

O wolność wyznawania religii we współczesnym świecie

Przeciwdziałanie przyczynom dyskryminacji
i pomoc prześladowanym na przykładzie chrześcijan

CAS Centrum
Analiz
Strategicznych
INSTYTUTU WYMIARU SPRAWIEDLIWOŚCI

Mukami Wangai

Religious pluralism and liberal constitutionalism: secularity and secularism in Kenya's religious freedom jurisprudence

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Introduction

In 2010, Kenya promulgated a new constitution (2010 constitution)¹. Bringing to an end a seemingly endless constitutional review process, this act carried with it large aspirations for a nation celebrating long-awaited and long-delayed democratic gains. Central to the construction of a new democratic state, a carefully crafted Bill of Rights was included².

The significance of the Bill of Rights has been acknowledged and well understood by the judiciary. Courts have referred to the Bill of Rights as ‘the foundation on which the nation state is built’ and thus, ‘the framework of all the policies touching on the populace’³. The recognition and promotion of fundamental rights and freedoms also serves to meet the ends of ‘social justice and the realisation of the potential of all human beings’⁴. This centrality is in keeping with the high importance of recognition and protection of human dignity and attendant rights in contemporary constitutions⁵. In Kenya’s case, the new Bill of Rights in 2010 signalled a shift in thinking of human rights and fundamental freedoms according to liberal democracy. Judicial authorities are now specifically tasked to interpret the Bill of Rights according to ‘the values that underlie an open and democratic society based on human dignity, equality, equity and freedom’⁶.

Religion is constitutionally recognised as a normative good for democracy. The right to freedom of religion or belief is protected under Article 32⁷. Conscious of the multiplicity and variedness of religious identities amongst its peoples, the 2010 Constitution confers separation of state and religion in Article 8. The provision pronounces that ‘There shall be no state religion’⁸. Secularism is thus called upon as a democratic principle to safeguard religious freedom.

This chapter considers the effect of Kenya’s secular state identity on the enjoyment of religious freedom. Courts have been called upon to interpret religious freedom as per the constitution where manifestations of religion have been suspected to either offend Kenya’s secular state identity or infringe on individual or group rights protected by Article 32. The chapter examines two different judicial views which correspond to two interpretations of secularisation. On the one hand judicial decisions have interpreted religious freedom based on a strict separation between state and religion. This first interpretation is equated to secularism. On the other hand judges have supported a policy of secularity. In short,

[¹] *Constitution of Kenya* (2010).

[²] Article 19(1), *Constitution of Kenya* (2010).

[³] *Attorney General v Kituo cha Sheria & 7 others* [2017] eKLR.

[⁴] Article 19(2), *Constitution of Kenya* (2010).

[⁵] M.K. Mbondeniyi, J.O. Ambani, *The new constitutional law of Kenya: principles, government & human rights*, Nairobi 2012, 155.

[⁶] Article 20(4)(a), *Constitution of Kenya* (2010).

[⁷] Article 32, *Constitution of Kenya* (2010).

[⁸] Article 8, *Constitution of Kenya* (2010).

one that allows an array of accommodations of religion in public spaces⁹. Liberal constitutionalism is used to explain these opposing positions. Here, the influence of economic development – evident through ‘the processes of urbanization and industrialization’ – on secularisation of governance is relevant.¹⁰ Kenya has experienced positive economic growth and accelerated urbanization. Presently, the government is actively promoting a policy of industrialisation¹¹. What can be expected is a more ‘secular’ state as a result of growing outside influences and alignment with liberal democratic ideals.

The chapter is divided into three parts. The first part outlines the framework for religious freedom in Kenya. It explains in-force constitutional protection for the right and highlights instances where the state and religion converge. The remaining parts turn to the two streams of judicial interpretation of religious freedom based on a secular state identity. Two principle sub-rights adjudicated by the courts are looked at. The right to manifest religion or belief is discussed through the wearing of religious dress and religious observance. The right to religion or belief itself is addressed via the lens of state and citizen recognition of minority religions and belief systems. Part two discusses cases under Kenya’s first constitution¹². Part three elucidates on judicial decisions since 2010, and aims to distinguish court judgments that support a policy that is more accommodating of religion in public life. On the whole, it is suggested that since 2010, increasing frequency of judgments akin to a policy of secularity may signify an expansion of religious freedom in line with liberal constitutional values.

1. Constitutional protection of the right to freedom of religion or belief

The current constitutional framework for religious freedom is extensive. The 2010 Constitution contains numerous protections for religious freedom and effectively widens the scope of the right beyond its previous level. As noted above, the 2010 Constitution declares Kenya a secular state¹³. From this arises an expectation of neutrality towards religion.¹⁴ It is true that the 2010 Constitution does not proclaim a state religion. However, the Preamble to the 2010 Constitution has been contentious for its reference to ‘God’. It begins:

‘PREAMBLE

We the people of Kenya–

ACKNOWLEDGING the supremacy of the Almighty God of all creation:

...’

Following a series of statements on the nation’s population, it then closes:

‘GOD BLESS KENYA’¹⁵

The clear reference to ‘God’ demonstrates recognition and a reverence by the people of Kenya for a single supreme being. It is also evident that God is believed to be supreme and Almighty, to be responsible for creation and to have the power to bless the nation. Interestingly, God appears at the beginning and the end of the Preamble. Is God then the beginning and the end? To date, there has not been significant debate on the same. Nevertheless, it bestows a strong identification with monotheistic

[9] B.G. Scharffs, *Four view of the citadel: the consequential distinction between secularity and secularism*, 6 Religion and Human Rights, 2011.

[10] J. Finnis, *On the practical meaning of secularism*, 43 Notre Dame Law Review, 1998, 492.

[11] The implementation of the ‘Big Four Agenda’ – manufacturing, food security, affordable healthcare and affordable housing – is the government’s current focus on strategic areas in Kenya’s overall development blueprint, ‘Vision 2030’.

[12] *Constitution of Kenya* (1969).

[13] Article 8, *Constitution of Kenya* (2010).

[14] M. Wangai, *Religious pluralism in practice: defining secularism in Kenya’s headscarf cases*, 3 Strathmore Law Journal 1, 2017, 178.

[15] Preamble, *Constitution of Kenya* (2010).

religions. In Kenya's reality this composes of the world's established religions and indigenous African religions with a Supreme Deity. While not necessarily at odds with a secular state identity, it is no less a deliberate statement of the beliefs strongly held amongst 'the people of Kenya'. What is particularly significant is the decision to include direct references to God, which stand as a rejection of a purely secular identity.

It should come as no surprise then that instances of 'ceremonial deism' are common.¹⁶ In its simplest sense, ceremonial deism can be understood as a category of public ceremonial activities where references/expressions of and to God are present¹⁷. Categories in Kenya include religious public holidays¹⁸, oaths of state officers and in judicial proceedings, legislative prayers and references to God in statements and addresses by executive and judicial authorities. There has been no major query on the constitutionality of these practices. Authorities and citizens take them to be part and parcel of 'the grand constitutional scheme'¹⁹. In sum, the combination of references to God in the 2010 Constitution and incidence of ceremonial deism strongly indicate the Kenyan state is not atheistic²⁰.

The presence of religious practices in state settings is also consistent with the inescapability of religion in ordinary Kenyan life.²¹ Observing day-to-day life during a visit to the country, one visitor was struck by 'the pervasiveness of religion in the everyday lives of Kenyans'²². A very public religion was evident through public transport displays of references to God, the playing of Christian music in various public and private spaces, and the naming of private businesses after Mary, Jesus and God. Religious organisations are also major sponsors of development, both political and socio-economic be it in the provision of public goods such as education and healthcare or challenging the state to protect and progress the nation²³.

Kenya's religious demography paints a similar picture. Religion is very prevalent and a definitive part of the identity of the vast majority Kenyans. Over 97% of Kenyans identify with a particular religion or belief²⁴. 82% stipulate that religion is 'very important' in their lives and 70% attend a service on a weekly basis²⁵.

The ensuing discussion reveals a centrality of religion to Kenya. A noteworthy position is given to religion in the Preamble to the 2010 Constitution. The same is exuded in public life, as well as in state activities. More so, the substantial value placed on religion calls for equally embracing provisions protecting the right to freedom of religion or belief.

Thus, tied to the constitutionally pronounced secular identity and Preamble statement is a comprehensive right to religious freedom contained in Article 32. The article confers that:

- '(1) Every person has the right to freedom of conscience, religion, belief and opinion.
- (2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.

[16] B. Epstein, *Rethinking the constitutionality of ceremonial deism*, 96 Columbia Law Review, 1996, 2083.

[17] B. Epstein, *op. cit.*, 2091.

[18] These typically include Christian and Muslim festivals which are prescribed as public holidays as per Article 9 of the 2010 Constitution.

[19] B. Epstein, *op. cit.*, 2089.

[20] M.K. Mbondenyi, J.O. Ambani, *op. cit.*, 18.

[21] E. Stoddard, *The ubiquity of religion in Kenya*, 2014, available at <https://berkleycenter.georgetown.edu/posts/the-ubiquity-of-religion-in-kenya>.

[22] E. Stoddard, *op. cit.*.

[23] Religious leaders have most recently been calling for moderation in ongoing political proposals on restructuring government through a constitutional amendment.

[24] Pew-Templeton Global Religious Futures Project, *The future of world religions: population growth projections, 2010-2050*, available at http://www.globalreligiousfutures.org/countries/kenya/religious_demography/#?affiliations_religion_id=o&affiliations_year=2010.

[25] Pew-Templeton Global Religious Futures Project, *op. cit.*.

