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19 ON THE MARGIN OF RELIGIOUS FREEDOM: INDIGENOUS PEOPLE, SACRED SITES AND ENVIRONMENTAL CONSERVATION AMONGST KENYA'S ENDOROIS AND OGIEK PEOPLES

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INTRODUCTION

The question of the extent to which freedom of religion protects indigenous religions is an old but unsettled question in international human rights law. At the heart of the debate is the conflation of indigenous religions with culture, along with the seeming refusal to acknowledge unique features of indigenous religions, such as their relationship with the natural environment, in particular site-specific or land-based belief. With these concerns in mind, this chapter grapples with the following questions: Can religious freedom protect indigenous religions, particularly when indigenous religions are conflated with cultural practices and these cultural practices and rituals are often designated as limitations to religious freedom? Is lack of proprietary interest in the land in which sacred sites are situated dispositive of the exercise of religious freedom? Does access to and use of sacred sites on public land impair environmental conservation? And would government protection and management of sacred sites amount to interference or privileging of certain religions?

The first substantive part of this chapter sets the foundation for addressing these questions by providing a factual background of the Endorois and Ogiek cases and the decisions of the African Commission on Human and Peoples' Rights (African Commission) and African Court on Human and Peoples' Rights (African Court) respectively in the context of religious freedom. The second part revisits the debate on the adequacy of freedom of religion in the protection of indigenous religions, particularly site-specific religions. The third part situates protection of religious freedoms in Kenya's constitutional framework and examines the protection of indigenous sacred sites. It also looks at the apparent conflict between environmental conservation and indigenous religions. The final part suggests a framework for Kenya's protection of indigenous peoples' freedoms, while ensuring environmental conservation. The chapter thus infuses the normative standards of the UN Declaration on the Rights of Indigenous Peoples² into interpretation of domestic law to provide a framework for Kenya's protection of indigenous religious freedom of the Endorois and Ogiek.

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2 Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (2007) [hereinafter Indigenous Peoples Declaration].

THE ENDOROIS AND OGIEK CASES

The Endorois case

The Endorois community comprises about 10 000 people, who form part of the five clans of the Tugen subtribe,³ who lay and ancestral claim to the land around Lake Bogoria in Kenya. The Endorois have for centuries lived around Lake Bogoria and used the land for pasture for their livestock and medicinal saltlicks. In addition, the Lake Bogoria region is significant for its peoples' historical prayer sites and traditional cultural practices, such as male circumcision.⁴

In the specific context of religious worship, the community believes that the spirits of all Endorois people, wherever buried, live in Lake Bogoria; hence, it is considered the spiritual home of all Endorois whether living or dead.⁵ According to Endorois oral history, their Great Ancestor, Dorois, came from heaven and settled in Muchongoi forest, adjacent to the present day Lake Bogoria. However, after a period of luxury and excesses, their god was angry and sank the ground, leading to the formation of Lake Bogoria. The present day Endorois are descendants of those who did not perish.⁶ In order to appease the spirits of their ancestors who drowned, the Endorois conduct festivities each time in the year when Lake Bogoria turns red and hot springs emit a strong odour. The Endorois thus regard Lake Bogoria and Muchongoi Forest as sacred grounds, which they have traditionally used to perform cultural and religious ceremonies such as burials, weddings, male circumcision and initiation.⁷

In 1973, the Kenyan government officially designated and gazetted Lake Bogoria as a protected game reserve, effectively dispossessing the Endorois of their ancestral land.⁸ At the time of gazettement, the Kenya Wildlife Services and the local authority undertook to compensate the 400 Endorois families affected by the gazettement and also to grant 25% of the tourism revenue from the game reserve and 85% of the employment opportunities generated to the Endorois.⁹ Further, the Kenya Wildlife Services committed to build cattle dips and dams for the Endorois in the new settlement area.¹⁰ Eventually, after several meetings, the Endorois were informed that they would be compensated 3 150 Kenyan shillings per family. In reality, only

3 Republic of Kenya. 2009. Kenya Housing and Population Census; Makoloo MM and Ghai YP. 2005. "Kenya: Minorities, Indigenous Peoples and Ethnic Diversity", *Minority Rights Group International*, 17.

4 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) v Kenya*, African Commission Communication 276/03, para 3 [hereinafter African Commission Communication].

5 African Commission Communication 276/03, para 79.

6 African Commission Communication 276/03, para 77.

7 African Commission Communication 276/03, para 77.

8 African Commission Communication 276/03, para 5.

9 African Commission Communication 276/03, para 7.

10 African Commission Communication 276/03, para 7.

170 families were compensated in 1986, and they were never paid the promised 25% of the tourism revenue or given the 85% of the employment opportunities, nor were the dams and cattle dips built.¹¹

In 1994, Endorois sought administrative redress through their Parliamentary representative, then President Daniel arap Moi,¹² who directed the local authority to honour the 1973 agreement. The local authority failed to honour the agreement,¹³ forcing the Endorois to institute a legal action at the High Court in 1997. In 2002, the High Court dismissed the Endorois case on the basis that upon gazettelement of Lake Bogoria as a game reserve, public land the Endorois lost any legal claim.¹⁴ The High Court also took the position that the payment of compensation to the 170 families fulfilled any duty that the Kenyan government owed to the Endorois for loss of their ancestral land.¹⁵ The Endorois then instituted a complaint at the African Commission in 2003.

The Endorois complaint before the African Commission alleged violation the right to freedom of religion, right property, right to culture, the right to freely dispose of their natural resources and the right to development all enshrined in the African Charter on Human and Peoples' Rights.¹⁶ In the specific context of violation of freedom of religion, the Endorois alleged the government's refusal to allow them free access to sacred sites for worship and failure to demarcate the sacred sites within the game reserve and to maintain the sites regarded to the Endorois as sacred. The Endorois argued that this constituted a severe and permanent interference with the Endorois right to religious freedom.¹⁷

The African Commission in 2010 found that the Kenyan government's eviction of the Endorois from the Lake Bogoria area and its denial of access to the land constituted interference in their right to maintain their religious practices, which were central to their religion.¹⁸ The African Commission took the view that the violation of religious freedom could not be justified against the objectives economic development and ecological conservation. It recommended that the Kenyan government should grant the Endorois unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites.¹⁹

11 African Commission Communication 276/03, para 8.

12 Under the 1963 Kenya Constitution, for one to be elected President, one had to be a Member of Parliament. President Moi was therefore the Member of Parliament for Baringo Central, where the Endorois live.

