

**THE PLACE OF ATHEISTS IN KENYAN SOCIETY: LEGAL AND CHRISTIAN
PERSPECTIVES**



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DECLARATION

I, **OLIVER ERUPE LOWOTON**, declare that this is my original work and that the same has not been presented to any institution of higher learning for the award of a diploma, degree or post-graduate qualifications.

Signature..... Date.....

OLIVER ERUPE LOWOTON

This project has been presented for examination with my authority as the university supervisor.

DR. NKATHA KABIRA

Signature..... Date.....

DEDICATION

I dedicate this work to my beloved family especially my late parents who directed me to chart my own course in life and create my own space and for my beloved wife Mrs Sarah Erupe for the rapport she provided to see me finish this study. Further this study is dedicated to several ministry comrades in Eastleigh among them Sheikh Salim Muhubiri, Sheikh Yahya Issa, Sheikh Hassan Kariuki and their dedicated Islam Propagation group whose Christian – Muslim debates at a time when Al Shabaab bombs and grenades were blown here and there in Eastleigh; they presented a tough but friendly religious contest with which I got challenged to pursue law to match their Sheria Law expertise. Finally this study is dedicated to Atheists in Kenya Society (AIK) and the Free Thinkers of Kenya (FIKA) whose engagements expanded avenues for ministry and the possibility of this research.

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The International Covenant on Civil and Political Rights (1966) GA RES 2200A (XXI)

The Religious Freedom Restoration Act (1993)

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The Universal Declaration on Human Rights (1948), GA RES 217A (III), UN DOC A/810

The United Nations Charter (1945)1UNTS XVI

LIST OF ABBREVIATIONS AND ACRONYMS

AACC	All Africa Conference of Churches
ACHPR	African Charter on Human and Peoples' Rights
AD	Anno Domino
AG	Attorney General
AIK	Atheists In Kenya
AU	African Union
CRE	Christian Religious Education
CHR	Commission on Human Rights
CPPHR	Commission on Promotion and Protection of Human Rights
CO	Conscientious Objector
CREAW	Center for Rights Education and Awareness
COTU	Central Organization of Trade Unions
CMS	Church Missionary Society
CSM	Church of Scotland Mission
CPK	Church of the Province of Kenya
ECOSOC	Economic and Social Council
FGD	Focus Group Discussion
IBEA	Imperial British East Africa
IBHR	International Bill of Human Rights
ICJ	International Court of Justice
IRE	Islamic Religious Education
IT	Information Technology

JSTOR	Journal Storage
KANU	Kenya Africa National Union
KEC	Kenya Episcopal Conference
KII	Key In-depth Interview
KNCHR	Kenya National Commission on Human Rights
KPU	Kenya Peoples' Union
LGBIT	Lesbian, Gay, Bisexual, Inter-sexual and Transgender
LLM	Master of Law
MP	Member of Parliament
MRC	Mombasa Republican Council
NCCK	National Christian Council of Kenya
NGO	Non – Governmental Organizations
NIS	National Intelligence Service
OAU	Organization of African Unity
PCEA	Presbyterian Church of East Africa
PSC	Public Service Commission
SC	Security Council
UDHR	Universal Declaration on Human Rights
US	United States
UN	United Nations
UNGA	United Nations General Assembly
WWI	World War One
WWII	World War II

ABSTRACT

This project examines the place of Atheists in the Kenyan legal system. It uses the example of the process of registration, suspension and deregistration of AIK in order to critically interrogate how the Kenyan legal system accommodate religious diversity and religious pluralism. Although the Constitution of Kenya 2010 contains an elaborate Bill of Rights framework, the place of Atheists in the Kenyan legal system continues to be in question. Despite the fact that the Constitution of Kenya 2010 contains elaborate human rights provisions geared towards the protection and respect for all Kenyans, the place of Atheists continues to be in question. This is because of the following reasons: firstly, the Constitution of Kenya 2010 does not explicitly recognize Atheists as a group. Secondly, the Constitution embodies an enduring tension between the desire to respect religious freedom on the one hand and to avoid institutionalization of any particular state religion. Thirdly, the constitution seeks to accommodate religious diversity and pluralism by adopting a critical liberal constitutional approach; this maintains the status of dominant groups in society, by legitimizing and perpetrating conservative hegemony. Fourthly, in practice the desire to protect the dominant system of social and power relations triumph over the need to protect the right of minority groups such as AIK. Fifthly, the political suppression of certain groups such as the AIK is disguised in the cloak of false constitutional and statutory validity. Lastly, contrary to the dictates of positivism; Church and State in Kenya are inseparable and legal questions need to be understood against the backdrop of such socio-economic and political contexts. This study relies on two theories; the human rights theory and the critical liberal constitutional theory. This study as well adopts a mixed research approach; doctrinal, case study and empirical research methodologies. The study was carried out among selected Christians, Muslims, Atheists and government officials.

CHAPTER ONE:

INTRODUCTION TO THE STUDY

1.1 Research Background

The retention of contested Articles within Kenya's 2010 Constitution is viewed as a key justification which motivated a large percentage of Kenyans to vote against the Charter in the 2010 referendum. The gravity of the *Atheists in Kenya (AIK) Society* as minorities and marginalized groups' controversy was previously evidenced by the rejection of the Draft Constitution in 2005 through the joint campaign of the political opposition and the Kenyan Church.¹ Those who opposed the 2005 constitutional proposals argued, among other reasons, that the document featured an expanded freedom and mandate of minorities and marginalized groups such as AIK to the detriment of classical religious institutions. It is on the basis of this count that, the right to freedom of expression where one constructs owns 'ideas and beliefs' are safe guarded in the Constitution. However, some Christians ultimately voted for the Constitution in 2010 primarily because political incumbency promised that consequential amendments would accommodate their concerns.

Clearly the controversy surrounding AIK as a minority and marginalized group was largely responsible for undermining the level of national consensus and legitimization that the 2010 Constitution, during its debut, enjoyed in the Kenyan mind. Furthermore, AIK issues – and its overarching concern about the role of freedom of conscience, religion, belief and opinion in a secular state in 2005 and 2010 threatened to introduce and entrench (perhaps even escalate) unprecedented religious conflict between such groups as AIK, Lesbians, Gay, Bisexual,

¹The 2009 Kenya Population and Housing Census ; see Table 12 (refer Appendix H) indicates Population by Religious Affiliation that No Religion totals 922,128 people out of 38,412,088 People; about 2.4%.

