William Ole Nitamama, who joined the crowd at the grounds to watch the swearing in of President Obama that was being beamed in a large screen by one of the leading national television stations, Royal Media Service’s Citizen Television. The Director of Culture at the Ministry of Culture and Heritage, Silverse Anami, declared on January 19, 2008 that: “From today and the years to come, the 20th January shall always be a day for Barack Obama K’Ogelo Cultural Festivals.” He further noted that the government had decided to build the
K’Ogelo Cultural Centre\textsuperscript{229}, with the first phase of the project expected to cost about Kshs. 100 million ($1.3m).” (Akoth 2010: 133).

![Figure 6.2 A model of the proposed Dero Kogelo Library and Cultural Centre by architect Ng’wuono Hongo (above right), and Anthony Ogola, who leased out the 1.5-acre site. Photo/Anthony Njagi.](image)

Similar events took place in 2010 at the K’Ogelo Senator Obama Primary School. I attended the festivals in 2010 when the guest of honor was the US ambassador to Kenya at the time, Michael Ranneberger. At the end of the festivals Ranneberger was ‘made’ a Luo elder as a sign of gratitude for his support of the cause of Luo people for \textit{maendeleo} (development). But neither the claims of \textit{maendeleo} nor human rights are uncontested in Luo Nyanza. Both terms share a denominator as expressions of promises for a better future.

In everyday life however they are engaged more as part of what James Ferguson has referred to as “unmet expectations” (Ferguson 1999) that seem to inform the 21st century shift of relating with \textit{maendeleo} as a space for recognition rather than redistribution\textsuperscript{230}. Even before these specific events related to Obama’s election and presidency, annual cultural festivals have long been a common feature in many parts of Luoland. They are organized in Ugenya, Lwanda and Migwena.

However, as Lentz & Nugent (2000) have also noted for the case of public and communal cultural festivals in Ghana, most of what is called cultural festivals in the postcolonial are multidimensional. On the first front, contemporary cultural festivals are most often recreated or modernized forms that enable engagement between localized cultural performances with national politics. Unlike Ghana,

\textsuperscript{229} The 1.5-acre piece of land on which the Dero Kogelo Library and Cultural Centre will stand has already been fenced off. The project is the brainchild of the Nairobi-based Dero Community and Cultural Organisation. Dero is Dhola’o word for granary.

\textsuperscript{230} The call for \textit{maendeleo} was both a \textit{raison d’etre} for independence nationalism as well as the central pre occupation for the independence government. Its promise as a nationalist project was mainly about equity in progress as well as distribution of national resources. But the postcolony has been characterized with a shift where \textit{maendeleo} is awarded to those who are connected to the state functionaries.
cultural festivals such as those in K’Ogelo and Migwena (which I focus on) have no direct link to some ancient cultural rituals. While rituals such as *tero buru*\(^{231}\) that I describe later in this chapter may be reference points for legitimating these festivals, by and large the cultural festivals in Migwena and K’Ogelo tend to be occasions for cultural innovation of ethnic and local identities and as a mechanism by local communities to stage a claim to national resources and identity. The festivals create an emphasis in producing local citizenship as a mechanism of claiming *maendeleo* and belonging in Kenya. In this production, the state and the local communities engage in debate over what is ‘good’ and ‘bad’ culture. Thus the same state which on one hand has committed itself to producing a national culture through discourse such as human rights is engaged in producing local cultures. To situate these contemporary practices of cultural festivals in Kenya, a short history would suffice.

### 6.3 Art and Culture in Kenya

We can distinguish three kinds of cultural festivals in Kenya. First we have the annual schools cultural festivals that are dominated by the state mainly through the Ministry of Education. Amongst other purposes, these festivals are regarded as spaces of socializing school children into the multicultural nature of the Kenyan state. Today, the school cultural festivals are often held between the months of May and October. Unlike its beginning that focused solely on African traditions (as the Europeans and other races were considered not to have tradition) today the festivals feature African, Western, Indian, vocal, instrumental music and dance, as well as elocution in African and Western languages (Rajan 1996: 34). After independence, the government of President Kenyatta was interested in redefining ‘African culture’ as a pillar of the country’s modernity. Art and Craft were therefore emphasized in the educational curriculum as both subjects of ‘elevating’ African culture and mechanism of *maendeleo* (Rajan 1996: 81).

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\(^{231}\) This is an elaborate ritual of appeasing and ‘sending forth’ the spirits of departed relatives.
These steps were reinforced by initiatives such as those of the United Nations Educational, Social and Cultural Organization (UNESCO) and Organization of African Unity (OAU) (now African Union, AU) that provided finances as well as space to develop and promote programmes on African culture. The ‘project of culture’ was presented as an attempt to ‘insulate’ the African countries from neocolonialism and for rehabilitating ‘African’ artistic expressions that the colonial administration and missionaries had branded as ‘primitive’ or ‘pagan’ (Sifuna 1980). The Kenya Schools Music and Drama Festivals were thus seen as an opportunity for defining both the distinct independence identity as well as problematization of the limitations of Western modernity. These ideas of culture and maendeleo were often expressed through a debate between continuity and change or traditional and modern. At its height, the debates were expressed through government policy papers such as Sessional Paper Number 10 that I discussed in Chapter Four.

Second are the public barazas (that were discussed in Chapter Four) and third are routinised cultural festivals such as those in Migwena. The place of art and culture in Kenya is multi-layered and has played out in both intellectual and political discourse of the postcolonial era. Most studies

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232 Whenever the president attends a baraza, the permanent Presidential Music Commission is under statutory obligation to ensure that a ‘Traditional Dance Group’ is at hand to offer entertainment. See www.nationalheritage.go.ke/index.php?option=com
on festivals in Kenya have focused on the annual music and drama festivals for schools and colleges. These festivals were started almost 84 years ago by the British colonial administration as a mechanism of ‘nativisation’ (Rajan 1996). Under the guise of preserving “African culture”, the British administration undertook to promote and create space for performance of culture for various ‘tribal’ groups.

In the public discourse, ‘cultural dances’ and ornaments are often displayed during political rallies. ‘Traditional dancers’ are a common feature during political barazas with the singers dressed in either patterned uniforms with what is called ‘African’ embroidery and batik. Even though most of these textile designs are not ‘African’, they are regarded as irresistible forms of authentic Kenyan identity. Yet others use sisal skirts and ornaments considered as the most traditional. A common form of that dressing is such as the one in illustration 6.2.

As the neo-liberal economic model continued to ‘manufacture poverty’ (Akoth and Kamunga 2003) for many more members of the population, ornaments and other ‘traditional’ wares became sources of income sold to the local middle class and with time to the ever-expanding ‘cultural market’ overseas. Besides the political space, traditional rituals like tero buru (taking back the ashes) among Luos in western Kenya persists as a basis for cultural festivals. Tero buru which is undertaken to send away evil spirits a few days after a prominent Luo or a jaduong’ has been interred is often associated with rigorous dances and adornment of ‘traditional’ ornaments. Tero buru and dances that accompany it serves as a mediating force between Luo people and the world of jok that was discussed in detail in Chapter Five. Open fields that are common between mier called gunda were used in old times for such dances. It is practices such as these that are now appropriated for the never-ending political barazas as well as cultural festivals in K’Ogelo in Alego, Migwena in Bondo and in the schools and colleges’ drama and cultural festivals. But it is the politics of production of culture at the festivals that is even much more useful.

6.4. Background to the Migwena Cultural Festivals

The Migwena Community Sports and Cultural Centre is located 6 km South of Bondo Town in East Migwena Sub-Location, South Sakwa Location, Nyang’oma Division of Bondo District. Most people who go to Migwena Cultural Festivals associate the occasion with some tero buru festivals. However, besides rituals such as tero buru, the history of Migwena Cultural Festivals is unclear. According to Peter Otieno Aduwa, Secretary to the Organizing Committee for Migwena Cultural Festivals, the festival dates back to the late 1920s. At the time, Migwena grounds were used for sports and cultural events that are since held annually between December 29 and January 1 of the following year under
the leadership of District Officers (DOs). Aduwa informed me that during the 1920s, the Migwena Cultural Festivals were marked through dances, bullfights, *mahino* (wrestling), and display of hand craft products. This colonial cultural politics of emphasizing cultural particularities has also been observed in Ghana by Lentz and Nugent (2000).

A pre-colonial history of Migwena Cultural Festivals however, may be understood in line with observations that have been made by Lentz (2001) in her attempt to explain the genealogy of cultural festivals in the South of Ghana among the Ashanti, Fanti, Ga and Ewe (Lentz 2001: 48). She suggests that although there were pre-colonial public rituals and festivals in Southern Ghana, the current character of these festivals could well be linked to the “court rituals of the Moguls in India” (Lentz 2001:52). Historians Claude Markovist, Nisha George and Maggy Hendry in *A History of India* (2002) have provided a detailed account of how the public sessions of Shah Jahana’s Court Rituals were performed. They narrate that, after completing his personal ablutions and prayers, Shah Jahan:

> Proceeded to the public audience hall where, surrounded by his chief ‘minister’ he sat on the throne facing the crowd of courtiers standing by order of precedence; it was here, in the public, generally in the presence of principle stakeholders, that most of the affairs of the central and provincial administration were transacted (Ibid.: 114 ).

The British colonial administration in India admired this model of governance (more so the relations between the governed and the governors) which they likened to the Greek City state model as well as the collective model of governmentality in Africa. The administrators appropriated these court rituals and soon it was the colonial masters and chiefs together with their followers who formed a hierarchical order of sitting during the public performance. This order is similar to one of *barazas* in Kenya as described by Haugerud (1997) in her work in Meru and suggests that the Migwena Cultural Festivals could have had this colonial link in its beginning. Emphasis on ‘tribal ethnography’ demonstrated in Chapter Three of this thesis further suggests the likelihood that the colonial administration may have wanted the various Luo maximals and Luo nation at large to perform their local specificity.

It is said that it was during one such event of the Migwena Cultural Festival that the late Jaramogi Oginga Odinga first met his wife and mother of Kenya’s Prime Minister, Hon. Raila Odinga. Activities during the event now include soccer, cycling, singing and dancing, display of cultural artifacts, local food and dramatized performances on topical issues. Over the years, Migwena Community Sports and Cultural Festival has brought together people from Bondo and neighbouring districts and has also provided space for socialization, aside from promoting young talent. Other than that, the annual event has created a platform for awareness-creation on common problems and provided a forum for reunions and strengthening of relationships through historical and cultural consciousness. Each year, the Odinga family invites guests from other constituencies, including one or two government ministers.
When I attended the cultural festivals at Migwena in December 2008 and 2009, the post uhuru politics of culture seemed to have retained some of its original character in addition to other elements that seemed to have been informed by contemporary discourses in defining Luo-ness and Kenyan-ness. Standing out as part of continuity of early missionaries and colonial ethnography were performances of presumably distinct and bounded clan and ‘tribal’ ethnographies. But unlike during the colonial time when Migwena was established, the festivals are not just about cultural particularities. Rather, they are about how such particularities can be used to make leverage and open negotiations (for recognition and representation) with the state for maendeleo and human rights. As politicians are interested in being seen as sympathetic to the Luo people, they engage and participate in production of culture at the Migwena and Obama K’Ogelo Cultural Festivals. But Luo people on the other hand use this invented imagery of culture to make claims. That is, they claim both rights to culture as well as their rights as a cultural group.

6.4 “Inventing” and “Performing” Culture at Migwena Community Sports and Cultural Festival

My field assistant and I were seated underneath a large shade that was built in 2008 at Migwena sports ground from funds raised by the County Council of Bondo. The new actors in 2010 were the state and commercial enterprises. A large banner advertised the National Social Security Fund, which we later understood, were the official sponsors of the event. Other sponsors included Mastermind Tobacco and Radio Nam Lolwe.

Often, New Year’s Day has been bright and warm but this year it was dull and chilly. It rained so heavily that morning and we made it to Migwena grounds at 1 pm. But despite the heavy morning downpour the event was attended by a large number of people. At the entrance, we could see private security guards from Dowo Security Company, in their neat navy blue uniforms. This year, we were able to sit on the main pavilion. All we had to do was pay for a badge at a fee of 200 Kenya Shillings. This was in contrast to 2008, where this area was strictly reserved for honourable guests. We sat on the red plastic chairs at the back row.

All around us were people with different backgrounds. Some had cell phones, others had flashy clothes and a great number were dressed in simple attire. I remember one in particular, who had a t-shirt with Michael Jackson’s picture. Another one still had a brightly printed shirt. A Kitenge, perhaps… or was it a Kente (as it is popularly known by the younger generation). The seats ahead of us were reserved for the guest of honour and his entourage.
In 2009, the guest of honour was Hon. Wycliffe Oparanya, Minister for Planning and National Development. His hosts included the Cultural Festival’s committee led by joint patrons, Hon. Dr. Oburu Odinga, the Member for Parliament of Bondo, and Hon. Eng. Odero Gumbo, Member of Parliament for Rarieda, a neighbouring constituency. The performances in 2008 and 2009 followed almost the same pattern. The event ordinarily starts on December 29 and culminates on January 1. When I arrived, Oiko Catholic Church choir was performing an original composition song. Other groups in attendance were Abiero Traditional Dancers, 10-Teens Group, and sole Nyatiti player among others. It seemed however that most of those present at the festivals were attracted by various competitive events that included: soccer, netball, volleyball, cycling, ajua and hot tea drinking competition among others. Ajua, also referred to as ‘traditional chess’ was played mainly by elderly men. Its tent was an attractive location for mbaka (social talk).

Entertainment groups were busy rehearsing. I tapped my foot rhythmically, instinctively responding to the pulsating ohangla drumbeat. The women swayed from side to side, their sisal skirts swirling in a beautiful display of colour. Despite the cold weather, the atmosphere was getting more and more vibrant. Young men donned all sorts of regalia: headgear, feathers and animal hides. The Migwena

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233 This is the first born son of Jaramogi Oginga Odinga.
Cultural Festivals had truly begun. From the far end of the field, the referee’s whistle signaled the end of yet another preliminary round of soccer. But this was no different from what I had witnessed in previous years. Cultural festivals, it seemed, were steeped in idiosyncrasies and cliché. Cultural performances always bore the same hallmarks: sports, ‘tribal’ dressing, traditional music and dance. But these preliminaries that took place in the first day, just like the activities that took place at K’Ogelo in the period January 14-20, 2008, were to prepare for the best that would be on offer once the politicians arrived.

There was also a large public address and music system from where the master of ceremonies sampled various songs besides the numerous announcements and promotional messages from the event sponsors (Master Mind Tobacco in 2009 and National Social Security Fund in 2010). The songs played included Ohangla, Nyatiti, hip-hop and Milton Ongoro Ja Karachuonyo of Jamnazi Band’s song, Timbe Luo manene (Ja karachuonyo means a man from Karachuonyo). This came at a time when the question of social identity was in sharp focus, especially after the 2007-2008 post elections violence in Kenya.

The cultural festival brought people together for different reasons. Some came to exhibit and sell their wares; other for sports; one or two came to mingle or better still, to update on local gossip. But there were also those who Kwame Appiah (2006) has called ‘cultural preservationists’ who came to perform and invent culture. I was introduced to one such person—Nicholas Ochieng Aneme—the Community Development Assistant, Nyangoma Division. At the time of the event, Aneme was a member of the festival’s organizing committee. As we talked, he asked much about Cape Town. He was particularly interested in the Zulu people. He admired them because in his opinion “they loved and preserved their culture”. He talked about his uncle in Cape Town. “He sent me these shoes and I think European products are cheaper there,” he added as he patted me on the back as an invitation to take note of his designer shoes.

So we have Aneme who admires the Zulu people “because they love and preserve their culture” attending cultural festivals in shoes from Europe bought for him in South Africa. While most people thought of cultural festivals as belonging to some distant past, in my experience, each encounter demonstrated existence of many intimate connections far away and that cultural festivals had little to do with what Appiah (2006:89) has called “presumed belonging quaintly to an African past”. Rather they were moments where much more culture was ‘invented’.

On the terraces of Migwena Sports Grounds, wananchi found an avenue to tell their children, “do you
see how Luos used to do things?” while some participants were excited at the production of something more superior than either the ‘traditional’ or the “modern” (Nyamnjoh 2002b). For the politicians present and local elites it was about a contest to produce a particular Luo who could engage with the state to bring maendeleo, human rights and perhaps make it “our turn to eat” (Wrong 2009).

6.5 The Arrival of the Guests of Honour

At around 4.00 pm the first signs of the guests’ arrival began to show. People begun blowing whistles and horns as the first vehicle in the guests’ convoy emerged. There was jostling and shoving as everyone tried to catch a glimpse of the new Volkswagen Passat, issued to Cabinet Ministers at the time. The dignitaries headed to the dais, where they took their reserved seats behind a well-organized table decorated with beautiful flowers.

The guests were introduced. In the entourage were: Hon. Oburu Odinga, M.P for Bondo Constituency; Hon. Eng. Nicholas Odero Gumbo, M.P for Rarieda Constituency; Hon. Wycliffe Oparanya - Minister for Planning; Hon. Ayiecho Olweny, M.P for Muhoroni Constituency; Hon. Ochieng’ Daima, MP for Nyakach Constituency; Hon. Olago Oluoch, M.P for Kisumu West Constituency, and; Eng. James Rege, MP for Karachuonyo Constituency. When they arrived, there was an upsurge of action by various groups selected by organizers that performed dances, solo songs and sport manoeuvres like acrobatics and taekwondo. One of the groups that had been selected
to perform to the guest was the Abiero Dancers. According to the chair lady of the group, Abiero Dancers are 13 in number but only 7 members are actively involved in the group’s activity. Almost all members of the group are mond liete. Amidst cheers, the guest of honour joined the group for a dance and singing and then presented some money as tokens of appreciation to the lead dancer.

Throughout the speeches, the underlying theme discussed by the guest of honour was that of preservation of Luo culture. Oparanya decried the ‘contamination’ that Luo culture had been subjected to. He impressed upon the elders to teach and create memorabilia that would educate the youth. Other presentations seemed to suggest that the cultural festivals are moments and places for emphasizing and reclaiming the ‘good old days of culture’. It was argued that in ‘those old days’, there was harmony and social solidarity. In the promotional materials, ideas behind the Migwena Cultural Festivals became more apparent. The goal, according to these documents, included the need to bring the people of Bondo and all other neighbouring communities together for socialization, sports and talent identification. But these objectives suggested nothing about the so-called ‘golden old days’.

For those in the political class, cultural festivals seem to be places used to ‘manufacture’ homogeneity in an attempt to naturalize ethnic identities. It is the political class, more than the wananchi and the organizers who seemed to emphasize the importance of ‘going back to our culture’. Such emphasis is seen through an increased trend in politicians seeking recognition by being installed as “elders” from the cultural society through councils of elders before they contest for public offices (see Akoth 2010). The political class therefore seems to be borrowing from the simple imagined popular formula that has been described by Baumann in his study in Southall, west London. The formula suggests that language groups constitute ethnic groups, which are identical to communities and natural leaders (Baumann 1996).

Representatives of the political class such as Oburu Odinga present themselves in these festivals as natural leaders. Oburu, as the patron of the Migwena Cultural Festivals, treated culture as a resource for politics and identity. He urged the Luo people not to abandon their culture and that in the new era, when ‘united as a people’ they shall win and take the national leadership (Remarks by Oburu at Migwena, 2010). From his speech it is likely that Oparanya shared similar notions of being a ‘natural leader’ in his own Butere Constituency also in western Kenya. This may explain why the Members of Parliament and other politicians seem to be the ‘patrons’ of cultural festivals. To give credence to their notion of ‘community’ and themselves as “natural leaders”, members of the political class have also promoted notions of customs that have served in the past to maintain order.
Through speeches given by politicians and other individuals who hold sway in shaping public opinion, the cultural festivals seem to ‘invent’ norms and a society where there is order. Although the description by Kwame Appiah (2006) of ‘preservation movement’ has been adopted here, it is not lost to most of those speaking of the ‘old good days’ of culture that most of these are mere imaginations. But they are imaginations with a cause, since the meanings expressed in cultural festivals are conscientious and ambivalent attempts to respond to certain questions like: Why isn’t maendeleo reaching Luo Nyanza forty years after independence? Why have there been assassinations of Luo people?

6.6 Cultural Festivals and Politics of Belonging

The festivals have various intrinsic roles that are manifest in the politics of who gets invited and who participates. For the organizers, the list of guests who attend is an indicator of the political importance of the region. More so, the organizing committees usually aim at getting the highest ranking politician to attend the festivals. In 2010 for instance when Ambassador Ranneberger attended the Obama K’Ogelo Cultural Festivals, there was almost a stampede over who wanted to sit next to him. His host turned out not to be the organizing committee but Mama Sarah Obama. Knowledgeable in Kenya’s patronage politics, Ranneberger ‘performed’ very well. He promised that the government of the United States of America was going to sink boreholes in Siaya after which he accepted to be installed as a Luo elder. Ambassador Ranneberger was therefore ‘one of us’, said one member of the organizing committee.

Cultural festivals are also places of rather clear representation of power often expressed not just in the sitting arrangements but also in songs, dances and imageries in various competitions. Speeches are well rehearsed and those who speak are ‘representatives of the people’. After declaring the rhetoric “mkosa mila ni mtumwa” (those with no culture/customs are people in servitude), they often go ahead to list the maendelo needs of their people.

For long, cultural festivals were domains of dominant interest groups in ethnic groups and local politicians. As demonstrated in K’Ogelo and Migwena, local politicians found in the festivals an opportunity to root for their position as ‘natural leaders’. The dominant interest groups on the other hand use the cultural festivals to invent and reiterate the ideals of being a Luo. The norms, values and the admirable past of ‘the Luo people’ became a central theme. In the 21st century Kenya, the state and private enterprises have gained interest in culture as material of branding. Culture is therefore something that ‘should be promoted’ (Government of Kenya 2009: 10).

In the recent past, there has been a rapid growth of marketing firms that target specific ethnic
populations more so those viewed as indigenous like the Maasai. These so called indigenous communities are minoritized and often presented as the symbols of the nation to western tourists. Cultural festivals have also raised the question: How can we benefit from ‘our culture’? This emphasis has been raised at K’Ogelo and in Migwena under the banner of cultural preservation. In K’Ogelo, the movement of cultural preservation coming out of the cultural festivals has suggested the construction of a monument in memory of Barack Obama. The idea of where and for whom this memory should be built remains contested. In 2011 an initial foundation block built at a cost of Ksh. 4 million (US$ 350,000) had to be abandoned as Mama Sarah Obama rejected its location.

In Migwena, the movement to preserve and generate income from culture has suggested that various cultural sites should be developed into sources of touristic income. Most recently this movement has got support from the state’s initiatives and non-governmental groups that suggest using culture as a ‘commodity’ and ‘property’ of specific people who reside in specific places. During my fieldwork, it became apparent that this interest in ‘locating culture’ now traverses various interest groups. As was evident at the cultural festivals, dominant groups in society, more so politicians, provide enterprise to subaltern social formations such as the Abiero Traditional Dancers and the state. They all suggest that authentic culture can be a source of income and pride for the various ethnic formations in Kenya.

6.7 Cultural Inc. and Maendeleo

In Ethnicity, Inc. Anthropologists John and Jean Comaroff have given a useful account of the ways in which ethnic populations are remaking themselves in the image of the corporation. Their account begins in South Africa, with the incorporation of an ethno-business in venture capital by a group of traditional African chiefs. But their horizons are global: Native American casinos; Scotland’s efforts to brand itself and a Zulu ethno-theme park named Shakaland (Comaroff and Comaroff 2009: 111).

Performing ‘traditional’ songs and dance at public barazas has become some sort of commercial enterprise. Local elites decide which groups get invited to perform during the rallies. Often, positioning is very important. The groups selected to perform are those which promote interests and perspectives of the power elites. During the reign of President Moi, most of these ‘traditional dance groups’ were organized under the Maendeleo ya Wanawake (Wipper 1975: 101). The choice of songs and costumes followed essentializing attributes that were assigned to the various ‘tribes’. That is, various places (as is the map and discussions in Chapter Three) are linked to particular people and specific culture. Dances, songs and costumes displayed during performances therefore showcase

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234 For details of the contested memorial for Obama see Steve Akoth, Reading Obama’s Memorial in K’Ogelo Politically (2011).
‘culture’ and ‘traditions’ of these places. As such each ‘tribe’ was invited to perform ‘tribal cultural dance’ with the ‘Luo tribe’ being expected to perform Nyatiti and Ohangla. The dancers would be attired in ‘customary dress’, beaded or sisal skirts, headdress and jewelry. The political meaning of these dances is that ‘the people have welcomed the politician and his/her guests” (Anonymous, 2010). In years preceding elections, cultural dances in public barazas are accompanied by the ‘installation’ of leaders as community ‘elders’.

During national holiday celebrations like December 12, Jamuhuri Day (Republic Day) in Nairobi, ‘cultural groups’ from dominant communities like the Luo are often invited to parade their dances as part of a national mosaic of cultures envisaged in UNESCOs idea of Our Creative Diversity (1995). This essentialist parade is often cited as evidence of the state’s respect for right to culture. Performances in these public barazas carries the baggage of colonial ethnographies (with emphasis on ethnic classification and separateness) and are often unable to speak to the everyday complexity of culture in postcolonial Kenya.

To support this idea of culture as a source of income, the state has started the process of constructing cultural centers in Kenya for the purpose of ‘preserving culture’ as well as for ‘cultural tourism’ (Government of Kenya 2009). By June 2011 twelve cultural centers had been constructed. The cultural centers house oral and material artifacts of culture and social histories of the various ethnic groups at various stages in history. In western Kenya, the most outstanding is the Nabongo Cultural Centre. The centre is managed by the Nabongo Council of elders and was put up with the support from Mumias Sugar Company and the Government of Kenya. Similarly, several areas have been demarcated as locations of Luo culture. Some of these are sites that are associated with various legends and mythology of Luo genealogy. These areas that were mostly neglected in the past have now received facelift and advertisements as sites of ‘Luo culture’ such as Got Ramogi (Ramogi Hill).
The mythology and narratives told about Ramogi contradicts genealogy of Luo migration into Kenya as told by Bethwel Ogot. Ramogi (after whom the hill is named) is said to have been the direct descendant of a motley group who are the ‘parent Luo group’. The narrative states that it is after Ramogi died in Yimbo that Luo people spread out alongside the various clans to occupy the now vast Luo Nyanza. There are indeed many Luo people who believe in this narrative of sacrosanct status of *Got Ramogi*.

*Got Ramogi* is covered with natural forests and is rich in indigenous trees and plants such as orchids, numerous herbs, grasses, sedges and lianas. The forest is frequented by birds and provides shelter for various species of wildlife. Kenya Society for Ethnoecology (KSE) has developed *Got Ramogi* as an ecotourism project that includes nature trails and a small museum at the base of the hill. As a result of this project, Ramogi Hill has been gazetted as a National Monument by the National Museums of Kenya. Cultural tourism is therefore a strategy towards institutionalization of the consumption of culture, which has ramifications not just on the study of culture but also the meaning and occupation of space.
This idea of promoting culture has contributed to the perspective of culture as a commodity that can be owned. Various ethnic groups have since taken the notion of culture as commodity in the same stride. This shift has presented a new moment in the history of Kenyan identity. Belonging to ethnic groups is now seen as a ‘jewel’ that can be put on the market for the state to brand the country to tourists as well as for corporate use.

Similar initiatives of ‘commodification of culture’ have been observed in other parts of Kenya more so in the Maasailand that is often associated with nature and wild animals, all which are tourist attractions (Hodgson 2011: 57). Although Kenya has not reached such dimensions as those observed by the Comaroffs in Ethnicity, Inc., ethnic groups are thus not just political tools but formations which have acquired attributes and opportunities associated with many other social and economic entities (Comaroffs 2009). While I agree with most of the arguments presented in the Comaroffs’ book, I have my reservations with respect to some of the issues presented in Ethnicity, Inc. Based on my fieldwork, it seems that the suggestion that ‘all actions that people undertake is based on their ‘reasonableness’” is very simplistic. These notions of rationality seem to underpin the analysis of the Comaroffs of postcoloniality not just in this book but also in their argument on Millennial Capitalism and the Culture of Neoliberalism (2001). It seems to me that their emphasis on rationality
(although good politics) is inadequate in dealing with spontaneity and connections (such as those observed at the cultural festivals) that appear by chance rather than on analysis of ‘international political and economic order’. This limit in my opinion renders inadequate the Comaroffs’ response to their question: What is the future of ethnicity?

6. 8. Recognition and Representation

The question of the future of ethnicity has perhaps been most prominent in the recent debate on the place of culture in Kenya’s supreme law - the constitution. Cultural festivals and other public performances have emphasized preservation of culture and going back to the ‘roots’. However, two things seem to stand out. First cultural festivals can’t be regarded merely as spaces for ‘invention of tradition’ as has been suggested by historians like Ranger (1993). On the contrary, it seems that the festivals are more of spaces of ‘authentication’ of what is culture and production of a genre of culture best informed by historical experiences as well as contemporary and colonial contestations of power, recognition, gender, class and so on.

The place of state officials and other local politicians and elites in cultural festivals also makes it difficult to take wholesome the claim that the postcolonial state is waning (see Appadurai 1996, Mbembe 1992). Rather what the cultural festivals demonstrate is kind of aggressive positioning (s) in the postcolonial. Anthropologist Dorothy Hodgson has used this notion in her engaging book on Being Maasai, Becoming Indigenous (2011). She observes that:

Positioning, therefore, incorporates an index agency, structure, meaning, and power; they demonstrate the articulation of political economy and cultural domains of meaning, signification, and representation. Positionings are thus, by definition, inherently relational. Individuals and groups position themselves for and against certain ideas, issues, institutions, and identities (2011: 9).

The way the stage is designed and programming done at the cultural festivals are all about who gets positioned where. At the centre of positioning during the cultural festivals, be it the Obama K’Ogelo or in Migwena, the centre around which positioning is done is the state. Whenever I left the festivals I often walked along with people who analyzed the success of the festivals based on ‘who’ came. The reference of ‘who’ is embodied in state power.

There would also be regular discussions on who sat next to ‘who’ and who had made the guest of honour to come. Under such circumstances, the place of the state in the postcolonial Kenya from where everyone wants to ‘eat’ is not waning. This question of ‘who’ is never ending in the postcolonial narrative of Luo people. Indeed, there are so many such questions of ‘who’ in relation not just to absence of maendeleo, but more so in relationship to numerous political assassinations of prominent Kenyans from Luoland.
In October 19, 2011, when unveiling a monument in honour of Thomas Mboya killed in 1969, the Prime Minister posed the question “Kenyans still want to know, who killed Mboya and why?” (Mochama and Amran 2011). Cohen and Odhiambo in their last of a joint volume of three series have documented the chants by wananchi and university students in February 1990 in Nairobi posing the question “Who killed Bob?” (Robert Ouko was commonly known as Bob). Robert Ouko, like Tom Mboya was a prominent Luo and member of the government at the time of his unclear ‘disappearance’ and subsequent discovery of his burnt body at Got Alila 3 km from his Koru farm in western Kenya (Cohen and Odhiambo 2004: 29). Who sits next to who or in the case of Ouko, who travels, emails, phones, visits, has dinner with who are important questions in the economy of knowledge production as well as understanding how power is constituted in Kenya’s politics. For Luo people, the risks of distance and production of knowledge as seen in the case of Ouko is all too clear making sure that no chances are taken in organizing protocol at cultural festivals and political barazas.