13 African Commission Communication 276/03, para 9-10.

14 *William Ngasia and others v Baringo County Council and others*, High Court Miscellaneous Civil Case No. 183 of 2000.

15 *William Ngasia and others v Baringo County Council and others*.

16 *William Ngasia and others v Baringo County Council and others*.

17 African Commission Communication 276/03, para 80.

18 African Commission Communication 276/03, para 173.

19 African Commission Communication 276/03, "Recommendations of the African Commission".

The Ogiek case

The Ogiek are a hunter-gatherer community, comprising about 79 000 persons, who inhabit the Mau Forest.²⁰ Although a subtribe of the Kalenjin community, the Ogiek, like the Endorois, consider themselves distinct in traditions and culture. The Mau Forest is a closed canopy forest that serves as catchment for fourteen rivers and five lakes, including Lake Victoria, which is shared amongst Kenya, Tanzania and Uganda and is the source of the Nile River.²¹ The Ogiek lay an ancestral claim to the Mau Forest. The Mau Forest was gazetted as a forest reserve under the forestry agencies by the colonial government in 1932.²² The gazettement marked the first eviction of the Ogiek from the Mau Forest and set the stage for repeated evictions over the years.²³ Recent evictions occurred in 2009 and 2012, with the latest in 2018.²⁴

In the context of religious freedom, the Ogiek contend that there are specific hills, caves and trees in the Mau Forest which they regard as sacred sites.²⁵ However, repeated evictions led to the destruction of these sacred sites and denied the Ogiek community access to the sites.²⁶ According to the Ogiek, they require unfettered access, protection and demarcation of the sacred sites to be able to maintain and use the sacred sites in line with their religious practices.²⁷

Following evictions in the 1990s, the Ogiek filed a case in 1999 in the High Court against their eviction from Mau Forest, which was however ruled against the Ogiek.²⁸ A subsequent case filed in the High Court against eviction from another section of Mau Forest was decided in 2014 in favour of the Ogiek.²⁹ This case did not however address itself to the issue of freedom of religion.

In 2009, the Ogiek moved to the African Commission, alleging violation of the rights of religious practice, property, development, culture, non-discrimination and free

20 Republic of Kenya, Kenya Population and Housing Census, 2009; Kamau J. n.d. "Ogiek: history of a forgotten tribe". Online at: <http://www.ogiek.org/report/ogiek-ch1.htm> [Accessed 28 March 2019].

21 Republic of Kenya. 2009. "Report of the Prime Minister's task force on the conservation of the Mau Forests complex", 17.

22 Chabeda-Barthe J and Haller T. 2018. "Resilience of traditional livelihood approaches despite forest grabbing: Ogiek to the west of Mau Forest, Uasin Gishu", *Land* 7(4):140 [<https://doi.org/10.3390/land7040140>].

23 Chabeda-Barthe and Haller, "Resilience of traditional livelihood approaches".

24 Oluoch F. 2018. "Battle for the Mau: Despite court ruling Ogiek face new eviction threats", *The East African*, 19 June.

25 *African Commission on Human and Peoples' Rights v Republic of Kenya*, Application No. 006/2012, Judgment 26 May 2017, para 158.

26 *African Commission on Human and Peoples' Rights v Republic of Kenya*.

27 *African Commission on Human and Peoples' Rights v Republic of Kenya*.

28 *Francis Kemei & others v Attorney General & 3 Others* [2006] 1 KLR.

29 *Joesph Letuya & 21 Others v Attorney General & 5 Others* [2014] eKLR.

disposition of their natural resources as enshrined in the African Charter.³⁰ In 2012, the African Commission issued provisional measures requiring the government not to evict the Ogiek from the Mau Forest, pending its consideration and determination of the case.³¹ However, the government disregarded the provisional measures, resulting in the African Commission referring the case to the African Court in 2013.³² In May 2017, the African Court issued a full-merit decision finding the Kenyan government in violation of the Ogiek's right to protection of the law, freedom of religion, right to cultural life, right to development and right to freely dispose of their natural resources.³³ With specific reference to religious freedom, the African Court held that the eviction of the Ogiek from the Mau Forest and imposition of a requirement for payment of fees and licences to access the Mau Forest interfered with the Ogiek's freedom of worship.³⁴

The decisions in the Endorois and Ogiek cases have not been implemented to date. Although the Kenyan government established two separate task forces to examine the decisions and advice on implementation, no action has been taken as of April 2019.³⁵ Notably, government actions, such as the 2018 eviction of the Ogiek from the Mau Forest, point to a disregard for the African Court decision.

FREEDOM OF RELIGION AND PROTECTION OF INDIGENOUS RELIGIONS

While global and regional human rights treaties protect freedom of religion, the contours of religious freedom remain contested. Pointedly, none of the treaties provides a definition of religion, even though protection of religious freedom predates protection of other rights. Early protection of religious freedom traces back to the protection of religious minorities under the League of Nations system. Minority treaties labeled as "obligations of international concern" were concluded between the League of Nations and various Eastern European states, in which the League served as a guarantor.³⁶

30 *African Commission on Human and Peoples' Rights v Republic of Kenya*, para 43.

31 *African Commission v Republic of Kenya*, Application 006/2012 provisional measures, 15 March 2013.

32 *African Commission v Republic of Kenya*, Application 006/2012 provisional measures.

33 *African Commission on Human and Peoples' Rights v Republic of Kenya*, para 227.

34 *African Commission on Human and Peoples' Rights v Republic of Kenya*, para 162-169.

35 See Kenya Gazette Notice No. 6708, 19 September 2014, and Kenya Gazette Notice No. 10944, 10 November 2017.

36 Walter C. 2012. "The protection of freedom of religion within the institutional system of the United Nations", in Glendon MA and Zacher H (eds). *Universal rights in a world of destiny – the case of religious freedom*. Acta 17. Vatican City: Pontifical Academy of Social Sciences, 588-589.