Intersexual and Transgender (LGBIT), on one hand and the Muslims and Christians in Kenya on the other. Despite the passage of the new Constitution in August 2010, the Church continues to question the degree of recognition accorded minorities and marginalized groups like AIK within the national charter and the confines of a secular state. Hence the AIK matter will continue to be an open, as opposed to a settled, question.

The Controversy surrounding AIK described above posed questions to the researcher who set out to find out why the AIK registration, was suspended and deregistered a controversy that remains a major bond of contention during this period threatening to miscarriage implementation of the constitutional project and hence unraveling Kenya's religious and social harmony.

1.2 Statement of the Problem

Although the Constitution of Kenya 2010 contains an elaborate Bill of Rights framework, the place of Atheists in the Kenyan legal system continues to be in question.

1.3 Justification of the Study

This study is justified for various reasons. Colonial, Post – colonial, during Kenyatta and Moi regimes Kenyans struggled unsuccessfully to seek an administrative order that is inclusive, with good governance, rule of law and that regards human rights particularly the rights of the minorities and marginalized. The independence constitution was seen as imperial and centralized. Although it guaranteed civil and political rights; nevertheless it did not uphold economic, social and cultural rights which are useful for the daily survival of many Kenyans. This is because, it did not guarantee the rights to equality, equity and non – discrimination. It did not provide standards for implementation of human rights.

Although the constitution of Kenya 2010 is now seen by implementing institutions as being extremely expensive and minutely structured as shown by the current call for a referendum; it

has a stable normative structure which includes a powerful Bill of Rights that includes all generational rights and international human rights principles of equality and non – discrimination which are a safe guard for minorities and marginalized groups such as AIK.² This is because, enforcement and promotion of such principles enhances national values and principles of governance as stipulated in Article 10.

However, the legislature and the judiciary by passing legislations and subsequently interpreting them; indicates in the AIK case under consideration a good move towards the realization of the Kenyan dream of a democratic and law abiding liberal society. Here, the recent judicial decision of the *AIK and 1 other Versus the AG and 2 other (2017)*, regarding the suspension and deregistration of AIK as a society shows attempts to protect minority and marginalized groups.

The study is a wakeup call to legal scholars and theologians to engage the realities of Africa which have come about by the growth of Atheism in the Continent. It breaks ground for further scholarship on issues of Christian – Atheists relations and in legal scholarship in countries of Africa where Atheists as a minority and marginalized group is accommodated in constitutions. The research informs the future of legal scholarship and theological studies and urges academic institutions and the church to engage constitutional making in African countries. This bold assertion is supported by the fact that for half a decade, since the new constitutional dispensation came to place, the 2010 charter and in consequent political regime in 2013 to 2018; the AIK controversy remains unresolved.

Christians have consistently argued that to specifically protect an institution and genre of law of one group in the Constitution to the exclusion of similar treatment of institutions and the law of other groups; violates the principles of equal protection of all groups and the separation of state

² Civil and Political rights; Social, Economic and Cultural rights and Environmental Rights among others

and religion and thus discriminatory and unconstitutional. To Christians, the protection of AIK as a minority and marginalized group by the Constitution amounts to official recognition and support of the missionary activity of one group's beliefs and opinions thereby facilitating an artificial growth of the favored group.

The Atheists reply by arguing that the constitutionalization of minorities and marginalized groups was necessitated by the historical and pragmatic need to protect the distinctive identity of a minority group which had previously lived in a predominantly religious territory but was recently incorporated fully in the 2010 Constitution. This study attempts to examine this contestation.

The political leadership which supported the 2010 constitutional draft promised that after the passage of the Constitution, the country would revisit the contentious clauses including those relating to Atheists as minorities and marginalized groups. Parliamentarians had prepared proposed amendments to the 2010 Draft constitutional bill which, nevertheless, were not discussed. Hence a research based on the Place of the Atheists in Kenya Society as minority and marginalized group within Kenya's legal and multi-religious environment commends itself as a sound and beneficial enquiry.

Through this research, it is hoped that credible and valid information will be generated for use during a future re-consideration of the constitutionalization of AIK as minority and marginalized group. Further, it is expected that the research enquiry will shed light on understandings of the nature and role of religion and secularism in a society that has a divided opinion between some religious groups and AIK as regards the place of AIK as a minority and marginalized group.

It is expected that the religious leadership in Kenya can utilize the results of this research to review their strategies concerning the legal articulation of AIK society. Also both the political

class and AIK should examine the findings of this research in an unbiased way for them to determine whether the study has some useful insights for untying the AIK quandary. As a law student, the researcher owes his country a duty to contribute towards the removal of possible impediments to religious tolerance and harmony. This is not possible without a research like this that will help to establish the issues of contention and discussion.

If the problem or controversy of AIK, which has persisted for more than a decade, is not well understood and solutions developed timeously in a pragmatic and enduring manner, Christians and AIK relations are likely to continue to deteriorate with possible religious conflicts ensuing in the future. Ultimately in this enquiry, constitutional issues of the existence of an environment of peace, justice, rights and freedom of minorities and marginalized groups is key.³

1.4 Research Objectives

1. Examine the place of Atheists in the Kenyan legal system.
2. Locate the place of Atheists from a historical perspective.
3. Examine the legislative and institutional framework governing the place of Atheists in Kenya.
4. Understand how the legal systems navigate the existence of multiple religious views in Kenya.
5. Identify lessons drawn from the process of AIK registration, suspension and deregistration.

1.5 Research Questions

To address the research problem, the following research questions will be explored:

1. What is the place of Atheists in the Kenyan legal system?
2. How has the legal system addressed religious diversity and plurality historically?
3. What is the legislative and institutional framework governing the place of Atheists in Kenya?

³Discrimination and of equality, conscience, religion, belief and opinion; of expression; association; right to assembly and petition; fair administrative justice; fair hearing and the right of minorities and marginalized groups whether by Christians or AIK are key.