- (3) A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of a person's belief or religion.
- (4) A person shall not be compelled to act, or engage any act, that is contrary to the person's belief or religion.²⁶

Article 24's protection against limitation of rights²⁷ and Article 27's equality and freedom from discrimination provision²⁸ may also be called upon to safeguard an individual's or a group's Article 32 rights. Further, extra protection is afforded to religious communities who are considered 'vulnerable groups'.²⁹

Three further provisions of the 2010 Constitution are worthy of note. Article 45(4) directs Parliament to enact legislation recognising marriages concluded under religious laws and systems of religious personal and family law as long as 'any such marriages or systems law are consistent' with the Constitution.³⁰ Article 91(2)(a) prohibits the forming of political parties on a religious basis.³¹ These two provisions collectively signify wider accommodation for religion at the constitutional level. A further provision on religious courts, the most far-reaching accommodation for a singular religion or belief system, ties up the significant extensions of constitutional protections for religion afforded by the current constitution³².

Article 170 of the 2010 Constitution establishes a framework for Kadhis' courts.³³ The power for that establishment is vested in Parliament.³⁴ Parliament is tasked to grant and define the powers and jurisdiction of Kadhis' courts through legislation.³⁵ Constitutionally, Kadhis' courts may only rule in 'questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhis' courts'.³⁶

The above discussion elucidates the constitutional framework of religious freedom. Taken as a whole, the legal system does show 'preference for certain religious principles and practices'³⁷ while protecting the rights of all citizens to freedom of religion or belief under Article 32. In typical fashion of a liberal democracy this has fallen to defining the form of secularism, and beyond that, to demarcating limits to religious freedom. The following sections discuss judicial efforts to determine the scope of religious freedom within constitutionally required and constitutionally limited bounds. As always, liberal constitutionalism places a huge responsibility on the achievement of the democratic values of accommodation and tolerance.

2. A secular state and 'the structure of freedom'³⁸ pre-2010

The right to freedom of religion and belief has been protected since the creation of the state of Kenya. This section addresses discourse on religious freedom during Kenya's first constitutional era from 1963–2010. A new constitution was introduced in 1963 and major amendments were consolidated

[26] Article 32, *Constitution of Kenya* (2010).

[27] Article 24, *Constitution of Kenya* (2010).

[28] Article 27, *Constitution of Kenya* (2010).

[29] Article 21(3), *Constitution of Kenya* (2010).

[30] Article 45(4), *Constitution of Kenya* (2010).

[31] Article 91(2)(a), *Constitution of Kenya* (2010).

[32] *Constitution of Kenya* (2010).

[33] Article 170, *Constitution of Kenya* (2010).

[34] Article 170(3), *Constitution of Kenya* (2010).

[35] Article 170, *Constitution of Kenya* (2010).

[36] Article 170(5), *Constitution of Kenya* (2010).

[37] M.K. Mbondenyi, J.O. Ambani, *op. cit.*, 18.

[38] R.W. Garnett, *Religious liberty, church autonomy, and the structure of freedom* in J. Witte Jr. and F.S. Alexander, *Christianity and human rights: an introduction* (eds.), Cambridge University Press, Cambridge 2010, 226–232.

and incorporated by parliament in 1969³⁹. Significant changes between the protections under Kenya's first constitution and the current in-force one are also noted. Notable changes demonstrate the evolution of the right, particularly developments in defining state policies towards religion. The case law presented demonstrates a stricter interpretation of secularism which is consistent with more defined limits of the right to freedom of religion or belief. Beyond the constitutional and legislative guarantees and limitations, decisions of courts have been the definitive guide on religious freedom. The court decisions here are in line with a policy of secularism defined by the maintenance of a secular order⁴⁰.

Running up to the promulgation of the 2010 Constitution, religious freedom was protected under section 78 of the independence constitution⁴¹. In that period Kenya was still defined as a secular state⁴². Beyond those major stipulations, the independence constitution generally stayed away from religion. Particularly, it was not keen on elevating or favouring any particular religion by mention in the constitution. The weightiest mention of a particular religion was the entrenchment of Kadhis' courts under section 66 of the 1969 amended constitution⁴³.

Nevertheless, after decades of developing as a state, the question was raised during subsequent constitutional review processes. The central demand coming from a section of the majority religion – Christianity – was that the constitution of Kenya should not accommodate any religious courts, that inclusion being tantamount to favouring one religion. The issue came to a head towards the end of the final constitution-making process. A group of Christian leaders brought a case against the Attorney General and the Kenya Constitutional Review Commission (KCRC). The petitioners' paramount assertion was that the independence constitution's accommodation of religious courts in the form of Kadhis' courts was against the principle of separation of religion and state. Further, they were adamant that the soon to be new constitution should not make a similar accommodation. They argued that the proposed draft was flawed by including a similar if not more extensive provision, and also declared the constitutional review process as unfair and skewed in favour of Muslims. The High Court's deliberations and judgment in *Jesse Kamau and 25 others v Attorney General*⁴⁴ is thus important in understanding contended with interpretations of secularism in the period before the promulgation of a new constitution in 2010.

The applicants composed of twenty-six Christian leaders from various denominations. The group was led by the Very Right Rev. Dr Jesse Kamau, who at the time was the Moderator of the Presbyterian Church of East Africa⁴⁵. The group's case can be condensed in to three main contentions on section 66 of the independence constitution detailed below:

- (i) That the inclusion of Kadhis' courts violated the constitutional principle of secularism and similarly, subsequent legislation in the form of the Kadhis' Courts Act⁴⁶ which elaborates on their jurisdiction, was in violation of the constitution; and
- (ii) that by entrenching Kadhis' courts in the constitution the treatment of Islam was discriminatory against other religions and violated section 82's prohibition against discrimination⁴⁷; and
- (iii) thus, on the basis of (i) and (ii), any proposed draft constitution should not constitutionally entrench Kadhis' courts/religious courts.

[39] *Constitution Amendment Act* (1969).

[40] Scharffs, *op. cit.*, 111.

[41] Section 78, *Constitution of Kenya* (1969). Kenya became independent in 1963.

[42] *Constitution of Kenya* (1969).

[43] Section 66, *Constitution of Kenya* (1969).

[44] *Jesse Kamau and 25 others v Attorney General* [2010] eKLR.

[45] *Jesse Kamau* [2010] eKLR.

[46] Section 4, *Kadhis' Court Act* (1967).

[47] Section 82, *Constitution of Kenya* (1969).

The inconsistency of section 66 with section 82 of the constitution they submitted, rendered section 66 unconstitutional, adding that any draft constitution that entrenches Kadhis' courts in the same way would also be unconstitutional⁴⁸.

Essentially, the petitioners argued that in order to maintain its neutrality towards all religions and beliefs, the constitution should not mention any particular religion or belief. Section 66 was inconsistent with the constitutionally mandated principle of secularism by first, mentioning Islam, and second, according Islam special treatment. Therefore, the applicants submitted that section 66 was 'inconsistent with the secular nature of the state' and should be declared unconstitutional. In anticipation of an upcoming constitutional referendum, the petitioners further stated that 'Kadhis' courts...should be accommodated outside the main body of the new constitution'⁴⁹ and therefore not included in any proposed draft constitution.⁵⁰ Based on the prayed for declarations of incompatibility with the constitution(s), the applicants sought an order preventing the Attorney General and the KCRC from holding any further deliberations and negotiations on the draft constitution, until the suit was determined⁵¹.

With the application having been first filed in 2004, the hearing actually began in December 2006. In between those two times, a constitutional referendum on the Zero or Bomas draft took place in 2005⁵². The proposed constitution was rejected by voters⁵³. By the time hearings on the application commenced, the KCRC had been wound up, and therefore took no part in the substantive hearing in 2006. However, before the commission closed its doors, a Preliminary Objection with replying affidavit of its Chairperson was filed in November 2004. It is this response which the court took account of in its final judgment.

The two respondents filed separate responses. The Attorney General's response was founded on section 3 of the independence constitution. Procedurally, it was argued that the court had no jurisdiction to strike out section 66 because its jurisdiction is limited to provisions in laws outside of the constitution⁵⁴. The suit was rejected as 'an investigation by the court of the legislative process', in violation of the doctrine of separation of powers and the exclusive legislative powers granted to Parliament by the constitution⁵⁵. It was stated that section 47 specifically sets out the manner in which the Constitution may be altered, and any change to section 66 should follow that process⁵⁶. Correspondingly, the Attorney General intimated that 'the politics of constitution-making is being exported to the courts'⁵⁷. Therefore, the Attorney General called for the application to be dismissed.

Meanwhile, the KCRC contended amongst other things, that in constitution-making there are political settlements that arise out of historical considerations. The Kadhis' courts are one such settlement. In any fact, the issues raised by the applicants were capable of being dealt with by the constitutional review process. In truth, the question of the Kadhis' court had been concluded during the final sessions of the constitution-making process where the applicants did participate. By agreement, and with representation and participation of the applicants, the decision of the Conference was to 'maintain the status quo on Kadhis' courts'. Despite being part of Conference Consensus Building Group, which was tasked with negotiating agreement on outstanding issues, the applicants had not raised the issue

[⁴⁸] The then proposed draft constitution provided for Kadhis' courts in sections 190–200 and a principle of secularism under section 9.

[⁴⁹] *Jesse Kamau*, [2010] eKLR.

[⁵⁰] The proposed constitution, at the time the case was launched in 2004, was known as the 'Zero' or 'Bomas' draft. The latter refers to the draft concluded through the main negotiation process hosted at the Bomas of Kenya, Nairobi.

[⁵¹] *Jesse Kamau*, [2010] eKLR, 4.

[⁵²] The referendum took place on 21 November 2005.