The second point is about representation. The organizers of the cultural festivals never stopped at seeking recognition by displaying their particularisms. Rather, there was a bigger drive to the festivities which was about representation. Luo people and those who organize and attend the festivals at K’Ogelo and Migwena are as interested in being part of their local districts as they are eager to be effective members of the Kenyan state. Politicians and dignities who are invited to attend the festivals are often those perceived to be more sympathetic to the cause of ‘the Luos’.

At the national level, this duality of recognition and representation was evident during the constitutional writing debate, which took about twenty years (1990-2010). During this process there were persistent calls to recognize minorities, indigenous communities as well as traditional systems of dispute resolution (FIDA-K 2008). The debate on recognition and representation has consistently posed questions such as: How many ‘tribes’ are there in Kenya? Who are indigenous Kenyans? Who are the majority and minority in Kenya? Does the constitution discriminate against some Kenyans? Debates on these matters are held in radio stations, offices, and cultural festivals and in matatus (commuter taxis). The possible responses are as varied as are the discussants to these questions.

6.9 Kenya’s New Constitution and Right to Culture

It however seems that the state and civil society-led approaches for the minorities and constitutional structure that protects ‘all’ Kenyans have taken sway. Organizations like the Centre for Minority Rights (CEMIRID) have documented numerous other language groups in Kenya whom they now describe as minority and/or indigenous groups (Odhiambo, 2005). Since independence and after the

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235 CEMIRID is an advocacy organization devoted to strengthening the capacities of minority and indigenous communities in Kenyan and East Africa.
2007 post elections violence, the state has made it a priority to promote celebration of these ‘cultures’ with tolerance and co-existence, thus a Commission has been created under the Ministry of Justice, Constitutional Affairs and National Cohesion to promote ethnic and racial cohesion. The National Cohesion and Integration Commission (NCIC) was established under the National Cohesion and Integration Act (12) of 2008 as one of the instruments to respond to the 2007-8 post-election crises in Kenya. The Commission’s mandate entails:

…to facilitate and promote equality of opportunity, good relations, harmony and peaceful coexistence between persons of different ethnic and racial backgrounds in Kenya and to advice the government thereof (NCIC Act (12) of 2008).

The mandate of this Commission has now been buttressed by Chapter Five of the August 2010 Constitution, which is dedicated to culture. But this acknowledgment does not change much because, as has been observed in the pedigree of the District Land Tribunals established all over Kenya under the Land Disputes Act No.18 1990, Africans had always enjoyed a precarious freedom to use customary law in their domestic relationships (see Chapter Three). Similar observations have been made by legal scholar, Bennett (1995) about South Africa. This was also the case in other colonies where the policy of racial segregation encouraged a return to African traditions. In countries like South Africa, the post-apartheid constitution went further in this subject of customary law and culture. Chapter 11 of South Africa’s 1994 Constitution deals with the powers of Traditional Authorities and offers recognition of Customary Law as part of South Africa’s legal system on the same terms as the Roman-Dutch Law. But it is perhaps Section 31 of the South African Constitution that attempts to explicitly centre the subject of culture within the post-apartheid state. It states that: “Every person shall have the right to use the language and to participate in the cultural life of his or her choice” (RSA Constitution Section 31(1)).

In common parlance (of everyday life in South Africa), this section has been read to imply the ‘right to culture’. While in the human rights grammar, this implies a positive claim - that is, something that the state should ensure, its practice is actually that of restricting the state and other third parties from infringing, interfering or being estoppels to enjoyment of some peculiar set of knowledge or artifacts. This movement of ‘right to culture’ is a strong concern for UNESCO if their report, Our Creative Diversity (1995) is anything to go by (Eriksen 2001: 127). In his critique, Thomas Hylland Eriksen (2001) has decried the essentialist perspective that informs the UNESCO proposal of the world as made of patches of culture that exists as some sort of mosaic. But the UNESCO report adopts an optimistic view that assumes mutual tolerance and co-existence of ‘independent’ cultural groups (Cowan et al., 2001: 11). The proposal of cultural diversity pays little attention to possible competing claims around culture often triggered with the politics of recognition and asymmetrical power relationships as has been experienced in the postcolony.
Kenya has adopted the same assumptions in its idea of the right to culture in the August 2010 Constitution. In practice, the idea of ‘right to culture’ envisages both intervention by the state, stated positively (as ‘right to’) as well as non-interference, stated in the negative (‘freedom from’). The dual ideas of mutual tolerance and co-existence of ‘independent’ cultural groups are captured in the Kenya’s policy statement of the Cultural and National Heritage Policy, which states that:

The Government shall take all necessary steps to ensure the protection and promotion of culture and of cultural diversity among Kenyans.

The Government shall take all necessary steps to ensure the protection and promotion of the country’s national heritage. (GoK 2009: 2).

Reading the term ‘culture’ in Chapter Five of the August 2010 Constitution of Kenya (CoK), culture is denoted as people’s entire store of knowledge and artifacts more so language, beliefs systems, foods and drinks, medicine, law and livelihood systems, that give social groups unique characters. This meaning has been translated into various obligations for the state in Section 27 (a-i) (CoK). As these ‘Responsibility of the State in respect of culture’ are instructive in the ensuing research and discoursing about culture, customs and practices, I find it necessary to offer an extensive citation of this section of the constitution.

**Responsibility of the State in respect of culture**

27. The State shall—
   (a) Promote understanding, tolerance and appreciation of diversity;
   
   (b) Respect, preserve, protect and promote the heritage of Kenya, and in particular, its cultural, historical, religious, sacred, archaeological and other significant sites and artifacts;
   
   (c) Promote—
      (i) Research and an education policy that enhances culture and cultural values and enables the people to develop strong moral, ethical and spiritual foundations;
      
      (ii) all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications and libraries and other cultural heritage; and
      
      (iii) Research into and documentation of the cultures of Kenya, including national history and customary law;
   
   (d) Recognize, support and promote the appropriate application of modern and traditional medical practices;
   
   (e) Recognize the role of science and indigenous technologies in the development of the nation;
   
   (f) Support, promote and protect indigenous knowledge and the intellectual property rights of the people of Kenya;
   
   (g) Through legislation, ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage;
(h) Promote, where applicable, the use of traditional farming systems, and traditional foods and drinks; and

(i) Through legislation, recognize and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.

The debate on the right to culture in the Constitution of Kenya 2010 was somehow different from the idea of culture expressed in the 1963 independence constitution. In the latter, the idea of culture was more about re-claiming “the African” identity. In this context, culture was expressed as an encompassing macro-national project that was often called ‘Africanization’ or Kenyanization’. Restoration of African culture was therefore seen as part of the broader aim of uhuru, which got impetus from the country’s independence leaders like Jomo Kenyatta, Tom Mboya and Oginga Odinga who were also part of the larger pan-Africanist movement. During the constitution making process that culminated in the August 2010 Constitution, however, culture talk was captured in the constitution as a basis of belonging to Kenya. That is, for one to become an ‘authentic Kenyan’, they are now required to have a culture. The logic of this debate further went on to argue that it was by having culture that one could claim other rights and maendeleo. As such under the 2010 CoK, Right to Culture has become both a substantive as well as facilitative right. Not surprisingly, the impression manifest in practices such as cultural festivals is that ‘you need right to culture for you to claim other rights.’

The neoliberal state and the large plethora of civil society organizations have successfully been able to position the issue of culture in its multiple perspectives in the constitution and governance structure in Kenya. While such instrumentalist approaches are welcome by local groups and Luo people such as those I met at K’Ogelo, the question that always lingers is how this recognition can match representation and perhaps bring maendeleo and human rights.

6.10. Human Rights and Cultural Festivals

This chapter has demonstrated how cultural festivals have become symbolic for positioning and political assertion in western Kenya. Cultural festivals whether in K’Ogelo or Migwena are organized around the production of culture. But that is not done with culture as something ‘out there’. Rather, culture is produced and produces several effects that have enormous bearing in the postcolonial economy of rights. The cultural festivals are moments that create or revive cultural consciousness. The festivals produce and emphasize Luo identity which is then situated in the context of Kenya. Not only are those localized reminded that they are Luos, but they are also mobilized to reflect on how they experience Kenyan-ness because they are Luos. Often images from the cultural festivals are broadcast by media stations, private pictorials or personal reporting.
In the many cultural festivals that I attended, I met parents who had brought their children to learn ‘Luo culture’. This means that cultural festivals are not just imaginations and performances (in the sense of performative theory) that argues that “it’s true: all this is socially constructed”. Rather, cultural festivals go beyond the idea of social construction. Some Luos such as those who bring their children to learn about Luo culture feel that cultural festivals are representations of real and authentic Luo culture.

There are two components to this practice of culture. First, it attests that culture (with a small “c”) doubles as at once material reality and at other times a lived reality. As a lived reality, many Luos see cultural festivals as places where to decipher the real Luo culture (that I return to later). These attendees (some who bring their children) believe in the festivals as a source of their own identification. Others like Oburu Odinga whose mother and father met at the Migwena Cultural Festivals have an intrinsic connection to the cultural festivals. As material reality and part of re-writing the Kenyan nation, the cultural festivals also seem to pay attention to production of some sort of “Luo Culture”. This conception of culture marked by capital “C” suggests a totalizing and larger universal where culture is seen as webs of significance.

Therefore, cultural festivals have multiple meanings that present some sort of ‘incomplete signification’ that is best explained in Homi K. Bhabha’s ideas in the Location of Culture and Nation and Narration (1994). In aiding understanding of culture (s) in postcolonial context, Bhabha has argued that: “The issue of cultural difference emerges at points of social crises, and the questions of identity that it raises are agonistic, identity is either claimed from the position of marginality or in an attempt at gaining the centre: in both senses, ex-centric” (Bhabha 1990: 177).

In the case of Luoland where I have observed the relocation of marginal culture into the centre not because of political negotiation but rather because recognition is now conceived as the most viable vehicle of realizing maendeleo and human rights, cultural festivals have been configured to account for several things. At one point, cultural festivals are accounts for the new ‘pluralism’ introduced by CoK that was promulgated in August 2010; at another level they represent the common rhetoric of ‘unity in diversity’ and an idea of Luo homogeneity’, yet at another level, cultural festivals aid Luo people in developing a schemata of identification, identity and socialization. The maendeleo expressed at cultural festivals is not different from what Homi K. Bhabha (1994: 145) calls “writing the nation”. For Bhabha (1994), these multiple experience are possible because:

The people are the historical ‘objects’ of a nationalist pedagogy, giving the discourse an authority that is based on the pre-given or constituted historical origin in the past; the people are also the ‘subjects’ of a process of signification that must erase any prior or originary presence of the nation-people to demonstrate the prodigious, living principles of the people as contemporaneity; as that sign of the present through which national life is redeemed and iterated as a reproductive process … it is through
this process of splitting that the conceptual ambivalence of modern society becomes the site of writing the nation (Bhabha 1994: 145).

Given the new socio-political climate in Kenya, the re-definition of Kenyan-ness, and search for new, different identities than those installed by the collapsed post-uhuru national project, how does Kenya imagine the “writing of its nation” in the 21st century and how does it reconcile located experiences such as these in Luoland to global discourses of modernity such as human rights? Whenever I went back to Nairobi after attending cultural festivals, I was often asked of my experience and cultural ornaments that I brought along. This attests that there are Kenyans who today see culture as part of modern Kenya. Leading Kenyan historian Ali Mazrui has suggested that culture can’t be ignored in the study of modernity as they have a role “…as lenses of perception, as means of communication, as basis of stratification, as a spring of motivation, as standard of judgment, as a pattern of production and consumption and as the foundation of identity” (2011: 19). These functions have been manifest in the ethnography of cultural festivals as well as the culture debate in Kenya’s constitution. Two major points seem important for human rights modernity in postcolonial Kenya. In activating cultural consciousness, cultural festivals and the culture debate has led to increased domestication of agency in postcolonial Kenya. As Francis Nyamnjoh notes:

…the collectivity shares the responsibility of success and the consequences of failure with the active and creative individual, thereby easing pressure on individuals to prove themselves in a world of ever diminishing opportunities, even for the most talented (2002: 115).

This is why Obama becoming president of the USA was something worth celebrating for the entire K’Ogelo. The festivals and the cultural debate tended to create a strong sense of ‘we’ against ‘them’. This sense of connection often tends to be manifest when individuals or a group of people who share common interest are in a precarious situation or undergoing a perceived infringement. That means that, rather than see themselves as ‘atomistic individuals’ (Makau 2002), Luo people tend to engage as a connected category. The notion of ‘our rights’ as was also observed in the case of the ‘Ocampo Six’ (See Chapter Two) becomes more common than the talk about ‘my rights’. The festivals and debates on culture therefore have an effect of producing new postcolonial subjects who although sensitive to their individual claims, are conscientious of making that claim within their category as Luo.

Cultural festivals and the debate on culture also witnessed a contestation of what is ‘bad’ and ‘good’ culture. That which is regarded as ‘good’ culture is upheld and preserved. As was noted, the festivals are multilayered and have elements of Christian influence, legal influence, state administration and corporations. The festivals are therefore spaces that open discussions on what ‘the moral script should be for Luo people’ in the 21st century. While its totalizing language is problematic, festivals play a key role in the indigenization of modernities.
Democracy and diplomatic services are given new meaning when the US ambassador is made a ‘Luo elder’ or when non-Luos, seen as friendly like the Hon Wycliffe Oparanya are invited to become chief guests. Also in the moral debate that has an influence on what becomes a criterion of judging what is good and that which is bad, postcolonial human rights discourse gets produced. The discourse of rights produced during the festivals is one that is sensitive to the “politics of recognition” (Englund and Nyamnjoh 2004) and inter-subjectivity (Nyamnjoh 2002). The politics of recognition is about mobilizing what is perceived as peculiar attributes of individuals or a group as a basic of claiming rights and belonging from the state. This genre of rights is accessed not just through courts or institutions such as the UN, the national human rights institutions or human rights NGOs, but more through building relationships and attention to human dignity.

As we shall see in Chapter Seven, although it is possible to see the cultural festivals as mere performance or invention of culture, there are many Luos in western Kenya who pursue their lives based on dominant scripts of Luo identity during ‘those days’ and contemporary Luo-ness articulated by organizers of the festivals. In any case, going by the interest generated by cultural festivals attested by commitment from parents to take their children to be part of the festivals, it must be having a bearing on people’s lives.

The cultural festivals also return us to the question: What is the future of ethnicity? It seems that Max Weber who gave his prediction in the 20th century was wrong when he predicted that “…earlier intimate social forms would dissolve, to be replaced by highly regimented bureaucratic-legal orders, governed by the growth of procedure, and predictability” (cited in Appadurai 1998: 228). Rather it seems that the inherent limitation and opportunities of liberal democracy is likely to result into production of ethnicity in its various forms. Here again, the asymmetrical power relationships and economic inequalities in the postcolonial seem to pave way to more serious attention to ethnicity.

Citizens seem to pay more attention to whom they are and where they belong. The rush to dala during the December festivities attests to the ethnicized manner in which citizenship is experienced. The ‘bad’ versus ‘good’ culture debate is in itself testimony of the ever central place taken by ethnicity. As malleable as it is, the uses of ethnicity also seems to multiply as required by circumstances and worldviews. To that extent, cultural festivals and culture debate aid in producing and giving new meanings to ethnicity. During cultural festivals, ethnicity is at one hand celebrated as a source of identity; at another point, it is seen as a source of moral code in times of uncertainty while, at yet another level, it is leverage for getting maendeleo and access to national resources. As long as politics of recognition and identity remains a modus operandi in the postcolonial era, so will
ethnicity in its various forms.

6.11 Conclusion

In this chapter, I have looked at how the Kenya postcolonial state promotes the ‘era of human rights’ both as one culture (culture of human rights) and multiculturalism (as separate and distinct cultures of the nation). I have particularly demonstrated how, on the one hand, the state continues to support cultural festivals that emphasize particular cultures while, on the other hand, there have been demands for culture to be protected in the constitution of Kenya (right to culture) as part of a claim to maendeleo as well as enforcement of the culture of human rights. The analysis of the ‘neo-traditional’ institutions (Lentz 2001:49) such as the Obama K’Ogelo Cultural Festivals and Migwena Cultural Festivals illustrates how this knowledge economy around which new ethnic and local identities are produced in the postcolonial Kenya is a space for citizens (wananchi), political elites, state bureaucrats as well as local gatekeepers.

The findings of this fieldwork are that cultural festivals are more than just forums that promote the interests of the political class and other dominant groups. For politicians, the cultural festival is where they reiterate their place as ‘natural community’ leaders. There is however no doubt that cultural festivals are major instruments of this authentication of culture, performance and meaning- ‘fixing’. To this extent the cultural festivals tend to be particularized performances of the context of human rights modernity. As we shall see in the next chapter, these identities have a strong bearing on both agency and notions used in making human rights claims.

Just as was the case with radio programs, cultural festivals are more of spaces of encoding between various modernities rather than arenas of ‘Luo Culture’ as claimed by their organizers. What is of interest to this chapter is that unlike the preceding chapter where it was members of the Luo nation that were involved in producing ethnic and local identities, the cultural festivals witness an active presence of the state, politicians and corporate interest groups in the ‘invention of culture’ (Ranger 1993). Although they are called ‘traditional’ cultural festivals, it becomes clear that they are unable to invoke legitimacy from the idea of tradition. Therefore, cultural festivals have most recently positioned themselves as spaces of assemblages between the ‘modern’ and ‘traditional’ as well as avenues for political negotiations for maendeleo and inclusion in national politics (Hodgson 2011).

The activities at the cultural festivals have potential for numerous meanings. There is the narrative of culture as human rights as well as manifestation of culture of human rights. In the gamut of right to culture, holding festivals for Luos or by Luos isn’t considered as discrimination of other ethnicities even though the human rights regimes have the same language that proscribes discrimination. The
issue is that activities within the postcolony that would otherwise be treated with skepticism are celebrated when branded as cultural and even attract diplomats. Culture is also used at cultural festivals to claims *maendeleo* (known in the human rights rubric as ‘right to development’) in postcolonial Kenya. This use of ‘culture’ to claim *maendeleo* or right to development (as enshrined in the UN rights to development charter) seem impossible to claim when in Nairobi but easier to do at cultural festivals or in rural Kenya. Human rights conversations in postcolonial Luo that I document in the next chapter can be read in the same context as the cultural festivals. As these claims of culture and activities at the cultural festivals are not mere performance, similar practices of performance and claiming right to culture can be observed when Luo people engage with discourses such as human rights.
CHAPTER SEVEN

BEYOND THE STATE: SYNTHESIS OF “TRADITIONAL” AND “MODERN” CATEGORIES IN THE PRACTICE OF HUMAN RIGHTS IN 21ST CENTURY KENYA

7.1 Introduction

Starting from the stories of Priscilla Oluoch and Ascar Madote Ogembo236, this chapter discusses ongoing debate in the practice of human rights in Kenya. Priscilla Oluoch and Ascar Madote live about 78 kms from each other in Luo Nyanza, western Kenya. The case of Madote was already introduced in Chapter One. Although they don’t know each other, they share the same experience as mond liete (widows of the grave). What makes these narratives useful for this thesis is that, after a long wait in a state that I have called “cultural refugees”, both of them finally have their own dala (homestead) (See Akoth 2011b). Priscilla’s dala is in Rachuonyo District while that of Ascar is in the Nyakach area, Sondu District. Even though miles apart, goyo dala has restored the citizenship and belonging of Priscilla and Ascar in their current matrimonial residences. Prior to moving to their respective dala, Priscilla lived in a rented house at the Asere Shopping Centre while Madote lived at Bar Oyuma Shopping Centre. Shopping centers in Luoland are ‘anonymous’ because, while it is known who owns the various buildings or trading stalls, shopping centres are not anyone’s dala. The shopping center is equated to a place generally called gunda237, which is the neglected area. It is common that people who have been ‘rejected by culture’ move to stay there. As a space of diaspora, Luos cannot build a home at the shopping center (see Akoth 2013, forthcoming). This is why whenever individuals feel restricted or are unable to fulfill certain cultural obligations, they tend to leave their dala for either kapango or the neighbouring shopping centre. As Grace Ogot has shown in her book, Land without Thunder (1968), when there is a crisis among kinsfolk or with jok, Luo people tend to go away for ‘refuge’ to distant ‘de-culturalized’ places such as shopping centres or Kapango. As recorded in chapter one, goyo dala is an elaborate process that is punctuated with processions and rituals at each stage. As a rule, goyo dala starts at dawn and must end by sunset. It is not expected that anyone would move from their dala and to the shopping centre unless they are moving away from yamo ma rach (‘bad wind’) or they are jo-buoro (temporary refugees).

236 The practice of adopting the surname of one’s husband is a common practice in contemporary Kenya. It was however uncommon in earlier Luo society. Thus although FIDA-K decided to refer to Ms. Madote by her late husband’s name i.e. as Mrs. Ogembo, Ms. Madote had never used that name in her life.

237 This is more of collective space which Luos say was initially the centre around where Luos built their homes as a collective unit.
During my fieldwork I spoke to Jodongo and even young people who insisted that dala is a very useful place and space in kaluo or Luoland; it is the place where a Luo locates his or her cultural citizenship in both the colonial notion of “homeland” (see Mamdani 2007) as well as pre-colonial mythical belief as a site where one’s placenta is buried at birth (see Ogot 1968). I also observed that dala is founded by a man while dipo (a household) which are the accommodation and operational units in a homestead is headed by a woman. While there is no denying that patrilineage and patrilocality in Luoland tend to relegate women in Luo society to a lower rung than men in dala, the way this cultural citizenship is defined is too entangled to be represented in a gendered divide such as male and female or private and public. Dala is established by a man but it is considered incomplete if the man does not have dhako (a wife). At the same time, dhako whose husband is yet to establish dala is regarded as one whose marriage is ‘incomplete’. Often, Ogara Taifa, radio elder at Radio Lake Victoria told me that Dhako e wuon dala (the wife is the owner of a home). Men who I met in Anyiko, Ng’iya, Nyakach, K’Ogelo or Migwena often expressed their pride in dala by saying that they had established dala for their wives.

The central place of dala in the narratives of Priscilla Oluoch and Ascar Madote in Luoland demonstrates that the upsurge in United Nations-based human rights advocacy and legal education in 21st century Kenya has not necessarily displaced pre-existing Luo life philosophies and mechanisms of resolving conflicts. In this chapter, I address the practice of human rights within a context that recognizes and engages both legal rights and cultural concerns. This approach integrates an acknowledgment of historical marginalization of women in patrilocal and patrilineal practices dominant among Luos of western Kenya, on the one hand, and the hybrid modes of female subjectivity emerging in postcolonial Kenya, on the other.

The narratives of Priscilla Oluoch and Ascar Madote unfold in the context of 1990s—mid 2000 that has been characterized by an upsurge of state and NGO-led civic education and a quest for legal reforms. During this period, most wananchi sought to reclaim the promises of uhuru and nursed high hopes for a bright future. Mutunga and Mazrui (2002: 231) have argued that it was a general expectation among the political elite and public who were demanding reforms that the ‘new’ legal regime and awareness of human rights would reverse many years of denial of rights for the majority of women in rural areas as well as the increasing category of the urban poor.

Despite such expectations, the findings documented in this chapter do not show some linear trend of movement from ‘traditional’ to ‘modern’ and universalizing rights. Rather what we see is persistent
conversation between the so-called ‘traditional’ and ‘modern’. This chapter uses the persistence of *goyo dala* in Luoland to demonstrate what Francis Nyamnjoh calls “mingled modernity”\(^{239}\). While the two cases of Priscilla Oluoch and Ascar Madote have common nodes, they also have peculiarities that this chapter builds on. The case of Priscilla on one hand shows how the various forms of citizenship diversify and increase thresholds for making human rights claims in contemporary Kenya. After a long struggle, she is able to access land and enjoy secure land tenure from both presumed Luo customs and the provisions of the Land Act.

On the other hand, the case of Madote demonstrates a collapse of the Judiciary as well as the limits of legal technism that was FIDA-K’s major approach before 2008. She had reported the incident of her dispossession to FIDA-K in 2005. By 2009 there had been little progress in the Kisumu Magistrate’s Court to resolve the matter. It is at this point that Madote turned to the Nyakach Council of Elders through which she finally obtained guaranteed security of tenure. The chapter will also show how ‘traditional’ councils of elders have actively (re) defined, (re) produced and (re) (mediated) the practice of human rights between residents of western Kenya and the human rights institutions.

The narratives of Priscilla Oluoch and Ascar Madote each demonstrate related manifestations of this inter-phase between the United Nations-based human rights discourse (and its associated legal technism) and scripts of personhoods promoted by the Luo and the Nyakach Council of Elders that have gained prominence in the period after 2000 associated with the quest for a new Constitution of Kenya, vibrant civil society movements and political pluralism. The new Constitution of Kenya (CoK) affords space by providing for right to culture in Article Two and an elaborate Bill of Rights in Chapter Four. In other words, the CoK provides for both recognition of cultural identity as well as protection of human rights as articulated in Western legal and political philosophy.

This space of supposed link between identity recognition and rights has been captured in recent scholarship on ‘politics of recognition’ (see Englund and Nyamnjoh 2004). In an environment characterized by ‘politics of recognition’, the subjects of human rights tend to be located and locate themselves in multiple positions. They are Kenyan citizens who demand basic citizenship rights in the CoK as Luos, married women, and so on. But these demands for rights are based not only on the Constitution of Kenya and international human rights instruments, but more on recognition of their culture and exercise of domesticated agency. This explains why such initiatives as the resettling of Priscilla Oluoch and Ascar Madote may not quite be part of the state-sanctioned Alternative Dispute Resolution Mechanisms (ADRM)s.

Among the questions that arise from the narratives of Priscilla Oluoch and Ascar Madote include:

\(^{239}\) This term was used by Nyamnjoh during a seminar at the University of Cape Town on October 2, 2012 to explain the intensity of postcolonial entanglements.
who is a Luo citizen? Do women enjoy Luo citizenship in equal measure like their male counterparts? What are the meanings of security of land tenure? Can an individual enjoy secure land tenure using Luo as well as common law mechanisms for land ownership in Kenya? Overall, these manifestations demonstrate how the binary between ‘culture’ and ‘human rights’ is unattainable in contemporary Kenya. This chapter shows that what tends to stand out in everyday practice is some sort of ‘synthesis’ between ‘traditional’ and ‘modern’ in the quest for justice and human dignity in postcolonial Kenya. Such is the ethnography of human rights that is undertaken on its numerous forms.

7.2 Priscilla Oluoch: Mediating “Tradition” and “Legal Rights”

I was directed to Priscilla who lived in Agoro Sare by Ker\textsuperscript{240} Riaga Ogalo in December 2009 after my long interview with him at his Dala Ka Riaga (the home of Riaga), itself located about 1Km from Priscilla’s place of work at Agoro Secondary School. At the School, Priscilla has joined other women to offer outside catering services in the Agoro Sare area. Ker had instructed one of his attendants\textsuperscript{241} to make sure that Priscilla narrates her story to me. He particularly asked that Priscilla should tell me about the tribulations she went through before goyo dala. Priscilla’s story, he had insisted, would enable me realize that “…the Luo also had human rights” (Discussions with Riaga Ogalo, November 2009). Secondly, he wanted me to know that the Luo Council of Elders is different from the group of elders who work with the government at the District Land Tribunal\textsuperscript{242} that was discussed in Chapter Three. The latter, he insisted “do not know culture, all that they do is business” (Personal Interview, November 2009).

After 9 years of marriage, Priscilla’s husband died in October 2001. Priscilla, or Mrs\textsuperscript{243} Oluoch as she was perhaps better known, was of the Turgen ethnic group that is part of the larger Kalenjin ethnic group. At the time of my fieldwork, Priscilla was 37 years old. She had been married to Oluoch, a Luo from Kasipul Kabondo Constituency in K’Ochieng’ Sub-Location, Kamagak East Location, Rachuonyo District in 1992. Oluoch was the first-born in a family of six. Theirs was an African Christian marriage administered under the African Christian Marriage and Divorce Act (1931) Cap 151 (Kenya). They had wed at the Oyugis Parish Catholic Church. Prior to the church ceremony,

\textsuperscript{240} Ker is a title given to the leader of Luo Council of Elders. It refers to a chair who has cultural as well as spiritual or ritual powers. See discussions on Jok in Chapter Five.

\textsuperscript{241} As is common in Kenyan culture of political patronage, Ker has numerous young men who often stay close by or pass through his homestead to run his errands. See Chapter Four.

\textsuperscript{242} Unlike the Luo Council of Elders which claims some organic genealogy (in Gramsci’s sense), these elders are constituted through the Land Dispute Tribunal Act No. 18 of 1990. The Act opened room for creation of District Land Tribunals. The tribunals comprising village elders were created to settle land disputes on the understanding that they were knowledgeable about local issues.

\textsuperscript{243} Although this label of heteronormativity is often used in legal documents, it is rarely used in everyday life in western Kenya. Married women are often referred to by their nuptial homes (e.g Nyar Gem – the lady from Gem) or by the name of their children (e.g. Min Onyango- the mother of Onyango).
Oluoch and his relations had offered dowry to Priscilla’s family in accordance with both Turgen and Luo marriage customs which involved Oluoch giving three heads of bullocks, a dairy cow and basket of maize to Priscilla’s father, uncles and aunts. On the day when they delivered these gifts to their in-laws, Oluoch and his friends who took him along were rewarded with honey and a gourd of mursik (sour milk). At the time, Priscilla had already moved in to live with him.

By 2001, Priscilla and Oluoch had two sons. Her first born son, Maxwell Omondi was 12 years old, and a pupil in Standard 8. The second son, Mark Oluoch was 10 years old, and in Standard 5. Priscilla also had a 17-year-old daughter from a previous relationship who died in 2004 after a long kidney illness. Priscilla’s daughter was buried in Eldoret, at her maternal grandparents’ home due to what she calls antagonism at the K’Ochieng home at that time. Her daughter left behind a nine month old baby who lives with Priscilla’s mother. The death of Priscilla’s husband would then set off a series of events that culminated in her dispossession of land and subsequent displacement from her marital home. At the time of Oluoch’s demise, he was still resident in his father’s dala. Oluoch therefore did not have his own dala although he had moved from simba (the first house built by a young man in his parents’ dala) and built a new house on the same compound which accorded Priscilla her own dipo (household).

Priscilla’s younger brother-in-law wanted to be her Jater which she declined with an explanation that she had already gone for an HIV test and established that she was HIV positive (there is still widespread prejudice and stigma that tend to classify positive HIV status as abnormal and immoral). She declared her HIV status to members of Oluoch’s family, but they did not believe her. Her father-in-law had died earlier. Her mother-in-law did not support her refusal to enter a levirate union as she had entered two such unions since the death of Oluoch’s father. Even then, Priscilla’s declaration was made in a context where living with HIV is often associated with termination of sexual life and a journey towards fatality. No wonder both HIV and AIDS are referred to by the same name in Dholuo—Ayaki, which means to ‘maul or tear apart’. Her brother-in-law insisted on ter but she stood her ground for what she explained was for the sake of her children and good health of her brother-in-law. When she made public her HIV status, Oluoch’s family also accused her of tarnishing the good name of their son by suggesting that he may have died of AIDS.