4. How has the legal system navigated the existence of multiple religious views in Kenya?
5. What lessons drawn from the process of registration, suspension and deregistration of AIK?

1.6 Research Hypothesis

Despite the Constitution contains elaborate human rights provisions geared towards protection and respect for all Kenyans, the place of Atheists continues to be in question. Because: first, it does not explicitly recognize Atheists as a group. Second, it embodies an enduring tension between the desire to respect religious freedom and avoiding institutionalization of any particular state religion. Third, it seeks to accommodate religious diversity and pluralism by adopting a critical liberal constitutional approach; this maintains the status of dominant groups in society, by legitimizing and perpetrating conservative hegemony. Fourth, the desire to protect the dominant system of social and power relations triumph over the need to protect the right of minority groups such as AIK. Fifth, the political suppression of certain groups such as the AIK is disguised in the cloak of false constitutional and statutory validity. Last, contrary to the dictates of positivism; Church and State in Kenya are inseparable and legal questions need to be understood against the backdrop of such socio-economic and political contexts.

1.7 Theoretical Framework

For the purposes of this study, two theories shall be used to guide the analysis, namely the human rights theory, and the critical liberal constitutional theory. The rights theory explains the inherent need to protect all human kind. It also explains the resulting conflict in an attempt to protect different groups of individuals in society who have competing interests. It therefore puts into perspective the study's concerns about the imbalance between the rights of minorities and marginalized groups and that of the majority. It lays the foundation for a justification in protecting the rights of both the minorities and marginalized groups and the majority through a

system that ensures fairness to both. This theory justifies the study's argument for the need to balance the rights of the minorities and marginalized groups and those of the majority. This study shall apply the "human rights theory."⁴ The "human rights theory explains the fact that all human beings are equal and entitled to human rights by virtue of being human beings."⁵ Competing human rights therefore have to be balanced to ensure the protection of the competing interests equally. The rights theory is relevant to this study to the extent that it argues for a balancing of competing rights. The rights of the majority in the society therefore need to be balanced with the rights of the minorities and marginalized groups for there to be fairness.⁶

Critical liberal constitutional theory provides an adequate theoretical framework to interrogate the principles and challenges of constitutional implementation and the factors that affect constitutional legitimacy in Kenya.

The Constitution of Kenya 2010 adopts a critical liberal constitutional approach to constitutional implementation. It puts emphasis on three key basic concerns of critical liberal constitutional theory. First how to expand the sphere of individual rights and liberty; second how to establish a democratic government constituted by majority consent expressed in regular elections; and third how to improve the situation of the underrepresented, the marginalized, the oppressed and minority groups in society.

In line with critical liberal constitutional theory, the Constitution of Kenya Review Act (Cap 3A) required the review process to secure provisions in the new Constitution that, among other things, would establish a free and democratic system of Government characterized by good governance, Constitutionalism and the rule of law, human rights and gender equality. Second, ensure respect for ethnic and regional diversity and communal rights including the right of

⁴Michael Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn, Sweet & Maxwell 2014)1287

⁵Mbodenyi Kiwinda Morris, *International Human Rights and their enforcement in Africa* (Law Africa 2014)24.

⁶Carol Smart, *Feminism and the Power of Law* (Routledge 1989)143

communities to organize, and participate in cultural activities and the expression of their identities. Third, ensure the provision of basic needs of all Kenyans through the establishment of an equitable framework for economic growth and equitable access to national resources.⁷

In terms of process, the Review Act required the review organs to “ensure that the Constitution making process accommodated the diversity of the Kenyan people including socio- economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disability and the disadvantaged.”⁸ The review organs were further required to facilitate respects of the enabling environment for “economic, social, religious, political and cultural development.”⁹ All these proposals were entrenched in the 2010 Constitution as demonstrated by the discussions in chapter three and four of this study.

1.7.1 The Rights Theory

The rights theory has its origin in the notion of natural rights according to the Greek philosophers Sophocles and Aristotle and the Roman Philosophers.¹⁰ The “concept of natural rights was developed further by Thomas Aquinas who argued that rights are entitlements due to people naturally because they are human beings and because God intended it to be so.”¹¹ Aquinas viewed the concept of natural rights as entitlements to human beings from a moral perspective. John Locke advanced Aquinas argument further and defended natural rights as God given, sacred and inalienable.¹²

⁷Constitution of Kenya Review Act (CAP 3A) section 3(b), (e) (f)

⁸Ibid. Section 5(b)

⁹Ibid. Section 17 (d) (iii)

¹⁰Mbondenyi (n5)24

¹¹H Grotius, *On the Law of War and peace* (Kessinger Publishing 2004)22; St Thomas Aquinas, *Summa Theologica*, lib.II (1475); Mbodenyi (n5)24

¹²Mbondenyi (n5)25-26

Thomas Paine defines natural rights as “those rights which appertain to man in light of his existence.”¹³ Jean –Jacques Rousseau’s views the notion of rights from the social contract perspective which argues that “the state has a responsibility to protect the rights of its citizens equally.”¹⁴ Rousseau’s argument is relevant to this study since it argues for equal protection of citizen’s rights. The implication is that the state must protect the rights of minorities and marginalized groups the same way it protects the rights of the majority in society. This argument makes the rights theory relevant to the study as it calls for equal protection of all citizens.

The contemporary notion of human rights views rights as “arising essentially from the nature of human kind itself. The idea that all humans possess human rights simply by existing and that these rights cannot be taken away from them are direct descendants of natural rights.”¹⁵ The preamble of the UDHR¹⁶ provides that human beings are entitled to human rights which flow from the inherent dignity of the human person. The importance of the rights theory is that it views rights as basic and fundamental entitlements to human existence which must take precedence over any other consideration. Human rights are therefore paramount and override any other claims within a society.¹⁷

1.7.1.1 Universality and Equal Protection of Human Rights

Human rights are universal because “they belong to all human beings in every society.”¹⁸ Human rights are inalienable since “they flow from and protect human existence.”¹⁹ To fail to recognize the human rights of an individual or group of individuals is to endanger the value of existence of

¹³Thomas Paine, *The Rights of Man* (Penguin Books 1965)68.