Global and regional instruments on religious freedom

The United Nations system marked a shift from the protection of religious minorities to the individualised concept of modern-day protection of religious freedom. The drafting history of the Universal Declaration of Human Rights (UDHR) points to the philosophical controversy, which resulted in an articulation of religious liberty without any settled meaning to date.³⁷ The relevant UDHR provision on religion provides: "Everyone has the right to freedom of thought, conscience and religion; this right includes the right to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship or observance."³⁸

The UDHR has been understood in two parts. The first clause guarantees the freedom of thought, conscience and religion. This clause is absolute in character. Notably, there is no attempt to define thought, conscience or religion.³⁹ The second clause lists an array of rights that relate to freedom of religion, thought and conscience. A number of positions have been advanced in relation to the second clause. First, the clause is not exhaustive, and more rights could be read. Second, that it is not the truth of the claims that is protected but the freedom of individuals and groups to hold those claims. Third, the clause implies both the positive and negative aspects of religious freedom. This means the protection of the negative dimension of religious freedom, the right not to profess any religion or belief and not to care about religion.⁴⁰ The collective dimension of the right only extends to freedom of religion as thought and conscience cannot be expressed in a group.⁴¹

The International Covenant on Civil and Political Rights (ICCPR) is more elaborate in its enunciation of the religious freedom. The right is provided as follows:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice and freedom either individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights of others.

37 Lindkvist L. 2014. "The politics of Article 18: Religious liberty in the Universal Declaration of Human Rights", *Humanity Journal* 4(3), 12 June [<https://doi.org/10.1353/hum.2013.0023>].

38 Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), art 18 [<http://hrlibrary.umn.edu/instreet/b1udhr.htm>].

39 Lerner N. 2012. *Religion, secular beliefs and human rights*. Leiden: Brill, 13-14.

40 Lerner, *Religion, secular beliefs and human rights*, 13-14.

41 Lerner, *Religion, secular beliefs and human rights*, 13-14.

4. The State Parties to the present Covenant undertake to have respect to the liberty of parents, and when applicable legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.⁴²

The Article is thus in four clauses. The first clause sets out particular elements of the right. Although textually similar to the UDHR, a difference exists in reference to the right to change religion or belief.⁴³ The Human Rights Committee General Comment 22 has interpreted the provision as implying a right for to change one's religion or belief.⁴⁴

The second clause contains freedoms against coercion to change the religion or belief of one's choice. Plainly read, appeals to conscience, preaching and seeking to influence a person to maintain or change their belief or religion do not amount to coercion. Further, General Comment 22, in addressing coercion, refers to "policies and practices having the same effect" and outlines illustrations relating to state coercion in public services, such as access to education, medical care, employment or in the right to vote, take part in the public affairs of one's country or gain access to the public service of one's country.⁴⁵ The General Comment thus limits itself to state-sponsored coercion.

The third clause introduces a limitation on the freedom to manifest one's religion or belief. The gist of Article 18 is that it is generally of an absolute character, since the core of the right of freedom of thought conscience and religion cannot be limited. This arises from the understanding that the beliefs have not been transmitted to practice. However, it is settled under international human rights law that practice may be limited. The third clause serves the purpose of setting out the limitations. General Comment 22 provides a non-exhaustive list of acts of manifestation of belief or religion. The Committee defines worship as encompassing both ritual and ceremonial acts as direct expression of belief, including building places of worship, use of ritual formulae and objects, display of symbols, observance of holidays and rest days.⁴⁶ Observance and practice of religion or belief encompasses observance of dietary regulations, wearing of distinctive clothing or head covering, taking part in rituals at certain stages of life and use of a language associated with a group.⁴⁷ Practice and teaching of religion or belief includes conduct of religious affairs by religious groups, such as electing leaders, ordination of priests, freedom to establish seminaries

42 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art 18 [hereinafter ICCPR].

43 The UDHR contains the phrase "the right to change his religion or belief", while the Covenant on Civil and Political Rights adopts more moderate language "freedom to have or adopt a religion or belief of his choice".

44 UN Human Rights Committee, CCPR General Comment 22, CCPR/C/21/Rev.1/Add.4 (1993), para 5.

45 UNHRC, General Comment 22, para 5.

46 UNHRC, General Comment 22, para 4.

47 UNHRC, General Comment 22, para 4.

and schools and to prepare, publish and distribute religious texts.⁴⁸ These acts are, however, subject to limitation by the state. The listed grounds of limitation include public safety, order, health, morals or the fundamental rights and freedoms of others. The limitations must be prescribed in law and justifiable in a democratic society.

The fourth clause gives parents and legal guardians protection against the moral and religious teaching of their children being manipulated by public and private actors. This right finds further expression in the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁴⁹ and in the Convention on the Rights of the Child (CRC).⁵⁰ The two treaties give primacy to the parents and legal guardians in protection of the religious and moral education of children.

At the regional level, the three main regional systems protect religious freedom. Article 9 of the European Convention on Human Rights (ECHR) is textually similar to the first and second paragraphs of the ICCPR.⁵¹ Article 12 of the American Convention on Human Rights contains language that echoes the four paragraphs of the ICCPR.⁵² The African Charter on Human and Peoples' Rights (African Charter) ambiguously protects the freedom of conscience and free exercise of religion.⁵³ The African Commission has nonetheless interpreted the African Charter in manner that has broadened the protection of religious freedom in Africa.⁵⁴ In addition to these global and regional treaties, there are also non-legally binding instruments on religious freedom, such as the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief.⁵⁵ This Declaration elaborates on the interpretation and application of Article 18 of the ICCPR.⁵⁶

48 UNHRC, General Comment 22, para 4.

49 International Covenant on Economic, Social and Cultural Rights, United Nations Treaty Series, vol. 993, p. 3, *entered into force* Mar. 23, 1976, art 13 (3).

50 Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990, art 14 [<http://hrlibrary.umn.edu/instree/k2crc.htm>].

51 [European] Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No. 5), 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11, which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively, art 9.

52 American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* Jul. 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), art 12.

53 African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986, art 8.

54 See *Amnesty International and Others v Sudan*, African Commission on Human and Peoples' Rights, Communication No. 48/90, 50/91, 52/91, 89/93 (1999); *Free Legal Assistance Group and Others v Zaire*, African Commission on Human and Peoples' Rights, Communication No. 25/89, 47/90, 56/91, 100/93 (1995).

55 UN General Assembly, Declaration on the Elimination of all Forms of Intolerance Based on Religion or Belief, 25 November 1981, A/RES/36/55. [hereinafter Declaration on Religion].