At the time of her husband’s death, Priscilla and her husband owned five heads of dairy cattle. She

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244 Burial in Luo Nyanza is not a straight-forward matter. Most maximals and clans have detailed rituals and protocol on who can be buried where. This becomes more intricate where the deceased is older. These actions are influenced by strong fear and respect for the dead as well as the never-ending contest of Luo citizenship. The widely documented case of SM Otieno is a useful ethnography of how burial of the dead is negotiated and contested one. See Cohen and Atieno (1992).
also had access to two plots of three acres each from the larger family land. When I met her, a
tearful Priscilla recounted how when her husband died, her brother-in-law sold off two of their cattle
without her consent. Two heads of dairy cattle later died leaving her with only one. The family land
had not been subdivided and so when Priscilla was locked out of the Oluoch’s family, her
access to family farmland became impossible. Her nyieke (wives to the late Oluoch’s brothers) also
stopped associating with her as she had not gone through ter. Being the wife of the first son, it was
traditionally expected that she would be the first to plough and harvest as long as she had a husband
or jater. In the absence of this, both her productive and reproductive life was ‘stalled’. As she had not
gone through levirate, Priscilla had okola (see Chapter Five). She was not allowed to visit some of her
relatives, could not carry young children and was barred from accessing family water points. She
described herself to me as a ‘victim of culture’ who could not visit or eat with anyone. She toiled
everyday under the cloud of prediction by her neighbors that because she has violated ‘Luo culture’,
jok would revenge through her own death.

When I met Priscilla in July 2009, however, she did not present herself as a lamenting ‘victim of
culture’ but as one chi liel who had benefited from collaboration between the Luo Council of Elders
(see Chapter Three), the Kenya National Commission on Human Rights (see Chapter Four) and the
Kenya Women Property Rights Organization (KWPRO). The Kenya Women Property Rights
Organization was a recent offshoot of the World Bank-related project for women and property rights
(KNCHR 2010). It was founded in 2008 by Dorothy Awino (commonly known as Doro) who was
singled out by Priscilla as the champion for the cause of women disinherited by what she calls
“outdated interpretations” and misinterpretation of ‘Luo culture’. Doro herself is a Luo from Nyakach
and married in Gem. With the support of USAID, KWPRO has been supporting access to ARVs for
women living with HIV and AIDS as well as reinstating the right to property for dispossessed women in
Luoland. Between 2008 and 2009 when I met Doro, the Kenya Women Property Rights
Organization had worked with elders from the Luo Council of Elders, the Nyakach Council of Elders
and Jodong gweng (village elders) to identify mond liete who had been dispossessed or dis-inherited
upon the death of their husband. Doro and her organization had numerous sessions to educate
community members on ‘correct Luo culture’ as well as to explore other means of protecting these
mond liete. It is such contexts that interconnect ‘tradition’, ‘legal rights’ and ‘human rights’ in
contemporary Kenya.

245 Although the notion of security of land tenure is often presented in legal terms as being equal to acquisition of title deed, evidence
from Luoland and recent scholarship demonstrate that security of tenure is constituted of social relationships and is often an embodiment
of a bundle of rights such as the right to access and use of resources as well as the right to own and inherit land.

246 In western Kenya, most land is owned as a single parcel of ancestral land.
Priscilla’s case had even been documented as a success story by USAID at the end of their Luo Nyanza Project in a booklet, *From despair to hope: Women’s right to own and inherit property* (2005). As a result, Priscilla could afford a smile during our conversation but noted:

> It is a long story but let me start by saying that what happened is that when my husband passed on, I was asked to follow ‘Luo culture’. And let me say that I am not the only one who has been affected because I am from the Kalenjin ethnic group, but when I spoke about my problems I also realized that there were many Luo women who face a similar predicament as mine upon the death of their husbands.

So when my husband passed away in 2001, I was told about ‘culture’. They started telling me, ‘You are not supposed to do this’; ‘You are not supposed to do that’ without a husband. They made everything look very difficult (25/7 2009).

When her *yuore* (brother to her late husband) and her mother-in-law started demanding that she either accepts *jater* or leave the Oluoch’s family, Priscilla could not report this matter to the village chief247 (Interview with Priscilla, July 2009). She had been told that what was demanded was a requirement of ‘Luo culture’. She lived within the same administrative location (Kamagak East Location) where *Ker* has his home, but could not even visit him because in her mind, *Ker* being the custodian of ‘Luo culture’ was unlikely to have any different opinion from what had been expressed by her immediate relations. Priscilla was well aware that the whole tussle around her levirate status was because it was intertwined with many other processes of social life in Luoland. This is a situation that Meillassoux (1982) has described as production and reproduction. That is, the clan needed her to stay at the marital home in order to take forward the lineage of the late Oluoch. At the same time, they needed her labour and that of her children in tilling the land and producing food for *dala*. She was, however, wary not just of her health status and that of her children but also of the fact that the idea of ‘culture’ being suggested was rather oppressive and too inflexible. She further narrated:

> The major thing was in relation to inheritance. Because what the younger brother to my late husband was saying is that they want (sic) to inherit me or take me as their wife and he was the one who was going to do it. And this is a young person whom I met (when she was married) as a small boy. I even wanted to take him to secondary school at that time but he declined. Besides, he has very bad character. He drinks lots of *Changaa* (local liquor) and is a drug addict and so it was difficult for me to take him in.

Besides, *yuocha* (plural of yuora) argued alongside other people that as a woman I was unable to make the right decisions without the intervention or presence of a man. Then there was the issue of my husband’s pension. My husband used to work with a Non-Governmental Organization (NGO) and so in their thought, some money or benefits had been left behind by my husband. So they wanted to make sure that I was given someone from their family immediately so that no one else in terms of a ‘new husband’ of my choice could come in to ‘interfere’ with their son’s wealth.

So what happened is that when I refused, they gave me an ultimatum and said: If you cannot obey us and follow the practices the way we have stated, we shall require that you go back to your parents (pre-nuptial home). According to what they called Luo culture, always when there is tilling of the land for the first time, one must have a man in the house for the purpose of *Golo pur* or *golo kodhi*.248 In western Kenya,

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247 The chief is part of the state’s provincial administration system.

248 This is a simple ritual where a husband and wife need to have ‘sexual knowledge’ of each other as a preface to commencing
there are two planting seasons: the long rains which come between April and May that is called *kodh chwiri*, and the short rains that come in October, *kodh opon*. The way it works is that the practice and ritual of tilling starts with the oldest person in the homestead.

As such, it would start with the father in law tilling their land and going through the ritual, then the eldest son in the homestead and his wife or wives going down to the youngest. It therefore goes systematically like that. However for my case, the mother in law was old and therefore they had stopped ‘seeing each other’. At the same time the eldest son was deceased, it so happened that my household was the eldest in the *dala*. As the eldest in *dala*, it was a requirement that I had to have a man for me to *golo kodhi* after which I would have made way for the others in younger households in the *dala*. Remember, they said this needed a man.

So, when I refused to take in a man, women who were following me (those in households that were ‘younger’) and whose husbands were still alive ran away. The one who was right behind my late husband said that she could not live in that homestead any longer as there was an utmost violation of ‘culture’. She had been living in *dala* while her husband resided in the city of Nairobi. She left and moved to Nairobi to stay with the husband so as not to be befallen by the bad omen occasioned by my refusal to be inherited and to facilitate *golo pur* or *kodhi*. The household that followed had a young man and his wife too said she would not stay any longer. She also resided in *dala*, essentially involved in peasantry farming. She left and went to her nuptial home. She claimed that she could not till her land and was therefore at the threat of perishing from food insecurity (15/7/2009).

The demands of Priscilla’s married relations are not uncommon in Luoland. However this long narration by Priscilla explains how specific contexts tend to mobilize meanings of culture. Amongst Luo people, there exists a time-long practice where a brother would take custody of his late brother’s wife and children. This practice is commonly known as *ter*. Although Christianity, Islam and other modes of governing relationships are widespread in Luo society, it is not uncommon for both men and women to make claims to the importance of the *ter* (Cohen and Odhiambo 1989: 90). In any case some women observe *ter* as an important condition to ‘reintegration’ and acceptance of *mond liete* and ‘guarantor’ to their deceased husbands’ lineage (Interview with Dorothy Awino, December 2010).

In insisting that Priscilla should get a levier, her relations were not just concerned with ‘culture’ but also about property. Understanding the meanings and signification of Priscilla’s experience will therefore require a reading of the nexus between culture and class that has been developed by Sylvain (2002) in her work on ‘San Identity and Global Indigenism’ in Namibia. In that kind of reading, the production of culture is not necessarily about adhering to some old values or systems but also about invention of images of some pristine past so as to protect contemporary material interests.

Most of Priscilla’s neighbours were *jodak* (squatters or people not living on their ancestral land). These neighbours could not intervene directly (perhaps because they had no material interest) to save

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249 See discussions on *okola* in Chapter Five.
the situation as they were not from the same *libamba* (lineage clan). One day Priscilla found out about a plan to have her forcefully ‘inherited’. Her family had called a meeting at her mother-in-law’s house. Sensing trouble, she escaped and later went to see the Administration Chief²⁵⁰, Tobias Oula, about the threats to her life. The Chief encouraged her to find an alternative abode within the area rather than returning to her pre-nuptial home. Priscilla, who had gone to school up to Form IV, was then working as an agricultural extension officer with the Oyugis Integrated Project. She got a loan, bought a parcel of land at K’Ochieng Sub-Location about 5kms away from her marital home and built herself a house with the help of her support group from Médecins Sans Frontières (MSF). She worked with the project until her contract expired in May 2005.

During the same period, Priscilla tried in vain to access her late husband’s benefits from the Amani Center where he had worked. In tandem with the practice of ‘politics of the stomach’ described in Chapter Four, the social security system in Kenya is poorly developed and retirement benefits often get embezzled by state officials (see Wrong 2009). She had also learnt that upon her husband’s death, the Amani Center had collected some money through *harambee* (communal effort), about Ksh.47,000 (USD. 645) for the children’s school fees, but this was never released to her. She was now a victim of personal crimes as well. As a victim of ‘culture’ and personal crime, Priscilla felt disenfranchised. She could neither enjoy her full rights as a Kenyan citizen nor as a member of Luo society. When she was invited to a Luo leaders’ *baraza*²⁵¹ by Doro on December 1, 2005, she raised the matter and things started to change.

### 7.3 Luo Leaders’ Baraza for Mond Liete

The Luo leaders’ *baraza* was organized by a consortium of NGOs with funding from the policy projects of the United States Agency for International Development (USAID). The consortium drew membership from the Kenya National Commission on Human Rights (KNCHR), the Jaramogi Oginga Odinga Foundation (JOOF) and the Governance, Justice, Law and Order Sector Reforms Programme (GJLOS)²⁵².

Although the aim of the *baraza* was to engage with the USAID and World Bank-led agenda of women and property rights in Luo Nyanza, it was convened to coincide with the 1st December World Aids Day. To accommodate both interests, the organizers adopted a broad theme of HIV and AIDS as well

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²⁵⁰ As stated in Chapter Three, these are chiefs who have a colonial pedigree. The chiefs are part of an elaborate structure that stems from the Office of the President.

²⁵¹ This is a Swahili word which refers to public assemblies that are usually held outdoors. But the word can also be used liberally to refer to a ‘space’ of free engagements and expression (see Haugerud 1997).

²⁵² The GJLOS project is an initiative of the GoK in partnership with European development partners who have worked on an agenda to reform key governance institutions like judiciary, the executive and the legislature. The aim is to promote better embrace of the principles of human rights.
as cases of dispossession of widows of their inheritance and property in Luo Nyanza. It was named the 1st leaders’ baraza and the venue was the Sunset Hotel in Kisumu. The background to the meeting was formed by glaring statistics which suggested the increased prevalence of HIV and AIDS in Luo Nyanza and all Luo leaders invited were given the 2005 statistics (latest at the time) on the status of HIV/AIDS prevalence in Kenya.

Table 7.1: HIV adult (15 – 49 years) Prevalence by Province and Gender (2005)

<table>
<thead>
<tr>
<th>Province</th>
<th>Male</th>
<th>Female</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nairobi</td>
<td>7.9</td>
<td>12.0</td>
<td>10</td>
</tr>
<tr>
<td>Central</td>
<td>2.1</td>
<td>7.9</td>
<td>5</td>
</tr>
<tr>
<td>Coast</td>
<td>5.1</td>
<td>7.0</td>
<td>6.1</td>
</tr>
<tr>
<td>Eastern</td>
<td>1.3</td>
<td>5.4</td>
<td>3.4</td>
</tr>
<tr>
<td>North Eastern</td>
<td>1.4</td>
<td>2</td>
<td>2.6</td>
</tr>
<tr>
<td>Nyanza</td>
<td>8.4</td>
<td>13.2</td>
<td>10.8</td>
</tr>
<tr>
<td>Rift Valley</td>
<td>2.8</td>
<td>5.4</td>
<td>4.1</td>
</tr>
<tr>
<td>Western</td>
<td>3.7</td>
<td>5.6</td>
<td>4.7</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>4.0</strong></td>
<td><strong>7.7</strong></td>
<td><strong>5.9</strong></td>
</tr>
</tbody>
</table>


Table 7.1 above shows that at the end of year 2005, Nyanza had the highest prevalence of HIV/AIDS in Kenya. Explanations for these statistics have varied and are often dependent on experiences of both social and state power. For most people in western Kenya, the high prevalence of HIV and AIDS is caused by the state’s negligence of Luoland. They (Luo people) have not been ‘eating’ nor had maendeleo been brought to them.

For institutions like USAID that funded the baraza, it is lack of private ownership of property and barriers to market access that make women vulnerable to HIV and AIDS. To the state and many other Kenyans, it is ‘cultural practices’ such as polygamy and ter commonly referred to as ‘wife inheritance’ that promote high prevalence of HIV and AIDS in Luoland. The objectives and uses of the baraza were therefore as many as were the perspectives of its organizers and participants.

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253 I am aware that having HIV is not synonymous with having AIDS. It has therefore been useful to separate the two so as to deal with the often discriminatory discourse and practice that prevail when they are entangled. But most statistics collected by Kenyan authorities tend to combine the categories.
According to one of the main organizers of the baraza, the Kenya National Commission on Human Rights, the central agenda for the 1st December baraza was to examine women’s access to ARVs, land and property, their inheritance rights and their legal capacity (KNCHR 2005). Present at the meeting were mond liete and kiye (orphans) from all districts in Luo Nyanza, the Luo Council of Elders, local politicians and leading Luo scholars such as Professor Bethwel Ogot, the chancellor of Moi University, who moderated the baraza. Invitations to mond liete and kiye to the meeting were coordinated by Doro who at the time was on an Internship at the Jaramogi Oginga Odinga Foundation. Participants from almost all districts in Luo Nyanza arrived at the Sunset Hotel in Kisumu a day before the baraza. Doro and other organizers decided to have a preparatory session with mond liete on the eve of the material day.

However the night did not go as anticipated. The participants and organizers wept most of the night as most mond liete couldn’t hold the grief of losing their husbands and being dispossessed of their marital property in the name of culture (Interview with Dorothy Awino, February 2009). When I met some of the participants a year later, several of them were still weeping all through our discussions. It is Doro and the Jaramogi Oginga Odinga Foundation that had identified most of the participants to which the baraza’s report observes that “… 90% of women in attendance were young mothers in their 20s. This was an age bracket that was both economically vulnerable and too tender to withstand widowhood” (USAID 2010). Amongst the mond liete present at the baraza was Priscilla Oluoch.

The next day, discussions that Priscilla describes as having been “open but painful” followed. Present at the session were Ker Riaga Ogalo and elders from all branches of the Luo Council of Elders. National political leaders from Luo Nyanza including the later Prime Minister Raila Odinga and Gem Member of Parliament, Jakoyo Midiwo, were also in attendance. There followed narrations from mond liete and kiye (orphans). One after another, they spoke of how they had been disinherited by their brothers-in-law, mother-in-law, co-wives, neighbours or even their own children. While it became apparent that the practice of disinheritance had long been common in Luo Nyanza, the context of HIV and AIDS had been highlighted to demonstrate how rampant the practice had become. However, even with the multiple ramifications of AIDS, it is the creative reading of culture and its resulting practice of subjectivity that this dissertation builds on.

At the baraza, each chi liel narrated her experience of what had happened after the death of her husband. Most of those who testified suggested that they had been dispossessed and left poor after the death of their husbands. After each testimony members of the Council of Elders present were asked to

254 These include Siaya, Kisumu, Homa-Bay and Migori districts.

255 Demonstrating the difficulties of undertaking ethnographies of injustice (Riles and Jean-Klein 2005).
confirm whether Luo culture had been violated or not. Some testimonies they said were part of cultural practices while many others they dismissed as being selfish distortions of culture. After that followed the proceedings of the KNCHR representatives who argued that the problem was not that culture was bad but rather, some Luo people needed to differentiate between ‘bad’ and ‘good’ culture (Interview with Catherine Mumma, December 2011). Doro recalls that this separation of authentically positive culture from the harmful cultural practices often manifested through practices such as dispossession of mond liete.

While giving the concluding remarks at the end of the baraza, Ker Riaga Ogalo confessed that he had witnessed change in ‘the Luo culture’. Some of these changes he claimed had detrimental consequences while others he argued were for the good of the Luo nation. He however registered displeasure at the selective and selfish interpretation which some members of the Luo community had given certain cultural practices. He singled out amongst these ter which, although initially meant as a safety net for widows, had been abused and used to the detriment of the same women whom it was meant to protect (USAID 2005: 23).

On the other hand, the Chair of the Kenya National Commission on Human Rights at the time, Maina Kiai observed during his concluding observations that ‘African culture’ has what he called safety nets. He noted that “…these cultural safety nets among Kenyan communities had been insurance mechanisms that cushioned the vulnerable, especially widows and orphans). These ‘insurance mechanisms’ were couched in kinship ties with rather specific rights and obligations (USAID 2005: 15). He also added that the KNCHR would work with institutions like the Luo Council of Elders (amongst the Luo) and other similar institutions like the Njuri Ncheke (amongst the Meru) and the Gada system (amongst the Borana) and also endeavour to make them ‘human rights friendly’.

It is at this baraza that Priscilla held her first meeting with Ker Riaga. From those discussions, she realized that the arguments of ‘culture’ that were used to dispossess her were flawed. She reports:

I was made to understand that the Luo people gave chi liel time to mourn her husband. One could even be given a year to mourn. It was only after a woman had mourned her husband that discussions about her custody could come to the table. Besides, Ker told me that not all women would be taken up. Some were called ‘dhako makech’ (a bitter woman) or dhako ma mikiye (a post-menopausal woman). These women could not be re-married.

She sought intervention through Ker Riaga Ogalo after the Kisumu meeting. It is then that she realized that Ker is related to her late husband—a relationship that further compelled him to deal with her case. After two meetings, Ker got in touch with the Chief and the District Officer to seek intervention in Priscilla’s matter. Ker insisted that Luo culture was more interested in protecting the welfare of chi liel and kiye than appropriation of property. This contestation is perhaps a more useful engagement with culture. Ker insisted that as a wife to the late Oluoch, Priscilla was the custodian of
her husband’s lineage. For as long as Priscilla was still married to Oluoch, it is through her that Oluoch’s children would get their inheritance (Interview with Ker Riaga, November 2009). Consequently the family agreed to give Priscilla access to her late husband’s land. Her brother-in-law, in whose name the land was registered, agreed to sub-divide it and give Priscilla the title deed for her piece of land. On this premise, Priscilla got access to land as a member of Luo society i.e. a Luo citizen endowed with culturally situated rights.256

As had been noted previously, during the conflict, Priscilla bought a parcel of land of her own at Oyugis. Although she was yet to acquire a title deed for this parcel, she built a home on her new plot with the help of the Oyugis Integrated Centre. This is property that she acquired as any other civic and rights claiming citizen of Kenya. She had bought a dairy cow to generate income as well as supplement the family’s milk needs, especially as she intends to live with her grandchild.

Priscilla had also planted some napier grass for the cow and has access to the only dairy cow left from the five she originally had at her matrimonial home. She does not intend to move back to her marital home but she is happy that she can now access the land for her sake and that of her sons. She visits her mother-in-law who in turn visits her in her new home. The friction has lessened. Her mother-in-law loves the children, although her brother-in-law is still distant and hostile and does not visit. Her children are happy in their new home. She has been on ARVs and is doing well although she suffers from frequent heartburn. Besides her personal life, Priscilla has now become an advocate for many other women. She emphasized that:

And from there, I have also been advocating; I have been going to the community to talk to women who have the same problem and refer them to the Luo Council of Elders and many have been assisted. And you know what I learnt from my case is that people just come to distract you. I also learnt that they usually start from the children. They tell them that you see, if your mother is going to do this, you are all going to die. When this happens, children panic and they put pressure on you to adhere to what ‘the culture’ wants or dictates. So when the Luo Council of Elders gave us assurance that this culture is this way and not the other, which is ‘they gave the real meaning of culture’, you realize that people are using culture for their own purposes. And the process by the Luo Council of Elders is something that takes like two to three days. It is not long and elaborate like going to court where you follow each other and start getting a witness, money and people to defend you and so on. So I think the Council has assisted so many women and me; I am grateful. I tell you right now you can see me smile and laugh, I used to cry a lot. At the first workshop for instance, we spent the whole night crying. That was when we first met Dorothy and the other facilitators. But you see we were all women so we could support each other. Then again, there is this issue of HIV and AIDS. This is now what has affected us completely as women. Like me, I can’t say what killed my husband. I suspected but after his death, I decided to go for a HIV test and I tested positive.

256 Often, critiques of human rights produced in the postcolonial like that of Jack Donnelly (1990) have suggested that entitlements such as those claimed by Priscilla are premised on one's status, which is often determined by one's ancestry, age, sex and occupation. But evidence from this ethnography shows that there is a large discretion for personal mobility only that it is constructed differently and it tends to be informed by interconnectedness.
When I told my mother-in-law that I was HIV positive it was another issue as they claimed that I was defaming the name of their *dala*. But the paradox was that at the same time, their perspective was that even if they dispossessed you of your property, you would be there to stay for a few months after the death of your husband. But you can imagine that from 2001, I am still alive and strong (she laughs loudly). And remember that at the time when my husband died, my second born was in class four; he is now in form four. And I struggle with my menial and precarious jobs and educate the children. So you know if I would have succumbed to that inheritance anything could happen. Because you see this man who wanted to take me as a wife, may have been hesitant to go to a Voluntary Counseling and Treatment (VCT) centre to determine his HIV status and may have refused to use protective devices. So maybe by now, I would have fallen pregnant once more or even been re-infected by the HIV-virus. My health would have deteriorated. But you see, I went to the hospital, I got counselling and started using ARVs and I am following the various requirements of living positively (25/7/2009).

Priscilla’s self-representation as a critical subject rather than a ‘victim’ of culture is telling of the everyday engagements in the era of human rights in postcolonial Kenya. Besides the pragmatic resolve of Priscilla’s predicament, the model used here is also a shift from the dominant ‘paradigm of victimization’ (Mbembe 2002) associated with the logic of human rights discourse. The Luo Council of Elders (which is itself mediated by various economies of interest) in this case tends to use ethnicity to promote civic virtues rather than as an instrument of exclusion that is often associated with ‘political tribalism’. John Lonsdale (1994:133) has referred to this formulation and promotion of ethnicity for the purpose of fostering solidarity and civic virtue as “moral ethnicity”. This perspective of moral ethnicity finds a lot of convergence with the idea of human rights.

In Priscilla’s narration, there is a never-ending debate of ideas and expressions of the past and present in Luoland. What constitutes culture, good behaviour and history of Luo people is produced by the actors at the *baraza* and later the intervention of *Ker* through a selective economy of interests, history and context. It also demonstrates that in the marriage and patrilineal social system of the Luo people, there exist intricate and ever-changing power relations with which women can claim their place and entitlements. It is this idea of malleability of what culture is and what culture can do that is instructive to human rights workers and scholars when reading human rights practices in the postcolonial or in a cultural context.

Since Kenya has ratified over 30 United Nations human rights conventions, it would have been a common-place expectation that Priscilla goes to court or uses instruments such as CEDAW to petition against threats to her rights to own property. But the knowledge systems and script of personhood fronted by the Luo Council of Elders and Priscilla tend to question this unproblematized and undifferentiated agency or subjectivity in mainstream human rights discourse (Nyamnjoh 2002:125). Priscilla’s socio-economic location and script of personhood (which is also contested) by Luo people tend to influence perspectives that she pursues in realizing her rights. As such, while she and *Ker* use the same universal grammar of rights, its practice and manifestation was being instructed by a specific
materiality, politics and histories thus demonstrating that neither agency nor subjectivity is ‘natural’. Rather the two (agency and subjectivity) are constituted and marshalled in changing contexts of indemnity, economy of interests and positioning.

Priscilla’s subjectivity is exercised as both co-joined to her local society as well as an individual citizen of Kenya. Using the language of belonging, she benefits from presumed Luo tradition, customs and culture and then appropriates the same language to acquire private property. Her idea of ‘rationality’ therefore moves beyond the criteria envisaged by the dominant human rights discourse that has been explained by individualist, market-driven, autonomous and litigious perspectives (Kapur 2006, Comaroff and Comaroff 1999).

Rather than merely engaging from the categories of a legal rights regime of ‘duty bearers’ and ‘right holders’, the realization of human rights are often associated with re-alignment and redefinition of societal institutions and relationships. The Luo Council of Elders, Priscilla and many Luo people in western Kenya engage the notion of human rights from their *habitus*, cultural and civic citizenship. This way the genre of human rights practiced in postcolonial Luoland tend to be a construct of particular situations, histories and power relations. Priscilla starts her claim for justice by seeking her recognition (Englund and Nyamnjoh 2004) as *chi liel* in Luoland.

The officers of KNCHR and the Luo Council of Elders were focused on the ‘authentication’ of culture at the *baraza*, while women led by Doro used the space of the *baraza* to renegotiate culture in a context of the economic and health conditions that prevailed. It was apparent to them that the debate on the authentication of culture was taking place in an asymmetrical situation. Rather than engage culture as a patriarchal structure of ‘list of rules’ that is presumably detrimental to women, what Doro and her collaborators in the KNCHR have done is to engage in multi-focal readings of human rights, culture and tradition. In this strategy, they question not ‘culture’ but the motif of ‘culture’ and thus as the Ugandan feminist Sylvia Tamale (2008) has argued, they explore the potential of ‘culture’ to deliver women’s human rights. Tamale (2008) has argued against binaries between ‘culture’ and ‘human rights’ that plays into the hands of those who perpetuate and solidify the existing structures of patriarchy (2008:47). What this means is that away from the totalizing notion of human rights discourse, there are positional, sophisticated and contested meanings. These are ingrained but not dogmatic, sensitive to but not maudlin about women’s experience. In my reading, such discursive and domesticated agency in experiencing human rights tend to offer a located mode of citizenship that is far more effective than universalizing the idea of the subjects of human rights as conceptualized in Western post-enlightenment thought.

The practice of rights that emerge from this situation is one that traverses binaries such as ‘local’ and ‘international’, ‘modern’ and ‘traditional’, ‘old’ and ‘new’, or even ‘culture’ and ‘human rights’. This
is also attested in critical ethnographic work by Becker (2001: 62) in South western Ovambo in Namibia and Moore’s (1989) findings from her studies amongst the Chagga of Mt. Kilimanjaro, Tanzania during the settlement of land disputes and serve to demonstrate that societies do appropriate the ‘new modernities’ within their ‘multi realities’.

When I met Priscilla in another workshop convened by the KNCHR in 2011, she told me that she now enjoys access and usufruct rights to her matrimonial land while, at the same time, exercising individual ownership of yet another parcel of land. This status is neither conflictual nor antagonistic. As Nyamnjoh (2002a) has observed in the Bum Grasslands of Cameroon, the result of these encounters between what is otherwise exogenous and another that is endogenous produces modernities that are not reducible to either but superior to both (Nyamnjoh 2002a: 135). In this multiple ownership and control of land and property, Priscilla demonstrates as Arjun Appadurai (1996: 180) has argued, that rather than experiencing the arrival of the Western modernity of human rights as the disintegration of their ‘old’ worlds marked by the establishment of an unproblematic new and ‘pure’ code of communication and rationality, most Luo women tend to visualize the rights regime as made up of living realities that juxtapose and interrelate with different materials, thus embracing notions associated with aspects of both ‘modernities’.

The practice of human rights in the case of Priscilla also demonstrates the ongoing conversation and negotiation between and within ‘cultures’ (in both reified form and contested contemporary practices as a process in perpetual movement through time) in the discourse of human rights. This should be instructive to the agents of human rights in postcolonial Kenya. Realizing the limits of legal interpretation of human rights, the KNCHR adopted the strategy of working with the Luo Council of Elders in 2006. During my fieldwork I met 20 other women who, like Priscilla were working with Ker, Doro and KNCHR to pursue their rights to property in western Kenya not from the premise of a court’s legalized rights regime alone, but from a perspective that borrows from their habitus and belonging in Luo society and Kenya. Among these women, six reported that they had been resettled in various homesteads. The KNCHR reports that:

...in partnership with the Luo Council of Elders and local provincial administration, [the project] has been able to resettle forty-two cases back to their matrimonial land through buying materials to rebuild their homes or transport households back home. Thirty-four others have received assistance to pursue marriage certificates, title deeds, and letters of administration and even to take disinherit children back to school through an intervention fund from the Canadian International Development Agency- Gender Equity Support Project (KNCHR 2009: 5).

It is, however, the multiple readings of culture and the open-ended perspective of liberalism that is intriguing and which offers an invitation to be taken seriously. Scholars from myriad disciplines such as feminist lawyer Silvia Tamale (2008), legal historian Chanock (1998) and the anthropologist Wilson (1997) have urged human rights actors to abandon their dominant view of ‘culture’ as being averse to
human rights and adopt the kind of discursive model demonstrated in Priscilla’s practice. A situated reading of human rights, paying attention to ‘functions’ of rights rather than its classical definition makes intelligible multi-vocality to the practices of human rights in the Kenya postcolony.

7.4 Resettling Ascar Madote

My meeting with Ascar (commonly known as Mama Victor in reference to her second born son) was a year later when I was invited for her goyo dala by Catherine Mumma, a director of the Kenya Ethical and Legal Network on HIV & AIDS (KELIN) and the Nyakach Council of Elders that had supported Ascar in financing and negotiations to have land for her dala. Besides members of the K’Oguta Clan, also invited were Wambui Kimathi and Lawrence Mute (both serving commissioners at the state-funded Kenya National Commission on Human Rights at the time). Representatives of the media, the area’s Member of Parliament and church leaders had also been invited for this occasion. The goyo dala would settle a complaint that Madote had filed with FIDA-K in 2006 accusing one of her yuuche of dispossessing her of her rightful inheritance. In her petition as drafted by FIDA-K, she claimed that:

John Juma Oburu (who is a paternal cousin to her late husband) had abused his position as custodian of family land LR. No. Kisumu- K’Oguta West/ 1889. She charged that instead of holding this parcel of land in custody for Ascar Akinyi Ogembo and other legitimate heirs of the late Tom Ogembo Oremo who died on 22nd March 1998 and was buried on the parcel of land in question, Mr. John Juma Oburu had sold the land to Sajius Otieno Ochola. She contested that neither she nor other legitimate claimants to the said parcel of land had given consent for the sale. She further lamented that when Sajius Otieno Ochola bought the land, he evicted her and her family leaving them with no shelter, source of livelihood or belonging. In her plea to the courts under Sections 28 and 148 of the Registered Land Act and Orders XXXVI and XXXIX rule 1 of the Civil Procedure Rules, she was seeking a directive from the court that the Land Registrar in Kisumu should not divide the land LR. NO. Kisumu/ Koguta West/1889; the said court should determine her beneficial share from LR. NO. Kisumu/ Koguta West/1889; that pending the hearing and determination by the court, Mr. John Juma Oburu be restrained from selling, transferring or otherwise disposing LR. NO. Kisumu/ KogutaWest/1889 (FIDA/KSM/GEN/18/07).