[⁵³] The 'No' campaign garnered 58% of votes.

[⁵⁴] Section 3, *Constitution of Kenya* (1969).

[⁵⁵] Sections 46, 47, 48 and 49 set out the legislative procedure by which the National Assembly enacts Bills and the President assents.

[⁵⁶] *Jesse Kamau*, [2010] eKLR, 9.

[⁵⁷] *Jesse Kamau*, [2010] eKLR, 16.

of Kadhis' courts. The KCRC concluded that Kenya would still be a secular state as per the proposed draft, and that all special courts set up by the constitution would be subordinate to the High Court⁵⁸.

As to the participation of other religious groups or representatives in the application, two groups are relevant. The court ordered service of the application to the Supreme Council of Kenya Muslims (SUPKEM) and the Hindu Council of Kenya. SUPKEM declined to participate and did not send a representative to court⁵⁹. The Hindu Council of Kenya Vice-Chairman filed a supporting affidavit to the Applicants case, stipulating their concerns and making recommendations. The Hindu Council were concerned about preferential treatment for Muslims alone which might lead to other religious groups also seeking separate courts. In their view, Kadhis' courts should not be accommodated under general law for two reasons. One some Muslim schools do not follow the Kadhis' courts but their own systems. In this vein they cited the case of Pakistan which was unsuccessful in setting up 'universal Islamic courts' because of conflicts between different Islamic schools. Two, for women, there would be no guarantee of respect for fundamental rights and freedoms because decisions would be the sole premise of the Chief Kadhi. Upon those concerns they recommended that the constitution should not mention any one religion and religious courts should be incorporated for all major religions for the purposes of personal law, but outside the main body of the constitution⁶⁰.

The bench reduced the comprehensive submissions of the parties to a single fundamental issue and question of whether Kadhis' courts should or should not be entrenched in the constitution⁶¹.

The High Court's judgment begins with a finding that jurisdictionally speaking it lacked the power to strike out section 66 even if there was a finding of unconstitutionality, and that the process of amending section 66 was the remit of the legislature⁶². Next, the court turned to consider whether section 82's provision excluding the right to protection from discrimination from personal laws opened a door for the introduction of personal laws in to the laws of Kenya. Drawing parallels with Mauritius's legislation, the High Court determined that the guarantee of protection from discrimination would not be guaranteed where personal laws were invoked⁶³.

Foremost in court's decision was the finding that section 66 on Kadhis' courts is 'inconsistent with the secular nature of the state'⁶⁴. The High Court adopted the reasoning on the separation of religion and state from two Mauritian cases, *Bishop of Roman Catholic Diocese of Port Louis & others v Tengur and Bhewa & another v Government of Mauritius*⁶⁵. The High Court also found that section 66 violated section 82's prohibition against discrimination and was discriminatory against the applicants⁶⁷. On whether a future constitution should or should not contain a provision on Kadhis' courts, the High Court declared the issue premature and made no further proclamation⁶⁸. The court also declared section 4 of the Kadhis' Courts Act inconsistent with the section 66 of the constitution⁶⁹. The judgment effectively designates Kenya's secularism as a clear separation of church and state. Such a designation would not be capable of accommodating religious courts in the constitution, or mentioning any single religion in the absence of others.

[⁵⁸] *Jesse Kamau*, [2010] eKLR 11–13.

[⁵⁹] *Jesse Kamau*, [2010] eKLR, 6.

[⁶⁰] *Jesse Kamau*, [2010] eKLR, 5–6.

[⁶¹] *Jesse Kamau*, [2010] eKLR, 14.

[⁶²] *Jesse Kamau*, [2010] eKLR, 20.

[⁶³] *Jesse Kamau*, [2010] eKLR, 26.

[⁶⁴] *Jesse Kamau*, [2010] eKLR, 40.

[⁶⁵] *Bishop of Roman Catholic Diocese of Port Louis & others v Tengur*, [2004] UKPC 9.

[⁶⁶] *Bhewa & another v Government of Mauritius*, [1990].

[⁶⁷] *Jesse Kamau*, [2010] eKLR, 41–42.

[⁶⁸] *Jesse Kamau*, [2010] eKLR, 41.

[⁶⁹] The judge reasoned that the establishment and extension of the Kadhis' courts beyond the former Protectorate went beyond the limits set by the former section 66, section 179(4) of the 1963 constitution.

While the decision *Jesse Kamau* case was effectively overruled by the passage of a new constitution in August of 2010 which entrenches Kadhis' courts⁷⁰, the decision still sheds significant light on issues of secularism and religious freedom. Similar issues of contention have appeared repeatedly in later cases as shown below. It must be noted that the latter cases are brought under the 2010 Constitution unlike *Jesse Kamau's* case. This is key because the same questions have arisen during a period of transformative constitutionalism (2010 to present), where the judiciary has embraced its role as a protector of fundamental rights and freedoms. In effect, the points of contention raised by *Jesse Kamau* are worthy of scrutiny. The *Jesse Kamau* case also indicates heavy reliance on comparative analysis with other jurisdictions. Both the applicants' and the respondents' cases as well as the court's decision relied on meticulous comparisons between Kenya's laws and the laws of other countries, in addition to comprehensively citing foreign case law. In particular, the bench in *Jesse Kamau* considered a wide array of perspectives on secular states including those from Tanzania, Ghana, South Africa, Mauritius, Pakistan, India and the United States. Due to the origins of Kenya's legal system in English common law system, the court also relies on precedent from England, a country with an established religion. Cases after *Jesse Kamau* have not tended to cite as many different jurisdictions in a singular proceeding but still place high if not overriding importance on interpretations of secularism and religious freedom in other jurisdictions. The judges justify this by referring to foreign jurisprudence as persuasive authority. Here, the bench in *Jesse Kamau* make a salient point, that above all else judges must be careful to contextualise their findings and reasoning according to the prevailing conditions in their specific situ. The *Jesse Kamau* bench attempted to do so by looking in to the historical question of the Kadhis' courts, assessing whether the pre-independence treaties on the Kadhis' courts jurisdiction were relevant and binding. On a broader scale, the bench kept sight of its role in balancing competing religious interests and supporting the construction of a unified nation despite religious plurality. Tied to the repeating issues, an identical pattern of using comparative jurisprudence transpires in later cases.

The case of *Ndanu Mutambuki & 119 others v Minister for Education & 12 others*⁷¹ similarly supports the interpretation of secularism as strict separation. Where *Jesse Kamau* dealt with comparatively large, powerful groups in society from majority world religions, the *Ndanu Mutambuki* case involved a small church known as Arata Aroho Muthuru Society or 'Kavonokya' in the local language of the Kamba people. It is therefore important for the recognition of practices and observances amongst minority religious communities. The case concerned the extent to which a religious manifestation is protected under section 78 of the independence constitution⁷². The manifestation in question was the wearing of a head scarf. The applicants were all female minors and members of *Kavonokya* attending public schools in Mwingi District. The applicants brought a case against the Ministry for Education and twelve other respondents, suing through their spiritual leader Musili Kiteme. The applicants claimed that the head teachers of the schools in question had refused to allow the students to attend school because the head scarf was not permitted under their respective school uniform policies⁷³.

The matter first came before a judge via a chamber application seeking interim orders under section 84 of the Constitution. The interim orders were sought to prevent the students from being excluded from the schools⁷⁴. The matter was heard inter-parties and an order given which directed that the students should not be excluded from school. The substantive ruling came on 11 May 2007 when the interim orders expired.

The applicants submitted that the wearing of the head scarf was a manifestation of their religion. They contended that wearing a head scarf was mandatory, as a 'principle teaching and doctrinal practice'

[⁷⁰] Article 170, *Constitution of Kenya* (2010).

[⁷¹] *Ndanu Mutambuki & 119 others v Minister for Education & 12 others* [2007] eKLR.

[⁷²] Section 78, *Constitution of Kenya* (1969).

[⁷³] *Ndanu Mutambuki*, [2007] eKLR, 3.

[⁷⁴] *Ndanu Mutambuki*, [2007] eKLR, 3.

which female members must adhere to at all times⁷⁵. On whether the wearing of the head scarf was a required practice, the court was urged to take the position in the European Court of Human Rights judgment in *Leyla Sahin v Turkey*⁷⁶. This meant not questioning the petitioner's belief and 'proceeding on the assumption that the petitioner's right to manifest had been interfered with'⁷⁷. Beyond this point, the applicants countered that the decision in *Sahin* was distinguishable from the matter in question because in Turkey's case the Higher Education Act of Turkey⁷⁸ set out the precisely the required dress for higher education institutions, while in Kenya the Education Act⁷⁹ does not contain anything specific⁸⁰. In the same limb, the applicants also distinguished leading South African case on the manifestation of religion, *Gareth Anver Prince v President of the Law Society of Cape of Good Hope*⁸¹ where the Drugs Act prohibited the use of cannabis generally. By default that included the use of cannabis even where 'inspired by religion'⁸².

The respondents retorted that the wearing of the head scarf was not a manifestation of the applicants' faith and there was no infringement of their section 78 right to freedom of religion or belief. It was also put to the court that the restriction on the wearing of head scarves 'was necessary for the sake of public order in the primary schools'⁸³. Further, the respondent relied on *Sahin* as persuasive authority. They submitted that section 78 of the constitution of Kenya and Article 9 of the European Convention on Human Rights are at par on the extent to which each protects the right to manifest or practice a religion or belief⁸⁴.