56 Declaration on Religion.

Limitations of religious freedom regarding indigenous religions

Turning to the question of protection of indigenous religions, the question must be asked: How adequate is the above discussed normative framework on religious freedom? At the outset, it is noteworthy that the foundational human rights instruments, the UDHR, the ICCPR and the ICESCR, do not contain any textual expression of the terms indigenous people or sacred sites. Even so, a number of provisions in the UDHR and the ICCPR contain a limited amount of language that implies protection of indigenous peoples' religious freedom.⁵⁷ Additionally, the UN Human Rights Committee in its General Comment 23 on the rights of minorities in Article 27 of the ICCPR elaborates on their rights to practise their religion and culture including on land.⁵⁸

The 2007 UN Declaration on the Rights of Indigenous Peoples is more assertive and definitive in its protection of the rights of indigenous people to traditional lands and sacred sites. The Indigenous Peoples Declaration is, however, non-binding and framed in broad terms. The thrust of the Declaration in relation to religion and sacred sites is contained in Articles 12 and 25. Article 12 provides for the right to manifest, practise, develop and teach spiritual and religious traditions, customs and ceremonies; the right to maintain, protect and have access in privacy to their religious and cultural sites; the right to use and control of their ceremonial objects; and the right to the repatriation of their human remains.⁵⁹ Article 25 provides that indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands and territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.⁶⁰ While the Indigenous Peoples Declaration does not define sacred sites, the voluntary "Akwé:Kon Guidelines" developed under the auspices of Convention on Biological Diversity provide a definition of sacred sites which incorporates the religious and spiritual significance of natural sites, objects or structures to indigenous communities.⁶¹

57 ICCPR, art 27: "In those States in which ethnic, religious and linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to practise and profess their own faith, or to use their own language."

58 UN Human Rights Committee, CCPR General Comment 23: Article 27 (Rights of Minorities), 8 April 1994, para 7.

59 Declaration on the Rights of Indigenous Peoples, art 12.

60 Declaration on the Rights of Indigenous Peoples, art 25.

61 Secretariat on the Convention on Biological Diversity. 2004. "Akwé:Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on Sacred Sites and on Land and Waters Traditionally Occupied or Used by Indigenous or Local Communities". Montreal: CBD. Online at: <https://www.cbd.int/traditional/guidelines.shtml>

The Declaration's protection of indigenous religions is taken up fully in the discussion below on the inadequacy of freedom of religion to protect indigenous religions and sacred sites.

Inadequacy of religious freedom in protection of indigenous religions

Returning to the question of the adequacy of the religious freedom framework to protect indigenous religions, a number of shortcomings have been raised. First is the conflation of indigenous religions with culture. Second is the concept of internalised belief, which views worship as an individual act disconnected from nature and specific sites. Third is the failure of freedom of religion to recognise land-based and site-specific religion, resulting in government violation of its obligation to respect sacred sites. Fourth is the failure to extend religious freedom to the protection of objects of worship. These are worth examining in greater detail.

First, with respect to the conflation of indigenous religion with culture, the colonial project sought to assimilate and integrate indigenous peoples into mainstream society. This is no different when viewed through the prism of religion. Indigenous religions were considered as incidents of culture and backward and innately inferior in the context of evolutionist thinking; thus they required replacement with modern beliefs of a higher order.⁶² This conflation of religion and culture diminishes the value of religion as a standalone right meriting protection.⁶³ This colonial legacy informs, up to present day, the view and treatment of indigenous religions as inferior and requiring assimilation into mainstream religions to overcome the inferiority and, importantly, to find protection under religious freedom laws. In addition, indigenous religious practices have been demonised and designated as limitations to freedom of religion.⁶⁴ For instance, burial practices observed in indigenous religions would be said to offend public health, hence a limitation on religious freedom might be in order.⁶⁵

Second, with respect to the concept of internalised belief, freedom of religion evolved from the Western legal tradition, which privileges individual liberty. International human rights law thus interprets religious freedom as an individual right, protecting individually held beliefs, recognised as religious beliefs, and also the individual

62 Amoah J and Bennett T. 2008. "The freedoms of religion and culture under the South African Constitution: Do traditional African religions enjoy equal treatment?", *African Human Rights Law Journal* 8(2):363-364 [<https://doi.org/10.1017/S0748081400001910>]. See also Hackett RJ. 2013. "Has religious freedom served or failed traditional/indigenous religions?", paper presented to the International Center for Law and Religion Studies. Online at: <https://www.iclrs.org/content/events/28/744.pdf> [Accessed 15 March 2020].

63 Collins RB. 2003. "Sacred sites and religious freedom on government land", *Journal of Constitutional Law* 5:243.

64 Mutua MW. 2002. *Human Rights: A political and cultural critique*. Philadelphia: University of Pennsylvania Press, 100-103 [<https://doi.org/10.9783/9780812204155>].

65 Hackett, "Has religious freedom served or failed traditional/indigenous religions?"

right to manifest those beliefs.⁶⁶ Monotheistic faiths consider religion to entail belief in a supreme being, proclamation of an everlasting truth and explanation of the plight of the human condition, which may be practised in man-made sites such as churches, mosques, synagogues and temples.⁶⁷ Indigenous religions are also communal, and they envisage relationships between people and the individual members of the group and specific locations.⁶⁸ Indigenous religions privilege rituals, such as ancestor worship, dances and sacrifices, conducted communally in specific sites, rather than internalised belief. Therein lies the difference. Notably, some of the rituals, such as divination, faith healing and witchcraft, are criminalised in a number of countries.

Third, international human rights law fails to recognise indigenous religions and their special relationship with the natural environment. The confluence of spirituality and nature seems to be at odds with the view of the monotheistic faiths. On the one hand, this is due to the internalised concept of belief in monotheistic religions, in which belief is belief in a Supreme Being and proclamation of a truth. On the other hand, it amounts to the failure to protect sacred or sacredness of locations.⁶⁹ The difference stems from the fact that monotheistic religions have settled man-made places of worship, while indigenous religions are rather nomadic in this regard. Tied to this is the fact that indigenous peoples' claim to land on which sacred sites are situated does not fit within the classical Lockean theory of property, making it difficult for property rights that protect man-made places of worship to protect sacred sites.⁷⁰ As a consequence, access to and use of sacred sites and exclusion of others is often a challenge.