The case of Mama Victor was filed by FIDA-K at the Kisumu Magistrate’s Court in November 2006. In their petition FIDA-K asked the court to arbitrate and accord Madote secure tenure through a registered title. By December 2009, even human rights officers at FIDA-K were grappling with the legal difficulties in Mama Victor’s case. The case had been at FIDA-K since 2004 and not much had changed. She was still living in a dilapidated rental house near the Oyuma Market Center, West K’Oguta. She had no title deed for the ancestral land left behind by her late husband, thus her claims were primarily anchored on legitimate expectations based on ‘Luo culture’ and the Succession Act. To strengthen her case, Mama Victor took the grandmother to her late husband to FIDA-K to testify that she had legitimate claims. None of these interventions resolved her case. There were also changes at FIDA-K after the post-election violence that rocked Kisumu in 2007-2008. Some of the key officers dealing with Mama Victor’s case moved to other positions within FIDA-K or new employment in other organizations. Nancy Abisai who had initially worked with FIDA-K had now moved to KELIN as the Chief Executive Officer. She had served the litigation department at FIDA-K, Kisumu for 5
years where she had ended up consulting with Luo elders more often than before. In any case, during the 25 years of FIDA’s operations, they had realized that cases argued on the basis of ‘culture’ take rather long to settle because of the numerous versions of the same ‘culture’ that can be presented on a single case. Indeed, this was one of the reasons why FIDA-K had gone through a paradigm change away from the 1980s strategy when they had described councils of elders as relics of patriarchy that needed to be abolished (FIDA 1990).

Frustrated by the long wait at the Kisumu Magistrate’s Court, Nancy Abisai, CEO of KELIN convened a session on April 2009 between KELIN, the Nyakach Council of Elders and actors like the local village chief, administrative elders and church leaders to deliberate on cases of *mond liete* such as Mama Victor. About 20 *mond liete* attended from various locations in Nyakach. The meeting was facilitated by KELIN with the assistance of John Ondigo, the chair of the K’Oguta branch of the Nyakach Council of Elders. At the meeting, Mama Victor was asked to narrate her story from when her husband passed on to how she had been dispossessed by *yuore*. She narrated that after the death of her husband, one of her *yuore* named John Juma Oburu sold the parcel of land where they had lived, razed her granary and asked her to vacate her house. She then moved to Bar Oyuma Shopping Centre.

All those participants with cases similar to that of Mama Victor were asked to sit next to her. The twenty *mond liete* present gave their situational and historically specific narrations of what had contributed to their current status of dispossession. In the end, the testimonies showed such varied factors at play that only one other *chi liel* was able to join Mama Victor. Influenced by the legal notion of precedent, KELIN had adopted Mama Victor’s particular experience as the master narrative and basis of ‘measuring’ if the violations that they were looking for had occurred. Such selection process explains why there is an ever-increasing number of *mond liete* as ‘cultural refugees’ in shopping centres in Nyakach and much of Luoland. At the end of the session, Mama Victor stated her immediate priority as having her own *dala*.

After the meeting, KELIN engaged elders from Nyakach and took them to task as to why ‘Luo culture’ that protected *mond liete* was not being practiced. Many factors were mentioned, but the most quoted is what the elders cited as the competitive nature of ‘these days’ that had put everyone in competition with their neighbours. They claimed that even *ter* had been corrupted by self-interested men and their women collaborators leading the otherwise well-meaning institution into disrepute so much that the *jo-ter* (plural of *ja-ter*) are now derogatorily labeled as ‘terrorists’. This is a term often used in Luoland to refer to men who are notorious for engaging in *ter* for self-serving purposes rather than fulfilment of customary requirements. In the ensuing discussions between KELIN and the
Nyakach Council of Elders, it was agreed between the two institutions that the Nyakach Council of Elders shall implement ‘Luo culture’. This led to another meeting in July 2009 where mond liete and other stakeholders were invited once more. Again, Mama Victor was asked to narrate her story. Every time another chi liel spoke, she was asked to repeat her narrative again. A comparison was then done by the elders and KELIN. Most narrations given did not match that of Mama Victor. The only exception was a chi liel who introduced herself as Josephine. The Nyakach Council of Elders and KELIN found her case to be ‘authentic’ as it was similar to that of Madote. At the end of the meeting, the elders announced that they would open discussions with the various sub-clans to facilitate ‘resettlement’ of Mama Victor and Josephine. KELIN promised that if the elders provided land that was culturally suitable for the respective mond liete, KELIN would contribute iron sheets and some finances to assist in putting up dala for them.

Mama Victor was later invited for several meetings by elders of the K’Oguta sub-clan where she is married. During one such meeting in August 2009, the elders didn’t want to go back to what had happened between Madote and John Juma Oburu. They wanted to know the best reprieve desired by Mama Victor. She replied that all that she needed was her own dala. She stated that it was shameful and demeaning to live at the Bar Oyuma Shopping Centre especially now that, with eldest daughter already married, it would not be possible for ochene (her daughter’s husband and his relations) to visit her or give their bride price. She also complained that her son, Victor, who was already 21 years old, could not build his simba as they neither had any family land nor space for the practice of culture at the shopping centre. After numerous sessions, the elders finally announced in November 2009 that they had negotiated with the late Ogembo’s grandmother who identified another part of the family land that was part of Ogembo’s inheritance from his father, Oremo. The elders visited the area and approved it as a suitable location for dala. A date for that purpose was then set for December 18, 2009.

7.5 The Month of December

As a rule, goyo dala starts at dawn and must end by sunset. It typically happens in the post harvest period when there is an abundant supply of food and the people are under no pressure of work. If goyo dala effectively helps the people realize the right to housing like KELIN argued, then it is as if ‘human rights has a season in Luoland’. For this reason, KELIN, Madote and the Nyakach Council of Elders chose December for this most significant undertaking.

The month of December is characterized by massive festive movements and the completion of ‘old’ projects in the ‘homeland’ among many ‘ethnic communities’ in Kenya. Marriage ceremonies, birth celebrations, memorial ceremonies, weddings, parties of all kinds, cultural festivals to mark Christmas, goyo dala ceremonies, ‘wife inheritance’ and the removal of lower teeth among the Luo
while, among other peoples, rites of passage such as circumcision are most often carried out during this time. Some of enactments of culture are accompanied by ritual bodily preparation, including ceremonial preparation of the hair and anointment of the skin. Among some communities, this period symbolizes some kind of ‘coming home’ from the wilderness into new houses.

In some areas, December is a special season for boys and girls who earlier in the ending year had braved the circumcisers’ knives to turn a new page in their lives. For many of them this month symbolizes the passage from childhood to adulthood. In Luoland, it is a period for conducting levirate unions, *tero buru* (a ritual carried out to cast away evils spirits after burial of adults), *goyo dala*, *gero simba* (building the young man’s first hut), the introduction of marriage partners as well as other ceremonies. These rituals, ceremonies and cultural festivals are the playing out of the people’s understanding and communion with the realities of ‘those days’ for most *wananchi* and the political elite in Luoland.

West K’Oguta Sub-Location stands 61.2 kms northwest of Kisumu City. It was a rather quite area until the Sondu-Miriu hydroelectric power project was completed in 2009. The dam has had significant impact on economic activities in the area. When I attended *goyo dala* for Ascar Madote on December 18, 2009, it took me and my assistant about two and a half hours to drive from Kisumu to the site. We had been given directions the day before by Catherine Mumma. From Kisumu City we headed to Katito Trading Center and turned onto K’Olweny-Kendu Road. Once in K’Olweny, we took the road to Nyamarimba on the way to Sondu-Miriu power project, and accessed the site through Mbora Primary School. We had just found parking and were figuring out the exact location of the home when we were approached by an energetic young man who posed: “How are you?” *Oora ni abi akau, mme poteza njia…” (I have been sent to direct you home). He jumped into the car and we were set to the location of *goyo dala* after he confirmed to us that we had taken a wrong turn somewhere. Fortunately the car was able to drive through the rocky area as it was a sturdy off-roader. As we subsequently learnt, the young man was Victor Omondi, the second born son to Ascar Madote. He started with his rendition of his mother’s ordeal:

We had built a house when my father was still alive. Soon thereafter, he fell sick and died after a short period. When he died my mother could not support all of us—six children. We were evicted from our house by a brother to my late father. I joined a Catholic White Fathers Missionary who enabled me to be an evangelist at Malinda. So *Mama* (mother) stayed at the trading centre after she was evicted from our house and received death threats from one of my uncles who warned her to leave the piece of land.

She reported the matter to FIDA-K and the local authorities but no immediate action was taken. Left with no option, she vacated the land together with all of us and went to stay at the trading centre. That

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257 While traditionally, Luos are not known for circumcision, a word for this practice exists in Dholuo - *Nyango* (Ayany, 1989) Most recently, there has been an upsurge in Luos going for medical circumcision mainly due to the World Health Organization campaign that associate circumcision with low rates of HIV infection.
has been our ‘home’ until recently when she called us to come and announced that we would be going to make a new home so we came back.

Finally, the day had come. His mother was to be given her own dala. Madote had left Bar Oyuma Shopping Centre early that morning together with her son, a pastor and one of her yuore. When we arrived at about 7.30 am, we were joined by yowuoyi (young men) at the construction site where the meticulous adherence to rituals in realizing what human rights NGOs like FIDA-K and KELIN call the right to a house was revealing.

Some women were ferrying soil to be used for making mud for muono (filling mud into the wall) while other women were ferrying water from the nearby swamp after the jater (levier) ‘had put his labour’ to the house. There were different people walking up and down, young and old, men and women, girls and boys. All seemed to be busy, girls carrying buckets heading to the river and young women cooking food that filled the air with an aroma. At the temporary fire place was a three-stoned firewood stove, a feature common in Luo kitchens.

There was music from Radio Lake Victoria and shouting, workers asking for tools, nails, panga (matchete), saruru (mattock), hammer, sisal rope and many other tools. Soon the holes were ready for insertion of the poles that would support the new house. By 11.00 am those at the building site could not hide their expression of fatigue, thirst and hunger that was all escalated by sweating in the scorching tropical sun. It is common practice in Nyakach and many parts of Luoland that od wuon dala (first house for the home owner) and simba for the eldest son, be complete by the end of the day (Mboya 1938: 12). And so those working at the construction site had to go for lunch in turns so as to ensure a continuous flow of work. This way, it did not take long before the structure of od wuon dala was erected with fitos (thin poles) tied across in rows and columns, spaced systematically in a way that the structure could be filled in with stones and mud. Soon after this, it was time for muono. The floor was dug at the centre to obtain soil for mixing with water (normally clay and loam soil are used for a semi-permanent house). Once more, it was jater who was the first in muono. Alongside him were Madote and the other relations (mostly women this time) who had come to her aid. There was no other construction going on for the son’s simba. Such variation is testimony that what is considered Luo custom and traditions of doing things have been changing over time. Victor was in a theological school and planned to build his simba much later.

Jodongo’s joy was evident through their mbaka (loosely structured debate and storytelling) mostly about how they had resolved the case of Ascar Madote whom they referred to as Mama Victor. The joint interventions with KELIN seem to give credence to the mantra that lineage and clan are key registers of cultural citizenship (Mamdani 1996). Goyo dala was about Madote ‘becoming a
complete Luo’ while for KELIN and the KNCHR it was about realization of the right to property, right to a home as well as a whole gamut of claims.

### 7.6 Christian Luo and Dala

It is in establishing a home where engendered power structures become evident among the Luo people. While the man is the head of the *dala* (homestead), the woman is the head of the *dipo* (household). It is the prerogative of a man to establish *dala* but he cannot undertake this without a wife and a son. This is by all means the dominant notion of culture, but it hardly applies to all Luos or all the time. In practice, I encountered numerous contestations and mutations of this narration of ‘culture’. Even Luo people themselves are aware of these heterogeneities which they call *kido* (variety). *Kido* are distinctions amongst clans, families and maximals. *Kido* also becomes manifest during various moments where there are competing interests or other contestations. Thus production of knowledge and practice of human rights in Luoland is based on never-ending negotiations and contestations often allowed as *kido*.

On her part, Ascar Madote was not just a Luo woman; she was also a member of the Disciples of Mercy Church, one of the evangelical Christian churches that have spread throughout western Kenya since the colonial era. During our chat as work went on, Madote reminded me that as a ‘born-again’ Christian, she could not do all things required by culture. Her consolation was a common maxim in Luoland, *Yesu oloyo* (Jesus can resolve it), which has been used to explain away traditional rituals and customs that get abandoned because they are seen as part of a ‘pagan’ past. This was her way of explaining the mingling of ‘Christianity’ and ‘tradition’ observed in the *goyo dala* ceremony. At the same time, she claimed that if she did things wrongly the wrath of *jok* would deny her peace in her *dala*.

Even then, there is supposedly a close link between the function of Christian religion and culture in western Kenya (Lonsdale 2008). During *goyo dala*, it is often argued that rituals such as that of the ancestral fire can be replaced by the Christian notion of Holy Spirit while *jater* can be replaced by the imaginary presence of Jesus Christ. This substitution of ‘culture’ and ‘Christian religion’ can be linked to the model of Christian evangelization in Kenya since the 19th century which posited ‘African culture’ as part of a backward paganism while Christianity was associated with enlightenment and being ‘modern’.

In terms of function, however, most Christians who claim to have been converted from ‘Luo tradition’ (as was also evident in the case of *jo-nanga* in Chapter Three) perceive Christianity to be nothing more than a sophisticated substitute for ‘cultural rituals’. For Ascar, rather than have *jater* as the first person to start off her *dala*, it was the Pastor from her church, Disciples of Mercy, who
performed the ground-breaking by digging the first hole for the poles and then offered a prayer. However, during my interactive sessions I managed to identify a yuore who accompanied her early that morning and was the first to do the muono, a key ritual that is reserved for wuon dala. He was in his early fifties and had been present since early that morning, when he acted as an aide to the Pastor as the latter dug the hole. During our conversations, he confirmed that he was the jater. But he was also quick to point out that he was not the kind of jater as was practiced in the ‘old days’ by Luo people; rather, his role conformed with the doctrines of the Christian religion.

Rather than spend the night at Ascar’s bed, he was going to ‘hang his coat’ in the od wuon dala (the house of head of homestead) on the first night. The use of Christianity to ‘substitute’ ritual (something common in Luoland since the 1940s, see Shadrack Malo 1953), is an indication of levels of heterogeneity and how production of contemporary practices in western Kenya appropriates from as many modernities as they can lay their hands on. Cohen and Odhiambo (1989: 10) have narrated how the entrance of Christianity in various families such as those of Musiga family (in Ugenya), the Nyong’o family (in Seme) and James Oganga family (in Alego) became an important part of deciding what gets carried on as part of Luo tradition and customs. It is such multiplicities of modernity that assists us in understanding and navigating the practices of identities and human rights in Luoland.

7.7. The Nyakach Council of Elders

A detailed discussion about councils of elders was undertaken in Chapter Three, but such histories never end. The Nyakach Council of Elders was established in 2008. It also seemed that goyo dala for Madote was organized by the Nyakach Council of Elders as an act of resistance to the possible hegemony of the Luo Council of Elders (anonymous interview, December 2009). When the Luo Council of Elders was re-established in 2004, its first Ker was elected from Karachuonyo, South Nyanza. Its various other representative ‘elders’ were chosen from other administrative districts. The Nyakach elders (and many other Luo people) complained about the candidature of this ker, noting that a majority of the previous holders of the office of ker had come from South Nyanza. Most importantly, there were complaints that by keeping to the state’s district boundaries, the Luo Council of Elders had lost out on agnates and lineage relations.

For this reason, the Nyakach Council of Elders was established as a structure that is made of more ‘natural leaders’ as opposed to the Luo Council of Elders. I met most of the Nyakach elders and had long discussions with Jaduong’ Owiyo (a former primary school teacher) and chair of the Nyakach

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258 This is a common symbolic imagery of presence often used to signify the presence of the head of the household. It is also used by government bureaucrats who are known to hang their coats on their chair and keep off duty for the rest of the day.
Council of Elders. Most of the members of the council according to Jaduong’ Owiyo are not necessarily the eldest in their Dho-ot but those who are both considered the best-informed about Luo culture and have some basic literacy. Jaduong’ Owiyo himself told me that there are many elders in Nyakach who are knowledgeable about Luo ways, but some could be too old while others are ‘illiterate’. Such members of a Luo clan can be invited once in a while to advice on what needs to be done but are not admitted as members of the council (interview with Owiyo, December 2009). What was intriguing to me was that most members of these councils of elders have been in at least one of the civic education sessions by the now numerous human rights NGOs. It seems appropriate to conclude that the very foundation of the councils is contextual and contemporary and cannot claim to be pre-colonial when age (biological and social) and relative wisdom (demonstrated by their inability to handle some issues, forcing them to call in other elders) were used in convening structures of councils of elders.

7.8 Human Rights NGOs, Succession Law and ‘Season of Rights’

KELIN is a legal rights organization with offices in Kisumu and Nairobi and was founded in 2009 in the wake of numerous interventions by the World Bank through USAID and FAO which linked the precarious situation of HIV positive widows in sub-Saharan Africa to lack of property rights. The World Bank’s hypothesis has been that adult deaths due to HIV/AIDS are an invitation for faster reforms in land tenure systems (FAO 2002). It suggests that for women in most parts of African societies whose access to land is hinged on marriage, the death of the husband means that their access to land is increasingly becoming fragile.

In the analysis of KELIN, these tenous situations arise where traditional forms of custodianship institutions such as the levirate have broken down. The consequence is that mond liete find themselves in a precarious situation that is a barrier to treatment thereby increasing their chances of re-infection with the HIV virus. This pragmatic link of property ownership to rights of the mond liete marks the distinction between the work of KELIN and FIDA-K. While the latter spends much of its budget on litigation, the former has used most of its resources in interventions such as goyo dala.

The intervention by the Nyakach Council of Elders in favor of Ascar Madote had come after a long wait as the case had been presented to FIDA-K in 2004. As discussed in Chapter One, Mama Victor’s claims had solid grounds under the Kenya Succession Act, 1981, which stipulates that dependents may inherit property of the deceased. Section 29(a) includes wives in its definition of ‘dependent’. This claim is also supported by section 82 (4) (b) and (c) of the 1963 Constitution, numerous case laws and official Customary Law such as those written by Contran (1968) as discussed in Chapter Three and Chapter Four.
As the main financial benefactor for Madote’s *goyo dala*, KELIN documented the event as a major milestone in using ‘culture’ to guarantee right to property. They had worked with the Nyakach Council of Elders to ‘deliver’ citizenship and housing for Madote in three months where a judicial-legal process through The Federation of Women Lawyers Kenya (FIDA-K) had not shown much success in three years. It dawned on me that what was in contestation was not just Luo history and meanings of human rights, but also other subtle considerations such as: What is most effective in realizing cultural rights—the ‘political’ Luo Council of Elders or the more ‘natural’ clan-based Nyakach Council of Elders? Based on their philosophy and approach, which was the most effective human rights NGO? And how do the Luo ritual of *goyo dala*, human rights values and Christian values meet?

The International Covenant on Economic and Social Rights (ICESR) and CEDAW to which Kenya is a signatory have also emphasized the importance of equality for men and women in and out of marriage. Despite the existence of these laws and international instruments, I realized during my fieldwork that there are numerous cases of personal matters that had been brought to FIDA-K over the years (See Annex 7.1). These so-called personal matters are often left for customary law that is treated as lower in rank compared to the national constitution and international human rights instruments.

### 7.9 Goyo Dala and Categories of Precarious Citizens

As observed in the case of Priscilla and Madote (commonly known as Mama Victor), adults who do not have *dala* in Luoland are regarded as ‘lesser’ persons. It seems to me that one contributing factor to this persistence of marginality seen in the binary between those with *dala* and those without *dala* is part of the continuity of the colonial divide between “territory” and “homeland” much talked about by Mamdani (1996). Appreciating the practices of human rights in postcolonial Kenya requires an understanding of this environment. The persistence of colonial constructs that Mamdani (2007) has described as “territory” and “homeland”, explains the never-ending asymmetries in the practice of citizenship in the postcolonial era. For the purpose of citizenship, it is therefore possible to speak of cultural citizenship (defined by cultural boundaries and norms) on one hand and civic citizenship (defined by state boundaries and the constitution) on the other (Akoth 2011a).

On paper and in legislated national policy, all regions in Kenya are presented as equal and legitimate claimants of intervention for progress from the central government. But the reality has been a collapse of the centric design of the state as has been the case in most postcolonies. Making observations for the case of Malawi, Chiweza (2005) has observed that it is the failure in the central government that has led to the current movement of decentralization. In a way, decentralization differs from the colonial
indirect rule to the extent that it aims at “transfer of power” (Chiweza 2005: 12). In Kenya, the situation in areas located far from Nairobi like western Kenya is not about ‘absence of power’; rather it is more an experience of exclusion.

On the one hand political patronage implies that parts of the country that are considered to be politically opposed to the ruling political party (as Luo Nyanza in western Kenya) are often excluded when allocating state resources. On the other hand, economic poverty and localized mechanisms of survival tend to be manifest in an engendered manner. Women-headed households are thus the majority among the poor. Women are also over-represented in other precarious categories such as those living with HIV or AIDS, mond liete and those in informal economic occupations.

But equally important to note is that although the marginality of women as a category of Luo people can be explained from the state policies of exclusion and collapse of the post-uhuru “national project”, the manifestations of exclusion equally tend to be understood from the local perspectives and knowledge systems. Thus poverty can be explained by families in Pentecostal Christian faiths as a ‘curse from God’, and such a family would make efforts to appease God through praises and service to the church as ways of escaping from poverty. As was discussed in Chapter Five, where one is widowed, there are numerous rituals that are often ascribed as mechanisms of cleaning and re-integrating the individual back to the society. But when the person dies out of unclear or ‘tagged’ ailments such as those associated with ayaki (AIDS) then much more intervention is required to re-integrate them into the society.

In the patriarchal societies such as the Luo, most of the cleansing is designed and carried out by men while those who often require cleansing are women. Thus, while mond liete have often been vulnerable members of the society, the question of cause of death of their spouses tend to cause further marginality and demand elaborate cleansing. In Chapter Six, I discussed how the removal of okola is essential in restoration of citizenship of a chi liel. In instances where death of a spouse is associated with ‘mysterious’ factors or forces such as being struck by lightning, drowning, suicide or death out of HIV-related infection, the ‘cleansing’ is more elaborate—or the chil liel may be rejected as a source of bad omen. Thus the reality of chi liel as we have seen in the case of Madote and Priscilla is not just about rights: rather, to be a chi liel is to be close to what Agamben (1998) has described as “bare life”. That is, mond liete—even when they get into the institution of ter—are not comparable to re-married widows. On the one hand, the chi liel is expected to keep custody of her replacement ‘husband’ and to build new social relations. The implication is that while ‘widows’ make up a significant demographic category not just in western Kenya (FAO 2002), but in all of Africa259,

259 Agot Kawango (2005) has argued that by 2004, thirty percent of adult women in Africa were widows.
their experience remains precarious.

7.10 The Role of the State in Modernizing Family Law

In the practice of human rights in postcolonial Kenya, the themes of culture and customary law recur. In certain contexts, Luo people engage the dominant notion of human rights as an effective mechanism for achieving customary claims such as land and dala but, in other times, they engage its limits by reverting to a reified notion of culture and debate on what is customary. Even then, strategies for these engagements are never constant. On the one side is the state and the human rights NGOs whose preferred option for realizing human rights is the judiciary and its rigorous application of law. From the post-uhuru times, the state has pursued this thought by promoting efforts to ‘modernize’ the marriage institution while the human rights NGOs front for a self-constituting and autonomous citizen as the basis for realizing human rights. On the other side of the practice of human rights in postcolonial Kenya are wananchi and institutions such as the Luo Council of Elders and the Nyakach Council of Elders who struggle to gain collective and individual autonomy to the practice of rights that is not entrapped in the state-centred legal model of human rights. For these wananchi, what is important is not to be ‘modern’ or ‘traditional’ but rather to be able to use both notions of ‘modern’ and ‘traditional’ to resolve their concerns. It is from the two perspectives that one can understand the responses by Madote and Priscilla which are aimed at moving beyond the state efforts to ‘modernize’ family law. The state’s restricted binary of public-private that is a common approach in official customary law has failed to recognize the struggles of mond liete in Luoland.

As discussed in Chapter Three, customary law from its origin in colonial times did not just create dualities in the practice of citizenship in the sense of what Mamdani (1996) has called ‘citizens’ and ‘subjects’. It was ingrained in the practice of family law. The scripting of customary law (to produce ‘official’ customary law) in the colony was a product of attempts to give meaning to the colonial state as well as that by the colonized to cope with social dislocation and their new position as colonial subjects. This ‘official’ customary law has been exposed by Martin Chanock as an “invented tradition” (Chanock 1985). In both the colonial and post-uhuru eras, the institution of government has legislated customs to create customary law. Customs dealing with matters of succession, marriage and land ownership have thus become resourceful instruments of government favoured in deriving political authority in society (Chanock 1985: 37).

In giving meaning to uhuru, the post-uhuru government spent the first few years enacting legislation that could fully integrate Africans into Kenya’s body politic. In this process, the place of customary law which had been produced from the colonial experience was rather contested. In the beginning, the new elites were divided between those who considered customary law as part of the colonial
instruments of marginalizing and subordinating Africans and others who wanted customary law to be protected and ‘rehabilitated’ for the sake of Africa’s identity (Thomas 2000).

However, as a general intervention, the immediate period after de-colonization (1964-1970s) witnessed attempts to promote what was regarded as ‘African roots’ as well as integration of Africans to the mainstream of the independent country. The process of going back to ‘African roots’ which I described in Chapter Four as ‘Kenyanization’ was the core agenda of *maendeleo* which attempted to develop laws and institutions that would be a symbolic ‘re-assertion’ and ‘re-stating’ of African values. Within the same period, however, there was often ‘competition’ between ‘official’ customary laws as presented by the state and the international human rights system, with its insistence that national laws (more so personal or family law) should meet international benchmarks as it was practiced in everyday life. As such, the interventions in ‘reforming’ family law (always read as synonymous to customary law) was about creating a sense of ‘national identity’, as well as linear progress expressed as *maendeleo*.

The law makers in Kenya’s parliament, who were and remain predominantly male, demonstrated this penchant in the way they dealt with three legislations related to succession, marriage and land ownership. First of these was the colonial Affiliation Act which had been enacted by the colonial Legislative Council in 1959. Using their imagination of how the kinship relationship must have held and managed these kinds of situations in pre-colonial Kenya, the Affiliation Act (1959) granted unwed mothers legal rights to claim child support from their children’s fathers (Shadle 2006: 222). The law was enacted at a time when regulations restricting women’s movement to urban areas had been relaxed in the colony. As a result many women went to urban areas and ended up getting children outside the marriage institution as recognized in what both Paul Mboya (1938) and Evans Pritchard (1949) have described as Luo customs or norms common among Christian converts. It was a situation that was rejected by both the colonial administration and African associations such as the Ramogi African Welfare Association (RAWA) alike. In fact, as early as 1949 RAWA with tacit support from British colonial administration developed and implemented a campaign to return to Luoland all women who lived in urban areas without proof of marriage. At the same time, the colonial authorities had noted an increasing trend of male labourers deserting children whom they had sired in the rural areas.

In the opinion of the colonial administrators, male Africans were taking advantage because the kinship relationships that regulated them in the past had since weakened or collapsed. For the colonizers this was both an issue of African custom as well as civil law and order that directly impacted their attempt to create responsible African men in the colony. In 1968, four years after independence, this act came under sharp criticism from parliamentarians (a good number of whom
were said to have sired children with multiple partners) who argued that the Act had made most African women ‘irresponsible’ and promiscuous. The Act was finally repealed to remove women’s rights for child support.

In 1976, another Bill related to personal law went to parliament. This time it was The Marriage Bill, 1976. The 1976 version of the Bill had sought, among other things, to criminalize adultery. The Bill outlawed polygamy and suggested stiff penalties for cases of bigamy. Most contentiously, it suggested that men and women should be equal partners before and after marriage. This is perhaps a Bill that has had the longest stay in the parliament of Kenya. In the ensuing debate which Eugene Contran (cited in Shadle 2006: 222) described as having been very heated, members of parliament argued that the Bill was insensitive to their biological needs as men. These ‘needs’, they argued, require them to keep multiple partners. The Bill was rejected.

Another version of the Marriage Bill was introduced to the house three years later. This version was silent on adultery but criminalized domestic violence and polygamy. Once more, the Bill was rejected, this time on the basis that it had a lot of Western ideas (Thomas 2000: 162). In 1985, another version of The Marriage Bill was introduced to the House. It had toned down on polygamy and adultery but maintained its provision against domestic violence. On polygamy, the requirement was that the man would require consent from his existing wife. Adultery on the other hand was defined to apply to a situation where a man has a sexual relationship with another married woman. The Bill did not even get the necessary approval to reach the floor of parliament. It elapsed. In 2002, another marriage Bill was proposed, this time with provisions that ‘experts’ had regarded as comprehensive enough to accommodate ‘African values’ like polygamy and ‘Western’ values like divorce and property ownership. It stayed in parliament until 2007 when it was redrafted (Nyokabi 2010).

In December 2010, I attended a meeting convened in Nairobi by the Kenya Law Review Commission (KLRC) to discuss the draft Bill that is officially referred to as the Marriage and Matrimonial Property Bill 2007. In her opening remarks, the then Vice Chair to the KLRC, Nancy Baraza, emphasized that the cabinet should prioritize the Draft Bill because “…current marriage laws do not take into account African customs and traditions” (The East African Standard, 9, November, 2009). It is unlikely that Baraza who was also the chair of FIDA-K at the time would have made the same comments in the 1990s Kenya. By 2000 the earlier path of pursuing human rights as some route

260 This is the institution mandated with guiding processes of writing all new legislations.

261 Ms. Baraza is also a Family Law lecturer at the Kenyatta University and the Kenya School of Law. She has been involved in the field of legislative reform since the 1990’s and served a short stint as a Deputy Chief Justice of Kenya between 2010 and 2011 before she fell from grace - incidentally, for assaulting a woman guard, perhaps due to class considerations of ‘knowing people’.
towards universal enlightenment seems to have waned and agents of human rights in Kenya were embracing the gamut of human rights through multiple possibilities that accommodate what was largely categorized as ‘tradition’ and ‘modern’. This explains why amongst other provisions, the proposed Draft Bill provides for polygamous marriages and outlaws mandatory payment of dowry. The Bill also suggested that in the event of divorce or separation, either spouse can meet the costs of maintenance for the other. None of these Bills have been tabled in parliament yet, which attests to how power structures contest Kenya’s marriages (Kamau 2009). Nevertheless, the Bills retain the dominant assumption that men’s property is to be inherited by women (ibid.).