¹⁴Jean – Jacques Rousseau, *The Social Contract*, Maurice Cranston (trans) (Penguin 1968)50.

¹⁵Karl Marx *et al. Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man*, Jeremy Waldron (ed) (Tylor& Francis 1987)185-208

¹⁶Universal Declaration of Human Rights (UDHR)

¹⁷Richard Dworkin, ‘Rights as Trumps’ in J Waldron (ed) *Theories of Rights* (oxford University Press 1984)78.

¹⁸J Donnelly, ‘Human rights as natural Rights’ (1982) 4 *Human rights Quarterly* 3, p.391, 396.

¹⁹J Finnis, *Natural Law and Natural Rights* (Oxford University Press 1980) 204

that individual or group of individuals.²⁰ Human rights are therefore natural rights that all human kind is entitled to. Recognition of human rights is important because they portray certain agreed standards of how human beings should be treated. In addition, recognition of human rights standards prevents the unwanted consequences of having no limits in the way human beings relate to each other. Whereas not everybody may agree and accept what is termed as human rights, proclamation and acceptance of human rights involves the majority.²¹ Human rights therefore exist because majority of human beings accept and recognize them as necessary for their protection.²²

1.7.1.2 Conflicting Human Rights

Although human rights seek to protect all human kind equally, it is recognized that different groups or individuals in society are bound to have their own interest which may conflict with the interest of another group of individuals.²³ Conflict of interest is therefore inherent in any society of human kind. The concept of human rights is not static but is dynamic. Human rights evolve through various values, interests, goods, services, concerns as well as needs which are gradually accepted and incorporated as human rights.²⁴

The concept of human rights has therefore been broadened beyond the traditional economic, social, cultural, civil and political rights. Today, human rights include concerns for the protection of special and vulnerable groups. They include women, children, the elderly, the disabled, the mentally-ill, minorities and indigenous people. In addition, human rights can either be individual

²⁰R McInerney, 'Natural Law and Human rights' (1991)36 *American Journal of Jurisprudence*

²¹J Blau, A Moncada, *Human Rights: Beyond the Liberal Vision* (Rowman & Little field 2005)179.

²²H Steiner, P Alston, R Goodman, *International Human Rights in context: Law, Politics, Morals: Texts and Materials* (Oxford University Press 2008) 879.

²³Y Dinstein, *Collective Human Rights of Peoples and Minorities* (British Institute of International and Comparative Law 1976)10.

²⁴Steiner, Alston, Goodman (n22)879

or collective.²⁵ In an attempt to protect all human beings of different groups and needs, there results a paradox of conflict between the human rights of different groups or individuals.²⁶ The resultant conflict creates a challenge in attaining the very goals of human rights which is to protect all human kind equally.²⁷

1.7.2 Balancing Conflicting Human Rights

When human rights compete, the resultant conflict results into a situation where some rights override the other.²⁸ The challenge therefore arises when competing human rights of different groups of human kind conflict yet both seek the protection accorded by human rights.²⁹ This negates the intended goal of equal protection for all human kind. When this happens, then the principle of equality of human rights applies to balance the interests of competing groups of individuals so as to ensure just and fair treatment.

Such competing human rights need to be balanced to the satisfaction of everyone. In this study, the competing rights of the minorities and marginalized groups of people and that of the majority members of the society, calls for a balancing of the different interests. This needs to be resolved in a manner that protects the interests of both the minorities and marginalized against that of the majority view. It is the balancing act that makes the rights theory relevant to this study. The theme of balancing the rights of the minorities and marginalized groups and that of the majority in the society therefore shall be examined in this study.

²⁵J Donnelly, 'Human rights as natural Rights' (1982) 4, 3 *Human rights Quarterly* 391, 396

²⁶Steiner, Alston, Goodman (n22)879

²⁷Ibid.

²⁸C Lekhasriram, O martin – Ortega, J Herman, *War, Conflict and Human Rights: Theory and Practice* (Routledge 2009)211.

²⁹J Amertus, J W Heslsin, *Human Rights and Conflict: Exploring the Links Between Rights, Law and Peace Building* (US Institute of Peace Press 2006) 419.

1.7.3 Criticism of the Human Rights Theory

1.7.3.1 Joseph Raz Criticism

Raz rejects assertion that a right is correlated to a duty. Raz states that rights not only justify the imposition or recognition of duties, liabilities and judicial outcomes but are also a ground for duties.³⁰ A right therefore may be based on a duty imposed on others, personal liberties and powers and immunity from law enforcement agencies. Raz criticizes Hohfeld and goes beyond his analysis in an effort to seek legal clarity. Raz states that the aim of the law is to effectively deal with conflicts arising from the clashing of the numerous human interests in play.³¹

Joseph Raz holds the view that the importance of human rights does not come out if viewed from an individual bearing rights approach. The importance of human rights is not pegged on its universality.³² Raz also criticizes Hohfeld's definition of power which is the ability to change one's own or another person's privileges, claims, powers and immunity. Raz cites ambiguity noting the power of the state as a law giver to be paramount. Further on the assertion that power imposes liability, Raz points out that there are instances where power is exercised without liability. Regarding liability, Raz remarks that the scope of liability should be increased to cover circumstances where liability is imposed without consent or arises beyond foreseeable control.³³

1.7.3.2 Maccormick's Criticism

The will theory states that a right is a power of waiver over another's duty. Maccormick argues against the will theory in that there are instances in law where the power of waiver is restricted in order to strengthen and protect rights. An example of such a case is where even though a victim

³⁰Margret Holmgren, *Raz on Rights, Mind*. New Series, Vol. 94 no 376 (Oxford University Press, 1985)591 <http://jstor.org/stable/2254730> accessed on 19th October 2018.

³¹Nigel E Simmonds, *Central Issues in Jurisprudence* (4th edn, Sweet & Maxwell 2013)314

³²Joseph Raz, 'Human Rights Without Foundations' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010)323.