The judge began by recognising the issue of religious dress in school uniform policies as 'a novel matter' in the Kenyan jurisdiction and then proceeded to rule. In agreement with the respondents, an assessment of the petition was carried out systematically following the approach set out in *Josephine Kavinda v Attorney General & another*⁸⁵, dealing first with a determination of whether there had been an infringement of the right. At face value, the judge found there had been no infringement for the following reasons. The applicants did not prove on the basis of evidence, the fact of exclusion from school, and correspondingly the respondents presented that the applicants had continued to attend school. The applicants had been attending school wearing the required school uniform i.e. without the head scarf. The judge thus declared the head scarf 'an afterthought instigated by their spiritual leader'. Additionally, upon registering in the schools concerned, the applicants were deemed to have consented to the prescribed school uniform. The applicants failed to prove that the head scarf is a part of their belief.

The decision then provides an alternative finding in the case there is found to be an infringement. In short, the court found that the interference was lawful in that it was limited by the Education Act⁸⁶ and the relevant rules in pursuit of the legitimate aim of a pressing social need to maintain discipline in public schools that are secular⁸⁷. The court elaborated that the respondents are responsible for running schools than accommodate all faiths and in which school uniforms and discipline 'further constitute basic norms and standards in any democratic society'. According to the court, school uniforms are the strongest representation of equality in schools. Here, the court also adopted the reasoning of the

[75] *Ndanu Mutambuki*, [2007] eKLR, 2.

[76] *Sahin v Turkey*, ECtHR judgment of 10 November 2005.

[77] *Ndanu Mutambuki*, [2007] eKLR, 5.

[78] *Turkish Dress Regulations Act* of 3/12/34.

[79] *Education Act* (1980).

[80] *Ndanu Mutambuki*, [2007] eKLR, 6.

[81] *Gareth Anver Prince v President of the Law Society of Cape of Good Hope*, (CCT 736/00) [2002] ZACC 1.

[82] *Ndanu Mutambuki*, [2007] eKLR, 7.

[83] *Ndanu Mutambuki*, [2007] eKLR, 5.

[84] *Ndanu Mutambuki*, [2007] eKLR, 6.

[85] *Josephine Kavinda v Attorney General & another* H.C.C.C. 1351 of 2002 (O.S.).

[86] *Education Act* (1980).

[87] *Ndanu Mutambuki*, [2007] eKLR, 7.

South African case of *Christian Education South Africa v Minister of Education*⁸⁸. Accordingly, the applicants in *Ndanu Mutambuki* had previously complied with the school uniform requirements as per the consent expected in section 78(1) of the constitution⁸⁹. This consent could not have been withdrawn by their spiritual leader but only by the parents⁹⁰. Calling on English and ECHR jurisprudence from *Begum v Headteacher and Governors of Denbigh High School*⁹¹ and *Karaduman v Turkey*⁹² the judge interjected that a person cannot 'go against the rules he has always accepted in the name of religion'⁹³. Finally, the judge was adamant that section 78 only protects manifestations which are an essential part of religion. The judge intimated that although he was under a constitutional duty to accept the belief of the applicants, they had failed to link their belief system to a mandatory practice of wearing head scarves. This reasoning relied on Indian jurisprudence. Following *Bijoe Emmanuel v Kerala*⁹⁴ the applicants ought to have established the donning of a headscarf as an essential part of their religion by reference to the doctrine of the *Kavonokya*. However, that did not come out clearly in the present case and therefore the applicants could not enjoy the protection of section 78⁹⁵. The judgment concludes with a 'tribute to the Framers of our Constitution' who decreed that fundamental rights, such as the right to freedom of religion or belief, remain subject to the rights of others and to public interest. In the judge's view, school uniforms are within the purview of public interest and schools require them for the common good. On those grounds the application by members of *Kavonokya* was dismissed⁹⁶.

The above discussions demonstrates the dominant discussions of religious freedom under the independence constitution. Based on a strict understanding of the necessity to keep church and state separate, the judicial decisions of the time favoured active limitation of individual manifestations of religion in public places, and constitutional neutrality toward religion. This position has been seriously challenged since the passage of a new constitution.

3. Establishing liberal constitutionalism 2010 onwards

Since a new constitution was introduced in 2010, Kenyan courts have continued to debate on the meaning of the right to freedom of religion or belief. The major difference being deliberations since 2010 have taken place under a more liberal legal system founded on a better constitution. The improvement of the constitutional framework on fundamental rights and freedoms is made clear by a number of features apparent from the 2010 Constitution. Chiefly, the constitution can be described as autochthonous⁹⁷, having been written by the local peoples of Kenya and 'reflective of their past experiences'⁹⁸. This quality makes the 2010 Constitution and the provisions therein more contextually appropriate and consciously awake to the lived realities of the people whom it affects. Furthermore, the constitutional provisions carry higher capabilities for interpretation and adaption in pursuit of good governance, democracy and the rule of law. Here the independence constitution can be distinguished as its interpretation was originally subject to English laws⁹⁹. With primary authority on the interpretation of the constitution, the judiciary is given wide and protected powers. Here again the provisions of

[⁸⁸] *Christian Education South Africa v Minister of Education*, (CCT4/00) [2000] ZACC 11.

[⁸⁹] *Ndanu Mutambuki*, [2007] eKLR, 8 & 9.

[⁹⁰] *Ndanu Mutambuki*, [2007] eKLR, 10.

[⁹¹] *Begum v Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

[⁹²] *Karaduman v Turkey*, ECtHR judgment of 3 May 1993.

[⁹³] *Ndanu Mutambuki*, [2007] eKLR, 11.

[⁹⁴] *Bijoe Emmanuel v Kerala* (1986) SCR 518.

[⁹⁵] *Ndanu Mutambuki*, [2007] eKLR, 9.

[⁹⁶] *Ndanu Mutambuki*, [2007] eKLR, 11.

[⁹⁷] M.K. Mbondenyi, J.O. Ambani, *op. cit.*, 19.

[⁹⁸] M.K. Mbondenyi, J.O. Ambani, *op. cit.*, 19.

[⁹⁹] M.K. Mbondenyi, J.O. Ambani, *op. cit.*, 18.

the 2010 constitution go beyond the independence constitution¹⁰⁰. The authority of the judiciary is 'derived from the people'¹⁰¹. An independent judiciary is safeguarded by Article 160(1) which makes them subject only to the Constitution and the law¹⁰². A new procedure for the appointment of the Chief Justice and Deputy Chief Justice is also introduced¹⁰³, as well as advancements in the appointed of other judges¹⁰⁴. Also key is the defined role of courts where the Bill of Rights is concerned¹⁰⁵. In applying the Bill of Rights, under Article 20(3) courts are required to:

- '(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and
 - (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom'¹⁰⁶.
- In interpreting the Bill of Rights under Article 20(4), courts are called upon to promote:
- (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
 - (b) the spirit, purport and objects of the Bill of Rights'¹⁰⁷.

Upon their well-defined and ring-fenced position in the grand constitutional scheme, the judiciary are to be 'equitable partners' in the democratisation process¹⁰⁸. The judiciary are one of the liberal constitutional institutions that are to progressively cast and mould the constitution of a plural society¹⁰⁹. A major challenge in plural societies, particularly younger states, is the cohesiveness of the various groups as one nation. Kenya's 2010 Constitution takes note of this in the Preamble where it states:

'PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation:...'¹¹⁰

Macedo writes that it is a mistake to assume that a system of liberal democracy automatically births liberal citizens amidst great diversity, those who can live amongst one another in moderation and restraint, being reasonable toward each other in the enjoyment of their individual and group freedoms¹¹¹. Instead, he argues that liberal citizens are made. Addressing conflicts between particular religious communities for example has the potential to build the desired political cohesiveness in the wider community¹¹². It is here that democracy can elevate the moderate beliefs shared by all, or at least, by a large majority of the population¹¹³. For Kenya, this can explain the Preamble references to God¹¹⁴ and the accommodation made for Kadhis' courts in the constitution¹¹⁵. It is true to say that the liberalist stance on matters religion and state is separation¹¹⁶. This stance has led to strict interpretations of secularism as discussed above. On that basis, references to religion as well as inclusion of religious courts in a constitution of a secular state 'would sound to many like the height

[100] M.K. Mbondenyi, J.O. Ambani, *op. cit.*, 75.

[101] Article 159(1), *Constitution of Kenya* (2010).

[102] M.K. Mbondenyi, J.O. Ambani, *op. cit.*, 75.

[103] Article 166(1)(a), *Constitution of Kenya* (2010).

[104] Article 166(2), *Constitution of Kenya* (2010).

[105] Article 20, *Constitution of Kenya* (2010).

[106] Article 20(3), *Constitution of Kenya* (2010).

[107] Article 20(4), *Constitution of Kenya* (2010).

[108] M.K. Mbondenyi, J.O. Ambani, *op. cit.*, 76.

[109] S. Macedo, *Transformative constitutionalism and the case of religion: defending the moderate hegemony of liberalist*, Political Theory, 1998, 58.

[110] Preamble, *Constitution of Kenya* (2010).

[111] S. Macedo, *op. cit.*, 59.

[112] S. Macedo, *op. cit.*, 59.

[113] S. Macedo, *op. cit.*, 61.

[114] See part 1.

[115] See part 2.

[116] S. Macedo, *op. cit.*, 62.

of illiberality¹¹⁷. This was the position taken in *Jesse Kamau*¹¹⁸ and *Ndanu Mutambuki*¹¹⁹. However, the reason that it is not is attributable to the transformative capability of liberal constitutionalism¹²⁰. As Macedo argues, liberalism is often misconstrued to narrow strictures of individual freedoms existing outside of ‘social practices’ and ‘normative diversity’¹²¹. As interpretations of secularity have shown, it is not illiberal to promote certain held beliefs or to make such accommodations as may be deemed reasonable and necessary to foster cohesiveness in a democratic society. The society itself relies on values and practices amongst private communities such as religious groups¹²². Therefore, it is argued here that the paramount concern of a liberal constitutional order should be to promote the right kind of liberal partisanship towards all religions and beliefs protected by the constitution¹²³. Within that, transformative constitutionalism prescribes a measure of accommodation in search of unified society where people’s sense of moral order converges and they enjoy mutual respect¹²⁴.