With the failure of these state-led initiatives to reform customary law, the colonial customary laws (with few amendments from case laws) persist. Today, customary law is admissible in Kenya’s courts of law subject to the Judicature Act Chapter 8, Laws of Kenya. The application of African customary laws is qualified by section 3(2) “...so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law...” As ‘official’ statutes of customary law, it is Contran’s Re-statement of African Law, Volume I and II, (1969) and Casebook on Kenya Customary Law, (1987) that remains in use. Claims such as those lodged by Madote through FIDA-K as well as Lillian Mwaura on behalf of Florence Wambui (see Chapter Four) cited the limits in the ‘official’ version of customary law with colonial pedigree. The Kenyan statutes have also remained widely unresponsive to the quest for gender justice (Houghton 2005).

Human rights organizations such as FIDA-K, KNCHR and KELIN would ordinarily want ‘reforms’ in official customary law to accommodate gender concerns. To accommodate this quest, institutions such as the Luo Council of Elders and the Nyakach Council of Elders are referred in human rights lingua as “Alternative Dispute Resolution Mechanisms”. But as the proceedings of the baraza at the Sunset Hotel demonstrated, such ‘alternatives’ are accepted only to the extent that they accommodate features of the dominant discourse of human rights. Under this approach of ADR, there has been the argument that the common court system is more adversarial as opposed to the African justice system which was more interested in creating equilibrium (KNCHR 2008 b). While this notion of African justice system affording places for creating equilibrium has been disputed by the works of anthropologists like Becker (2001) and Moore (1989), the ‘invention’ persists. The Kenya National Commission on Human Rights and FIDA-K have taken up this perspective arguing that such an approach has the likelihood of more “efficient and agreeable delivery of rights” (Lawrence Mute, personal communication, 2010). It is indeed the Kenya National Commission on Human Rights that has led this process. In 2006, the KNCHR launched a project to work with what they described as cultural institutions.
In their concept paper entitled, *Project on Working with Cultural Institutions to Strengthen the Protection and Promotion of Human Rights*, the KNCHR has argued as part of its rationale for looking beyond the judiciary that:

Firstly, the majority (of Kenyans) neither understand the system nor can they afford the costs of litigation. Secondly, the judicial process is inordinately slow and protracted and many vulnerable people get frustrated and are unable to stay the course. Thirdly, the court systems are intimidating, inaccessible and alienating. This situation is worsened by administrative machinery which is highly susceptible to corruption. The result has been a situation where existing legal structures and social trends have by and large worked to the detriment of the vulnerable in society in regard to the protection and enforcement of their human rights (KNCHR, 2008b:1).

These are valid arguments with weighty propositions on which civil society organizations and international donors continue to demand legal and constitutional ‘reforms’ in Kenya. Indeed several meetings have been convened by the KNCHR and other human rights NGOs to train the elders on ADR.

During my fieldwork, the KNCHR invited me to two such meetings. One was held in a Kisumu hotel, while the other took place in a Nairobi hotel. At both meetings, the emphasis was on using the ideas of everyday practice of customs, official customary law and international human rights standards to create a dispute resolution system that is effective in responding to personal disputes. Lawrence Mute, a commissioner at the Kenya National Commission on Human Rights illuminated this emphasis when he stated at one of the consultative meetings that, “….while cultural traditions and institutions can be accommodated in human rights work, they must first meet the human rights standards of equity, accountability, participation and non-discrimination” (Seminar presentation, October 2010, Nairobi, Kenya).

Mute’s remarks mirror the same scheme that was used in the colonial production of customs and ‘official’ customary law. In the colony, it was institutions such as the Natives Tribunal that were used to measure what is justice and that which can be called customary law through notions of repugnancy and natural justice. But in 21st century postcolonial Kenya, it is trainings offered by the KNCHR on ADR where the Bill of Rights in the constitution and international human rights instruments that constitute the benchmarks for justice and what may be called customary law. The KNCHR has often emphasized that the structure of ADR should be as authentically traditional as they were in pre-colonial Kenya and that in dispensing justice, these structures must then adhere to the principles of the 21st century human rights standards. It is these kinds of formulations and imaginations that have enabled the KNCHR to work with the Councils of Elders. The KNCHR and their NGO collaborators present councils of elders as the primordial authority of customary law and ‘authentic traditional structure’ even though (as I stated in Chapter Three) their history is fairly recent and more of a response to postcolonial uncertainties. In the midst of these uncertainties, it is the responses associated with “those days” that tend to generate solutions and responses to the conundrums of
“these days”.

### 7.11 Importance of Particular Settings

The narratives of Madote and Priscilla and the stalemate in enacting the Marriage Bill are evidence of the limitation of political and economic liberalism which makes ‘moral ethnicity’\(^{262}\) possible in the era of human rights. In the story of both Madote and Priscilla, it is noticeable that while the era of human rights attempts a twin balance between respecting citizens’ individual choices and promoting a meta-narrative of human rights, it is unable to “rectify unequal circumstances” (Kymlicka 1990:153). Neo-liberal policies in postcolonial Kenya seem unable to rectify disadvantageous circumstances that undermine economic progress of western Kenya and Luo people. The architecture of Kenya as a cultural state (See Chapter Three) where “geographical maps” are aligned to “cultural maps” (Cohen and Odhiambo 1989: 9), has made it easy for those in control of state power to isolate ‘opposition zones’ (Odinge Odera 2010). Kymlicka notes:

> Removing well-entrenched inequalities between different social groups requires little intervention in, or even attention to, discrete individual choices. The inequalities are so systematic that no one could suppose that they are traceable to different choices of individuals. But the principle of equalizing circumstances applies to disparities not only between social groups, but also between individuals, and it is less obvious whether those differences are due to choices or circumstances (1990:152).

In the context of Kymlicka’s assertion, the ethnography of human rights in western Kenya cannot ignore the history of Kenya and formation of ‘Luo-ness’. In this regard, identities of practice (Brubaker and Cooper 2000) such as ‘Kenyan-ness’ and ‘Luo-ness’ must be engaged from heterogeneous manifestations of the postcolonial Kenya. I have brought in Kylimcka at this point to contest the hegemony of liberalism. Liberalism in the way I have used the term in this thesis transverses the rationalist and individualist notions and thus often negates antagonistic dualities such as those cited above. Social world experiences such as those of Madote and Priscilla gives us an opportunity to engage pluralisms politically and see how subjectivity produces and is produced in an ongoing conversation of often conflicting alternatives of modernities. It spawns a reality that affords the chance to subvert the dominant hegemony. Through Madote and Priscilla’s gendered social relations and performance (Butler 1997), the councils of elders get positioned to control knowledge and the circulation of women as agents and means of production and reproduction. The council of elders here are agents of “moral ethnicity”. The practice of “moral ethnicity” as suggested by Lonsdale (1994) has thus become the most persistent critique of the failures of liberalist politics and economy in 21\(^{st}\) century Kenya. But rather than read the 21st century “moral ethnicity” as a writing ‘against the

\(^{262}\) In a context of ‘political tribalism’ as well as debate on detrimental implication of Modernity on local moral codes in Kenya, John Lonsdale (1994: 131) has characterized the new movement that uses ethnic consciousness to safeguard “internal standard of civic virtue against which we measure our personal esteem” as “moral ethnicity”. This is ethnicity from ‘below’ as opposed to ethnic organizing from the ‘top’. While the former is associated with wananchi, the later is associated with politicians.
grain’ as suggested by liberal thinkers like Chirayath (2004), it is more useful to read it as part of a commitment to individual choices. In the 21st century, institutions such as the Luo Council of Elders, the Nyakach Council of Elders, NGOs and state-funded human rights institutions have seized this dual space of liberalism and uncertainties to explore human rights practice that traverses binaries such as ‘rights’ versus ‘culture’.

It is however the Luo Council of Elders that has taken the discourse to a notch that is similar to practices championed by the Luo Union in the 1930-60s and by RAWA in the 1950s. In responding to problems of engendered inequality and disparities at micro (within western Kenya) and macro (within the Kenya state) levels, the elders have mobilized the idea of being Luo and the civic virtues of practicing Luo-ness. In this space, there has been both appropriation of freedom to culture (Barrett 1988: 36) provided by liberalism as well as mobilization of moral ethnicity to critique and engage with the “unmet expectation” (Ferguson 1999) of the 21st century human rights modernity. As a liberal maxim, the legal model of human rights has a commitment to respect for people’s choices (Kymlicka 1990: 152). This demand for respecting choices has become widely accepted, more so after the end of bipolar world in the 1990s. The indigenous movements and upsurge of The United Nations Educational, Scientific and Cultural Organization (UNESCO)’s quest for ‘cultural policy’ (UNESCO 1998) is a further evidence of this practice of liberalism. This plurality allows Luos to enjoy their rights to culture and right to own property.

As long as dominant human rights narratives continue to ignore these realities in their practices, reporting and engagement, gender justice shall remain a claim rather than an everyday practice. In any case, marginalizing local knowledge that produces everyday scripts of personhood plays into the hands of those seeking to perpetuate and solidify the existing structures of patriarchy (Tamale 2008). The reporting and discussion framework of CEDAW that will be discussed in the next chapter is one such restrictive framework that stifles the African women’s agency and quest to challenge domination and injustice.

7.12 Contestations on Customary Law and Ideas of De-contextualized Personhood

In western Kenya where the Luo Council of Elders and the Nyakach Council of Elders are found, the National Council of NGOs records have documented that at least 123 NGOs (excluding church groups and community-based organizations) work there. Out of these, forty percent are legal and human rights NGOs. As interest continues to grow amongst NGOs and state agencies in carrying out human
rights work with ‘communities’ the question is: what is the result of these interventions in terms of the language and practice of human rights?

Encounters and experiences in western Kenya attest to the deep crisis that now characterizes the dominant notions of “the era of human rights” that have for long attempted to position themselves as universal, ahistorical, acultural and neutral. To this extent, feminist scholars like Lila Abu-Lughod (1991) and Moran (1995) who have called for an ‘ethnography of the particular’ and the analogy of ‘situated lives’ respectively are spot-on in their assertion that the Western human rights modernity (which is widely touted as universal) are inseparable from the rationalist mentality of the Enlightenment and of linear progress. The stories of Priscilla, Madote and the numerous other women who I spoke to suggest that the practice of human rights in Luoland (and indeed postcolonial Kenya) is distant from this much-touted rhetoric of ‘the era of human rights’. Rather than the impression that the legal model of human rights is immutable, everyday practice in western Kenya is characterized by appropriations and reformulations such as those undertaken by the Nyakach Council of Elders and Madote. Also significant is that both Priscilla and Madote do not seem to have acted in accordance with rationalist and individualist philosophies of the dominant notions of human rights. To meet the so-called criteria of rationalist and individualist philosophies (projected as reasonable man), they should have trusted the legal models of human rights as prescribed by the mandates of NGOs such as FIDA-K and the Kenya National Commission on Human Rights as a national institution. This disruption invites yet another question of: what made Priscilla’s and Madote’s actions possible in what is called an ‘era of human rights’?

I think the answer to the above question lies in realizing that the objectives of practices of human rights in the postcolonial era differ from those of arising from zeal to spread the dominant discourse of human rights in the 21st century. The dominant notion of human rights seems be informed by writers like Habermas (1985), Kant (1984) and Rawls (1971) who have worked towards establishing an ‘Archimedean point’ to provide a universal rational foundation for both generalizable and cross-culturally intelligible norms. In its approach, the universalizing approach of ‘Archimedean point’ seek to ‘convert’, ‘save’ and dominate. It thus misses the point of both the social life of human rights and domesticated agency that emerge in this dissertation. The kind of practice of human rights which I document here drifts away from such visions of an ‘Archimedean point’. A proper reading of the practical manifestation in postcolonial Kenya therefore can only be realized by paying attention to cross-cultural conversations such as has been suggested by Islamic scholar An-Na’im’ (1990: 334). An-Na’im’s argument has asked for better understanding between Islamic law and the international human rights standards.

263 The communities with whom the Kenyan NGOs work show large areas of overlap depending on the criteria chosen to define them. There are instances where the community leaders make claims to speak for a religious, regional, linguistic or persuasively ethnic community depending on the context.
This thesis has read the various unfoldings around the discourse of human rights in western Kenya in the context of cross-cultural communication rather than an ‘Archimedean point’ that is forced by state coercion through instruments such as an ‘official’ version of customary law. My discussion starts from the standpoint of societal plurality. It is plurality that is practiced not within distinct categories of ‘formal’ and ‘informal’ or ‘mainstream’ and ‘alternative’ but rather that which is entangled and that produces itself through multiple entanglements.

The negotiation that fulfills the realization of dala for Madole and Priscilla is elaborate and multi-layered. But this result of goyo dala which had many implications in improving the well-being of the two women is not uncommon in the postcolony. This result is referred to by human rights institutions, activists and academics as realization of human rights. Yet to the Nyakach Council of the Elders and Luo Council of Elders, these results lead to respect for Luo culture. This equates to what scholars of liberalism that does not unsettle the Western post-enlightenment thought of hegemony like An-Na’im’ (1990: 334) call “civic reasoning” —meaning that practice and language of human rights that may be arrived at based on a discussion between cultural agents like elders, religious leaders, ritual leaders such the ajuoga (herbalist), jabilo (magician) on one hand and agents of Western modernity on the other. Such are the notions that support the ‘Archimedean point’ project. While I accept the suggestion of reasoning that underlie such debate, I think that seeking to understand the actions of Madote and Priscilla from the perspective of “civic reasoning” or even the kind of consensus that Herbamas (1985) talks about may play to the hands of the same hegemonic liberalisms that has been disputed by the findings of this thesis. Rather, Madote and Priscilla as well as the elders and the human rights institutions are involved in antagonistic negotiations for which there is no single predetermined point of consensus. For Madote and Priscilla, it is about being Luo, while for the Nyakach Council of Elders and the Luo Council of Elders, it is about stamping their authority as ‘custodians of Luo culture’. The human rights institutions on the other hand are interested in taking a more pragmatic approach to human rights work. This pragmatic approach however is benchmarked against the international human rights instruments such as CEDAW that I shall engage in Chapter Eight.

My argument is that a thoroughgoing understanding of what is happening here calls for appreciation of the contradictory nature of social life. What is manifest is how social behaviour is both complex and contradictory, leading to intense and antagonistic tension and contests among a group that is otherwise generalized as collaborators because, as Barrett (1988) observed in her arguments on anthropological theories, “virtually every value, norms, decision and act has an alternative (or alternatives) that is potentially its negation”. This however does not mean that the various alternatives are in irresponsible antagonism. No, as I have shown although operating from different perspectives the various interventions are able to show some sort of unity at the same time. This image of unity is made possible not because of some ‘Archimedean point’ but rather because, as Barrett (1988:5) points
out, the “contradictory nature of social life contains within it another contradiction; it is also patterned”. The fact that the results of joint interventions have different names and meanings for these actors attest to the kind of latent antagonism that underlie what is otherwise made possible by liberalism. This variety of liberalisms is also a critique to the Comaroffs’ emphasis on rationality as an index of explaining manifestations in the postcolony.

Madote and Priscilla have also attested that the law, policies and contracts are not the only relevant benchmark for everyday practice, and sometimes not even the most relevant in resolving contested issues of succession, marriage and land ownership in postcolonial Kenya. They have demonstrated that due to anxieties over 21st century modernity, the movement of a ‘return to those days’, that is, the imagined past cultural realities, suggests many ways of realizing human rights. The model used here lays emphasis on responding to practical situations such as dis-inheritance of mond liete rather than abstract pursuance of some ‘Archimedean point’. Legal contracts such as the envisaged Marriage Bill would by all means be of assistance in this endeavour. It is however questionable whether the Bill when ratified will change ideas such as goyo dala and notions of access, management and occupation of land in Luo society.

7.13 Conclusion
In this Chapter, I have demonstrated that while ‘official’ customary law continues to occupy space in post-uhuru Kenya, the equal circulation of the language of human rights and its related institutions have enabled interventions that move beyond the state. This endurance of colonial scripts of customary law speaks to the positivist character of postcolonial Kenya. As Chanock (1985) has observed, it is indeed these legalizations of customs under the rubric of customary law that has made both customs and post-colonial states ineffective. The case of Madote for example was one where one variety of structure and interpretation of customary law was abandoned for another.

In the 21st century, Kenyan parliamentarians find themselves as the protectors of culture (through cultural festivals as shown in Chapter Six) while also, at the same time, being mandated as the protectors of legal modernity. Moreover, the enactment of laws by parliament seems to be influenced by the claims of cultural responsiveness. In this case, the claim is made by agents of modernity such as parliamentarians. In other words, culture seems to find its way deep into parliament. Thus it’s not really a case of modernity resisting culture: indeed, such notions of ‘resistance’ are mere imaginations because the agents of modernity are at the same time the agents of culture and use them interchangeably. It can therefore be argued that culture in a reified sense has shaped the drafting of the postcolonial constitution just as experience of the postcolonial is shaping culture or the constitution itself.
In this period however, the practice of family law is interfaced with the spread of human rights discourses. It seems to me that the reason why the collaboration between Kenya National Commission on Human Rights, KELIN, the Nyakach Council of Elders and the Luo Council of Elders have reported some success lies in their ability to unlock the social life of customary law. In the social life of customary law, the focus is not on the written customary law but a ‘new’ construction of customs informed by both contemporary Luo habitus and postcolonial anxieties characterized by HIV/AIDS, scarcity of land, unemployment, unequal maendeleo and contested notions of personhood. The production, practice and circulation of human rights in western Kenya (and much of the postcolony) is therefore characterized by contestations between narratives of the ordinaries (Cohen and Odhiambo 2004: 69) which works against “the rule of experts” (to use the words of Mitchell (2002). As Chapter Eight shall demonstrate, this contest and never-ending dualism would become more evident in the Western capitals where human rights reporting is done.
CHAPTER EIGHT

THE CONVENTION ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) AND THE CULTURE OF HUMAN RIGHTS IN POSTCOLONIAL KENYA

8.1 Introduction
The practices of human rights in Luoland are a process that tends to display two commingled sides. On the one hand, there is an ongoing incorporation of local understanding and production of an everyday idea of rights, while on the other is the persistence of the global discourse of human rights agenda that is promoted by the United Nations (mainly in Geneva and New York) and global institutions such as the International Criminal Court that is based in The Hague. While there is no dispute that the dominant notions of human rights discourse are based on Western liberal-legalistic ideas, fieldwork in post-uhuru and postcolonial Kenya shows that these tensions between the locally produced version and the internationally prescribed list of rights is unending. While these two categories of rights do not exist as isolated binaries, there is never-ending competition between local genres that Merry (2003: 29) has called “vernacularised rights” and the UN-based system. This competition between the vernacularised rights and the UN-based system is most evident in how human rights violations are presented through human rights instruments and standards. This study has demonstrated that there are ‘hidden’ notions and possibilities in the construction of human rights discourse through practices in postcolonial Kenya. It has been clear that the rhetoric of human rights is practically constructed through speeches, public barazas, goyo dala and contests in common courts.

This chapter examines the genre of human rights reporting with reference to the work of FIDA-K and the Government of Kenya. In the United Nations system, the responsibility to prepare human rights reports is assigned to the state. By state, the United Nations System refers to governing authority including the police, the courts, the legislature, the public service and foreign policy. It is argued that in the United Nations-centred human rights reporting, the question of representation of the situation of human rights is reminiscent of the challenge of epistemological domination that Mudimbe (1994) has talked about. That is, while those whose rights are wronged (to use Spivak’s 2004 phrase) have particular context-based representation of rights, the process in which state agents and even NGOs write reports for the UN often exclude situated interventions such as those captured in the case of Madote and Priscilla in this thesis.

I use the process of writing and presentation of Kenya’s CEDAW report to the Committee on the Elimination of Discrimination against Women as a basis of reflecting on how the dominant human rights discourse continues to ignore the locally produced version of human rights. The use of some
sort of universalist template such as that of CEDAW tends to ignore contextual and real-world life encounters that produce the genre of rights practiced in Luoland. For this reason, it is court cases using official customary law or those that make reference to CEDAW that form precedents in human rights discourse. The critical understanding of the rhetoric of human rights practice in the postcolonial requires engaging with these competing representations.

8.2 The Rise of CEDAW and Women’s Rights

At the time the contemporary human rights discourse was getting institutionalized in the 1940s and 50s, most of the African states like Kenya were under colonial rule. There were however various historical and immediate circumstances of the time that continuously informed the formulation and declarations of human rights texts. Besides the post-World War II atrocities of Nazi Germany, one such factor was the colonial experience itself. For instance, as African countries started demanding self rule, the notion of the right to self-determination got its way into the Universal Declaration on Human Rights (UDHR) in 1948.

The discourse of human rights and its various texts have changed either in response or anticipation of various circumstances and dialogues in what we broadly call ‘the global north’ (where it remains centred) or through a broader transnational dialogue. By 1966 for instance, two covenants, that on Civil and Political Rights (March 1966) as well as the other on Economic, Social and Cultural Rights (December 1966) had been enacted to be read alongside the 1948 UDHR as International Bill of Rights. These developments were as a result of decades-long contestation and competition (that almost turned into open war) between the US (that favoured civil and political rights) and the USSR (that favoured social and economic rights) (see Langlois 2001, Makau 2002).

In the decade of decolonization in Africa between 1960 and 1970, the global debate on rights was engaged on rather specific claims by individuals and groups who demanded specialized recognition. These varied from people with disability, the elderly, children, women, and the indigenous (see Merry 1997, Bobbio 1996, Cowan, Dembour and Wilson 2001). The notion of who is the subject of human rights was equally put under the microscope with the uniformitarian notion of ‘human’ being disputed on registers like race, religion, gender, class and nationality.

Most countries in Latin America and Africa that had gained independence called for more rigorous assessment of the root causes of inequality and human rights violations. Using frameworks such as

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264 As I have suggested elsewhere in this chapter, the genealogy and historicity of human rights discourse globally and in the post colony remain contested. Chapter Two provided a postcolonial genealogy of the discourse. The era of institutionalization of the contemporary discourse of human rights is often signposted at 1940 and 50s. See Thee Marek (1993).

265 Some of the most useful publications that were written by the leaders of this movement include: Fanon (1963), Walter Rodney
those of dependency thought and neo-Marxist discourse, scholars and activists called for a more problematised vision of the subjects of human rights. As various continents ‘domesticated’ and reformulated the rights debate through instruments such as the African Charter on Human and People’s Rights, the idea of rights moved gradually from the individualistic emphasis and paid more attention to collective rights (Cowan, Dembour and Wilson 2001:40).

Feminist discourse on the other hand asked for problematization of boundaries such as those of private versus public. In its various versions, feminists argued that such bifurcations of private vs. public homogenized women (Spivak 1999) and insulated violation of women under the guise of the private realm or culture. Moreover, there was an already persistent claim that the notion of human rights in the 20th century was not just male but its subject was a male Christian who was middle class and white (Villa- Vicencio 1992, Engle 1992, Mullally 2006). Wee Kim Wee (2007) has argued that while the “… treaties (human rights) exhorted the equal rights of men and women, they failed to take into account the discrimination that women regularly face throughout the world across a myriad of areas be it, work, access to health services or legal rights” (2007: 239). Such claims could not be resolved by a liberal interpretation of the existing text. More recognition had to be paid to having a specialized ‘bill of rights’ for women as had already been done with numerous other specialized rights groups.

It is in response to this disparity that the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) was enacted in 1979. The Convention entered into force on September 3, 1981. Its articles cover women’s economic, political and social rights, and also delve into more focused areas such as education, health and recreation, access to land, citizenship rights and rights of married women. Members of the CEDAW Committee have argued that the instrument “…seeks to raise levels of equality between men and women, and is not, as might be popularly believed, a buttress for female superiority” (Wee Kim Wee 2007: 4).

While some might criticize the Convention for being too general in its language which, for better or worse, is a necessity as it is intended to be applicable to any and every state, its effect is undeniable. For states which are already mindful of women’s rights and are relatively advanced in terms of legislation which protects the rights of women such as Scandinavian states, CEDAW acts as a guide against which they can measure their achievements and make sure that they are on track. Wee Kim Wee (2007) has argued that for states where women have ‘fallen behind’ and where the political will to ‘improve’ their lot is weaker, CEDAW is a modernist instrument to serve the purpose of making sure that the human rights rhetoric responds to the rights of all (Cowan 2001: 114).

(1972) and Freire (1970).
8.4 State Reporting

Kenya ratified CEDAW on March 9, 1984. By this action, the country committed itself to incorporating the ideas expounded in the treaty to its domestic law. This is what is referred to as domestication. When state parties become signatories to CEDAW, they are required under Article 18 of the Convention to submit an initial (baseline) and subsequent regular reports on the steps taken to effect obligations under the convention. The reports are reviewed and discussed under the Committee on the Elimination of Discrimination against Women, which consists of 23 independent experts elected by states that are parties to the convention but serve in their personal capacities. The CEDAW document has a preamble and sixteen substantive articles that confirm women’s equal rights concerning; education, health, employment, property, marriage, divorce as well as public and political participation.

Considering the spaces and issues that have emerged during this study and debates of the Committee on the Elimination of Discrimination against Women, three articles namely: Article 14, which requires state parties to take all appropriate measures to eliminate discrimination against women in rural areas; Article 15, which requires state parties to accord women a legal capacity identical to that of men and same opportunity to exercise citizenship, and; Article 16 that requires state parties to take appropriate measures to eliminate discrimination and ensure equality of men and women in marriage and family relations, are often the most contested in the reporting and debate on state of human rights in the postcolony. State parties, NGOs, human rights experts and wananchi often discuss and engage these matters during report writing and at the presentation to the CEDAW Committee in Geneva or New York. As demonstrated in Chapter Four, the Government of Kenya signed to CEDAW and other human rights instruments largely as a ‘symbol’ of belonging to the international community rather than intent for action. This explains why although the county’s initial state party report was due to the Committee on the Elimination of Discrimination against Women on April 8, 1985, it was not submitted until December 4, 1990. The same was the case for the second report that was due on April 8, 1989 but was submitted on the same date of December 4, 1990. This was a time when human rights language was widely perceived by the Kenyan state as being subversive and oppositional (Mutunga 1999). In any case, organizations like FIDA-K that would come to share the platform with the government delegations to CEDAW in the 2002 had been denied registration and blamed for promoting ‘Western culture’ in the guise of human rights.

The Committee on the Elimination of Discrimination against Women considered the reports

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266 At the time, Kenya was a dualist state (applying common law doctrine), meaning that an international treaty did not apply automatically to the country once signed by the state. Rather legislation must be taken to the national assembly in respect to the ratified legislation. This position however changed in 2010 when Kenya adopted civil law.
submitted by the government on December 4, 1990 as combined initial and second report at its Twelfth session held in 1993 in Geneva. There were numerous contestations at the meeting on the status of human rights in Kenya mainly between the Committee and the government representatives. The 1st and 2nd report\textsuperscript{267} did not attract much attention as the NGOs in Kenya themselves were struggling at the time to give human rights a more national meaning in the quest for liberal multiparty democracy.

The 2003 session of the Committee on the Elimination of Discrimination against Women had a new twist of significance. The state report had been prepared after concerted advocacy by civil society organizations led by FIDA-K demanding that the state should fulfill its obligations of reporting under international human rights instruments (FIDA-K 2006: 18). At that time the government had skipped two other reporting timelines namely the Third Period report that was due on April 8, 1993 and Fourth Period report due on April 8, 1997. After numerous advocacy efforts and demands through press conferences, workshops and meetings between government and the representatives of civil society, the government finally submitted a report to CEDAW in December 2002\textsuperscript{268}. FIDA-K in collaboration with Women in Law and Development in Africa (WiLDAF) prepared a ‘shadow report’\textsuperscript{269} that contested most of the progress claimed by the government at the time.

Human rights activists and ‘experts’\textsuperscript{270} at the time claimed that the state was still treating human rights as an inter-state relational discourse and often wrote the human rights periodic reports as ‘diplomatic briefs’ (Wilson 1997: 30). While FIDA-K’s secretariat had sent an advance copy of its report to the Committee, its representatives travelled to New York to be present at the CEDAW Committee session. Alongside Women in Law and Development in Africa and other international human rights NGOs, they presented an alternative report and evaluation of the state of human rights in Kenya. As Violet Mavisi who was vice chair of FIDA-K at the time (and later served as judge of the constitutional court) would later tell me, the structure of the narration in FIDA-K’s report was however, the same as that of the state, using legal language and positioning customary law and patriarchy as the root causes of women’s misery and denial of human rights in Kenya (Interview with Mavisi, September 2009).

\textsuperscript{267} For the combined initial and second periodic reports submitted by the Government of Kenya, see CEDAW/C/KEN/1-2 which was considered by the Committee at its twelfth session.

\textsuperscript{268} For the combined third and fourth periodic report, see CEDAW/C/KEN/3-4 which was considered by the Committee at its twenty-eighth session.

\textsuperscript{269} This refers to alternative reports that often provide a different reading or additional details of the situation. The practice was introduced as part of initiatives to promote open democracy and mitigate against the single narrative of the state.

\textsuperscript{270} This category includes the employees of NGOs like FIDA-K and the many consultants who claim to have command of law and human rights.
In their submission, FIDA-K (2008) argued that the government had not done enough to deal with issues of rural literacy and women’s access to property, more so land. The FIDA-K report claimed that the government had not put in place adequate policy and legislations to reverse customary laws and discriminatory practices that persist in rural Kenya (FIDA-K 2007: 12).

State technocrats on the other hand, led by the then Assistant Minister in the Ministry of Gender, Sports, Culture and Social Services, Alicen Chelaite, claimed that the government had enacted a Succession Act which gave both men and women the equal right to inherit, own and dispose property (Chelaite 2003). The state claimed it had enacted appropriate laws and was undertaking appropriate reforms of the judiciary to ensure access to justice for Kenyan women. FIDA-K on the other hand claimed that the Kenyan state was itself parochial and discriminated against women. FIDA-K cited the fact that women were dismally represented in public offices like political parties, parliament, cabinet and state corporations. They also lamented the status of rural women whom they claimed ‘...derive their rights of access and use (of land and property) by virtue of their relationship to these men, mainly as their wife or daughter’ (FIDA-K 2006: 8).

FIDA-K’s report also offered a reflection on the state of community-based organizations (CBOs) in rural Kenya. It noted that the CBOs (which often differ from the urban-based NGOs only in scale), had increased in numbers in the last two decades. However, their effect in creating legal and human rights awareness among the rural women was dismal. As a recommendation, it suggested that the state should play a more prominent role in creating awareness. This matter of proliferation and strategies used by CBOs and NGOs in Kenya is a discussion that I shall return to later in this chapter.

In their concluding observations, the Committee on the Elimination of Discrimination against Women session in 2003 expressed its displeasure at the status of women in Kenya and called on the state to take appropriate actions in providing both accurate information and improving the livelihood of women. More specifically, it asked the government to enact the various legal changes that would enable complete implementation of provisions under CEDAW (see CEDAW/C/SR.592 and 593). The session of the Committee on the Elimination of Discrimination against Women held in Geneva at the time was therefore a duel between state and human rights organizations on what was the ‘true’ status of human rights in Kenya. While the template for writing the report as stipulated by the CEDAW guidelines were followed by the state and civil society organizations, the ‘uses’ of human rights presented by the state and the civil society organization were different.