³³ Nigel (n31)315-316

gives consent to a certain action, such as murder, it remains unlawful. Another case is an employer employee relationship where an employee is given rights but does not have the power to contract out of their rights. This is a classic case of restriction of the power of waiver.³⁴

The will theory propagates that a right is a power of waiver over a duty being enforced and the one to whom the right is bestowed can waive the duty, enforce performance, determine whether to sue or not. Whenever there is a breach of a duty owed to a child, any power or enforcement is placed on a guardian or parent. It is therefore apparent that under the will theory children lack rights which make it a false theory as children do have rights.³⁵

Maccormick also criticizes the correlation of rights and duties by alluding to the scenarios where there are rights which do not have corresponding duties such as the presidential immunity based on legal proceedings and there are duties that do not have corresponding rights such as the duty of citizens to uphold, respect and adhere to the constitution as the supreme law of the land.³⁶

1.7.3.3 John Rawls Criticism

Rawls criticizes the rights theory in a bid to draw a distinction between human rights, constitutional rights and political rights.³⁷ According to Rawls, the most important rights are the right to life and the right not to be tortured. The provisions of UDHR such as non – discrimination and protection from arbitrary arrest are ‘liberal aspirations’ and not human rights.³⁸ The second category of rights that Rawls deems as urgent are those that are in relation to protection of life, liberty, freedom of conscience and from slavery.³⁹

³⁴ Nigel (n31) 332-334

³⁵ Nigel (n31) 333

³⁶ Nigel (n31) 334; Article 43, COK, 2010.

³⁷ Jeremy Waldron, *Human Rights: A Critique of Raz/Rawls* (NELLCO Legal Scholarship Repository 2013)14.

³⁸ John Rawls, *The Law of Peoples* (Harvard University Press 1999)80.

³⁹ *Ibid.* 79

1.7.4 Critical Liberal Constitutional Theory

Several schools of legal philosophy help explain how constitutional systems develop, work and affect the development of societal norms, relations and wellbeing. For purposes of this study, critical liberal constitutional theory shall be applied. A.V. Dicey, for instance, argues that “constitutional law consisted only of the rules affecting the structure and powers of government, which were only enforceable in courts of law.”⁴⁰ The debate on constitutional theory plays out in two basic forms: conservative and liberal theories following John Locke’s liberalism.⁴¹ Locke’s liberalism is rooted in the enlightenment with emphasis put on the rights – bearing individual either to the right or to the left.

Although the modern conservative constitutionalism takes to the right and is protective of property rights and more comfortable with inequality in wealth and status as may be compared with modern liberals. Nevertheless, liberal constitutionalism takes to the left. Because it emphasizes a sphere of individual liberty guaranteed by “a fixed government constituted by majority consent expressed in regular elections participated in by an enfranchised citizenry.”⁴²

The critical liberal constitutional theory argues that the law including constitutional law is a powerful tool, which dominant groups (Christians, Muslims) use historically to maintain their superior status and to pursue their own political ideologies. In this regard, the law has imposed a serious affront to democracy leading to suppression of some groups such as AIK, LGBIT, women, minority racial and ethnic groups, the poor etc. As a result, these groups’ “interests are often not adequately recognized and protected by the dominant mainstream ideologies to which political elites including government administrators, judges etc., have an affinity.”⁴³

⁴⁰A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn, McMillan 1959)

⁴¹John Locke, *Two Treatises of Government* (various editions) Book II, Chapters XI-XIV (1690)

⁴²Wil Waluchow, ‘Constitutionalism’ *Stanford Encyclopedia of Philosophy* (Spring edn, 2004).

⁴³Ibid.

Critical liberal Constitutional theories argue that constitutional law is first used to play the powerful role of legitimizing and perpetrating conservative hegemony; second, to protect the dominant system of social and power relations; and third, to de-politicize or remove crucial issues from the public agenda. Thus, “instead of curbing arbitrary government power for which the idea of constitutionalism is supposed to stand,” very often, “political suppression” of certain groups such as AIK is disguised in the cloak of false constitutional and statutory validity.⁴⁴

1. 7.5 Criticism of Critical Liberal Constitutional Theory

The critical liberal constitutional theory has been criticized on three grounds. Firstly, critical liberal constitutional theory has been criticized for its inability to explain the phenomenon of constitutionalism in different contexts, and to “distinguish between interpreting and rewriting the constitution in the context of democracy.”⁴⁵ According to Jed Rubenfeld, liberal constitutional theory has asked the wrong question in the past. To him, the right question to ask is why should the constitution have any legitimacy over time? Why should we even try to interpret it, in the first place? Secondly, constitutional scholars have tended to relate liberal constitutionalism with certain established practices of government in Western democracies. Yet, most of these practices are only relevant to specific socio-economic conditions to be included in understanding the core notion of constitutionalism elsewhere. Thirdly, the critical liberal constitutional theory has been criticized for detaching legitimacy from justice. According to liberals, so long as the constitution of a political order is sufficiently or reasonably just, then the general structure of authority is legitimate. This separation is inadequate since it leads to an inadequate response to the existing constitutional and socio – political challenges including the realities of social injustice.

⁴⁴Waluchow (n 42)

⁴⁵Jed Rubenfeld, *Freedom from Time: A Theory of Constitutional Self – Government* (2001).

1.8 Research Methodology

The study employed a mixed research approach; focusing on doctrinal, case study and empirical research methodologies. The research employed empirical research method using qualitative research tools to meet the desired outcome of the intended research.

Doctrinal and qualitative research approaches are appropriate for this study. Both suit as relate the overall intention of the research, which is to: *Examine the Place of the Atheists in Kenya Society from legal and Christian perspectives*. The methodology enabled the researcher to gather textual documents and legal materials pertaining to the enquiry. It also made it possible for the researcher to engage the AIK society members, the registrar of societies, the religious community specifically the Christians and the Muslims apologists who engage AIK members and some of their theological experts who are current participants in the contested subject of “*Does God Exist?*” debate with the AIK.

The study utilized both secondary and primary sources of information. The secondary sources included access to scholarly journals, books and internet sources, dissertations specific to the area of study. Also such information was accessed online through Journal Storage (JSTOR) among others. The primary sources utilized included the Constitution of Kenya, other statutes, international conventions and direct dialogue with probable respondents by way of Key In-depth Interviews (KII) with select key resource persons and through a Focus Group Discussion (FGD) with the select respondents in a consultative forum in Nairobi and Eldoret.