It is this struggle which sets the stage for two divergent judicial interpretations of secularisation akin to secularism and secularity in Kenya’s new constitutional order. The objective of the next exposition is to demonstrate these interpretations in case law concerning the right to freedom of religion or belief itself, and manifestation of religious freedom. The most recent hot-button issue has been manifestation of religion or belief in schools. The jurisprudence since 2010 falls into two broad categories: religious observance and religious dress. An examination of the judgments reveals dynamism amongst judges, playing out as vehement advocacy for either secularity or secularism. Also apparent is a pattern of analogous applicants and respondents from the cases. Applicants are students or their representatives, while the respondents typically are the Minister for Education¹²⁵ and named schools. More or less the attendant question in each case has been whether an identified practice or observance – as a manifestation of faith – should be accommodated by the appointed school.

Three cases on religious dress are pertinent: *Republic v The Head Teacher Kenya High School & another ex parte SMY*¹²⁶, *Methodist Church in Kenya v Mohamed Fugicha & 3 others*¹²⁷ and *JWM (alias P) v Board of Management O Primary School & 2 others*¹²⁸. The collective judicial debate from the three cases epitomises the recent struggles over religious freedom in Kenya.

A sensible starting point is the *Kenya High*¹²⁹ case. Originating in 2009, before the passage of the new constitution, the case proceedings were based on preceding formal complaints on school uniform policies made to the Chairman of the Departmental Committee on Education, Research and Technology¹³⁰, a Committee of Parliament¹³¹. The complaints were against a number of schools which did not allow Muslim students to wear religious dress as part of the prescribed school uniform. The letters were written by four organisations: The National Muslim Leaders Forum, the Kenya Council of Imams and Ulamaa, the Young Muslim Association and the Family Resource Centre located at the Jamia Mosque’s Administration block. The complaints were forwarded to the Ministry of Education. The Permanent Secretary for Education then issued a response in the form of a letter to all Provincial Directors of Education, all District Officers and all Municipal Education Offices, and copied to all

[117] S. Macedo, *op. cit.*, 62.

[118] *Jesse Kamau*, [2010] eKLR.

[119] *Ndanu Mutambuki*, [2007] eKLR.

[120] S. Macedo, *op. cit.*, 56.

[121] S. Macedo, *op. cit.*, 57.

[122] S. Macedo, *op. cit.*, 65.

[123] S. Macedo, *op. cit.*, 65.

[124] S. Macedo, *op. cit.*, 73.

[125] Since 2010 the designation of ‘Minister’ changed to ‘Cabinet Secretary’.

[126] *Republic v The Head Teacher Kenya High School & another ex parte SMY* [2012] eKLR.

[127] *Methodist Church in Kenya v Mohamed Fugicha & 3 others* [2019] eKLR.

[128] *JWM (alias P) v Board of Management O Primary School & 2 others* [2019] eKLR.

[129] *Kenya High*, [2012] eKLR.

[130] The letters were addressed to the Chairman of the committee, the Hon. Daniel Koech.

[131] The letters were of various dates between 18 May 2009 and 26 May 2009.

heads of schools. The letter dated 14 July 2009 stipulated that 'no child should be denied the right to education on the basis of religion, a right enshrined in the Constitution' and instructed school principals 'who may have expelled students on the basis of wearing the hijab to admit them immediately'¹³².

A formal petition for judicial review was then instituted in the courts. The applicant SMY, then being a minor, sued through her mother and next friend 'A B'. The case was that the respondents, the head teacher of Kenya High School and the School's Board of Governors, had 'failed and/refused to comply with the ministerial directive'¹³³. The applicant submitted that the Permanent Secretary's letter formed the basis of a legitimate expectation that she would be allowed to wear the hijab¹³⁴. That expectation had not been met by the respondents. Her written evidence included an affidavit sworn by religious scholar and Imam of Jamia Landhies Mosques Sheikh Ahmed M. Athman. Sheikh Athman explained that 'wearing of a hijab for women required covering themselves save for their hands and face was a religious edict of the Quran which was mandatory for all Muslim women'. In his view, the policy of the respondents that did not allow for the hijab as a manifestation of the student's religion and beliefs was tantamount to religious discrimination in violation of the applicant's rights under Article 32 and Article 27 of the 2010 Constitution¹³⁵.

The respondents' case was contained in detailed affidavits sworn on behalf of both Kenya High School and its Board¹³⁶. It was also supported by an affidavit sworn by the Chairman of the school's Parent Teachers Association (PTA), an opinion from a religious scholar, Prof Dr Imam Al-Hajj Ibrahi B. Sayed and an opinion from educationist, Dr Eddah W Gachukia. The school's case hinged on the historical background and experience as a long-standing educational institution in the country. The respondents explained that the school was founded back in 1910 as a Christian institution of the Anglican faith. Since then it had been successful in admitting and qualifying at secondary school level students from different social-cultural, religious and economic backgrounds in Kenya¹³⁷. The school had built up experience in managing the different traditions, practices and dress codes of its students. It did so primarily through an equalization policy aimed at 'the set up and maintenance of students' co-existence'¹³⁸. The maintenance of 'uniformity, order and discipline' rounded up that co-existence. Part and parcel of equalization, a single, uniform dress policy established a standard dress code to be worn by all students. The school uniform, it was submitted, 'serves a critical role in the education set up as it creates harmony, cohesion and unity among students which in turn contributes to high academic performance'.¹³⁹ The school claimed that the Permanent Secretary's letter had been brought to its attention in September 2009 by the applicant, and up until that point, had not been received officially. The issue was discussed at the school's Board. It was also discussed at an Annual General Meeting of the PTA on 20 March 2010. The PTA decided that the status quo be maintained in the interests of promoting 'discipline, identity, harmony, equality and uniformity in the school'¹⁴⁰.

On the substantive question of discrimination, the school intimated that none of the students had been excluded or had their right to education curtailed. The school defended the policy in two ways. First, by providing details of structural accommodations made for Muslim students such as Islamic religious education and weekly attendances by an Islamic preacher. Second, by arguing that the student's right to freedom of religion was limited to the extent allowed; meaning it was by law and proportionate. Clarifying that freedom of religion is not an absolute right, the school argued that limiting the right

[132] *Kenya High*, [2012] eKLR, 3.

[133] *Kenya High*, [2012] eKLR, 3.

[134] 'Hijab' for female school girls composes of a head scarf and a pair of trousers or long skirts up to the ankles.

[135] *Kenya High*, [2012] eKLR, 3&4.

[136] Affidavits in the name of the Chief Principle of the school and Secretary to the school's Board, Rosemary Saina.

[137] The school named some the groups to demonstrate its diversity. Groups included major world religions such as Hindus, Buddhists, Sikhs, as well as recognized religious sects in Kenya, Legio Maria, Akorino and finally traditionalists.

[138] *Kenya High*, [2012] eKLR, 4.

[139] *Kenya High*, [2012] eKLR, 5.

[140] *Kenya High*, [2012] eKLR, 5.

was necessary to meet the goals of ‘equality, cohesion, discipline, tolerance and inclusivity as well as ‘the overriding education need for multi-religious, multi-cultural and multiracial student community’. The respondents closed their arguments by defending the dress code under their statutory discretion to make such rules.

The judge ruled on the procedural question of the directive issued by the Permanent Secretary and on the substantive claim of discrimination. Agreeing with the respondents, the judge found that the Permanent Secretary’s letter was not a directive issued under section 27 of the Education Act¹⁴¹ because it was issued in the Permanent Secretary’s own name and not on behalf of the minister. The minister would have had to have delegated a power to the Permanent Secretary via a gazette notice. This had not been done and therefore the direction issued by the Permanent Secretary had no legal effect¹⁴². The respondents thus were not legally bound to comply with it. More so, due to its non-effect, no legitimate expectation arose for SMY. Further support to this was the fact that no evidence was given to show that the respondents had at any point made a representation to SMY that could have given rise to the pleaded legitimate expectation. In fact, the respondent had also not permitted the wearing of religious dress before the suit was brought¹⁴³.

The applicant was unsuccessful in satisfying the court that her constitutional rights under Article 32 and Article 27 had been violated. The judge agreed with the respondents that her right to manifest her religion through the wearing of religious dress had been limited to a reasonable and justifiable extent, for a dual purpose. To endorse inclusivity, unity and social cohesion and to balance the competing interests and religion/beliefs of the various groups at the school¹⁴⁴. The High Court judgment in *Kenya High*¹⁴⁵ was indicative of secularism creating a level playing field literally. The next case on religious dress in schools initially followed the same pattern, but on appeal switched dramatically to secularity, and then surprisingly, back to secularism in the highest court in the land.

Like *Kenya High*¹⁴⁶, *Mohamed Fugicha & 3 others v Methodist Church in Kenya*¹⁴⁷ the school did not to accommodate Muslim religious dress under its dress policy. This time though, the case was instituted by the religious sponsor of the school, St Paul’s Kiwanjani Day Mixed Secondary School (St Paul’s Kiwanjani) located in Isiolo county. St Paul’s Kiwanjani like Kenya High School is also church sponsored, but by a different Christian denomination, the Methodist Church. In *Fugicha* again, the matter was dealt with administratively at the school level before reaching the High Court following a somewhat curious emergence at an Annual General Meeting and Prize Giving Day of the school on 22 June 2014¹⁴⁸. The county governor made a request during the event that Muslim girls be allowed to wear the hijab at the school. Amidst a level of disharmony and tension tied to subsequent events, the school was visited a month later by the District Education Officers, Ministry of Education officials and members of an interfaith group¹⁴⁹. After discussions on the school uniform issue, it was ‘unanimously agreed’ that the school uniform remain as is¹⁵⁰. That is without an accommodation for Islamic religious dress for female students. Shortly after, a meeting of the school’s Board of Management (BOM),

[141] *Education Act* (1980).