Finally, international human rights law tends to separate belief from the objects of belief. As discussed earlier, religious freedom protects in an absolute sense the freedom to hold belief, but provides for limitation of freedom to manifest the beliefs in worship, practice and observance. The question then is whether belief can be

66 Newman D, Rouzzi E and Kirchner S. 2017. "Legal protection of sacred natural sites within human rights jurisprudence: Sami & beyond", in Heinamaki L and Herrmann TM (eds). *Experiencing and protecting sacred natural sites of Sami and other indigenous peoples*. Dordrecht, Netherlands: Springer Nature, 19-20 [https://doi.org/10.1007/978-3-319-48069-5_2].

67 Amoah and Bennett, "The freedoms of religion and culture under the South African Constitution", 371; Newman, Rouzzi and Kirchner "Legal protection of sacred sites within human rights jurisprudence", 19-20.

68 Newmann, Rouzzi and Kirchner, "Legal protection of sacred sites within human rights jurisprudence", 20.

69 Newman, Rouzzi and Kirchner, "Legal protection of sacred sites within human rights jurisprudence", 18.

70 Newman, Rouzzi and Kirchner, "Legal protection of sacred sites within human rights jurisprudence", 21. The Lockean property theory views ownership in an individualistic way, as creating private claims and with the right to exclude others. Indigenous peoples' claim to land does not fit within the individualist and private notions of property ownership; rather, land is communally owned.

separated from the objects of belief. Freedom of religion has been interpreted as not protecting objects of belief, such as presence of spirits on land or the subjective spiritual meaning derived from the object of belief.⁷¹

In summary, it is evident that international human rights law suffers an inherent deficiency of analysing freedom of religion with concepts drawn from monotheistic doctrines. This places the interpretation and application of religious freedom at odds with indigenous religions, hence its inadequacy in protecting indigenous religious freedom.⁷² The Indigenous Peoples Declaration, to a limited extent, addresses some of these inadequacies. Article 12 departs in significant ways from the international human rights law concept of internalised belief and its individualistic conception by laying particular emphasis on “spiritual and religious traditions, customs and ceremonies”, rather than “thought, conscience and belief”.⁷³ Additionally, the Declaration extends protection of religious freedom to religion and spirituality that is connected to land and other natural resources. This occurs through the inclusion in Article 12 of the “right to maintain, protect and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to repatriation of their human remains”.⁷⁴

The Indigenous Peoples Declaration points to the possibility of better protection of indigenous religion and the necessity for the international human rights regime to develop norms and mechanisms for protecting indigenous religions. It is not binding, as alluded to earlier, thus making a case for it to be infused in domestic interpretations, so as to afford protection to indigenous religions and sacred sites. The next section discusses Kenya’s constitutional arrangements on freedom of religion and seeks to infuse the normative framework of the Indigenous Peoples Declaration to propound the position that indigenous religions and sacred sites find protection in Kenya’s constitutional arrangements.

KENYA’S CONSTITUTIONAL ARRANGEMENTS ON FREEDOM OF RELIGION, WORSHIP, BELIEF AND CONSCIENCE

The Constitution of Kenya, 2010, provides for religious freedom generally. Although it does recognise marginalised and minority communities, it does not specifically address itself to indigenous religions and sacred natural sites. The Constitution contains express textual reference to religion in six instances: (1) on the relationship between the state and religion; (2) on protection of religious freedom; (3) on religion as protected ground in the non-discrimination clause; (4) on the establishment of

71 See *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resources Operations)* 2017 SCC 54, (2017) 2 S.C.R. 386 para 70-77.

72 Gordon SB. 1985. “Indian religious freedom and government development on public land”, *The Yale Law Journal* 94:1459-1462.

73 Newmann, Rouzzi and Kirchner, “Legal protection of sacred sites within human rights jurisprudence”, 22.

74 Newmann, Rouzzi and Kirchner, “Legal protection of sacred sites within human rights jurisprudence”, 22.

religious personal law in the constitutional order; (5) in reference to legal pluralism in the context of marriage; and (6) in reference to Kadhis' Courts. The Preamble of the Constitution also expressly mentions "God", though no further provisions in the Constitution do. The Preamble serves as a symbolic marker of Kenya's national identity and has no binding force. While these provisions are interrelated, it would exceed the intentions and limits of this chapter to discuss on all the six. This section will thus only concern itself with the relationship between religion and the state and the protection of religious freedom.

The first substantive provision on religion deals with the relationship between the state and religion. Article 8 curtly provides: "There shall be State religion."⁷⁵ It is framed in the negative and denies the establishment of state religion. The question is whether this requires or implies a secular state. Viewed against the history of the constitution-drafting process, the principle social cleavage at the time was amongst religions, that is between Christianity and Islam, and not on whether to have a secular or religious state.⁷⁶ In this regard, it could thus argued that the Kenyan Constitution does not imply state neutrality towards religion, but rather is a positive accommodation of all religions and religious communities. This view finds further support in the fact that the Constitution affords a measure of jurisdictional autonomy to religious personal law.⁷⁷ The drafters of the Constitution thus sought to protect religious freedom without banishing religion from the public sphere. The Constitution does not envisage a secular state, but rather pluralist accommodation of religion, in which the state treats all religions equally. This has particular significance, as it implies that the Constitution requires the state to accommodate all religions including indigenous religions.

The second provisions deals with protection of religious freedom. On this point, the Kenyan Constitution provides as follows:

- (1) Every person has the right to freedom of conscience, religion, thought, 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.
- (3) A person may not be denied access to any institution, employment or facility or the enjoyment of any right, because of the person's belief or religion.
- (4) A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion.⁷⁸

⁷⁵ Constitution of Kenya, 2010, art 8.

⁷⁶ See *Jesse Kamau and 25 Others v Attorney General* [2010] eKLR.

⁷⁷ See Article 24 (4) which allows persons professing Muslim religion to apply Muslim law in matters relating to personal status, marriage, divorce and inheritance.

⁷⁸ Constitution of Kenya, 2010, art 32.