271 For details of the guidelines see (HRI/GEN/2/Rev.1/Add.2).
The state report seemed to have used the CEDAW report to argue that it was supporting non-differentiated liberalism where both men and women have equal opportunities as Kenyans. Indeed unlike FIDA-K’s shadow report which categorically speaks of CEDAW as a human rights instrument that promotes the rights of women, the state report often made reference to CEDAW as a Convention that promotes the rights of both men and women. This contestation of whose rights should be discussed when speaking about CEDAW and its reporting has much to do with representation and negotiation of both recognition of class and gender that were ongoing in Kenya at the time (see Maathai 2006: 157). Wangari Maathai (2006) has narrated how these debates on gender, power and who is an ‘ideal Kenyan woman’ played out during and after her election as chair of the National Council of Women in 1986:

Soon after I became chairman (sic), some of my friends and supporters came to me to say that my election was causing them trouble with their husbands, many of whom were influential in the government. They asked me to step down and allow someone else to lead the NCWK (National Council of Women in Kenya). This saddened me, but I was not wholly surprised. ‘Some of you have supported me for a long time and I won’t ever forget that,’ I told them. ‘But I can never withdraw from the chair after women have given me their support and their confidence. I must stay.’ I completely understood the pressure they were under not to be seen as supporting a divorced woman, but I couldn’t change my mind (Maathai, 2006: 157-8).

In the Kenyan parliament, these contestations of gender and power are traceable as far as 1996 when parliament rejected a proposed legislation by the then Member of Parliament for Kitui Central, Charity Ngilu, meant to ensure implementation of the Beijing Platform of Action. At the centre of this proposal was a call to promote women’s participation and increased representation in decision making organs such as parliament. A similar motion was raised in parliament in 1997 by another female legislator, Phoebe Asiyo from Karachuonyo constituency; once more the bill was defeated. Although these bills were rejected, they offered an opportunity for discussions about numerous issues that are considered as barriers to women’s participation and contribution to national politics and leadership in Kenya.

Among the elements of ‘the culture of Kenyan politics’ (see Haugerud 1997) that were blamed for deterring women from participating in public affairs were its violent, confrontational and conspiratorial tendencies. It was also disputed whether the issue of women’s participation should be addressed through the ‘removal of structural barriers’ or designating special seats for women in structures such as Parliament and District Development Committees. While most women organizations and leaders including FIDA-K have argued in support of special seats for women in the two mechanisms, other women, more so those from rural parts of Kenya like western Kenya have often contested this approach.

Perhaps this is why the Committee on the Elimination of Discrimination against Women of the 92nd and 93rd sessions took the much safer path of insisting on legal and policy reforms as enablers
of women’s recognition and effective claim of their rights rather than affirmative action. This manifestation of heterogeneity of Kenyan women and the way power is constituted and experienced at national level in relation to the global debate on CEDAW would continue to play out as NGOs gained more interest in CEDAW reporting.

8.5 Wananchi and Stakeholders

The writing and presentation of the fifth and sixth status of implementation of CEDAW in Kenya reports brought a different dimension of CEDAW’s sessions in relation to Kenya. The report this time was prepared as a state-led process but that brought on board a large array of stakeholders. These included individual experts, the Kenya National Commission on Human Rights and FIDA-K. The National Commission on Gender and Development (NCGD) which falls under the Ministry of Gender, Sports, Culture and Social Services convened a meeting on November 2007 to seek input from stakeholders and later developed the two reports that were overdue at the time. The idea of stakeholders is a recent euphemism of the 21st century that mainly makes reference to involvement of civil society in public debate and decisions made by the government. As Dorothy Hodgson (2011: 160) has noted in her work in Tanzania, civil society in postcolonial politics refers to organized non-state actors who have the political freedom to comment on, criticize, and challenge government policies and practices. Their participation in public policy and development of government human rights reports are now widely considered as a necessary part of liberal democracy (Haugerud 1997).

Often, stakeholders invited for consultative meetings such as the one convened on CEDAW are either NGO representatives or their ‘constituents’. For the Nairobi meeting, the National Commission on Gender and Development (NCGD) (which convened the meeting) had liaised with numerous NGOs to send their lists of actors who were subsequently invited. Most of the participants came from Nairobi. The representation was however varied. There were those from Faith-Based Organizations (FBOs), Community-Based Organizations (CBOs) and associations that were not registered with either the Registrar of Societies or the NGOs Board but broadly referred to themselves as members of the ‘peoples’ movement’.

This variation in the nature of civil society organizing is a result of the movement to the ‘grassroots’ that was funded by donors in the 1990s and early 21st century. The movement to the

272 Part of the mandate of the NCGD is “to coordinate, implement and facilitate gender mainstreaming in national development through advice to the government and stakeholders’ participation in policy formulation” (www.gender.go.ke).

273 I have however been seized with the report of the meeting. Among those who were present is Elijah Odhiambo, a human rights practitioner who worked with the Centre for Economic and Social Rights. Odhiambo who holds a BA in Sociology from Egerton University and Masters degree on Gender Studies from the University of Nairobi, has over the years worked closely on gender issues and often consults for the National Commission on Gender and Development.
‘grassroots’ was part of the broader milieu of liberalism that supported the work of NGOs in the wake of criticism of the government as not being accountable or inclusive enough (Haugerud 1997, Comaroff and Comaroff 1999). Civil society organizations and more so human rights NGOs have positioned themselves in Kenya as those who “right the wrongs” (to use Spivak’s 2004 phrase). As a response, many Western governments and funding agencies channeled their money through NGOs to undertake civic education and mobilization of wananchi in Kenya. By the mid-21st century, the same funders were raising concerns that the NGOs were predominantly urban-based.

In light of this, several NGOs opened offices in rural parts of the country (FIDA-K opened offices in Kisumu and Mombasa) while many others designed their activities to go beyond Nairobi. This is how many participants got invitations to the stakeholders’ meeting. I spoke to one ‘human rights expert’ who attended the meeting. She narrated to me how the NGO people spent time at the meeting trying to explain their understanding of CEDAW. ‘Some were almost reciting the guidelines of writing CEDAW reports’ (Anonymous Interview, 2009), she said. The representatives from the grassroots did not speak much. When given a chance, they mostly complained about the suffering of women and neglect by government or rated how well they had benefited from the NGOs. In her work, the consultant relied on CEDAW’s guidelines. She also visited some parts of the country where women were said to be most violated. According to Elijah (see footnote 273), the places visited were often those that have been branded as locations where women are victimized by cultural practices such as: wife inheritance, forced marriage, Female Genital Mutilation, dis-inheritance of land and property and other forms of gender discrimination.

Thus, besides the guidelines offered by CEDAW, the consultant had another guideline of ‘culture’. She had mapped out places in Kenya where ‘culture’ still ‘prevailed over human rights’ and set out to report how CEDAW had performed in reversing this state of affairs. From both perspectives (CEDAW guidelines and a list of harmful cultural practices), the narrative strategy for writing CEDAW report is predominantly that of women as victims. The consultant’s key task was therefore to collect a catalogue of violations and evidence of discrimination against women. When I put it to the consultant that this method of work ignored context, history and everyday making and unmaking of gender, she replied:

As a lawyer, I know what CEDAW requires. They require that any country report should be well grounded in facts that can withstand the rigour of evidence. We use the CEDAW guidelines as the list of reference against which to assess progress. Looking at the past, it is Articles 14, 15 and 16 of CEDAW that I paid much attention to. For local context, we rely on reports from various Civil Society Organizations although if we had the means a national survey would have been welcome. (Anonymous Interview, 10 March, 2011).

Like many colleagues who work in the area of human rights either as ‘expert’, advocates,
defenders or scholars, I have often been invited to participate or offer guidance on the process that would culminate in writing of ‘shadow reports’ to the United Nations Committees that monitor implementation of various human rights instruments. This is a task that I had undertaken for the last decade (1998-2008) and the last such assignment was in 2007-2008, when I led the process of writing Kenyan’s civil society report to the Committee on Economic, Social and Cultural Rights.

In undertaking these tasks, I always had doubt as to whether the reports captured the situated human rights experiences of Kenyans. When writing the 2007 report I had a difficult moment with the two colleagues (both who were trained lawyers) on the most appropriate strategy of writing. In one of the various discussions that we held, one of the colleagues charged that my approach to the report was very political (personal communication, November 2007). By ‘political’ what he meant was that I was insisting too much on historical and situational information. This in his opinion was a deviation from the framework of reporting required by the United Nations. What my colleagues did require of me was to follow the legal maxim of ‘keeping to the facts’. The writing of CEDAW and numerous other human rights reports then seem to be producing yet another culture and that is ‘culture of human rights’.

8.6 Culture of Human rights

This ‘culture of human rights’ is manifest in the way human rights have become a *sui generis* of many postcolonial states like Kenya. Kenya is currently a signatory to about 127 human rights treaties and conventions. In August 2010, a new Constitution of Kenya anchored on a strengthened Bill of Rights was enacted. Under this Constitution, notions such as rule of law, democracy, good governance, obligations and responsibility are the common currency for relationships among the governed and between the governors and the governed. Under Article 2(6) of the new Constitution, “any treaty or convention ratified by Kenya shall form part of the Law of Kenya.” In the same vein, Article 21(4) states that “the state shall enact and implement legislation to fulfill its international obligations in respect to human rights and fundamental freedoms.”

The rights discourse has therefore become entrenched as a structuring discourse of relating in postcolonial Kenya. The dominant rights discourse is often based on the legal model. In this paradigm, legal reasoning becomes the means through which everyday life is made intelligible and communications undertaken. This legalistic ‘culture of human rights’ is lucidly captured by Cowan, Dembour and Wilson when they argue that:

In this paradigm, law is conceived as a world view or structuring discourse which shapes the way the

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The world is apprehended. ‘Facts’ are not simply lying around waiting to be discovered; they are socially constructed through rules of evidence, legal conventions and the rhetoric of legal actors. Certain things can be said; others cannot be said and thus simply disappear from view. In many societies, legal reasoning becomes one of the most important ways through which people try to make sense of their world (2001:12).

The effect of the legalistic ‘culture of human rights’ has therefore been essentialization of human rights discourse. By this I mean a practice where human rights instruments like CEDAW are engaged as immutable and inflexible texts that state universal truths. In this sense, human rights reporting becomes a practice that relies on strict checklist of rights that are universal, ahistorical and acultural (Makau 2003: 45). This kind of negation of history and circumstances that have influenced the production of rights instruments and practice engages human rights as foundational abstract, a perspective that cannot even explain the development of specialized human rights conventions such as CEDAW.

Finally, the combined fifth and sixth report written in the rubric of ‘legal reasoning’ and imbued with the ‘culture of human rights’ was submitted to CEDAW by the Government of Kenya through the Ministry of Gender, Sports, Culture and Social Services in December 2002. By this time, Kenya had gone through monumental political changes. The Government of KANU and Moi had been defeated in the 2002 ‘velvet revolution’ (KHRC 2003) while new institutions like Ministry of Justice and Constitutional Affairs as well as Kenya National Commission on Human Rights had been established to ensure effective implementation of human rights in Kenya.

The delegation that went to New York to attend the 39th session where the 5th and 6th combined state reports were being discussed was large. It included members of the Ministry of Gender, Sports, Culture and Social Services, Kenya National Commission on Human Rights, Ministry of Justice and officials from Kenya’s embassy in the UN. There was also a larger constituency of national NGOs and international interest groups. I never attended this session but I have had access to numerous reports, pictures and interactions with organizations and individuals who went for the session.

8.7 CEDAW Meeting in New York

Although the state report was jointly written by the officials of Governemnt of Kenya and civil society (after the stakeholder meeting), the debate at the 39th session of the CEDAW Committee was not without new contestations from the civil society organizations and later from the Committee through its concluding observations. When the meeting opened at UN Headquarters, New York, on Friday, July 27, 2007 it is Articles 14, 15 and 17 of CEDAW that attracted robust discussions. The states’ report had argued that the government had established credit facilities such as Agricultural Finance Corporation (AFC), the Kenya Women Finance Trust (KWFT), the Kenya Farmers Association (KFA) and the Kenya Rural Enterprise Programme (K-Rep) to cater for access to

FIDA-K contested that such measures were unlikely to result into actual access to credit because many of the women in Kenya’s rural areas had no land titles that are often required as collateral to secure credit (FIDA-K 2007: 25). On employment, the periodic reports had claimed that women now occupy about 70% of employment in agricultural sector in Kenya (Republic of Kenya 2006: Para. 139). However, FIDA-K contested that most employment in the agricultural sector are low paying, precarious and often uncertain (FIDA-K 2007: 24). On social welfare, the periodic report stated that the government had established a Ministerial Grant Committee under the Ministry of Gender, Sports, Culture and Social Services to give grants to rural men and women groups (Republic of Kenya 2006: Para. 144).

In response, FIDA-K argued that most women in rural Kenya are unlikely to access such grants as they are not members of self-help groups through which the grants are often paid (FIDA-K 2007: 28). On access to market, the government reported that it had established market facilities like the Coffee Board of Kenya, the Kenya Sugar Board and the National Cereals and Produce Board to enable farmers in rural areas to export their produce (CEDAW 2006: Para. 139). FIDA-K appreciated this fact in their report but contested that these institutions are often out of reach for rural women involved in subsistence farming and with very little surplus to sell (FIDA-K 2007: 25). At the conclusion of its presentation on this article, the government listed numerous other initiatives undertaken to increase the number of women joining co-operative societies, access to health care and girl-children accessing primary education (Republic of Kenya 2006, para. 103-111). This time, FIDA-K contested in its report that the claims made by the state were not supported by any verifiable data (FIDA-K 2007: 18-9).

Although it can be presumed that the writing of periodic reports to treaty bodies such as CEDAW is often guided by the ‘culture of human rights’, this legal perspective is often engaged with myriad political contestations. Taking human rights reports as incomplete and indeed human rights itself as an incompletely theorized agreement (Sunstein 2007), FIDA-K was successful in raising doubts on completeness of the state report. However, there were still many things that remained unresolved, among them the question of how to measure the levels of implementation of the CEDAW convention.

8.8 Civil Society Open Space

There is no doubt that CEDAW has opened abundant space for civil society (and more so NGOs) participation in the human rights project at both local and international level. Unlike the indigenous and disability movement which had an emphasis on self-representation by either those recognized (or seeking recognition) as indigenous or those living with disabilities, CEDAW
operates in a less differentiated manner. At both the formal and informal sessions with the CEDAW Committee, both male as well as female leaders of NGOs are often present. One human rights ‘expert’ described for me how most participants come to the informal sessions kitted out in the latest *kitenge* (fabric with patterns), *chondo* (hand bags made from sisal) and with their iPads or small laptops. Often, most participants seem to know each other either through prior email contact or having met in other UN sessions. The informal sessions are often driven with the common feminist rhetoric of ‘universal sisterhood’. This drive has served well for many years when the struggle of access to justice for women was often undertaken by women organizations or women-led organizations.

The informal consultation sessions among NGOs and between them and the CEDAW Committee members have however become more important lately. The sessions as well as submission of reports have attracted participation from a larger number of NGOs from all over the world. Most important, participation in these sessions has become not just a matter for women-led NGOs but for male-led Human Rights NGOs as well. However, such a gendered presence seems to contest the underlying idea of ‘universal sisterhood’.

Although homogenising notions are highly questioned in practice as noted in Kenya where *wananchi* seem to yearn for more discussions about the ‘difference within the different’ (Spivak 1999: 50), some women-led NGOs have recently questioned what should be the position and role of male-led NGOs in both formal and informal sessions of the CEDAW process. My friend Elijah Odhiambo did not attend the New York meeting but went for the 2011 sessions of CEDAW in Geneva (which I have not covered in this thesis). He observed that as a leader of a male-led NGO, he was rarely informed about the informal sessions. When he went to one of them, the session was constructed as that of ‘universal sisterhood’ and thus muting his participation. At the formal session, one NGO representative questioned his ability to represent issues in CEDAW. This was contrary to the opinion of the CEDAW Committee members who were in fact keen to hear perspectives and reports from male representatives. The question raised at the informal sessions seems to be: who can speak for women under CEDAW?

8.9 Legal ‘Engineering’

It is now evident from this thesis that the official practice of human rights in Kenya is highly centralized around NGOs, Kenya National Commission on Human Rights and the state. As these influential actors often pursue the UN favored legal model of human rights (Langlois 2001), they often argue that legal innovation can affect social change. Roscoe Pound (1965: 247-252) has called this view legal engineering. In this formulation, the law backed by political power and legitimacy are means of changing what are often complex social arrangements.
The duel between civil society organizations (led by FIDA-K) on one side and the state representatives on the other attest to the multiple meanings of CEDAW. While the two parties differed on particular changes required for Kenyan women to benefit from CEDAW (with the government insisting on omnibus changes for all Kenyans while FIDA-K demanded far-reaching structural changes in power and gender relationships in Kenya), both agreed that it is legal changes that would enable the Kenyan woman to enjoy her human rights. To accompany this, they also agreed on the need for reliable data based on shared baselines. Accordingly, the Committee recommended in their concluding observations for:

… speedy enactment of the relevant bills, including the Domestic Violence (Family Protection) Bill of 2002; the Equality Bill of 2001; the National Commission on Gender and Development Bill of 2002; the Criminal Law Amendment Bill of 2002; the HIV/AIDS Prevention and Control Bill of 2002; and the Public Officers Code of Ethics Bill of 2002. The Committee also recommends that the State party’s relevant ministries continue working with civil society, including Non-Governmental Organizations, in order to create an enabling environment for legal reforms, effective law enforcement and legal literacy (CEDAW 2007: 36, Para. 208).

This notion of legal engineering (Roscoe Pound (1965: 247-252); Kapur [2006]) that is at the centre of the ‘culture of human rights’ remains dominant in both the conception and formulation of human rights programming. Of course the law is useful in the process of realization of human rights, but as we have seen in the preceding chapters, there are numerous limits to the use of law in social processes. Besides, it is such ideas of supremacy of the law that continue to marginalize novel practices such as those observed in the joint programme between Luo Councils of Elders and organizations such as KNCHR, FIDA-K and KELIN. Ignoring such novel initiatives suggests an immutable idea of human rights which is certain and contextually and historically transcendental.

In addition to legal engineering, the fact that CEDAW is the only human rights treaty that targets culture and tradition as influential forces shaping gender roles and family relations has also had a significant bearing on who the convention is used for. Article 14 of CEDAW calls on state parties to take appropriate measures to modify their cultural and social patterns of conduct in order to eliminate harmful customary practices. This modernist perspective of CEDAW (Griffiths 2001: 118) often ignores how human rights and culture is changing and is being changed by everyday life (Cowan, Dembour and Wilson 2001). Often however, actors importing the use of CEDAW have interpreted this provision to mean mere enactment of laws and policy measures to deal with what is broadly called ‘harmful customs’. During my fieldwork in western Kenya, I came across numerous practices often called ‘tradition’, ‘culture’ or ‘customs’ that promote discrimination (as defined under CEDAW and by Luo people). However, at no time did I find consensus that such practices are homogeneous Luo practices or that they enjoy uncontested application. As has been demonstrated in this thesis, what is commonly known as culture or customs are multi-layered resources often appropriated by various interests in the society. Documentation of practices of human rights from Luoland has demonstrated
that it is individuals who animate and transform culture (Pottage and Mundy 2004: 229). My fieldwork among Luo people in various parts of western Kenya for instance attests to these multiple appropriations of culture. This is not about relativism (which essentializes both culture and human rights) or the thinking of the doyen of the now much-criticized earlier cultural anthropology, Franz Boas. Rather, it is uncovering how ignoring the ongoing negotiations and contestations in the process of writing and presenting CEDAW reports is redefining the meanings of both culture and human rights in postcolonial Kenya. Besides, the strategies of legal engineering albeit considerably influenced by these contestations, continue to operate on a flawed understanding of culture.

The concluding observations given by the CEDAW Committee tend to engage with culture as some static, bounded and common whole that ‘captivates’ rural women who can only be freed through enactment of laws and education by the state. This essentialist notion of culture (often shared by some human rights NGOs and experts as well) ignores suggestions by anthropologists to engage culture (and of course human rights) as:

Historically situated, historically unfolding ensemble of signifier-in action, signifier at once material and symbolic, social and aesthetic. Some of these at any moment in time, will be woven into more or less tightly integrated, relatively explicit worldview; others may be heavily contested, the stuff of counter ideologies and ‘subculture’; yet others may become more or less unfixed, relatively free floating, and intermediate in their value and meaning (Comaroff and Comaroff 1992: 27).

This is an adequate description of culture in practice in Kenya. In its operation, it is not fixed to ‘rural areas’ as state reports and shadow reports to CEDAW insinuate. Rather, the performance of culture is fluid and defies the boundary of rural versus urban. Its actors are neither fixed to some ‘Luoland’ in western Kenya but in one big Diaspora experience. They are connected and often make claims of rights both as individual women as well as connected individuals where success and failure is often engaged collectively (Nyamnjoh 2002, Englund and Nyamnjoh 2004: 35, Werbner 2002). I met women who had come to FIDA-K clinic in Kisumu and asked them what they knew about the international human rights movement. One respondent, Jane Oluoch, told me during a lunch meeting that:

You see all we know about the international human rights movement is about the women’s meeting that took place in Beijing. When women came from Beijing, they claimed that there was freedom. Each time, they tell us they are still going back to report to Beijing on progress but it is only the urban women who go. We have never seen what they bring; perhaps it is the new constitution that shall bring us some freedom (Personal Interview, June November 2010).

The claims by Jane Oluoch open the question of the presumed homogeneity of women as well as the assumed role of international human rights instruments like CEDAW. However, this is not to say that Jane disputes the usefulness of instruments such as CEDAW. In fact she claims that reprieve on women’s marginalization is more probable through a new constitution. What she seems to be implying
is that some of the strategies used in implementing and monitoring CEDAW are rather assuming of local processes of formulating human rights.

Living in Kisumu which is about 300 miles away from where CEDAW stakeholders meeting had taken place in Nairobi, Jane Oluoch, as has been witnessed in my discussions with many women in rural Kenya, is more interested in actions that improve their current and future conditions. Such actions mobilize many social symbols and resources including global instruments like CEDAW (Abu-Lughod 2002; Griffiths 2001), but often they are formulated within a space of domesticated agency (Nyamnjoh 2002) and other relational politics of recognition (Englund and Nyamnjoh 2004; Nyamnjoh 2004).

At the time of my lunch meeting with Jane Oluoch, the Constitution of Kenya (CoK) had been promulgated on August 27, 2010. Acclaimed as a liberal and human rights-centered constitution, this new contract among Kenyans and between them and the state, is a result of twenty years of canvassing, debate, conflicts and political consensus-building. It must be this elaborate process that has contributed to Jane Oluoch’s optimistic view on this document. Jane is in fact unaware that this Constitution has borrowed heavily from the ideas and ideals of CEDAW.

The new constitution includes affirmative action to achieve gender parity in parliament. Women are guaranteed a minimum of one-third of elected and appointed posts in government (Article 81 (b). To respond to gender inequalities, Article 27 (3) asserts that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Furthermore, the scope within which women and men are protected from violence has been widened to include the private spheres (Article 29 (c). As I have documented in the previous chapters, it is during the same period of talks about CEDAW and the constitution that I observed the work of the Luo Council of Elders, the Nyakach Council of Elders, the radio elders, the Kenya National Commission of Human Rights and FIDA-K. Alongside women in rural western Kenya like Priscilla Oluoch and Madote, these institutions had combined their conceptions of gender and family with the global human rights view (Merry 1997: 49) to redefine their local cultural practices and delivery of rights envisaged in CEDAW. Such commingling of ideas of personhood and agency with instrumentalist discourses from ‘out there’ seem to be more of how wananchi experience CEDAW and other human rights instruments in Kenya.

The challenge of human rights reporting therefore is that social and contextual experiences of human rights such as those in western Kenya (referred to in CEDAW as rural women) seldom engages with the

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275 A majority of the court rulings by the Supreme Court in December 2012 stated that it is impractical and unachievable in the short term or specifically, in the March 2013 elections to attain this ratio. It thus remains by and large an aspirational statement, not a statement of fact.
human rights narratives given at the CEDAW meetings or national debates. Richard Wilson has noted this limit of human rights reporting in his analysis of a case in Guatemala (1997:134-160). He observes that the ‘culture of human rights’ deciphers what is a human rights violation, how it should be reported and where it should be reported. Often, this strategy of writing of human rights ignores the social context and meanings.

Under these circumstances, localized experiences in production and practice of human rights are often unintelligible and miss their place in universalizing documents such as state periodic reports on CEDAW and shadow reports by NGOs like FIDA-K. A reversal of this episteme of human rights can be realized by a reading of social life of human rights as attempted in this thesis. This thesis has developed the notion of the social life of human rights as a call to understand the social circulation of what Wilson calls ‘symbolic capital’ (Wilson 1997) of human rights. These are the social and political relations and processes through which human rights production (Wilson 1997) acquires and constructs social meanings. This has been evident in everyday human rights productions and encounters in western Kenya. It is a perspective where various modernisms of human rights put pressure on each other and engages in negotiations and conversations. The notion of social life of human rights therefore, should be read alongside Appadurai’s (1988) assertion that people don’t allow homogenizing practices of “globality” to obliterate “locality” as an organizing or experiential and normative reference. In practice the notion of social life of human rights challenges the universal template of reporting.

8.10 Challenging the Universal Template
Kenya’s reporting to CEDAW opens discussions for debate on gender, power, NGOs and *wananchi* that persist in postcolonial human rights practice. On one hand, there are the human rights experts who insists that CEDAW report should be written in accordance with strict guidelines that pay adherence to legalistic ‘culture of human rights’. On the other hand is the practice that is manifest from the report writing process in Nairobi, experiences of human rights by *wananchi* in western Kenya, dialogues in New York and various standpoints of NGOs.

The reporting structure, process and content at CEDAW insists that human rights have to be modeled around legal discourse. Often, fear is expressed by human rights experts that any attention to local particularities would be about ‘cultural relativism’ which they all try to avoid. “You see Steve”, stated one expert who works for the Kenya National Commission on Human Rights and has often attended CEDAW sessions, “Human Rights are universal and when you start talking about thinking of Luos as you talk of human rights, then that is not human rights” (Anonymous Interview, June 2010). Such notions ignore work by feminists and anthropologists who have demonstrated the importance of

The insistence by CEDAW actors on the legalistic model also ignores the agency and episteme promoted by the actors’ actions and testimonials. From this perspective CEDAW is often articulated by both activist and human rights ‘experts’ as oppositional to culture. Culture is in a sense presented as inconsistent to modernity and thus often repugnant such that recognizing rights is seen to entail a denial, rejection or overriding of culture; conversely, recognizing culture is seen to prohibit pursuit of individual rights (Cowan et al 2000: 4). This perspective is inconsistent with the findings of this thesis as discussed in details in Chapters Five, Six and Seven. What we see in the testimonies of Priscilla and Madote (Chapter Seven) is more of an exercise of ‘right to culture’ in the context of neo-liberal Kenya.

Culture was thus produced, made, re-made and mobilized as ‘an optional resource’ (Pottage and Mundy 2004: 230) in pursuance of human rights. The same is the case with human rights: it is appropriated, made, unmade and produced at the stakeholder meetings, local research in western Kenya and dialogue sessions in Geneva and New York. Richard Wilson has emphasized that such contextual readings of human rights gives meaning that is both consistent with its translational meaning as well as its locatedness (1997). While Wilson has emphasized on cultural and socio-historical understanding in human rights reporting, there is yet another dimension that is widely missed out in the narratives of the state, human rights NGOs in CEDAW reporting and its production of human rights. This is social relations. Francis Nyamnjoh’s concept of domesticated agency (Nyamnjoh 2002a, 2002b, 2004) and the practice of conviviality have been outstanding for most of this thesis. These relational discourses are often lost in the legal discourse of rights. Pottage and Mundy (2004) have suggested that “… we would be losing (out on) an intellectual resource not to take into account the diverse ways in which persons visualize themselves as carried by other persons and, for better or worse, by their relations to others” (Ibid. 232-233). Similar observations on relationships were made in Chapter Seven in the case of both Priscilla and Madote. When stating that her rightful situation had been restored, Priscilla explained: ‘... I am happy now, my mother in-law can visit me and I can visit... and the children are happy as well’. After dala was constructed for Madote, she explained: “Koro an dhano e kind jowadwa” (now I am a person among my people).

The negation of the context and social relationships in CEDAW reporting is an additional epistemic discontinuity (Spivak 2004) that continues to not only mark and marginalize the ‘wronged’ but also reproduce a genre of human rights that ‘others’ the wananchi or subaltern (those removed from the ladder of social mobility). What is common in these multiple conversations is that various actors from wananchi to those sitting in the CEDAW meetings in Geneva or New York, have adopted rights talk
as a way of thinking and discussing social justice (Merry 2006:47). However, what is produced as the practice and experiences of human rights remains uncertain. Insisting on a universal legalistic template and design of reporting on progress made on human rights is essentialist and runs the risk of undermining the multivocality of liberalism and the human rights discourse.

8.11 Conclusions

The reporting and discussions in Nairobi, Geneva and New York attest that the social life of human rights is an ongoing process. While at the formal level, NGOs, the state, CBOs and CEDAW all tend to agree on the ‘universal’ human rights instruments as the basis of what should inform human rights reporting, the persistent contestations of what is an accurate human rights report are an important observation. I had observed the same contestation during various other human rights reporting meetings that I attended in 2007 around periodic reports on Economic, Social and Cultural Rights.

It seems that while the language of human rights has been adopted as a ‘measure’ of Kenya’s modernity as observed elsewhere for ‘legal discourse’ in the postcolony by Comaroffs (2006), its use attracts complex and often contradictory implications for individuals and groups (Cowan et al. 2001: 1). Local concerns and how various groups experience personhood, agency and interactions with state power shape how what are otherwise universal human rights categories like CEDAW are implemented, reported and transformed. Afraid of implications of affirmative action and explicit declaration of rights of women, the Kenya state sees CEDAW as declaration on the rights of men and women. Its report is generic and argues that policies and legislations that are inclusive are adequate in guaranteeing women’s rights. The government seems to be implementing the idea of liberalism in its strict sense of providing an equal competitive environment for every Kenyan.

Civil society organizations like FIDA-K on the other hand have adopted a position that is often associated with many human rights NGOs in Kenya which demands structural changes in power relationships between men and women. Using instruments such as CEDAW to increase women’s power (versus men’s power), they often ‘construct’ women as one cohesive group. But as noted during the stakeholders meeting, generational, class, ethnic, regional and political party affiliation are some of the cleavages that have posed a challenge to this homogenizing construct.

Rural women are often presented as the key beneficiaries of CEDAW argue that the ‘urban’ women are elitist and unable to articulate their interests. They argue that these urban women rarely go to the ‘grassroots’. A more fundamental challenge is that of intelligibility; the ‘rural’ women argue that the special position being suggested under the aegis of affirmative action are likely to benefit the
‘urban’ women and not the ‘rural’ women. This epistemic discontinuity between wananchi, civil society and state elites is evident in reports sent to CEDAW, be it by state or human rights NGOs. Often, the reports are written within the rubric of ‘culture of human rights’ that marginalize testimonies and genres of rights produced in the so-called rural areas. Where reference is made to these rural areas, it is about how human rights are ‘emancipating women’ rather than how women in rural areas are producing a genre of rights that can give life to instruments such as CEDAW. Such selection of narratives from rural areas also tends to be in a register that only deciphers what constitutes human rights precedent or where data is required to demonstrate violations. In this register, narratives of human rights produced within the experience of the same rural women (meant to be the subject of CEDAW) remain marginalized and unintelligible.