1.8.1 Doctrinal Research Methods

Doctrinal research methods are used in the discipline of legal studies. They are employed in the examination of specific doctrinal corpus to provide insights in terms of analyzing people’s

perceptions of law and justice⁴⁶ and socio – economic and political arenas.⁴⁷ Analyses of documents provide a wealth of data. Data shall be text based or image based documents. Documentary sources, other than primary doctrinal sources such as cases and statutes, are relatively under-utilized in empirical doctrinal research. But they provide a rich source of data.

Webley avers:

Documents, as the sedimentation of social practices, have the potential to inform and structure the decisions which people make on a daily and longer term basis; they also constitute particular readings of social events. They tell us about the aspirations and intentions of the period to which they refer and describe places and social relationships at a time when we may not have been born, or were simply not present.⁴⁸

This research utilized the case of *Atheists in Kenya and 1 other Versus the AG and 2 others*⁴⁹ as a primary doctrinal source. Court proceedings and debates analyzed as well.

Within a qualitative research, a doctrinal approach aims at capturing and categorizing social phenomena and their meanings as stipulated within law.⁵⁰ The method enabled the researcher to analyze detailed descriptions of the nature and structure of AIK society and the process in which they were registered, suspended and deregistered by the government. The researcher primarily focused on primary data from documented sources.

1.8.1.1 Constitutional and Legal Provisions

The researcher collected data pertaining to the articulation of secularism in Constitutional and legislative enactments in Kenya. Such data was analyzed with a view to establishing whether (and how) it supported the constitutionalization of secularism or disapprove of the same.

⁴⁶Hazel Genn, *Paths to Justice: What do people think about going to law?* (Hart Publishing 1999)20

⁴⁷Brown, J., Collins, A. and Duguid, P “Situated Cognition and the Culture of Learning” in *Educational Researcher* (18)40.

⁴⁸Webley, L. Rogers, et al, *Qualitative Data Analysis* (2nd edn, Sage Publication 2001) 157-158

⁴⁹High Court Civil petition No 308 of 2016 [unreported]. Judgment was delivered on 26th Feb. 2018.

⁵⁰M.W. Bauer, “Classical Content Analysis: A Review” in M.W. Bauer, G. Gaskell and N.C. Allum (eds), *Qualitative Research with text, image and sound: A Practical handbook* (Sage Publications 2000)9.

1.8.1.2 Judicial Decisions Pertaining to Atheists in Kenya (AIK)

The researcher is aware of two important decisions that were handed down in relation to constitutional violations and infringement which will be relevant to the study. These are *Joseph Kimani & 2 others Versus Attorney General & 2 others*, Constitutional Petition no 669 of 2009 and *Jesse Kamau & 25 others Versus Attorney General*, Miscellaneous Civil Application no 890 of 2004.

The researcher therefore read the argument in the Jesse Kamau case cited and carefully analyzed it. From the judgments, valuable data was collected. Whereas the last two cases were on the Constitutionalization of the Kadhis' Court; the relevance to this study is that they present a similar religious tension. It also presents the arguments for and against the constitutionalization of Kadhi's courts which is a similar argument advanced in relation to AIK registration. This was helpful to the research.

The researcher further read the important decision by Justice Chacha Mwita that was handed down in relation to constitutional violations and infringement of *AIK suspension and deregistration*. This is *Atheists in Kenya and 1 other V. The AG and 2 others* Constitutional Petition no 308 of 2016. He therefore read the arguments in the case and carefully analyzed it as well. From the judgment, he was able to collect valuable data.

In social science research, primary data (including field research data) is considered to be the most dependable and valuable data. Analysis of such data, especially if it is data not previously analyzed, can bring to the fore new insights and contribute to the development of knowledge.⁵¹

⁵¹Kate Turabian L, *A Manual for Writers of Research Papers, Theses, and Dissertations: Chicago Style and Researchers* (7th edn, The University of Chicago Press 2007)25.

1.8.2 Qualitative Research Methods

This study adopted a qualitative research method concerning the opinions of various people in relation to their thoughts on the ‘AIK society.’ Creswell defines a qualitative study as “an inquiry process of understanding of a social or human problem, based on building a complex, holistic, picture, formed with words, reporting detailed views of informants and conducted in a natural setting.”⁵² Patton deepens our understanding of qualitative method by explaining that this method is chosen when the researcher is seeking to understand peoples’ experiences and in this case their feeling towards the presence of AIK as a minority and marginalized group in the Constitution.⁵³

The use of qualitative research in this study was limited to specific focuses such as: interaction with Key participants in the AIK society debates, forums and consultative meetings with the religious groups through FGDs and KII, and content analysis of archived documents.⁵⁴ The researcher made appointments with the AIK society president and members, religious group members, religious experts and Registrar of Societies General who were selected to carry out the research from. The researcher also organized FGDs with a select membership drawn from the listed target group. Most interviews were conducted by the researcher and were tape recorded which later were transcribed and themes developed as indicated in chapter four of this project.

1.8.2.1 Key Informants

The research targeted to interview five (5) experts. This target was achieved as four interviews were successfully carried out and the case analyzed to assess the thoughts of the judicial expert.

⁵²John W. Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (2nd edn, Sage Publication 1994)1-2.

⁵³Michael Quinn Patton, *Qualitative Research and Evaluation Methods* (Sage Publications 2002)33

⁵⁴Edgar Elliston J, *Introduction to Missiological Research Design* (William Carey Library 2011)80.

The study limited the expert opinions to the AIK President, the religious apologists⁵⁵; the Registrar of Societies General and the judicial official whose judgment was analyzed.⁵⁶

According to Spradley, they act as teachers to the researcher but they do not act as subjects, respondents, friends or actors in the required study. Spradley observes “n social science, investigators are not primarily interested in discovering the cultural knowledge of the objects; they seek to conform or disapprove a specific hypothesis by studying the subjects’ responses.”⁵⁷

Key informants also provide a considerable amount of data because the researcher can interview them for a long time and use information from literature review to ask in-depth questions.⁵⁸

1.8.2.2 Focus Group Discussion

The research targeted to interview 30 to 40 people. However, only 23 of them were interviewed using the Focus Groups Discussions (FGD).⁵⁹ This was limited by the fact that most AIK members and participants were yet to return since the society suspension and deregistration. Elliston explains that, “a focus group combines interviewing with observations of human interaction within a construct of a carefully chosen group of individuals who are knowledgeable about the research and its content.”⁶⁰ This research attracted; AIK society members, religious participants and government officials.