The first and second clauses of the provision are textually similar to the provisions of the ICCPR save for the inclusion of the word “opinion” in the first clause and the phrase “including observance of a day of worship” in the second clause. The differences have no significance, as General Comment 22, in its elaboration of the right to religious freedom, includes observance of worship days as a form of manifestation.⁷⁹ Akin to the ICCPR, the provision protects freedom of religion, belief, conscience and opinion, which are absolute in character. It also protects the positive and negative dimensions of the right, which in the negative dimensions implies protection not to profess any religion or belief, not to attend any religious rituals and to be unconcerned about religious matters. The freedom to manifest religion is subject to the general limitation clause in Article 24 of the Constitution. The third clause introduces the prohibition of religious discrimination in the context of access to institutions and employment. The fourth clause outlaws compulsion to engage in any act that is contrary to one’s belief or religion. The third and fourth clauses should be understood in the context in which the constitution review process took place: contestation between Muslims and Christians, hence the need to protect from each other’s discrimination and compulsion.

Having established that the Kenya Constitution protects indigenous religions, the question then turns to rights pertaining to indigenous religious practices and sacred sites on public land. At the heart of the Ogiek and Endorois cases is government’s recognition of ancestral claims to land. Broadly, it brings to the fore questions of land rights Kenya. The land problem in Kenya has been described as complex and multi-faceted, involving not merely ‘the “land question”, but “land questions”’. Prior to colonisation in 1890s, African societies were organised into ethnic communities defined by common language, culture and traditions.⁸⁰ Land ownership was centred around these communities, such that the concept of land ownership was collective with communal rules based on cultural norms regulating access and use.⁸¹ Under colonisation, Europeans took the view that Africans did not fit the European concept of statehood, hence were “stateless, pre-law and intellectually immature”.⁸² Flowing from this perception, Europeans conferred on themselves title to the territory of Africa without any regard to the indigenous people, whom they argued could not understand the concept of sovereignty to cede territory by treaty.⁸³

79 UNHRC, CCPR General Comment 22, para 1-4.

80 Murphy J. 2012. “Extending indigenous rights by way of the African Charter”, *Pace International Law Review* 24(1):161.

81 Kameri-Mbote AP and Cullet P. 1997. “Law, colonialism and environmental management in Africa”, *Environmental Management in Africa* 6(1):25 [<https://doi.org/10.1111/1467-9388.00071>].

82 Murphy, “Extending indigenous peoples rights by way of the African Charter”, 161.

83 Murphy, “Extending indigenous peoples rights by way of the African Charter”, 162.

In Kenya, the British Protectorate assumed that the native people had no form of government; hence, there was no sovereign holding radical title over the land.⁸⁴ Consequently, in 1899, the Crown claimed radical title over all land in the Kenyan territory that was not physically occupied by native people, which in Eurocentric notions of land use meant sedentary agriculture.⁸⁵ In 1915, the Crown Land Ordinance was extended to cover all lands, which rendered native people tenants of the Crown.⁸⁶ Following tensions from natives, the 1930 Native Land Ordinance Act was established which established native land reserves governed by customary law.⁸⁷ Subsequent land reforms created individualised titles for elite Africans through the Land Registration Act aimed at improving agricultural production.⁸⁸ At independence, the government upheld individualised tenure and individual title, locking out indigenous people who claimed that their lands had been alienated during colonial rule.⁸⁹ Additionally, the bias towards sedentary agriculture as the primary means of putting land into productive use resulted in lack of attention of other land uses, such as pastoralism, hunting and gathering food and honey production.⁹⁰ Pointedly, these are the activities that were associated with indigenous communities land use.

In terms of environmental conservation, colonialism disrupted the native people's relationship with land. Native people practices such as hunting and gathering were considered incompatible with environmental conservation.⁹¹ In this regard, natural resources, such as wildlife and forests, were gazetted as reserved areas and native Africans kept out of them.⁹² This explains the history of the gazettement of the Mau Forest back in 1932 and the subsequent evictions of the Ogiek. The independence state also assumed exclusive rights over natural resources. Similarly, this explains the gazettement of Lake Bogoria game reserve by the government in 1973 and the eviction of the Endorois from the game reserve and adjacent land. It is imperative

84 Musembi CN and Kameri-Mbote P. 2013. "Mobility, marginality and tenure transformation in Kenya: Explorations of community property rights in law and practice", *Nomadic Peoples* 17(1):6-7 [https://doi.org/10.3167/np.2013.170102].

85 Musembi and Kameri-Mbote, "Mobility, marginality and tenure transformation in Kenya", 6-7.

86 See *Isaka Wainaina wa Gathomo and Kamau wa Gathomo v Murito wa Indangara, Nganga wa Murito and Attorney General* (1922-23)9 (2) KLR 102 (cited in Wachira GM. 2008. *Vindicating Indigenous Peoples' Land Rights in Kenya*, LL.D thesis, University of Pretoria, 61.

87 *Isaka Wainaina wa Gathomo and Kamau wa Gathomo v Murito wa Indangara, Nganga wa Murito and Attorney General* (1922-23)9 (2) KLR 102.

88 Wachira, *Vindicating Indigenous Peoples' Land Rights in Kenya*, 63.

89 Musembi and Kameri-Mbote, "Mobility, marginality and tenure transformation in Kenya", 6-7.

90 Musembi and Kameri-Mbote, "Mobility, marginality and tenure transformation in Kenya", 6-7.

91 Kameri-Mbote and Cullet, "Law, colonialism and environmental management in Africa", 26.

92 Kameri-Mbote and Cullet, "Law, colonialism and environmental management in Africa", 26.

that government ownership over natural resources is akin to a right of private property ownership, as it constitutes exclusive control including denial of access.⁹³

The above discussion sheds light on the indigenous people “land question” in Kenya. The alienation of their lands by the colonial government and the dual bias of land ownership towards individualised title and of land use towards sedentary agriculture, from the colonial to the independence government, defines the character of the struggle by indigenous people over land rights in Kenya. The Constitution of Kenya, 2010, redresses these concerns as discussed below.

The Kenyan Constitution provides a framework for recognition of minorities and marginalised groups and provisions on community land, which impliedly addresses indigenous people and their land. It recognises minorities and marginalised groups as categories of persons requiring affirmative action.⁹⁴ While the Constitution does not contain the textual expression “indigenous persons” in its substantive provisions, the definition section defines a marginalised community to include “an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy”.⁹⁵ It can thus be inferred that the Constitution does recognise indigenous people.