The observations by Elijah Odhiambo that women-led NGOs do not seem tolerant to male-led NGOs at CEDAW meetings open questions not just on the issue of language of human rights but also on what politics of recognition means. CEDAW states its objectives to be pursuance of human rights for men and women. However its text is also explicit that the core beneficiaries are women. So who are the stakeholders in CEDAW? Should men-led human rights organizations be left out of CEDAW meetings? Of course at play here seems to be the understanding of the notion of gender. I have observed during my own fieldwork that although academics have succeeded in delinking gender from biology and sex (See Bulter 1997), often the debate on gender issues centre on recognition and representation of women. The effect however is that the NGOs coalition that is often expected to engage with state parties in making claims for ‘rural women’ is equally divided and have to engage with its own internal contestations. The question of who should speak about whose human rights pervades genders, sexes and institutions.

The thesis has centered on the Luo people and engaged various entangled historical moments and places in Kenya in an effort to explore first-hand the collapse of the politics of centralization right from its colonial pedigree of creating a cultural state. This model was continued in the postcolony under the patrimonial leaderships where maendeleo became the buzzword and indicator of integration into the postcolonial state. While making reference to particular material conditions, I have demonstrated how most recently, Luo habitus has become relevant in the “modern” sphere of Kenyan human rights organizations and discourse.
CHAPTER NINE

CONCLUSION: THE SOCIAL LIFE OF HUMAN RIGHTS

9.1 Ethnography of Human Rights

This thesis has undertaken ethnography of human rights not as a tool of advocacy on behalf of some ‘victims’ of violations but rather as an object of research. At the centre of this study of social life of human rights are subjectivity, culture and rights. It becomes evident right from the beginning of this project that understanding the historical and postcolonial manifestation of human rights in Kenya requires a narrative of rights not as some inflexible, absolute and pre-given instrument being used by ‘victims’ for their emancipation but rather as a cultural process that is in continuous production. The same applies for Luo personhood, habitus and customs. Rather than seeing these as pristine, static and functional inheritance of a distant past, this thesis has shown how they are in an ongoing production and social circulation. Ethnography for this kind of work is also distinct. The radio programmes, cultural festivals and various community events that I attended in both Luo Nyanza and other spaces were characterized by expressions of collectively experienced reality rather than single autonomous accounts. It was about what is the Luo philosophy of life that is concerned with such central questions as: Who shall enforce chike? What will happen to those who ketho kwero (break the taboos)? What can and/or should Luos abandon in these modern times?

There are many notions and debates on human rights discourse from as many standpoints often engaged from a meta- narratives and teleo-strategies. Coming indeed after the horrendous acts of the World War II, it was difficult for most scholars to critique it. This explains the isolation of anthropology in the 1940s following its critique of the universalizing and hegemonic attitude of the 1948 Universal Declaration of Human Rights (UDHR). Although anthropologists were themselves struggling with the discipline’s tagging to colonial attitudes and knowledge strategies that produced ‘natives’ for both colonizers and anthropology field workers, their caution would later prove useful for an internal critique of human rights. Further critique would further be raised in the various appropriations and multiple representations of the language of rights in the struggle against colonization and debates that ensued in formulating and demarcating African colonial states. Human rights discourse would become in practice a set of contradictions—it was used by the colonizers and the African nationalists alike.

To read human rights in post-uhuru and postcolonial Kenya therefore requires not a foundationalist outlook at the philosophical tenants of human rights discourse. Rather, it seems that its practical
manifestations offer better opportunity for scholarship. In the case of western Kenya, these practical manifestations offer the most opportune avenue to read meanings of human rights discourse. The idea of reading human rights from its practical manifestation has allowed me to engage it as a relational and socially-derived discourse. Writing in post-uhuru and postcolonial context, social life of human rights has been both a critique as well as a multi-vocal reading of its practical manifestation.

As a critique the thesis engages human rights as a product of particular post-enlightenment European experiences and political thought. It is however not possible to use this specific European experience as the orbit of reading all moral codes. This is why I refute even the now common attempts by some anthropologists, philosophers and legal scholars to develop lists of values or modes of governance that has consonance to the United Nations-based human rights scripts. Rather, I argue that what makes cross-cultural conversations with human rights discourse possible is the universal capability of all civilizations to develop scripts of personhood. Human rights discourse is therefore engaged as one of specific scripts of personhood whose hegemony has been created through numerous cultural institutions and the use of numerous institutions as Michael Foucault has explained in his *Discipline and Punishment* (1975). While my discussion is cautious on the limits of Foucault’s work on subjectivity, Chapter One and Chapter Two of this thesis are informed by Foucault’s work on how the political discourses construct political subjects. This process is both historical and situational. In Chapter Three, I have given a critique of British colonialism in Kenya through an account of interventions and processes that they deployed to produce what I call ‘responsibilized citizens’. In postcolonial Kenya, the project has been to produce a rational and litigious citizen. But my critique is not in explaining the attempts of colonial and post-uhuru political discourses to construct political subjects. Rather, I have used Mudimbe’s notion of “epistemological dominance”276 to engage the real intentions of the rights project in colonial Kenya as well as the human rights project in the post-Cold War era.

But it is in the multi-vocality that I offer opportunities of stepping outside the parameters of the dominant legalistic human rights framework. Multi-vocality has been about reading and documenting manifestations of human rights from different standpoints and historical moments. Because most of these ethnographic accounts are historicized, a common strand that is notable in my multi-vocality is that history is a (presumed) recollection of past events accounted within the contemporary economy of interest and context. Rather than present us with a problematic of false consciousness, this malleability in historicizing human rights in the postcolonial era has offered genealogies of human rights practice. It is these genealogies, discussed in Chapter Two, which avail the intellectual resources useful in reading the making and unmaking of human rights in postcolonial Kenya.

276 That is very close to Edward Said’s idea of *Orientalism* (1978).
At the end Chapter Four, a dilemma of visions of the post-uhuru nationalist project is ruptured when we engaged for the first time with the question of postcolonial subjectivity. It becomes evident that for the Kenya postcolony, agency is the basis of subjectivity. Here again, agency manifests itself at one point as some sort of populism, another time as expressionisms and some other times as part of pluralisms. But what is outstanding is that this agency is a critique of culture and operates not with habitus but rather outside it, as such making the post-enlightenment notions such as ‘reasonable man’ untenable. After the initial manifest at the end of Chapter Four, Chapters Five and Six are an account of how this agency is continuously produced and ‘authenticated’. In its inherent problems of homogenizing, this agency stands out as uni-linear, discursive and convoluted. Francis Nyamnjoh’s notion of “domesticated agency” best describes this kind of agency.

After reading the accounts of social life of human rights between Chapter Five and Seven of this thesis, the lingering question is: why does the legalistic notion that I have called the dominant notion of human rights persist? Indeed, representation of human rights practice often manifests interesting aspects that can be captured in what Cohen and Odhiambo (1992, 2004) have called economies of knowledge. This notion seems to be influenced by Foucaultian work on the relationship between discourse and power. As we observed in Chapter Seven and in the constitution-making process in Chapter Six, the state and some of the NGOs insist on a ‘pure’ nature of human rights discourse on whose basis they report back to the United Nations or give their own account of human rights performance. In Chapter Eight, I demonstrate this inter-phase between power and discourse where I admit that power produces knowledge (Foucault 1977: 27). The chapter shows that the human rights discourse is one of power whose aim is the control and manipulation of knowledge and, ultimately, the society. As I have shown in Chapter Eight, Luo people and human rights NGOs themselves make an explicit link between culture, human rights and power. Chapter Eight is therefore a very important chapter in this thesis because it demonstrates the possible representation of human rights within a space of competing interpretations. By combining these two aspects in the chapter, it has been possible to demonstrate how ideological discourse is produced forcefully and authoritatively within a given space—that of the United Nations reporting sessions. The UN reporting sessions therefore become the space of maintaining ideological discourse where power is not a mere privilege of the dominant group (government officials) who exercises power upon the dominated (in this context NGOs and the stakeholders). Rather, what we see at the UN meetings are relations of power which are not necessarily external but immanent in the interaction between the various actors presenting and discussing Kenya’s human rights records. Power relations and contestations around the human rights discourse are therefore products of ‘divisions, inequalities, and disequilibrium’. Anthropologist Henrietta Moore (1986) has summarized this interpretation of Foucault’s thesis in her work among the
Marakwet of Kenya. She concludes that: operations of power are not unitary; it is not the possession of a single group but an effect or product of operation of social relationships (Moore 1986: 194).

My fieldwork demonstrated how Luo-ness is produced and practiced within particular experiences of modern Kenya. Luo people who spoke on radio programmes want to distinguish themselves and at the same time belong to Kenya. Rather than rely on what experts record as Luo ways, they mobilize their testimonies of contemporary everyday life to seek historical continuity and change at the same time. Callers to the radio stations had their opinions about what being an authentic Luo is (or should be) but saw no contradictions between this ‘authentic Luo’ and Christianity or the common law regime in Kenya. Thus Luo people have not just resisted the category of being objects for anthropological description but have also embraced liberalism’s tenets of plurality, diversity and openness that characterize 21st century identities. This ethnographic experience leaves open questions such as: Is what the anthropologist writes about knowledge, or is it merely the rumours, gossips and mbaka that characterize everyday discoursing among the common folk? Although I was able to be close to individuals who shared their testimonies with me (like Pricilla and Madote in Chapter 7), I can’t be them. Ethnography may indeed need to be a more collaborative project than I have been able to realize myself.

The thesis has centered Luo people and engaged various entangled historical moments and places in Kenya in an effort to explore first-hand the collapse of the politics of centralization right from its colonial pedigree of creating a cultural state. This model was continued in the postcolony under the patrimonial leaderships where maendeleo became the buzzword and indicator of integration into the postcolonial state. While making reference to particular material conditions, I have demonstrated how most recently, Luo habitus has become relevant in the “modern” sphere of Kenyan human rights organizations and discourse.

Although fluid, contested and often a factor to asymmetrical power relations a presumed Luo habitus gives rise to both the idea of inclusive Luo-ness as well as institutions such as the Luo Union (in the 1940s) and Luo Council of Elders since the 2004. In its inter-phase with postcolonial Kenya, the anthropological tools and methods used to understand Luo people have also been deployed in understanding the culture of human rights. In engaging the intersections and gaps between Luo habitus and the culture of human rights, the study opens opportunities for the discipline of anthropology to deploy its practice in the production of new knowledge of human rights.

Wambui Otieno, Cohen and Odhiambo (1992, 2004), Nyamnjoh (2002b), Madote, Priscilla and other narrators of this thesis therefore pose a central question to the notion and subject of identity in the postcolony. Acknowledging this fluid nature of modernism, Eriksen (2001) has posed that “if the
modern ‘problem of identity’ is how to construct an identity and keep it solid and stable, the postmodern ‘problem of identity’ is primarily how to avoid fixation and keep the options open” (Pg. 299). This debate of leaving options for identity and indeed for practices that produce modernities such as that of human rights open was argued by Justice Bosire during the trial for the burial place for the prominent lawyer SM Otieno. While responding to the lead ‘expert’ witness (Professor of philosophy, Henry Odera Oruka) for the Umira K’Ager Clan’s claim that there were Luo sages who had unparalleled command of ‘Luo culture’ and “Luo philosophy”, Justice Bosire asserted:

Even if I was to accept what professor Henry Odera Oruka said, that clan sages take the decision, who is to decide that a particular person should be called upon to give direction with regard to burial as required? To my mind it will be idle to say that the clan takes a decision as to where and how a deceased person is to be buried. A line must be drawn somewhere… (As cited by Cohen and Odhiambo 1992: 50)

With this assertion which questions ‘the experts’, Justice Bosire affirms like Campbell, (2006: 81-5), Chanock (1985) and Moore (1989) that ‘traditions’ are deployed by contending parties (mostly men and those benefiting from dominant interest) to contest and influence the outcome of disputes/litigations. In concluding this debate, Campbell asserts that “as such, tradition is better understood as situated knowledge that reflects contemporary socio-political processes rather than as a historical truth” (2006: 82). This comment resonates with my findings on how culture and human rights are produced and practiced in postcolonial western Kenya.

It resonates with observations made earlier on the understanding of culture by amongst others, Comaroff and Comaroff (1999) who reiterate what had long been stated by scholars such as Cohen (1974), and Hall (1996) that cultural identities (including notions that embody it such as human rights) are not inherent, bounded or static. They are actually dynamic, fluid and constructed situationally in particular places and times. In treating human rights as an object of ethnography, this thesis has established that human rights is a cultural process to be understood simultaneously as tradition and communication; as roots, destiny, history, continuity and sharing on one hand; and as impulse, choice, the future, change and variation on the other (Eriksen 2001: 249).

Wambui Otieno, whose case was a constant reference point in most discussions about Luo modernity, is perhaps the best representation or response on whether Luo people are ‘traditional’ or ‘modern’. Wambui contests that both herself and S.M. Otieno were modern people. They read “Shakespeare, Bernard Shaw and Perry Mason” (Cohen and Odhiambo 1992:82). However, this narrative of Wambui is confronted by that of Joshua Ochieng’ Ougo who claims that he is afraid of spirits of dead people who

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277 This refers to wise men recognized by the community who are able to explain phenomena and beliefs beyond the basic common sense.
(whom he wants to appease) and is a Christian at the same time (ibid, 62). Such is the multi-layered nature of subjectivities in the postcolonial which defy the classical human rights construct of an atomistic, rational and market-focused individual. This economy of interest and situations are used here to examine the dominant notion of human rights as some ‘moving equilibrium’ (see Chapter Four). In this strategy, the thesis documents the effect of dominant notions of human rights upon Luo people and their agency within and upon it. Rather than some ‘experts’ who pose as consultants in anthropology, history, law and philosophy, it is contestations such as that of Wambui, Madote, Ogara Taifa, Priscilla, and many other women and men in rural parts of Kenya that construct these notions of subjectivities.

As was the case in the colonial ‘cultural resistance movement’ that gave rise to African independent churches like Mumboism, Legio Maria and Nomiya in western Kenya, these wananchi are giving rise to a ‘new’ genre of human rights. However, while these religious groups that defied missionary logic and salvific mission were dismissed as ‘cults’, human rights modernity produced by the likes of Madote are rarely admitted as authentic precedent. They do not even feature at the global human rights discussions in Geneva and New York—they are distortions. In the end, an epistemic discontinuity (between Human Rights NGOs and wananchi) following on the structural attitude of ‘epistemic domination’ links the colonial missions and governmentality with the postcolonial human rights crusade by NGOs and postcolonial state.

9.2. Changing Rights and Changing Culture

At the declaration of the Universal Human Rights in 1948, members of the American Anthropological Association asked: “How can the proposed declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?” (AAA, 1947, cited in Merry (2001:33-34). The central theme in this statement (although it was assuming homogeneity and static culture of some small group of natives) was a warning against imperialism. The American Anthropological Association was concerned that Eurocentric notions and interventions such as that of the ‘white man’s burden’ and desire to ‘civilize’ had led to imposition of hegemony and domination by the West.

Human rights in the UDHR had been defined as natural, inflexible, ahistorical and irreversible truth. Culture for AAA was on the other hand a character associated with isolated, bounded units of people. It is these essentialist positions informing the human rights thinkers and AAA anthropologists that led to a spat and an extended aversion between human rights and anthropology. For long, human rights was therefore treated as that modernity that travels and imposes itself on ‘natives’—a logic well captured by Makau Mutua’s (2002) metaphor of ‘savage’, ‘saviour’ and ‘victim’. 

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Luckily, more recently there was reconciliation between anthropologists and human rights. In the same essentialist discourse common in the 20th century functionalism, anthropology was useful in demarcating populations that claimed cultural distinctness. This gave rise to the minority movements, indigenous people movements and other categories that claimed homogeneous distinctness such as the women’s movement. Even with more progressive works that break the link with classical essentialist discourse in favour of ‘strategic essentialist discourse’ and problematization of difference, in the post-uhuru period, these essentialist relationships between human rights and anthropology have played out where anthropologists have been invited to give testimonies as expert witnesses\textsuperscript{278} in cases such as that of Otieno \textit{v. Ougo and Siranga}.

As this thesis has shown, it is also in the postcolony that evidence of the changing nature of human rights is abundant. Ethnographies from numerous spaces of this thesis defy the notion that human rights are complete. Rather, evidence is abundant of how human rights and those practices that are called ‘traditional’ are in constant change and undergo ‘distortions’. These never-ending changes posit human rights as an incompletely theorized agreement. It is the numerous cultural practices, histories, traditions, situations, interests, generational contests and power relations such as narrated here that produce a genre of human rights for the postcolonial.

The postcolonial has shown an invincible and almost zealous interest for human rights instruments to be domesticated and used as ‘tools’ of holding perpetrators accountable. The interest on who is wronged, who should speak about human rights and how human rights violations can be measured has offered room for a completely new terrain—that of human rights as a cultural process. While both human rights and culture are changing, the challenge seems to rest on the insistence by human rights practitioners to define rights in terms of an essentialist universal, acultural and ahistorical norm whose measure is based on a universal template. Thus there is evidently incongruence between the factors used by state parties and NGOs to write their reports on CEDAW and the everyday experiences of gender rights in western Kenya. The shift of engaging human rights not as a mere travelling modernity but rather as a modernity that is in continuous production in an economy inter-phased with contestations over power, interest and gender among others is useful in comprehending human rights in the postcolony.

\textsuperscript{278} Although Henry Odera Oruka was not an anthropologist, his method of study and theory of ‘Sage Philosophy’ was deeply influenced by strategies deployed by the 20th century British anthropologists.
9.3 Possibilities of the Postcolony

The works of Mudimbe (1988), Cohen and Odhiambo (1992), Arjun Appadurai (1986), Achille Mbembe (2001) and other postcolonial scholars have made it possible to engage with this ethnography of human rights in western Kenya. The discussions in this thesis endorse the view that struggles and difficulties of writing about Africa have mostly been about “representations” (Mbembe 2001:6). Often, CEDAW Committee, NGOs and the state represent places like western Kenya as locations that exist in misery and cultural oppression. These representations (or misrepresentations) often thrive on binaries such as ‘traditional’ versus ‘modern’. Its rationality is interventionist through instruments such as human rights. My findings show that, rather than move towards some instrumentalization and habitualization of human rights, the postcolonial Kenya has erupted with multiple possibilities: “... the postcolony is chaotically pluralistic; it has nonetheless an internal coherence (ibid. 2001:102). These multiple possibilities are both ideas of liberalisms as well as a manifest of limitations of Western European and North American post-emancipation idea of liberalism. It is this topography of the postcolony that allows for legal and practical recognition of the Luo Council of Elders, FIDA-K, KELIN, Kenya National Commission of Human Rights and a host of other human rights actors to exist side by side.

The result is a postcolony not of despondence, victimhood and lethargy as often presented by human rights reports and some academics. Rather, it is an active social, political, economic and moral process to discontinue the postcolonial state in Africa with all its attendant violence and epistemic domination.

Thus rather than wait for human rights to liberate them, places like western Kenya have become sites where new common languages of human rights and contestations of what constitutes human rights violations and who should represent who is being negotiated. However as we have seen, these contestations are not only resident in western Kenya. They are visible during the stakeholders meetings in Nairobi and the CEDAW Committee meetings in New York and Geneva.

9.4 The Testimony of the Wronged

The critique of representation has not just been on the postcolonial state; rather, there has been an ever persistent query and indeed recognition within the social sciences on limits of how much scholars can speak on behalf of members of groups for which they do not belong. While this was a matter that was long anticipated by anthropology, the kind of ethnographic account required by this discourse has called attention on how those who have for long been portrayed as ‘others’ can speak for themselves. This ethnography has underlined this notion of “who is speaking?” by allowing the voice of the wananchi to be present in western Kenya, at stakeholders meetings and in New York. Even when absent in person, the wananchi have been constantly present in guiding the ways of
knowing, discourses of speaking and cosmo-visions that produce human rights in the postcolony.

This challenge of representation and indeed presentation is versatile. It has linkages between the place of postcolonial state in global politics as well as the question of who are legitimate agents of human rights. At the national level, NGOs have acquired the space of less ‘trusted state’. These changes with the emergence of ‘independent’ human rights actors like the Kenya National Commission on Human Rights (KNCHR) and human rights-centred constitutions such as the one adopted in Kenya in August 2010.

However the physical location of human rights, where presentations are made, is still removed from where the wrongs happen. Stakeholder meetings are held in Nairobi and presentations on progress made on realizing CEDAW are made in Geneva and New York. The distinction of ‘home’ and ‘abroad’ is stark. Abroad is mostly developing world locations where violations occur, while ‘home’ are Western and North American cities that are the ‘source’ of human rights modernity.

This contestation has also opened questions on the institutional infrastructure for ‘measuring’ and enforcing human rights. The results are situated genealogies of human rights that make an import to domesticated agency that pave way for conversations (Oomen 2005) about the International Criminal Court, national politics, culture and cosmo-visions. All these are recipes of social life of human rights which give rise to particularized and situated genealogies of human rights in postcolonial Kenya.

The practice of human rights in western Kenya, as it unfolds, has also been about who can speak for whom and how to measure human rights. While the NGOs position themselves as ‘saviours’ and ‘advocates’ for the wronged victims, their ability to mediate between the ‘victims’ and competent authorities like the state and the UN agencies is not unquestioned. ‘Measuring’ human rights violations and agreeing on who is wronged is yet another area where the social life of human rights becomes useful. Departing from legalistic methods of measuring ‘the wrong’ on the premise of human rights instruments or legal codes, the KELIN and Nyakach Council of Elders resorted to measuring violations based on common mwananchi’s testimony.

To establish whose rights were violated according to Luo customs outlining treatment of chi liel, Madote was asked to give her testimony not once but many times over. Each time another woman gave her testimony, she was asked to repeat her experience. This is what was used to decide where a violation had occurred. Madote’s knowledge and experience as chi liel became the premise of deciding whose rights had been violated. Her testimony was resilient and was allowed to circulate by
the Nyakach Council of Elders like any other textual precedent. Similar use of testimonies was evident at the baraza meeting at the Kisumu Sunset Hotel. After the baraza, it is Dorothy Awino and beneficiaries like Priscilla Oluoch who guided other actors in making selections and interventions.

This model where the ‘wronged’ become agents of restoring their rights casts doubt on the almost naturalized mediation role of the human rights organizations and institutions. What one gleans from these stories is that we live in a post-cultural world within and where the roles of the individuals and groups to make and unmake culture are much more recognized. In writing genealogies and practices of human rights, anthropologists now need to pay attention to historical and biographical circumstances in order to make the middle ground between local and supra-local universals intelligible.

In the final analysis, it is the domesticated agency that is seen to offer convergence that give meaning to the entangled and much intelligible notions of human rights practices in western Kenya. It is these life experiences informed by human rights (not as inflexible truth) and situations of both certainty and uncertainty in the postcolony that enable the lived experience of human rights. It is the social life of human rights that reads human rights from everyday relationships, situations and power asymmetry that produce it and its subjects. The current influence of these notions and their role in legitimating neo-traditional institutions like the Luo Council of Elders is a phenomenon that requires further study. As a critique of both the state and localized hegemonies, these new languages of rights and modernity contribute to the now enlarging rubric of dialectical relationships between state and nation in the era of politics of recognition.
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<td>Ratification 09.04.1979</td>
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<tr>
<td>Child Labour</td>
<td>Ratification 07.05.2001</td>
</tr>
<tr>
<td>Covenant on Civil and Political rights</td>
<td>Accession 01.05.1972</td>
</tr>
<tr>
<td>Covenant on Economic, Social and Cultural rights</td>
<td></td>
</tr>
<tr>
<td>Convention on the Rights of Persons with Disabilities (ICRPD), 2006</td>
<td>Ratification 18.05.2008</td>
</tr>
<tr>
<td>Rome Statute of the International Criminal Court.</td>
<td>Ratification 05.03.2005</td>
</tr>
<tr>
<td>Convention on the Status of Refugees (CSR)</td>
<td>Accession 16.05.1966</td>
</tr>
<tr>
<td>African Charter on Human and Peoples’ Rights on the Rights of Women in Africa</td>
<td>Signed by Kenya on December 12, 2003</td>
</tr>
</tbody>
</table>
Source: Assorted Sources
# ANNEX 4.0 GENEALOGIES OF HUMAN RIGHTS

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>1760BC</td>
<td>In Babylon King Hammurabi draws up the ‘Code of Hammurabi’, an early legal document that promises to ‘make justice reign in the Kingdom and promote the good of the people’</td>
<td></td>
</tr>
<tr>
<td>c528BC-486BC</td>
<td>In India Gautama Buddha advocates morality, reverence for life, non violence and right conduct</td>
<td></td>
</tr>
<tr>
<td>c26-33AD</td>
<td>In Palestine Jesus Christ preaches morality, tolerance, justice, forgiveness and love</td>
<td></td>
</tr>
<tr>
<td>613-632</td>
<td>In Saudi Arabia, Prophet Mohammed teaches the principles of equality, justice and compassion revealed in the Quran</td>
<td></td>
</tr>
<tr>
<td>1215</td>
<td>In England Magna Carta is issued, limiting the power of the King and giving freemen the right to be judged by their peers</td>
<td></td>
</tr>
<tr>
<td>1689</td>
<td>In England Parliament agrees the Bill of Rights that curtails the power of the monarch and includes freedom from torture and from punishment without trial</td>
<td></td>
</tr>
<tr>
<td>1789</td>
<td>In France the National Assembly agrees The Declaration of the Rights of Man and of The Citizen that guarantees the rights to liberty, equality, property, security, and resistance to oppression</td>
<td></td>
</tr>
<tr>
<td>1791</td>
<td>The United States Congress agrees their Bill of Rights, amending the US Constitution to include rights to trial by jury, freedom of expression, speech, belief and assembly</td>
<td></td>
</tr>
<tr>
<td>1833</td>
<td>The British Parliament abolishes slavery through the Slavery Abolition Act</td>
<td></td>
</tr>
<tr>
<td>1945</td>
<td>The United Nations is created ‘to affirm the dignity and worth of every human person’</td>
<td></td>
</tr>
<tr>
<td>1948</td>
<td>The United Nations adopts The Universal Declaration of Human Rights</td>
<td></td>
</tr>
<tr>
<td>1950</td>
<td>European Convention for their Protection of Human Rights and Fundamental Freedoms</td>
<td></td>
</tr>
<tr>
<td>1952</td>
<td>International Convention on the Political Rights of Women</td>
<td></td>
</tr>
<tr>
<td>1965</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
<td></td>
</tr>
<tr>
<td>1974</td>
<td>International Charter on the Economic Rights of States</td>
<td></td>
</tr>
<tr>
<td>1966</td>
<td>International Covenant on Economic Social and Cultural Rights; International Covenant on Civil and Political Rights</td>
<td></td>
</tr>
<tr>
<td>1979</td>
<td>International Convention on the Elimination of All Forms of Discrimination Against Women</td>
<td></td>
</tr>
<tr>
<td>1969</td>
<td>American Convention on Human Rights</td>
<td></td>
</tr>
<tr>
<td>Year</td>
<td>Event</td>
<td></td>
</tr>
<tr>
<td>------</td>
<td>-------</td>
<td></td>
</tr>
<tr>
<td>1981</td>
<td>The African Charter on Human and Peoples' Rights, is adopted by Organization of African Unity. This is the most important regional human rights treaty for people living in the Africa</td>
<td></td>
</tr>
<tr>
<td>1984</td>
<td>International Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment</td>
<td></td>
</tr>
<tr>
<td>1986</td>
<td>Declaration on the Right to Development</td>
<td></td>
</tr>
<tr>
<td>1989</td>
<td>The UN adopts The United Nations Convention on The Rights of the Child, now ratified by all but two of its 191 member states (US and Somalia)</td>
<td></td>
</tr>
<tr>
<td>1990</td>
<td>International Convention on the Rights of the Child</td>
<td></td>
</tr>
<tr>
<td>1993</td>
<td>World Conference on Human Rights in Vienna, Austria, adopts the Vienna Declaration and Programme of Action</td>
<td></td>
</tr>
<tr>
<td>1998</td>
<td>Rome Treaty establishes the Permanent International Criminal Court, to try perpetrators of genocide, war crimes and crimes against humanity</td>
<td></td>
</tr>
<tr>
<td>2002</td>
<td>The Kenya National commission on Human Rights is established with the mandate to investigate and provide redress to human rights violations in Kenya, to research and monitor the compliance of human rights norms and standards, human rights education and training and campaigns, advocate, and collaborate with other stakeholders in Kenya</td>
<td></td>
</tr>
<tr>
<td>2010</td>
<td>Kenya sets an example in East Africa and the continent for adopting a new constitution with one of the most liberal bill of rights.</td>
<td></td>
</tr>
</tbody>
</table>

ANNEX 5.0 WHO IS A LUO?

He is a River-Lake Nilote. He lives near the shores of Nam Lolwe [Lake Victoria]. He is arguably the most passionate person about anything in the world. He is Loud. He would live a most lavish life if only he could afford it. He is the one without a chair when the political song ends, although he sang the loudest. He is the one seen in a suit and briefcase when Gor is/was playing AFC…and woe unto you who didn’t know that some people have their special chairs at City Stadium. He is the one who will make you stand from that chair.

She is the one who was expelled for shouting in the dinning hall that the food is bad. She is the old woman who often rises up with cries of “halleluyah” in an otherwise bored church. He is the guy who came up with the bright idea of making a replica of the offering bags when Pastor so--and-so came to town so that they could swindle him of money. He is the one who first came from home in the second term with some dried fish. At first people shied away, then acted like they have never tasted fish before. She is not the one in brown stockings, blue skirt in green blouse. He/she is who he/she is and there is just no stopping him/her.

ANNEX 6.0 THE DEVELOPMENT OF THE NATIVE TRIBUNALS IN COLONIAL KENYA

1895-1902

- The pre-colonial ‘indigenous’ judicial institutions are vaguely supervised by the colonial administrators;
- As early as 1897, the Native Courts Regulation provides for ‘concurrent’ jurisdiction—civil and criminal for certain local chiefs and headmen;
- In some part of the colony, the Natives had the latitude to choose either the ‘indigenous’ judicial institutions or British Colonial Judiciary;
- East Africa Native Courts Amendment (1902) recognizes the existing courts and gives the Commissioner Powers to create anywhere they do not exist.

1902-1910

- The enactment of the Village Headmen Ordinance (frontrunner of the Native Authority Ordinance) which provided for appointment of official Headman;
- The method of administration through headmen and chiefs as agents for colonizers was introduced;
- The headmen and chiefs become the conveners and lead arbitrators in the Native Tribunal structure that was diffused with the Native Council;
- Councils of elders were established in the native countries to work with the headmen and chiefs;
- The policy adopted at the time was of gradually improving the standards of the tribunals and transforming them into up-to-date courts within the colonizers standards;
- The Courts Ordinance (1907), removed the discretions of ‘The Tribal Chiefs or Council of Elders or Headmen’ and placed their actions under rules Gazetted by the Governor;
- The first guidelines for the ‘The Tribal Chiefs or council of Elders or Headmen’ were made in 1908.

1910-1920

- The initial policy of the colony was that new tribunals could be created or the old ‘indigenous’ judicial mechanism be recognized, however the 1911 rules by the Governor stated that only the pre-existing (indigenous judicial mechanism and bodies) would be recognized;
- Governor Percy Groud promulgated Natives Tribunal Rules, when he directed that the headmen and chiefs should no longer be part of the native tribunals;
The governor had taken note that overtime, the Native Tribunal and Councils of Elders with which they worked had departed from the ‘indigenous’ models that were practiced prior to colonial rule;

The new guidelines in the Native Tribunal rules, attempted to separate judiciary and executive functions and functionaries in the colony.