1.8.3 Validity of the Data

Creswell,⁶¹ Bernard⁶² and Gatara⁶³ discussed issues of validity and reliability of data in research. The reason for relying on legal research and qualitative data is to juxtapose the two sets to ensure

⁵⁵Christians and Muslims

⁵⁶Refer to Appendix D.

⁵⁷James, Spradley P, *The Ethnographic Interview* (Wadsworth Group 1979)29.

⁵⁸Timothy Henry Gatara, *Introduction to Research Methodology* (The Olive Marketing and Publishing Company 2010)62-64.

⁵⁹Refer to Appendix E.

⁶⁰Elliston (n54)145

⁶¹ Creswell (n52)195-197

reliability. The validity of qualitative data was measured against the existing wealth of legal research data.

1.8.4 Ethical Considerations

The researcher has a responsibility to safeguard the rights, interests and sensitivities of the informants.⁶⁴ The researcher explained to the interviewees the purpose and nature of the research. The researcher also enquired their willingness to participate in the research.⁶⁵ The aim of engaging the informants upfront was to ensure the right ethical standards for academic research. The informants freely expressed their views and their support to the research process was needed. For purposes of this study, all participants have been coded to protect their identity.⁶⁶

1.9 Literature Review

The present study purpose is to explore a literature review of the relationship between Church and State in a textual perspective. The literature shall examine a number of scholars in Kenya, Africa and Internationally for it is imperative to examine current Church – State trends in light of the study in the three regional areas in order to further understand the tension challenging Christian faith, Constitutional implementation and the place of Atheists in the Kenyan society.

1.9.1 The Church – State Relationship in Kenya

1.9.1.1 Kenya's Social Context

Social realities are seen as the challenges that encumber the society. These challenges may be seen from many perspectives. The ongoing study warrants careful consideration of these realities

⁶²Russell Benard H, *Research methodology in Anthropology: Qualitative and Quantitative Approaches* (4th edn, Altamira Press 2006) 53-60.

⁶³Gatara (n58)14-23

⁶⁴Spradley (n57) 36

⁶⁵ Refer to Appendix B.

⁶⁶ Refer to Appendix G.

in view of Kenya's prominent place in law making and Christian history during this early period of the twenty first century. According to Pierli and Abeledo, *Slums are seen as a challenge to evangelization*.⁶⁷ The Church is busy addressing this challenge; providing micro finances for micro projects; addressing AIDS and pastoral care; mitigating local brews etc. Nnyombi, Stenger, Wandera and Hannon note the challenge of *Islamic resurgence*. The church here endeavors to promote *Christian – Muslim reflection*.⁶⁸ National events where all religions have been called upon have forced them to work together in constitutional review making and national prayers. Powell, Rastello and Rolandi identify *Youth and young adults Challenges*;⁶⁹ these may include burning of schools, drug abuse, early marriages etc. Jong recognizes the challenge of *ethnicity*; tribalism, nepotism and ethnic cleansing.⁷⁰ Perli, Mwaniki and Methu consider *the Pastoralists Challenge*⁷¹; evangelization, cattle rustling, nomadism and influx of weapons through porous borders are factors for consideration here. Shorter identifies the *Challenge of the Family*. There are Pastoralists and slum experiences of the family, polygamy and single headed families among others.⁷² Kerber captures *Globalization* as an African challenge,⁷³ while Brenan and Roddy argue for *Inter – Cultural Living challenge* among others.⁷⁴ In relation to the Kenyan

⁶⁷Francesco Pierli and Yago Abeledo (eds), *The Slums : A Challenge to Evangelization*. Tangaza Occasional Papers/No.14 (Paulines Publication Africa 2002)

⁶⁸Richard Nnyombi (ed), *Christian – Muslim Reflection*. Tangaza Occasional Paper No.9 (Paulines Publication Africa 2000); Fritz Stenger, Joseph Wandera & Paul Hannon (eds), *Christian – Muslim Co- Existence in Eastern Africa*. Tangaza Occasional Papers No 22 (Paulines Publication Africa 2008)

⁶⁹Carmel Powell (ed), *Ministry to Youth and Young Adults*. Tangaza Occasional Papers No 13 (Paulines Publication Africa 2001); Elena Rastello, (ed) *Youth Challenge*. Tangaza Occasional Papers No 16 (Paulines Publication Africa 2004); Elena Rastello and Gianni Rolandi, *Youth Ministry, a Life – Giving Ministry*; Tangaza Occasional Papers No 18(Paulines Publication Africa 2006)

⁷⁰Albert de Jong (ed), *Ethnicity: Blessing or Curse*. Tangaza Occasional Papers no 8 (Paulines Publication Africa 1999)

⁷¹Francesco Pierli, Terry w Mwaniki and Peter Mbuchi Methu (eds), *The Pastoralists: A Challenge to Churches, State and Civil Society*. Tangaza Occasional Papers No 20(Paulines Publication Africa 2006)

⁷²Aylward Shorter et al, *Theology of the Church as Family of God*; Tangaza Occasional Papers No 3 (Paulines Publication Africa 1997)

⁷³Mary Kerber. 'Globalization: The Challenge for Africa' in Patrick Ryan (ed), *Structures of Sin, Seeds of Liberation*. Tangaza Occasional Papers No 7 (Paulines Publication Africa 1998) 51-60.

⁷⁴Loretta Brenan and Peter Roddy eds. *Inter – Cultural Living: Gift or Chaos?* Tangaza Occasional Papers no 15 (Paulines Publication Africa 2003)

context it can be concluded that in all these challenges to the Church, the rise of Atheism as a religious challenge seems absent in the literature. However Bishop Henry Okullu in *Church and State* illustrated its existence among the Kenyan intellectuals as shall later be reviewed in this study. This is the challenge that this study is partially attempting to address.