In regard to indigenous people and land, the Kenyan Constitution outlines the principles of holding, use and management to include equitable access, security of land rights and sound conservation and protection of ecologically sensitive areas.⁹⁶ It further recognises the three forms of land ownership in Kenya as public, private and community.⁹⁷ The Constitution designates government forests, government game reserves, water catchment areas, national parks, government animal sanctuaries and specially protected areas as public land.⁹⁸ It is imperative that in the Ogiek case, the sacred sites are a government forest and a water catchment area, the Mau Forest, while in the Endorois case, the sacred sites are in a government-gazetted game reserve in Lake Bogoria. Community land, on the other hand, is defined to include land lawfully held, managed or used by specific communities as community forests, grazing areas or shrines, as well as ancestral lands and lands traditionally occupied by hunter-gatherer communities.⁹⁹

The obvious question that presents is whether the sacred sites claimed by the Ogiek and Endorois are on public or community land? The question is not easy to answer. A plain reading of the Kenyan Constitution implies that the sacred sites claimed by the Endorois and Ogiek are on government land. Conversely, these provisions, when read in the context of the normative framework on the rights of indigenous

93 Kimeri-Mbote and Cullet, “Law, colonialism and environmental management in Africa”, 26.

94 Constitution of Kenya, 2010, art 56.

95 Constitution of Kenya, 2010, art 260.

96 Constitution of Kenya, 2010, art 60 (1) (a), (b) & (e).

97 Constitution of Kenya, 2010, art 61.

98 Constitution of Kenya, 2010, art 62 (1) (g).

99 Constitution of Kenya, 2010, art 63 (d) (i) & (ii).

people, particularly the African Charter to which Kenya is signatory, would suggest that the Endorois and Ogiek have a legitimate claim based on ancestral ownership. Nonetheless, lack of proprietary interest is not dispositive of exercise of religious freedom.

Finally, does the Kenyan Constitution protect sacred sites on land that is owned by the government and thus public? The Constitution is silent and only addresses itself to sacred sites and shrines in the context of community land.¹⁰⁰ The better question would be: Does religious freedom protect religious interest on public land? The answer ought to be in the affirmative for at least two reasons. First, as discussed, the Constitution requires the state to exercise pluralist accommodation in its relationship with religion. This implies treating all religions equally and in a non-discriminatory manner. Government claim over land does not exempt it from religious accommodation. Second, the right to religious freedom imposes on the state the obligation to respect it, which means that the state and its agencies should not infringe on the exercise of religious freedom. Accordingly, the state is required not to take any action that impedes religious freedom on public land.

The constitutional requirement to treat all religions equally and in a nondiscriminatory manner imposes a related obligation not to privilege any religion. This raises the issue of whether managing sacred sites on government land would create “government managed religious sites” and thus constitute government privileging of one religion? The Kenyan Constitution recognises the special application of rights to minorities and marginalised groups. The state is constitutionally obligated to put in place affirmative action programmes to ensure that minorities and marginalised groups “develop their cultural values, languages and practices”.¹⁰¹ While religion is not expressly mentioned, it can be inferred from “practices”. State management of sacred sites on public land would thus not amount to privileging indigenous religions, but rather would be evidence of affirmative action for minority and marginalised groups in line with the Bill of Rights. Further, as discussed, the Constitution requires accommodation of all religions.

Even then, freedom to manifest one’s religion and belief, and to engage in ceremonies, rituals and customs, is not absolute and can be limited in line with the Kenyan Constitution. In both the Endorois and Ogiek cases, the state limits exercise of religious freedom for the purpose of environment conservation. The right in issue is the right of the public to enjoy a clean and healthy environment, including access to clean water and environmental conservation. The Kenyan Constitution enshrines the right to a clean and healthy environment as a justiciable and enforceable right in the Bill of Rights, which includes the right to have the environment protected for the benefit of present and future generations.¹⁰² In addition, in regard to the environment, the Constitution imposes express obligations on the state: to eliminate

100 Constitution of Kenya, 2010, art 63 (d) (i) & (ii). The Constitution recognises land lawfully held, managed or used by communities as shrines as community land.

101 Constitution of Kenya, 2010, art 56 (d).

102 Constitution of Kenya, 2010, art 42 (a).

processes and activities that are likely to endanger the environment;¹⁰³ to utilise the environment and natural resources for the benefit of the people of Kenya,¹⁰⁴ to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources and ensure equitable sharing of the accruing benefits;¹⁰⁵ and to encourage public participation in the management and conservation of the environment.¹⁰⁶

In view of the above, can environmental conservation, as enacted by the government in the Endorois and Ogiek cases, restrict religious freedom for indigenous peoples? Framed another way, should indigenous religious claims of sacred sites on public land prevent government activity on the land? International human rights law frowns on hierarchy of rights. Debate on which rights occupy a higher place in the hierarchy – environmental conservation or religious freedoms for indigenous peoples – should thus be abandoned. Rather, a balancing and proportionality test should be adopted that accommodates the competing interests in environmental conservation and indigenous religious freedom. The Kenyan Constitution provides as much in its general limitations clause in the Bill of Rights.¹⁰⁷ It lays down criteria for limiting rights, requiring that any limitation should be by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹⁰⁸ Further, it requires that the least restrictive means should be applied to achieve the purpose of the limitation.¹⁰⁹ The question then turns to whether the eviction and denying access of the Endorois and the Ogiek from Mau Forest and Lake Bogoria respectively is the least restrictive means in achieving environmental conservation.

The competing interests asserted by the Kenyan government and the Ogiek and Endorois to public land are not fundamentally incompatible and can be tempered with compromise and mutual accommodation. What would the mutual accommodation and compromise look like? The next section recommends a framework that Kenya can adopt to protect indigenous freedom while ensuring environmental conservation.