In 1923, the governor published rules giving authority to the Provincial Commissioners and District Commissioners revise cases ‘administratively’;

There were increasing reports that Native Tribunals were not performing their tasks, condoning or engage in corruption and were not adequately supervised;

Giving his experience on South Kavirondo, Mr Nathcote (who later become sir Geoffrey) stated ‘My experience leads me to believe that courts held by elders not closely supervised by European officers invariably lead to great abuse’;

Reorganization done to enable supervisions from the District Officers and Provincial Commissioners;

In 1924, the PC and DC had been recognized as magistrates and as such the Native Tribunals were no longer operating in parallel but as part and parcel of the ordinary Judicial system of the colony;

The PC and DCs (them being under the jurisdiction of the Supreme Court as Magistrates) were appellate courts for the Native Tribunals. They often started the hearing of each case a fresh;

The Native Tribunals Ordinance (1930) incorporated many of the challenges that were arising from the ‘sophistication of the natives’. Some of the key clarifications were:

1. Native tribunals were given jurisdiction over all natives within their area, not merely those of their own tribe;

2. Advocates were debarred from appearance before a native tribunal or, on appeal from a native tribunal, before a DC or a PC;

3. The appeals were to be through a native court of appeal, to the District Commissioner and then to the Provincial Commissioner, instead of through a subordinate courts to supreme courts;

With the Adoption of the 1930 Native Tribunal there was : Reduction in the number of tribunals and elders sitting in each session of the tribunal; Introduction of an appeal of elders at each Tribunal; Payment of fixed salaries for court elders and clerks and greater separation of the functions of executive and judiciary.
• Establishment of appeal tribunals at distinct level;

• Tribunal members were granted security of tenure and were only removable for abuse of office;

• The appeals tribunal were given the status of a permanent court at District level with president and vice-president from the various local tribunals;

• An increased upsurge in demand for elders who had literacy skills and could speak English and Swahili;

• It was provided that the 1930 Ordinance would continue until end of 1937, but it was allowed to continue in operation with minor amendments in Nos. 35 of 1932, 31 of 1933, 51 of 1934, 55 of 1934, 5 of 1935, 32 of 1937, 38 of 1940, and 17 of 1942

• Worth mentioning of these amendments was the no. 17 of 1942 that disallowed other courts apart from the Native Tribunals from holding proceedings on matters of native land.
### ANNEX 7.0 CASES REPORTED TO FIDA

#### 7.1 Cases reported at FIDA KSM in JAN-DEC 2008

<table>
<thead>
<tr>
<th>NATURE OF CASES</th>
<th>Jan</th>
<th>Feb</th>
<th>Mar</th>
<th>Apr</th>
<th>May</th>
<th>Jun</th>
<th>Jul</th>
<th>Aug</th>
<th>Sep</th>
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<td>03</td>
<td>01</td>
<td>02</td>
<td>03</td>
<td>02</td>
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<td>04</td>
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<td>23</td>
<td>13</td>
<td>29</td>
<td>17</td>
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Source: FIDA/KSM clients Register 2008

Note: A total of 253/258 Files closed: client(s) failed to come back and so the files closed, while 5 out of 258 were withdrawn by the respective clients either after agreement between the parties involved.
ANNEX 7.2. : CASES REPORTED BETWEEN JAN- DEC 2009

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<th>May</th>
<th>Jun</th>
<th>Jul</th>
<th>Aug</th>
<th>Sep</th>
<th>Oct</th>
<th>Nov</th>
<th>Dec</th>
<th>Total</th>
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<tbody>
<tr>
<td>Child custody</td>
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<td>29</td>
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<td>01</td>
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<td>02</td>
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<td>01</td>
<td>-</td>
<td>04</td>
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<td>07</td>
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<td>16</td>
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Source: FIDA/KSM clients Register 2009
ANNEX 7.3. CASES REPORTED DURING THE 1ST HALF OF 2010

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<th>Nature of Case</th>
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<th>MAR</th>
<th>APR</th>
<th>MAY</th>
<th>JUN</th>
<th>TOTALS 1ST HALF</th>
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<td>88</td>
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<td>Succession</td>
<td>09</td>
<td>08</td>
<td>14</td>
<td>03</td>
<td>08</td>
<td>24</td>
<td>66</td>
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<td>Domestic Violence</td>
<td>13</td>
<td>16</td>
<td>21</td>
<td>07</td>
<td>15</td>
<td>06</td>
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<td>Custody</td>
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<td>58</td>
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<td>Devolution of Property</td>
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<td>01</td>
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<td>Rape</td>
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<td>Others</td>
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<td>150</td>
<td>38</td>
<td>106</td>
<td>235</td>
<td>729*</td>
</tr>
</tbody>
</table>

Source: FIDA/KSM Register 2010
Annex 8.0 SONGS BY MILTON ONGORO (JAMNAZI BAND)

8.1 Kendu Bay Dalawa

D'HOLUO VERSION

Kendu bay dalawa, kanyasoro dalawa Kendu bay dalawa, kanyasoro dalawa Kendu bay dalawa, kanyasoro dalawa Kendu bay dalawa, kanyasoro dalawa Kendu bay dalawa, alaba jonyo dalawa Kendu bay dalawa, kanyasoro dalawa Kendu bay dalawa, kanyasoro dalawa Kendu bay dalawa, kanyasoro dalawa Kendu bay dalawa, alaba jonyo dalawa Kendu bay dalawa, kanyasoro dalawa

Waparo nyikwa ramogi kaka ne wawuok juba,
Waparo nyikwa ramogi kaka ne wawuok sudan,
Waparo nyikwa ramogi kaka ne wawuotho yawa,
Waparo nyikwa ramogi kaka ne wadonjo kenya,
Waparo nyikwa ramogi kaka ne wadonjo nyanza,
Waparo nyikwa ramogi kaka ne wadonjo kisumo pacho

Kisumo to dalawa ma nyakagonda dalawa, Kisumo dalawa banfire dalawa,
Kisumo to dalawa ma nyakagonda dalawa,
Kisumo dalawa banfire dalawa,
Kisumo to dalawa mama alego dalawa, Kisumo to dalawa banfire dalawa, Kisumo dalawa banfire dalawa,
Waparo kaka ne wan baba, Waparo kaka ne wan baba, Ne walupo to wapuro baba, Ne walupo to wapuro baba,
Wagolo kodhi kendo wakomo baba, Ne wadoyo to wakeyo baba,
Ne wadoyo to wakeyo baba,
Watiyo matek joka janam nyandwat nyaka milambo,
Watiyo matek joka janam nyandwat nyaka milambo,
Watiyo matek joka janam nyandwat nyaka milambo,
Gimoro chando wiya,
Wach moro chando chunya,
Gimoro chando wiya....wach moro chando wiya,
Timbe luo manene, timbe luo manene, Benadus oluoch Okello Benadus oluoch Okello,
Kona luo wapenjo u, timbe luo manene,
Tero mon uweyo nang’o Ng’ado lak uwito nang’,
Karachuonyo apenjo un kanye, Jokouma apenjo un kanye, JoRongo apenjo un kanye Richard kouma apenjo in kanye, Jokabuoch apenjo un kanye, karis okonja apenjo un kanye, ajuja apenjo’ un kanye, tero mon uweyo nang’o, ng’ado lak uwito nang’o, Jokisumo apenjo un kanye...
8.2 Kendu Bay Dalawa
ENGLISH TRANSLATION VERSION

Kendu bay is our home, kanyamsoro our home,
Kendu bay is our home, kanyamsoro our home,
Kendu bay is our home, kanyamsoro our home,
Kendu bay is our home, kanyamsoro our home,
Kendu bay is our home, kanyamsoro our home,
Kendu bay is our home, kanyamsoro our home,
Kendu bay is our home, kanyamsoro our home,
Kendu bay is our home, kanyamsoro our home,
Kendu bay is our home, kanyamsoro our home,
Kendu bay is our home, kanyamsoro our home,

We remember as Ramogi’s grandchildren how we left Juba
We remember as Ramogi’s grandchildren how we left Sudan
We remember as Ramogi’s grandchildren how we walked alas
We remember as Ramogi’s grandchildren how we entered Kenya,
The Kisumu people where are you?
We remember as Ramogi’s grandchildren how we entered Nyanza
We remember as Ramogi’s grandchildren how we entered Kisumu,
Kisumu is our home, born fire our home,
Kisumu is our home, born fire our home,
Kisumu is our home, mama Alego; our home
Kisumo dalawa born fire our home,
Kisumo dalawa born fire our home,
We remember how we were dady,
We remember how we were dady,
We were fishing and ploughing, We were fishing and ploughing,
We used to prepare seedlings and plant:

We were weeding and harvesting ‘dady’ We were weeding and harvesting ‘dady’
We worked hard Jonam, North to South, We worked hard Jonam, North to South,
There is something disturbing my head, It ponders in my heart, There is something disturbing my head,
It bothers me in my heart,
The Luo norms, the Luo traditions, Benard Oluoch Okello,
We ask the Luo, where they have left their traditions, Why did you Luo stop wife inheritance?
Teeth removal, why did it stop?
The Karachuonyo I am asking where are you? The Ouma family where are you?
The Rongo people where are you? Richard K’ouma where are you?
The Kabuoch community where are you? Karis Ukonja I am asking where is you?
Ajuja am asking, where you are! Why did you stop wife inheritance?
Why did you abolish the practice of Teeth removal?
8.3 : USIKU

Mimi nalo jambo lanisumbua akili, ulimwengu umepeka mahali, Mungu alipanga usiku saa ya kulala, mbona walimwengu mme badili mipango, usiku saasa imeguaka mchana, na mchana saasa ni kama usiku jamani eee mi nashangaa X 2

Karo za watoto mnatafuta usiku, kodi za nyumba mnatafuta usiku, biashara nyingi mwafanya usiku, chai kwa makate sasa mwauza usiku, mahindi choma saasa mwauza usiku, hata maombi nyingi mwafanya usiku, koinange mnatafuta usiku, wake kwa waume shughuli zenyu usiku, hata safari nyingi mwaenda usiku, biashara zote mwafanya usiku kwa nini? Eee mi nashangaa (solo)… X2

Niliambiwa na babu yangu kweli zuba utapata mwana si wako X 3

Nimeamini kilichosemwa na babu, nimekubali kilichosemwa na Babu, gaga na umbwa haliwali mkavu, lakini sasa mwapumzika saa ngapi, asubuhi mnatafuta riziki, mchana kutwa mnatafuta riziki, hata majioni mnatafuta riziki, usiku wa manane mnatafuta riziki niambieni mwapumzika saa ngapi wenzangu eee ee nashangaa…

Niliambiwa na babu yangu kweli zuba utapata mwana si wako X 3

(I have got an issue that bothers my mind, the world has has gone bonkers somewhere, God planned night for sleep, why have the people changed the plan? Night has been turned into daytime and daytime changed to night time, surely why?)

You look for school fees during the night, rent too at night, you do much business during the night, tea and bread you sell at night, you roast maize too at night, worship services offered at night, You visit Koinange street at night, men and women work at night, you travel frequently during the night, all the business you do at night, I wonder why? X2

I was told by my grandfather that when one is asleep all the time will find all finished X3

I now believe and trust what was said by my grandfather when do you rest from work, early morning you hustle, you hustle the whole day, even late in the evening you hustle, wee hours of the night you hustle, tell me people, when you usually have rest? I wonder why?

I was told by my grandfather that when one is asleep all the time will find all finished X3

I now believe and trust what was said by my grandfather when do you rest from work, early morning you hustle, you hustle the whole day, even late in the evening you hustle, wee hours of the night you hustle, tell me people, when do you usually have rest? I wonder why?)
<table>
<thead>
<tr>
<th>Dates</th>
<th>Theme</th>
<th>Content</th>
</tr>
</thead>
<tbody>
<tr>
<td>6th June 2011</td>
<td><em>Kend</em> (marriage)</td>
<td>Marital social relations discussion.</td>
</tr>
<tr>
<td>13th June 2011</td>
<td><em>Nyombo</em> (dowry)</td>
<td>African traditional marriage vs contemporary modern marriages and biblical implications.</td>
</tr>
<tr>
<td>20th June 2011</td>
<td><em>Goyo dala</em> (establishing a home)</td>
<td>What protocols guides the establishment of a home?</td>
</tr>
<tr>
<td>27th June 2011</td>
<td><em>Kend kod weruok</em> (marriage and separation/divorce)</td>
<td>Can a Luo woman and man divorce?</td>
</tr>
<tr>
<td>4th July 2011</td>
<td><em>Ter or lako</em> (Levirate)</td>
<td>Can a woman of old age be subjected to levirate?</td>
</tr>
<tr>
<td>11th July 2012</td>
<td><em>Lungo Nying</em> (naming)</td>
<td>How do Luo people name their children?</td>
</tr>
<tr>
<td>18th July 2011</td>
<td><em>Goyo dala</em> (establishing a home)</td>
<td>Can children of <em>ich samba</em> (born before marriage) accompany their foster father in <em>goyo dala</em>? Are children of <em>ich simba</em> eligible for all entitlements of a first born in <em>dala</em>?</td>
</tr>
<tr>
<td>25th July 2011</td>
<td><em>Ter or lako</em> (Levirate)</td>
<td>How is age of a woman a factor in <em>ter</em>? Can a woman who is in her menopause go through <em>ter</em>?</td>
</tr>
<tr>
<td>1st August 2011</td>
<td><em>Chike Luo gi Maro</em> (mother in law)</td>
<td>How do Luo customs expect the son-in-law to relate to <em>maro</em>?</td>
</tr>
<tr>
<td>8th August 2011</td>
<td><em>Goyo dala</em> (establishing a home)</td>
<td>Can a man <em>goyo dala</em> when her children are still breast feeding?</td>
</tr>
<tr>
<td>15th August 2011</td>
<td><em>Ter or lako</em> (Levirate)</td>
<td>When <em>jater</em> takes in a <em>chi liel</em>, does she move to live in his <em>dala</em>?</td>
</tr>
<tr>
<td>22nd August 2011</td>
<td><em>Kend</em> (marriage)</td>
<td>Some people in Uyoma do not marry among their clans- how comes that happens amongst Jo ugenya?</td>
</tr>
<tr>
<td>Date</td>
<td>Theme</td>
<td>Question</td>
</tr>
<tr>
<td>--------------------</td>
<td>--------------------------------------------</td>
<td>--------------------------------------------------------------------------</td>
</tr>
<tr>
<td>5th September 2011</td>
<td>Gero simba (building bachelor’s house)</td>
<td>Once jaduong’ has build dala, how does the various children build their simba?</td>
</tr>
<tr>
<td>12th September 2011</td>
<td>Anywola mar Luo (Luo lineage)</td>
<td>What is the history of Luo people from Jaramogi Ajwang’ to the current clans?</td>
</tr>
<tr>
<td>19th September 2011</td>
<td>Chike Joluo (Luo customs)</td>
<td>What is chike Luo gi Timbegi?</td>
</tr>
<tr>
<td>26th September 2011</td>
<td>Goyo dala (establishing a home)</td>
<td>What are chike ja guong’ e dala ne” (the laws that are used by an elder in his homestead).</td>
</tr>
<tr>
<td>3rd October 2011</td>
<td>Goyo dala (establishing a home)</td>
<td>Can a woman goyo dala?</td>
</tr>
<tr>
<td>10th October 2011</td>
<td>Ter or lako (Levirate)</td>
<td>Why is there problem with ter these days?</td>
</tr>
<tr>
<td>17th October 2011</td>
<td>Ter or lako (Levirate)</td>
<td>Can a Christian woman go through ter?</td>
</tr>
<tr>
<td>24th October 2011</td>
<td>Timbe ma nene (things of the past)</td>
<td>How did Luos relate to each other during pre-colonial days?</td>
</tr>
<tr>
<td>31st October 2011</td>
<td>Timbe ma nene (things of the past)</td>
<td>Did Luos have belief in God before the arrival of the missionaries?</td>
</tr>
<tr>
<td>7th November 2011</td>
<td>Goyo dala (establishing a home)</td>
<td>Is one allowed to re-use the iron sheets used in his simba in the newly established home?</td>
</tr>
<tr>
<td>14th November 2011</td>
<td>Goyo dala (establishing a home)</td>
<td>And can the younger sister get married before the elder one?</td>
</tr>
<tr>
<td>21st November 2011</td>
<td>Chike Luo (Luo norms)</td>
<td>Do Luo people have a ‘cultural constitution’?</td>
</tr>
<tr>
<td>28th November 2011</td>
<td>Ter or lako (Levirate)</td>
<td>When a man gets children with chi liel, are those his children or are they children of his late brother?</td>
</tr>
<tr>
<td>5th December 2011</td>
<td>Goyo dala (establishing a home)</td>
<td>Can a son establish his dala before his father?</td>
</tr>
<tr>
<td>12th December 2011</td>
<td>Goyo dala (establishing a home)</td>
<td>What animals can one keep in dala?</td>
</tr>
</tbody>
</table>

Note: while single themes have been highlighted, discussions in each of the programme sessions were often characterized with overlapping of themes. The selection is based on emphasis given by elders during the programme.
# ANNEX 10.0

## RADIO LAKE VICTORIA’S GALAMORO MAR CHIKE

<table>
<thead>
<tr>
<th>Dates</th>
<th>Theme</th>
<th>Content</th>
</tr>
</thead>
<tbody>
<tr>
<td>9th May 2011</td>
<td><em>Goyo dala</em> (establishing a home)</td>
<td>What rituals should accompany establishment of a home?</td>
</tr>
<tr>
<td>16th May 2011</td>
<td><em>Goyo dala</em> (establishing a home)</td>
<td>Can a Luo man <em>goyo dala</em> in any place?</td>
</tr>
<tr>
<td>23rd May 2011</td>
<td><em>Kend</em> (marriage)</td>
<td>Can the second born son marry before his older brother?</td>
</tr>
<tr>
<td>30th May 2011</td>
<td><em>Nyombo</em> (dowry)</td>
<td>What gifts should a man send to his in laws as part of dowry payments?</td>
</tr>
<tr>
<td>6th June 2011</td>
<td><em>Kend</em> (marriage)</td>
<td>Is <em>ter</em> synonymous to <em>kend</em>? Or has someone who has been involved as <em>jater</em> get married?</td>
</tr>
<tr>
<td>13th June 2011</td>
<td><em>Goyo dala</em> (establishing a home)</td>
<td>Is one allowed to re-use the iron sheets used in his <em>simba</em> in the newly established home?</td>
</tr>
<tr>
<td>20th June 2011</td>
<td><em>Nyombo</em> (dowry)</td>
<td>African traditional marriage vs contemporary modern marriages and biblical implications.</td>
</tr>
<tr>
<td>27th June 2011</td>
<td><em>Kend</em> (marriage)</td>
<td>Is there an age when Luo should marry?</td>
</tr>
<tr>
<td>4th July 2011</td>
<td>Birth Control</td>
<td>What norms regulate child birth among Luo People?</td>
</tr>
<tr>
<td>11th July 2012</td>
<td><em>Kend</em> (marriage)</td>
<td>What gifts must a Luo man send to complete bride price?</td>
</tr>
<tr>
<td>18th July 2011</td>
<td>Barrenness</td>
<td>What can cause barrenness among Luo people?</td>
</tr>
<tr>
<td>25th July 2011</td>
<td><em>Kend</em> (marriage)</td>
<td>Can Luos marry Non-Luos?</td>
</tr>
<tr>
<td>1st August 2011</td>
<td><em>Luo Laws,</em></td>
<td>What are the basic Luo laws?</td>
</tr>
<tr>
<td>8th August 2011</td>
<td><em>taboo,</em></td>
<td>What is the distinction between Luo Kwero, Kido and Chike?</td>
</tr>
<tr>
<td>15th August 2011</td>
<td>customs and traditions,</td>
<td>What is the distinction between Luo Kwero, Kido and Chike?</td>
</tr>
<tr>
<td>22nd August 2011</td>
<td><em>Goyo dala</em> (establishing a home)</td>
<td>Can a son establish his <em>dala</em> before his father?</td>
</tr>
<tr>
<td>29th August 2011</td>
<td>mother in law relations,</td>
<td>What sanctions exist where these are</td>
</tr>
<tr>
<td>5th September 2011</td>
<td><em>Ter or lako</em> (Levirate)</td>
<td>Does <em>ter</em> mean that a wife is like property?</td>
</tr>
<tr>
<td>12th September 2011</td>
<td>Foods eaten by Luos in various social positions</td>
<td>What kind of food must Luos have during occasions such as <em>nyombo</em> and <em>lief</em> (funerals)?</td>
</tr>
<tr>
<td>19th September 2011</td>
<td>Mother in law</td>
<td>What should be the conduct and protocol of relating to mother-in-law?</td>
</tr>
<tr>
<td>26th September 2011</td>
<td>Social relations</td>
<td>What should guide the relationship between a Luo, the living and the ancestors?</td>
</tr>
<tr>
<td>Date</td>
<td>Topic</td>
<td>Question</td>
</tr>
<tr>
<td>-------------------</td>
<td>--------------------------------------------</td>
<td>---------------------------------------------------------------------------</td>
</tr>
<tr>
<td>3rd October 2011</td>
<td><em>Goyo dala</em> (establishing a home)</td>
<td>What process should a Luoman follow in establishing a home?</td>
</tr>
<tr>
<td>10th October 2011</td>
<td>Social relations</td>
<td>How should a Luo behave as a well socialized person?</td>
</tr>
<tr>
<td>17th October 2011</td>
<td><em>Doho</em> / polygamy</td>
<td>How should a Luo man manage his <em>dala</em> when he has more than one wife?</td>
</tr>
<tr>
<td>24th October 2011</td>
<td>Diseases</td>
<td>What are the common diseases and appropriate medications in Luoland?</td>
</tr>
<tr>
<td>31st October 2011</td>
<td><em>Doho</em> / polygamy</td>
<td>What is the role of <em>mikaye</em> (the first wife) in a situation of <em>doho</em>?</td>
</tr>
<tr>
<td>7th November 2011</td>
<td><em>Goyo dala</em> (establishing a home)</td>
<td>And can the younger sister get married before the elder one?</td>
</tr>
<tr>
<td>14th November 2011</td>
<td><em>Goyo dala</em> (establishing a home)</td>
<td>What are <em>chike ja guong’e dala ne’</em>? (the laws that are used by an elder in his homestead).</td>
</tr>
<tr>
<td>21st November 2011</td>
<td><em>Ter or lako</em> (Levirate)</td>
<td>What happens when <em>chi liel</em> dies before <em>ter</em>?</td>
</tr>
<tr>
<td>28th November 2011</td>
<td><em>Goyo dala</em> (establishing a home)</td>
<td>Can a son establish his <em>dala</em> before his father?</td>
</tr>
<tr>
<td>5th December 2011</td>
<td><em>Ter or lako</em> (Levirate)</td>
<td>Is <em>ter</em> enough to remove <em>Okola</em>?</td>
</tr>
<tr>
<td>12th December 2011</td>
<td><em>Goyo dala</em> (establishing a home)</td>
<td>Can a son establish his <em>dala</em> before his father?</td>
</tr>
</tbody>
</table>
ANNEX 11.0 STATUS OF AFRICAN COUNTRIES ON CONVENTIONS AND PROTOCOLS ON WOMEN’S RIGHTS

<table>
<thead>
<tr>
<th>Country</th>
<th>Reservation to CEDAW</th>
<th>Reporting status to the CEDAW Committee</th>
<th>Ratification of the CEDAW Protocol</th>
<th>Ratification of the African Women’s Protocol</th>
<th>Reporting status to the African Women’s Protocol</th>
<th>Reporting status to the AU Solemn Declaration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Algeria</td>
<td>Articles 2, 9, 15, 16, 29</td>
<td>Round 3 due 6/09</td>
<td>Neither signed nor ratified</td>
<td>Signed</td>
<td>Signed</td>
<td>Reported</td>
</tr>
<tr>
<td>Angola</td>
<td>None</td>
<td>Round 6 due 10/07</td>
<td>Acceded</td>
<td>Ratified</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Benin</td>
<td>None</td>
<td>Round 4/5 due 4/09</td>
<td>Signed</td>
<td>Ratified</td>
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<td>…</td>
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<tr>
<td>Botswana</td>
<td>None</td>
<td>Round 1/2/3 submitted 10/08</td>
<td>Neither signed nor ratified</td>
<td>Acceded</td>
<td>Neither signed nor ratified</td>
<td></td>
</tr>
<tr>
<td>Burkina Faso</td>
<td>None</td>
<td>Round 6 submitted 5/09</td>
<td>Ratified</td>
<td>Ratified</td>
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<tr>
<td>Burundi</td>
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<td>Cameroon</td>
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<td>Signed</td>
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<tr>
<td>Cape Verde</td>
<td>None</td>
<td>Round 7/8 due 9/10</td>
<td>Neither signed nor ratified</td>
<td>Ratified</td>
<td></td>
<td></td>
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<tr>
<td>Central African Republic</td>
<td>None</td>
<td>Round 4 due 7/04</td>
<td>Neither signed nor ratified</td>
<td>Signed</td>
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<tr>
<td>Chad</td>
<td>None</td>
<td>Round 3 due 7/04</td>
<td>Neither signed nor ratified</td>
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*Research is underway to track reporting progress.*
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<thead>
<tr>
<th>Country</th>
<th>Protocol Signed</th>
<th>Round Due Date</th>
<th>Status</th>
<th>Notes</th>
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<tr>
<td>Comoros</td>
<td>None</td>
<td>Round 3 due 11/03</td>
<td>Neither signed nor ratified</td>
<td>Ratified</td>
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<tr>
<td>Congo</td>
<td>None</td>
<td>Round 6/7 due 8/07</td>
<td>Neither signed nor ratified</td>
<td>Signed</td>
</tr>
<tr>
<td>Cote D'Ivoire</td>
<td>None</td>
<td>Round 2 due 1/01</td>
<td>Neither signed nor ratified</td>
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<tr>
<td>Democratic Republic of the Congo</td>
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<td>Round 6/7 due 11/11</td>
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<tr>
<td>Djibouti</td>
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<td>Round 2 due 1/04</td>
<td>Neither signed nor ratified</td>
<td>Ratified</td>
</tr>
<tr>
<td>Egypt</td>
<td>Articles 2, 9, 16, 29</td>
<td>Round 6/7 submitted 2/08</td>
<td>Neither signed nor ratified</td>
<td>Neither signed nor ratified</td>
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<tr>
<td>Equatorial Guinea</td>
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<td>Round 6 due 11/05</td>
<td>Neither signed nor ratified</td>
<td>Signed</td>
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<tr>
<td>Eritrea</td>
<td>None</td>
<td>Round 4 due 10/08</td>
<td>Neither signed nor ratified</td>
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<tr>
<td>Ethiopia</td>
<td>Article 29</td>
<td>Round 6/7 due 10/06</td>
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<td>Gabon</td>
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<td>Round 6/7 due 2/08</td>
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<td>Signed</td>
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<tr>
<td>Gambia</td>
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<td>Round 4 due 5/06</td>
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<tr>
<td>Ghana</td>
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<td>Round 6/7 due 2/11</td>
<td>Signed</td>
<td>Ratified</td>
</tr>
<tr>
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<td>None</td>
<td>Round 7/8 due 9/11</td>
<td>Neither signed nor ratified</td>
<td>Signed</td>
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<tr>
<td>Country</td>
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<td>Round</td>
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<tr>
<td>Guinea-Bissau</td>
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<tr>
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<td>None</td>
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<tr>
<td>Lesotho</td>
<td>Article 2</td>
<td>Round 3 due 9/04</td>
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<tr>
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<tr>
<td>Libyan Arab Jamahiriya</td>
<td>Articles 2, 16</td>
<td>Round 6/7 due 6/14</td>
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<tr>
<td>Madagascar</td>
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<tr>
<td>Malawi</td>
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<tr>
<td>Mali</td>
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<td>Ratified</td>
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<tr>
<td>Mauritania</td>
<td>Articles 0, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30</td>
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<tr>
<td>Mauritius</td>
<td>Articles 11, 29</td>
<td>Round 6/7 due 8/09</td>
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<td>Signed</td>
</tr>
<tr>
<td>Morocco</td>
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<td>Round 5/6 due 7/14</td>
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<td>Acceded</td>
<td>Ratified</td>
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<tr>
<td>Country</td>
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<td>Action 2</td>
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<td>Namibia</td>
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<td>Niger</td>
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<td>Round 3/4 submitted 5/09</td>
<td>Acceded</td>
<td>Signed</td>
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<td>Ratified</td>
<td>Ratified</td>
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<tr>
<td>Rwanda</td>
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<td>Round 7/8/9 due 9/14</td>
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</tr>
<tr>
<td>Sao Tome and Principe</td>
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<td>Round 1 due 7/04</td>
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<tr>
<td>Senegal</td>
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<td>Ratified</td>
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<tr>
<td>Seychelles</td>
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<td>Round 3 due 6/01</td>
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</tr>
<tr>
<td>Sierra Leone</td>
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<td>Neither signed nor ratified</td>
<td>Signed</td>
</tr>
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<td>Not ratified</td>
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<td>None</td>
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<td>Acceded</td>
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<td>Round 2 due 4/09</td>
<td>Neither signed nor ratified</td>
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<td>Round 7/8 due 9/14</td>
<td>Acceded</td>
<td>Ratified</td>
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<tr>
<td>Togo</td>
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<td>Round 6/7 due 10/08</td>
<td>Neither signed nor ratified</td>
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<td>Tunisia</td>
<td>Articles 9, 16, 29</td>
<td>Round 5/6 submitted 4/09</td>
<td>Acceded</td>
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<td>8/02</td>
<td>Neither signed nor ratified</td>
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<tr>
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<td>7/02</td>
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<td>Ratified</td>
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<td>Zimbabwe</td>
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<td></td>
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Source: *Human Rights of Women: Commitment Progress Matrix Analysis*
ANNEX 12.0: THE AFRICAN ANCESTRY OF BARACK OBAMA

The African ancestry of Barack Obama c. 1250 to present

The African Ancestry of Barack Obama: c. 1250 to present

The Plain Nilotes including the Maasai, Samburu, Turkana, and Teso

The Highland Nilotes including the Nandi, Kipsigis, Pokot, Tugen, and Kopan

The River-Lake Nilotes including the Shilluk, Dinka, Nuer, Acholi, and Pagida

12 wives

SIN-KURU aka KUKU LUBANGA b. uncertain

LIDILETUK YANG

ODONG TOK BONI

OONY OOKO KOMA

RINGRUOK b. 1245

OWAT b. 1274

TWAFO b. 1303

JOK b. 1332

NAYO b. 13617

NYALU b. 1498?

RAMOGI AJWANG b. 1500

MONGRA b. 15027

OMOLO b. 15297

OCHIELO b. 15317

RAGAM b. 15607

GEM b. 15627

UGENYA b. 15647

(2 wives)

NAIK' A

OGLE O NYARO' O AGER WAMERAA

OYO OMENYA ABURA OWINY IGOMA

NYALU b. 15337

NYANDUOGI b. 15087

ORIAMBWA b. 1537

OWINY b. 15667

GOMA WIRI ADHOLA

KISODHI b. 15957

NYALU ADHOLA

NYOLA b. 18007

OBONG b. 18027

NYOGORO OKWIRE b. 1655

NYAKWAR b. 16577

OKOTH b. 1684

ONYANG MOBAM b. 17137 (born with a curved back)

NYANYODHI b. 1715

OGOLA b. 17427

OCHUO b. 17717

OTONDI b. 17737

OGOLA b. 18007

OBONG b. 18027