[142] *Kenya High*, [2012] eKLR, 8.

[143] *Kenya High*, [2012] eKLR, 9. The court also referred to this principle as set out in *Council of Civil Service Unions v Minister for Civil Service* (1995) AC 374.

[144] M. Wangai, *op. cit.*, 179.

[145] *Kenya High*, [2012] eKLR.

[146] *Kenya High*, [2012] eKLR.

[147] *Mohamed Fugicha & 3 others v Methodist Church in Kenya* [2016] eKLR.

[148] *Fugicha*, [2016] eKLR, 2 & 3.

[149] A week following the AGM and Prize Giving Day a group of unidentified persons brought hijabs and white trousers to the school. The items were worn by female Muslim students in addition to the prescribed school uniform. The students were asked to revert to the latter. In defiance, they and male Muslim students ‘went on the rampage’. The school submitted that the group damaged school property and threatened teachers and Christian students, afterwards leaving the school and marching to the District Education Officer’s office.

[150] *Fugicha*, [2016] eKLR, 3.

the school Parents Teachers Association (PTA) and the Church was held on 30 July 2014. Afterwards, the County Director of Education (CDE) held meetings with the BOM, the PTA and the principal. The PTA felt they were being coerced and the principal formally objected to directions issued by the CDE on the issue through a letter. The CDE proceeded to hold a meeting with parents at the school, directing that the school's management and its sponsor meet before 11 September to determine whether Islamic religious dress would be included in the school uniform¹⁵¹. The meeting voted overwhelmingly in favour of maintaining the status quo by a vote of eighteen to twenty-two. The CDE's response was a further direction that Muslim female students should don the dress and that the school's principle should be transferred. A constitutional petition was filed by the Methodist Church in Kenya¹⁵² challenging the final CDE's action, the transfer of the principal¹⁵³ and the interference with the running of the school¹⁵⁴. The petitioner sought a declaration that the decision to allow Islamic religious dress was 'discriminatory, unlawful, unconstitutional and contrary to the school's rules and regulations'¹⁵⁵. A parent of students at the school later joined the case under a certificate of urgency¹⁵⁶.

The judge at the High Court applied its own precedent from the earlier decision in *Kenya High*. However, in a dramatic sequence, the Court of Appeal overturned the High Court ruling in its November 2016 decision. On its face value assessment of whether the school dress policy directly discriminated against the applicants, the Court of Appeal agreed with the bench in *Kenya High*¹⁵⁷. The policy did not directly discriminate against Muslim students. From that point, the Court of Appeal faulted the *Kenya High*¹⁵⁸ court for not delving in to the question of indirect discrimination. Here the Court of Appeal determined that the lack of an accommodation of Islamic religious dress was indirectly discriminatory against Muslim students because complying with the School policy prevented them from manifesting their religious practice¹⁵⁹. The court relied on the English case of *R (on the application of Watkins-Singh v Aberdare Girls' High School & another*¹⁶⁰ to come to this conclusion. The English case of *Begum*¹⁶¹, relied on in *Jesse Kamau*¹⁶², was on this occasion distinguished.

As it was not contentious whether the school uniform met the legitimate aim of social cohesion and inclusivity, the final salient matter was whether the absence of an exception of Islamic religious dress was proportionate. Could the limitation on the Muslims students' right to manifest their religion through the wearing of religious dress be justified as necessary? The Court pronounced no. In a torrent of criticism of the High Court bench's approach the Court found that Islamic religious dress should be accommodated at St Paul's Kiwanjani. The failure of the school to accommodate the said dress was not a proportionate means of meeting the non-contentious legitimate aim¹⁶³. Adopting the approach taken by the South African Constitutional Court in *MEC for Education: Kwazulu Natal and others v Pillay*¹⁶⁴, permitting religious dress would not impose an unreasonable burden on the school¹⁶⁵. On those findings, St Paul's Kiwanjani was ordered to 'immediately initiate...amendment of the relevant school rules' to accommodate students whose religions or beliefs required them to don particular clothing together with school uniform¹⁶⁶. Interestingly, the same order also obliged

[151] *Fugicha*, [2016] eKLR, 3.

[152] Suing through its Registered Trustees.

[153] A transfer letter was issued on 12 September 2014.

[154] Petition No 30 of 2014.

[155] *Fugicha*, [2016] eKLR, 5.

[156] Mr Fugicha's was enjoined as an interested party on 15 October 2014.

[157] *Kenya High*, [2012] eKLR.

[158] *Kenya High*, [2012] eKLR.

[159] M. Wangai, *op. cit.*, 180.

[160] *R (on the application of Watkins-Singh v Aberdare Girls' High School & another* [2008] EWHC 1865.

[161] *Begum*, [2006] UKHL 15.

[162] *Jesse Kamau*, [2010] eKLR.

[163] *Fugicha*, [2016] eKLR, 66.

[164] *MEC for Education: Kwazulu Natal and others v Pillay* (CCT 51/06) [2007] ZACC 21.

[165] *Fugicha*, [2016] eKLR, 69.

[166] *Fugicha*, [2016] eKLR, 84.

the school to consult with its stakeholders – especially parents and students – in that review process. Here the court's approach can be criticised because the pertinent issue had previously been considered and determined on by the said stakeholders prior to the court proceedings. On the basis of the court submissions, there was nothing to suggest the outcome would be different.

The Court of Appeal ruling in *Fugicha*¹⁶⁷ was met with triumph amongst Muslim faithful in the country. For some time, it appeared that judges were advocating for a move away from the strictest interpretations of secularism. Instead, the Court of Appeal decision in *Fugicha*¹⁶⁸ chose 'a brand of neutrality that accommodates a broad range of religions and beliefs'¹⁶⁹. In essence, secularity. This interpretation was celebrated as being in keeping with the spirit of the 2010 Constitution¹⁷⁰. The judges believed that exception for Islamic religious dress in schools is an accommodation reasonable and necessary to build unity in Kenya's transitional democracy. On a personal scale, it allows individual adherents to Islam to actively live out the tenets of their religion. Such a measure also meets a wider purpose of belonging for Muslim faithful, a small religious community nationally when compared with the Christian majority. Keeping view of historical conflicts in the realm of constitutional religious accommodations as typified in the Kadhis' courts issue¹⁷¹, this move would also signal a widening of the religious space in Kenya's polity. The judges believed it to the extent of making orders for service of the judgment on the Cabinet Secretary for Education. The intended consequence being the formulation of special rules, regulations or directions to guarantee stronger protection of the right of 'all pupils and students in Kenya's educational system' to freedom of religion or belief under Article 32 and equality and freedom from discrimination under Article 27 of the 2010 Constitution¹⁷². Consistent with liberal constitutionalism's transformative quality, the judicial bench was calling upon the Executive to exercise its powers to make education rules, regulations or directions in keeping with the protection of the right to freedom of religion or belief under the constitution¹⁷³.

The celebration of the Court of Appeal's judgment in *Fugicha* was short-lived, as the Supreme Court set aside the judgment in its own ruling in January 2019. Unhappy with the loss at the Court of Appeal, the Methodist Church appealed to the Supreme Court. It is important to note that following the passage of the 2010 Constitution Kenya's court structure underwent major alteration. A Supreme Court was added to the structure, above the previous highest court in the land, the Court of Appeal. Under the stewardship of a President, who is the in-office Chief Justice of the Republic of Kenya, the court has been engaged in the most important questions on the constitutionality of government actions and the interpretation of the 2010 Constitution. Based on this set-up, expectations ran high on the ruling that would be brought by the Supreme Court in *Fugicha*. Nevertheless, the judgment did little to address rising tensions and confusion surrounding the extent of permissible manifestations of religion or belief in schools. On the whole, the setting aside of the Court of Appeal's judgment restored strict secularism sensibilities on the issue.

The Supreme Court's decisions turned on a procedural error. The error concerned the High Court's consideration of issues arising out of a 'cross-petition' filed by Mr *Fugicha*. Recalling that he was enjoined as an interested party, the majority opinion stipulated that the trial Court should have only considered issues presented by the principle parties¹⁷⁴. The High Court erred in entertaining issues raised by Mr *Fugicha* because he was not a principle party to the case. Mr *Fugicha* had been joined to the case at the High Court as an interested party and not a respondent. The cross-petition did not

[167] *Fugicha*, [2016] eKLR.

[168] *Fugicha*, [2016] eKLR.

[169] M. Wangai, *op. cit.*, 184.

[170] M. Wangai, *op. cit.*, 184.

[171] See part 1 on the *Jesse Kamau* case.

[172] *Fugicha*, [2016] eKLR, 84.

[173] *Constitution of Kenya* (2010).