SUGGESTED FRAMEWORK FOR PROTECTION OF INDIGENOUS RELIGIONS AND SACRED SITES IN KENYA

The decisions of the African Court on Human Rights and the African Commission on Human Rights in the Endorois and Ogiek cases are judicial acknowledgement that valid government action on public land does infringe on religious freedom

103 Constitution of Kenya, 2010, art 69 (1) (g).

104 Constitution of Kenya, 2010, art 69 (1) (h).

105 Constitution of Kenya, 2010, art 69 (1) (a).

106 Constitution of Kenya, 2010, art 69 (1) (d).

107 Constitution of Kenya, 2010, art 24 (1).

108 Constitution of Kenya, 2010, art 24 (1).

109 Constitution of Kenya, 2010, art 24 (1) (e).

for indigenous peoples. It is also a pointer that indigenous religions must be afforded protections not identical to the manner and form of protection afforded to monotheistic religions. Further, as discussed, the UN Declaration on the Rights of Indigenous Peoples is non-binding and Kenya is not a signatory to it. Debate on whether the Indigenous Peoples Declaration has acquired the status of customary international law or if some of the norms enunciated, such as self-determination, non-discrimination, and land and development rights could constitute general principles of law is unsettled.¹¹⁰ The better strategy would be to infuse the normative standards of the Indigenous Peoples Declaration into domestic interpretation of indigenous religious freedom protection. This suggested framework attempts to achieve that.

From the discussions above, it is clear that Kenya must make distinctive accommodation of indigenous religions, particularly sacred sites on government land, either through specifically designed laws or policies or through political settlements, since the Constitution guarantees protection of their religious freedom. Literature on accommodation of religious freedom suggests that ordinarily religious claims are accommodated through the political process and common law rules. This mainly applies to majority religions whose members comprise a large part of the electorate.¹¹¹ For instance, provisions on the Kadhis' Courts and abortion in Kenya's Constitution demonstrate political settlements between the drafters of the Constitution and Muslim and Christian leaders to secure approval of the 2010 Constitution in the national referendum that led to its adoption.¹¹² However, for indigenous religions, which constitute minority religions, such political will is historically lacking.¹¹³

In view of this, the best practice would be specific policy and statutory rules in laws protecting the environment and natural heritage, as Kenya lacks a general statute on religious freedom. The National Museum and Heritage Act recognises sacred sites as "areas which are or have been of religious significance, use or veneration and which include and are not limited to Kayas".¹¹⁴ It places the management, control and preservation of such sites in the National Museum.¹¹⁵ This indicates that the Kenyan government views sacred sites as part of culture in a way that reflects a problematic conflation of religion and culture, thus diminishing the value

110 Gbendazhi S. 2017. "The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in contemporary international human rights law", *International Human Rights Law Review* 6:242-261 [<https://doi.org/10.1163/22131035-00602006>]; Davis M. 2012. "To bind or not to bind: The United Nations Declaration of the Rights of Indigenous Peoples five years on", *Australian Journal of International Law* 3:17-48.

111 Collins, "Sacred sites and protection of religious freedom on government land", 242.

112 Committee of Experts on Constitutional Review. 2010. "Final Report of the Committee of Experts on Constitutional Review", 13-15.

113 Collins, "Sacred sites and protection of religious freedom on government land", 242-243.

114 National Museums and Heritage Act, 2012, s 2.

115 National Museums and Heritage Act, 2012, s 4.

of religious sacred sites. Unsurprisingly, there are no further provisions on sacred sites in any statutory laws.

At the outset, the National Land Commission, which is charged with management of public land, should develop policies on protection of sacred sites on public land. These policies would create presumptive and procedural protection of sacred sites on public land. It would require the Kenyan government and its agencies to take measures for the management and protection of the sites. It is notable that in the Ogiek case the government was alleged to have destroyed the sacred caves and trees during the evictions. State agencies dealing with the environment and forestry, such as the National Environment and Management Authority and the Kenya Forest Services, should include in their statutory law provisions on recognition and protection of sacred sites. Lessons from New Zealand indicate that distinct identification of religious interests as having equal footing with other interests, such as culture and heritage, affords better protection of sacred sites.¹¹⁶

The statutory provisions should be complemented with elaborate plans on access to and use of the sacred sites by indigenous peoples. In the Ogiek case it was alleged that the Kenya Forest Service required the Ogiek to pay fees and obtain a licence to access the sacred sites. The African Court found this to be interference with religious freedom and thus a violation of the government's obligation to respect religious freedom. The agencies should incorporate appreciation for the sacredness and spirituality of the sites in environmental management, planning and permitting within forests and game reserves to accommodate the Ogiek and Endorois.¹¹⁷ The Kenyan Constitution in its specific application of the rights of indigenous persons, as discussed earlier, requires affirmative action programmes to develop their cultural and religious practices.

On the question of exclusion of others, would religious protection of the sacred sites require exclusion of others from the sites on public land? Practices from Australia indicate the possibility of mutual compromise in which voluntary requests are made to members of the public to refrain from visiting the sites in view of their sacredness and spiritual significance to indigenous people.¹¹⁸ While these practices have not recorded marked success in Australia, they point to possibilities of a mutual compromise to balance the competing interests of the indigenous peoples in respecting the objects of their religious worship, the government's interest in environmental conservation and the general public's right to benefit from Kenya's natural resources – in the Endorois case, Lake Bogoria as a tourist attraction site and a game reserve, and in the Ogiek case, the Mau Forest as a water catchment area.

116 Collins, "Sacred sites and protection of religious freedom on government land", 248.

117 See Hickling J. 2017. "Religious freedom in new world? Indigenous sacred sites and religious beliefs in the courts in British Columbia", *Oxford Journal of Law and Religion* 6:578 [<https://doi.org/10.1093/ojlr/rwx050>].

118 Collins, "Sacred sites and protection of religious freedom on government land", 253.

CONCLUSION

This chapter has explored the protection of indigenous religious freedom, including sacred sites in Kenya from the lens of the Endorois and Ogiek cases. Kenya's Constitutional arrangements on religious freedom protect sacred sites and, further, that the state is specifically required to accommodate indigenous people through affirmative action programmes. However, in Kenya, the problem lies in the conflation of sacred sites with heritage protection. This has led to the diminished value of indigenous religious sacred sites, which are viewed as cultural goods rather than objects of religion meriting protection under the constitutional framework on religious freedom. Since both religious freedom and environmental rights find express constitutional protection in Kenya, the best strategy would be a balancing approach based on mutual compromise. Given that the decisions in the Endorois and Ogiek cases remain unimplemented, an adequate framework for the implementation of these decisions would infuse the normative standards incorporated in the UN Declaration on the Rights of Indigenous Peoples into the interpretation of Kenya's constitutional provisions on religious freedom. This framework would ensure protection of indigenous religious freedom, while at the same time ensuring environmental conservation and allowing both the Kenyan public and the Ogiek and Endorois to mutually benefit.