[174] *Methodist Church in Kenya v Mohammed Fugicha & 3 others* [2019] eKLR, 9.

comply with Rule 10 and Rule 15 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules)¹⁷⁵. Rule 15(3) sets out that a cross-petition may be filed by a respondent. Any cross-petition filed in accordance with Rule 15(3) must then be in compliance with the Rule 10(2) as to content. Although he had referred to 'cross-petitioning' in his affidavit¹⁷⁶, the High Court had declared his cross-petition defective and ordered it be struck out. The Court of Appeal countered this order by setting it aside and substituting it with an order allowing the cross-petition. The principle reason being that Mr Fugicha's affidavit passed the informality test contemplated by the constitution¹⁷⁷. The Court also ruled that the Court of Appeal's consideration of the issues in the cross-petition was in violation of the Church's right to fair trial because no opportunity arose for them to respond¹⁷⁸. The Church was so entitled to a right to be heard under Article 25¹⁷⁹ and Article 50¹⁸⁰ of the 2010 Constitution¹⁸¹. In sum, because the cross-petition was 'improperly before the High Court and ought not to have been introduced by an interested party' it should not have been considered by the Court Appeal¹⁸².

This procedural non-compliance in effect thwarted the possibility of the Supreme Court deliberating on the issue raised in Mr Fugicha's now impugned cross-petition. Notwithstanding, the majority did recognise that the issue as one of national importance, and anticipated 'a jurisprudential moment for the Court' when the matter comes before them procedurally. The Court thus averred that anyone seeking to pursue the matter should consider formally instituting proceedings at the High Court¹⁸³. This acknowledgment unquestionably is relatively small and immaterial in the eyes of the victors celebrating the Court of Appeal's judgment. For dissenters, it communicates a failure to deal with the pertinent question, or alternatively, an avoidance of the same. Some relief will be found in the dissenting opinion of Ojwang, SCJ who illuminates that 'the justice of the case revolves around Mohamed Fugicha' as a parent to children on whose behalf the inclusion of religious dress is sought¹⁸⁴. His findings are succinctly stated in paragraph 88 of the judgment. Although the cross-petition is again found to be technically flawed, he affirms that the flaw was 'mitigated' by the High Court and Court of Appeal processes which 'appraised the pertinent question' and ruled on them¹⁸⁵. Ojwang SCJ submitted that the proper approach in such a case was to apply Article 159 and Article 22 on the procedural matter, under which the judiciary are to administer justice 'without undue regard to procedural technicalities'¹⁸⁶, and keep to a minimum any formalities relating to the proceedings¹⁸⁷. Under this level of scrutiny, the cross-petition passed the test as evidence by the High Court's and Court of Appeal's decision to address the merits of the cross-petition. On the substantive challenge, the dissent denoted as 'rational' the finding of the Court of Appeal that the wearing of religious dress should be accommodated. Explaining that the Muslim students required differential treatment in order to manifest their religion, the correct balance would be achieved by including an exception for them which would in no way upset the multi-cultural environment of St Paul's Kiwanjani¹⁸⁸. The dissent's attendant orders were in keeping with the Court of Appeals as stated above¹⁸⁹.

[175] *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules)*.

[176] Paragraph 34, replying affidavit of Mr Fugicha.

[177] Article 22, Article 159, *Constitution of Kenya* [2010].

[178] *Fugicha*, [2019] eKLR, 9.

[179] According to Article 25 the right to a fair trial cannot be limited.

[180] The substantive right to a fair hearing.

[181] *Fugicha*, [2019] eKLR, 10.

[182] *Fugicha*, [2019] eKLR, 10.

[183] *Fugicha*, [2019] eKLR, 10.

[184] *Fugicha*, [2019] eKLR, 11.

[185] *Fugicha*, [2019] eKLR, 15.

[186] Article 159(2)(d), *Constitution of Kenya* (2010).

[187] Article 22(3)(b), *Constitution of Kenya* (2010).

[188] *Fugicha* [2019] eKLR, 15, 16.

[189] *Fugicha* [2016] eKLR.

Also running its course as the *Kenya High*¹⁹⁰ and *Fugicha*¹⁹¹ discussions ensued in the High Court and at the Court of Appeal, was a challenge against another well regarded school. This time though, the subject of contention was religious observance. The Seventh Day Adventist Church filed a petition in September 2012, representing a select group of its followers who were students at eighteen named public high schools in the country¹⁹². Expectantly, the defendants included the Minister for Education and the Attorney General. The Board of Governors of the school, Alliance High School were enjoined as an interested party, and newly formed constitutional commission the National Gender and Equality Commission (NGEC)¹⁹³ as amicus curiae. SDA (EA) Ltd took issue with the school not permitting the students to observe the Sabbath as per their belief, from Friday sunset to Saturday sunset. The church lost at the High Court, in a judgment delivered by Lenaola J.

On appeal, the ‘broad question’ was whether the schools’ failure to allow SDA students their Sabbath was justified and reasonable under Article 24, or whether it infringed on their Article 32 right unjustifiably¹⁹⁴. SDA (EA) Ltd stressed that its followers are obliged to respect and observe the Sabbath. In their view, the schools had violated the Article 32 and Article 27 rights of the students by either restricting or curtailing the opportunity to observe that practice. Instead, students were required to attend classes, sit examinations and carry out cleaning duties during some of those times. Those who registered absences would either be suspended or requested to leave the school. The treatment of students celebrating the Sabbath on other days was contrasted. These aspersions relied on the South African decisions in *Christian Education South Africa*¹⁹⁵ and *Pillay*¹⁹⁶. The Court of Appeal agreed with the petitioner, setting aside the orders of the High Court. Key was the Appellate Court’s finding that the schools had directly discriminated against the students by not according them the same treatment as other Christian students who observe Sabbath on Sunday. The Court went as far as to declare the schools’ actions a ‘gross violation of their fundamental freedoms’¹⁹⁷. The bench fiercely rejected Alliance’s arguments based on institutional autonomy provided for in statutory powers under the Basic Education Act¹⁹⁸. Those arguments were named ‘lame and gloomy’ by the court, including the deposition that students knew of the school policy prior to enrolment and had opted in to them by joining Alliance¹⁹⁹. This finding supports SDA (EA) Ltd’s pleading that prior to 2009/10 – the period during which the final draft constitution was undergoing its the ultimate leg of its journey – ‘the overwhelming majority of public schools’ had allowed SDA students to observe the Sabbath according to the church’s tenets²⁰⁰. Thus, the restriction on the student’s Article 32 rights were not permitted by a law²⁰¹. Finally, the court aligned its findings on proportionality with its judgment in *Fugicha*²⁰². Noting that numerous jurisdiction have adopted and developed the concept of ‘reasonable accommodation’, the SDA’s Sabbath observance fell squarely within practices that are covered. The court declared that Kenya falls short in embracing religious rights in school in line with the concept. Concluding that no steps had been taken by the Cabinet Secretary for Education to comply with the

[190] *Kenya High*, [2012] eKLR.

[191] *Fugicha*, [2016] eKLR.

[192] *SDA (EA) Ltd* [2014] eKLR.

[193] NGEC is one of three constitutional bodies formed under Article 59 of the 2010 Constitution. Constitutionally established as the ‘Kenya National Human Rights and Equality Commission’, Parliament later enacted legislation under Article 59(4) and (5) restructuring the one body in to NGEC, the Commission on Administrative Justice (CAJ) and the Kenya National Commission on Human Rights (KNCHR).

[194] *SDA (EA) Ltd*, [2017] eKLR, 9.

[195] *Christian Education South Africa*, (CCT4/00) [2000] ZACC 11.

[196] *Pillay* [2007] ZACC 21.

[197] *SDA (EA) Ltd*, [2017] eKLR, 18.

[198] Section 59, *Basic Education Act*, (2013).

[199] Lenaola J was faulted for following his earlier decision in *Nyakamba Gekara v Attorney General & 3 others* [2013] eKLR where it was declared that joining a public school is a voluntary decision and ‘the court cannot regulate the way schools are run’.

[200] *SDA (EA) Ltd*, [2017] eKLR, 2.

[201] *SDA (EA) Ltd*, [2017] eKLR, 20.

[202] *Fugicha*, [2016] eKLR.

order of the High Court in *SDA (EA) Ltd*²⁰³, and the Court of Appeal in *Fugicha*²⁰⁴, the court once again ordered the Cabinet Secretary to institute a process of formulating appropriate rules to guide schools on religious freedom²⁰⁵.

After a Supreme Court ruling, an expectation of predictability would not be gravely misplaced. Still, the issue of the extent to which school dress policies should accommodate manifestations of religion or belief remains live. The most recent case pits the High Court's secularism rulings in *Kenya High*²⁰⁶ and *Ndanu Mutambuki*²⁰⁷ against the Court of Appeal's secularity decision in *SDA (EA) Ltd*²⁰⁸. The case concerns none of the religious groups in those cases, but instead the Rastafarian religion. The petitioner (JWM alias P) submitted that his daughter MNW had been sent home from school with the instruction to shave her 'rastas' which were against the school's dress policy²⁰⁹. JWM filed the case against the Board of Management of Olympic High School, the Ministry of Education and the Attorney General. This was after the school had resisted attempts to resolve the matter in early 2019. JWM argued that MNW's rights to religion²¹⁰, education²¹¹ and fair administrative action²¹² had been violated as the rastas were a manifestation of her Rastafari religion. JWM's case relied heavily on *SDA (EA) Ltd*²¹³. On the opposing side, the respondents banked on *Kenya High*²¹⁴ and *Ndanu Mutambuki*²¹⁵. The court found the action of the school an infringement of MNW's Article 32 right and was not reasonably limited. The effect was to 'punish' MNW for the manifestation, attempting to force her to act contrary to her beliefs, and barring her from full realisation and enjoyment of her constitutionally guaranteed rights. The measure ordering MNW to shave the rastas was not the least restrictive means. The court stipulated that school rules and regulations are subordinate to the constitution, and thus could be changed to make a reasonable accommodation in this case²¹⁶.

The judgment in JWM echoes the new judiciary's appreciation of its jurisgenerative powers²¹⁷. In the application and interpretation of the Bill of Rights, there is an onus on courts to maximise and expand, rather than minimise and constrict those rights, in 'creative and proactive' ways for the advancement of openness and democracy in all spheres of socio-political life in Kenya²¹⁸.

It is discernible from both groups of cases that Kenyan judges in the present constitutional dispensation have embraced their unique powers as 'forces of creation' and as 'forces of preservation'. It is suggested then that in *JWM*²¹⁹ and *SDA (EA) Ltd*²²⁰, the jurispathic force adopting secularity has superseded the jurisgenerative one. On the other hand, in *Kenya High*²²¹ and *Fugicha*²²² the forces

[203] *SDA (EA) Ltd*, [2014] eKLR.

[204] *Fugicha*, [2016] eKLR.

[205] *SDA (EA) Ltd*, [2017] eKLR, 23. A one year time limit was set from the date of the judgment (3 March 2017).

[206] *Kenya High*, [2012] eKLR.

[207] *Ndanu Mutambuki*, [2007] eKLR.

[208] *SDA (EA) Ltd*, [2017] eKLR.

[209] 'Rastas' were distinguished from dreadlocks during the petitioner's cross-examination. He averred that dreadlocks are a matter of choice/style whereas rastas were a manifestation of faith. The High Court has previously ruled in a case concerning the wearing of dreadlocks in school for reasons of fashion versus those of a cultural or religious nature in *JK (suing on behalf of CK) v Board of Directors of R School & another* [2014] eKLR.

[210] Article 32 & Article 27, *Constitution of Kenya* (2010).

[211] Article 43(1)(f), *Constitution of Kenya* (2010).

[212] Article 47(1), *Constitution of Kenya* (2010).

[213] *SDA (EA) Ltd*, [2017] eKLR.

[214] *Kenya High*, [2012] eKLR.

[215] *JWM*, [2019] eKLR, 3.

[216] *JWM*, [2019] eKLR, 3.

[217] B.G. Scharffs, *op.cit.*, 123.

[218] *JWM*, [2019] eKLR, 7, referring to statements in *AG v Kituo* [2017] eKLR.

[219] *JWM*, [2019] eKLR.

[220] *SDA (EA) Ltd*, [2017] eKLR.

[221] *Kenya High*, [2012] eKLR.

[222] *Fugicha*, [2019] eKLR.

of preservation – previously held notions of a secular order – as seen in *Jesse Kamau*²²³ and *Ndanu Mutambaki*²²⁴ – prevailed.

Whereas uncertainty prevails in the jurisprudence on manifestations of religion or belief, from a liberalist standpoint, forward strides have been observed on state recognition of religions or belief systems. The case of *Atheists in Kenya and another v The Registrar of Societies and 2 others*²²⁵ affirms the right to no religion or belief²²⁶. On 17 February 2016 Atheists in Kenya (AIK) had been registered as a society under the Societies Act. In Kenya, registration of religious organisations – whether as societies or other legal entities – serves as the main formal recognition by the state. On 26 April 2016, the Registrar of Societies had issued a letter warning of suspension of AIK, because its activities had ‘generated great public concern which is prejudicial and incompatible with peace, stability and good order of the republic’. The letter further warned that at the end of seven days after the date of the letter, AIK would be suspended²²⁷. AIK and its Chairman then brought this petition claiming violation of constitutional and statutory rights²²⁸. The court only determined one issue on the pleadings, the question of whether the suspension of AIK was procedural and lawful²²⁹. By failing to accord the society a hearing before taking action against it, the court found the action of the Registrar in violation of AIK’s Article 47 right to administrative justice, and attendant, rights under the Fair Administrative Action Act²³⁰ and section 12 of the Societies Act²³¹. However, the court made no deliberation on the right to freedom of religion or belief, and related rights pleaded. At worst, the court may have avoided the issue²³² and passed up an opportunity to apply the right to freedom of religion and belief to non-religion²³³. At best however, it may have been prudent in the circumstances to exercise judicial restraint. As Sang also explains, the public concern referred to actually came from clergy groups who had formally called for deregistration of AIK²³⁴. Tensions were quite high on the newly issued Church Regulation Guidelines²³⁵ that required churches to re-register at the time²³⁶. With the state’s executive powers negotiating with large religious institutions on the extent to which the state can regulate churches, the court could safeguard itself by limiting its adjudication to the matter of registration. The registration of AIK in of itself is a weighty occurrence. AIK are a minority group, and one in direct challenge to the preference shown for monotheistic religions and beliefs²³⁷. Their inclusion by way of registration still stands as an accommodation for them in the current constitutional space. That inclusion provides an opportunity for the entire democracy, especially the majoritarian communities, to demonstrate ‘what it means to live up to’ their own values²³⁸.

A further strategy for institutions to consider in the construction of Kenya’s new democracy, is the use of indirect and unoppressive means²³⁹. Looking at the laws jurispathic and jurigenerative faces, one countenance is more coercive than the other²⁴⁰. Whether looked at from the standpoint of the

[223] [2010] eKLR.

[224] [2007] eKLR.

[225] *Atheists in Kenya and another v The Registrar of Societies and 2 others* [2018] eKLR.

[226] B. Sang Y.K., *Constitutional law and atheists in Kenya: affirming associational rights, avoiding non-religious freedoms*, o Oxford Journal of Law and Religion, Case Comment, 2019.

[227] AIK [2018] eKLR, 5.

[228] Articles 24, 27, 32, 36, 37, 47, 50 and 56, *Constitution of Kenya* (2010); Section 12, *Societies Act* 1998 (revised 2012).

[229] AIK [2018] eKLR, 4.

[230] *Fair Administrative Action Act* (2015).

[231] *Societies Act* (2012).

[232] B. Sang Y.K., *op.cit.*, 4.

[233] B. Sang Y.K., *op. cit.*, 10.

[234] Some went as far as issuing ultimatums and calling for his resignation if AIK was not deregistered.

[235] Church Regulation Guidelines.

[236] B. Sang Y.K., *op. cit.*, 3.

[237] B. Sang Y.K., *op. cit.*, 11.

[238] S. Macedo, *op. cit.*, 73.

[239] S. Macedo, *op. cit.*, 70.

[240] B.G. Scharffs, *op.cit.*, 123.

judiciary, the legislature or the executive, a jurispathic power uses an authoritative and determinate stance. Take the issues of religious freedom dealt with here. Judicial jurispathic power dominates in *Jesse Kamau*²⁴¹, *Ndanu Mutambuki*²⁴², *Kenya High*²⁴³, and in *Fugicha*'s final decision²⁴⁴. Preservation won the day on each of those occasions where judges applied a strict secularism to guarantee equality and peace²⁴⁵. Opposingly, in *Fugicha*'s Appellate Court ruling²⁴⁶ and in *SDA (EA) Ltd*²⁴⁷, *JWM*²⁴⁸ and the *AIK*²⁴⁹ cases, the jurisgenerative role overcomes the jurispathic one. The judges chose 'alternative conceptions of the good'²⁵⁰ based on thin theories of common values between the different religious groups. Secularity thus allows or creates a wider constitutional space for religious and non-religious groups to 'define and live out...their "comprehensive doctrines"'²⁵¹.

4. Conclusion: Reconciling plurality in home-grown jurisprudence

Kenyan people and religious organisations do benefit from comprehensive protections on the right to freedom of religion and belief. Freedom of religion is believed to be of benefit to the state and its peoples. A secular state is framed to protect religious rights in Kenya's plural society that is undergoing a period of transition to liberal democracy. Buttressed by a new constitution, judges have actively engaged in debates on of religious freedom. It has been argued that since 2010, courts have expanded religious freedom through the adoption of secularity. This expansion can be reconciled with Kenya's period of transformative constitutionalism. It is common-place for liberal constitutionalism to demand accommodation and wider tolerance across the spectrum of rights and fundamentals accorded by a constitution. Nevertheless, it cannot be guaranteed unless judges take up their role as defenders of the constitution. Expectedly, the judicial charge on interpretations of secularity has been met with opposition. Established value systems have challenged the expansion of certain religious practices and belief systems as seen in *Kenya High*²⁵² and *Fugicha*²⁵³. Still, the protection of minority and vulnerable groups emerges in the judgments of *JWM*²⁵⁴, *AIK*²⁵⁵ and *SDA (EA Ltd)*²⁵⁶. In adjudicating, judicial decisions continue to rely heavily on foreign jurisprudence. Hence, there remains a need to develop 'organic interpretational approaches that promote robust religious pluralism'²⁵⁷. Without necessarily preferring either secularity or secularism, judges can focus on promoting the right type of liberal partisanship – for all and by all. On different occasions that might call for greater accommodations or preservation of the status quo.

[241] *Jesse Kamau*, [2010] eKLR.

[242] *Ndanu Mutambuki*, [2007] eKLR.

[243] *Kenya High*, [2012] eKLR.

[244] *Fugicha*, [2019] eKLR.

[245] B.G. Scharffs, *op. cit.*, 124.

[246] *Fugicha*, [2016] eKLR.

[247] *SDA (EA) Ltd*, [2017] eKLR.

[248] *JWM*, [2019] eKLR.

[249] *AIK*, [2018] eKLR.

[250] B.G. Scharffs, *op. cit.*, 124.

[251] B.G. Scharffs, *op. cit.*, 121.

[252] *Kenya High*, [2012] eKLR.

[253] *Fugicha*, [2019] eKLR.

[254] *JWM*, [2019] eKLR.

[255] *AIK*, [2018] eKLR.

[256] *SDA (EA) Ltd*, [2017] eKLR.

[257] B. Sang Y.K., *op. cit.*, 11.

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