1.9.1.2 The Church Presence in Kenya

The issue of Church presence in any country has always drawn various debates advancing different approaches, classifications and categorizations. This study shall examine the arguments advanced by Omari, Bhebhe, Gitari, Mazrui, Okullu, Mbiti and Mugambi among others.

According to Omari, “after independence many African countries adopted secularist and pluralist governments.”⁷⁵ Omari identified three approaches to describe the Church – State relations in Africa, similar to Kenya, “First, there is the notion of the separation between the two institutions or the theology of two kingdoms. Secondly, there is the notion of ‘theocracy’ in which the church and the state are inseparable; and thirdly, there is the secularist and pluralist paradigm in which the two institutions co-exist and collaborate while retaining separate identities.”⁷⁶ Omari notes three areas of possible conflicts and harmony between church and state in Kenya and in Africa, first when the church takes a stand of its basic Christian principles such as condemning apartheid in South Africa. Second, when the church spreads the Christian faith such as speaking against social evils as the case was in Kenya and thirdly, when one religious group tries to superimpose its religious belief onto other people in the society.⁷⁷ Here the example of Sudan.

⁷⁵C.K. Omari, ‘The Church and State Relationship in Africa’ In Jose B Chipenda, Andre Karamanga, J N K Mugambi and Harold Miller (eds), *The Church of Africa: Towards a Theology of Reconstruction* (Africa Challenge Books series 2010)51.

⁷⁶ Ibid.

⁷⁷Omari (n75) 55-60.

Bhebhe on the other hand continues Omari debate noting three classifications or categories of Church – State relations in Africa, “first, there are those who have sought to uphold a dualistic relationship or what is known as Luther’s doctrine of two kingdoms. Second there are those who have advocated a merger of the two. The third group or category is for those who see the relationship in terms of darkness and light.”⁷⁸

Gitari however, admits that “generally speaking the church in Africa has not as yet found an answer to the question of how best to relate to political, social and economic structures. Certainly there is no agreed formula on how the church should relate to the State.”⁷⁹ Nevertheless, Gitari identifies some four (4) probable attitudes by Churches to the State:⁸⁰

- (a) “The churches adapt themselves actively when they identify themselves with the goals and intentions of the power or the State.”
- (b) “The churches adapt themselves passively when they withdraw into the sphere of the purely religious and abstain from any statements on decisions and activities of the power or the State.”
- (c) “The churches can engage in critical and constructive collaboration with the power or the State by evaluating on the basis of their understanding of the Gospel, political decisions and proposed programmes.”
- (d) “The churches may be led to resist or oppose the power or the State. The obligation to resist which may arise under certain circumstances has no destructive intention; the attitude of resistance will be adopted to serve society and even the State, because the State as well is called to be the servant of God and the people (Rom.13).”

In reference to communistic practices in South African Apartheid regime, Gitari regrets that atheism was then propagated by predominantly Christian nations.⁸¹ Noting that:

History has shown that for a government to be run by the church does not necessarily guarantee democracy or justice. John Calvin’s attempt in 1541 to set up a state at Geneva run according to his celebrated ecclesiastical ordinances, by which the clergy had power to improve the Christian

⁷⁸Stanley M Bhebhe, ‘Church and State in Zimbabwe: An Evangelical Appraisal’ in Carl F Hallencreutz and Ambrose M Moyo (eds), *Church and State in Zimbabwe* (Mambo Press 1988)313.

⁷⁹David M Gitari, ‘The Church’s Witness to the Living God in Seeking Just Political, Social and Economic Structures in Contemporary Africa’ in Rt Rev. Dr. David M Gitari and G.P.Benson (eds), *Church – State Witnessing To The Living God in Contemporary Africa: Findings and Papers of the Inaugural Meeting of Africa Theological Fraternity* (Africa Theological Fraternity 1986)119.

⁸⁰ Ibid. 119-120.

⁸¹Gitari (n79) 122

morals and ethics of every citizen, led to many terrible results: the burning at stake of Servetus, who had questioned the doctrine of the Trinity, is one of the more dramatic examples.⁸²

In discussing the Church – State relations approaches described by Omari, Bhebe and Gitari; Mazrui, argues that although the idea originated with Jesus, it was not institutionalized until the time of Constantine I of Rome. Mazrui is of the opinion that the institutionalization of the idea led to development of the secularist states which according to Mazrui, is a Christian legacy. Thus Mazrui believes that a country like Nigeria in its debate regarding a secular versus an Islamic state was influenced by this Christian legacy from the West. Mazrui traces this legacy to countries like the United States.⁸³

Expanding secularist debate Okullu observes the US debate as advanced by Mazrui on the separation of State and Church “unsettled in any simplistic form.”⁸⁴ Okullu goes on to say that Africa faces the debate in the same way as does the US. Okullu cites examples of many African governments which have included the name of God in their national anthems while their leaders’ start any national activity or function with an invocation of the name of God for guidance. This is a form of civil religion.⁸⁵ Okullu further is of the opinion that this view originates with Calvinist teachings in which God, the Lord of all, rules all spheres of human life. This is the theocratic approach to the understanding of Church – State relationship.⁸⁶

Okullu in his prophetic and pastoral responses to the contemporary perspective of Church - State relationship takes the theme of “human dignity” as the point of departure “human dignity was to be respected and upheld and every person would have the right to be heard and freedom to

⁸²Ibid. 124

⁸³Ali Mazrui, ‘The Islamic Revivalism and Expansion’ in *African Events* (Vol 6 no 2 1990)28; where it has been embodied in the First Amendment of the constitution

⁸⁴Henry Okullu, *Church and State in Nation Building and Human Development* (Uzima Press 1984)61.

⁸⁵Ibid.

⁸⁶Okullu (n84) 62

participate in the politics of his country.”⁸⁷ In order to exercise human dignity, Okullu contends that, “the rights of the minorities and opposition parties were to be allowed and protected and, where these did not exist, free discussion between the rulers and the ruled would prevail.”⁸⁸

Historically there has been a conflict between Church and State in the Middle Ages in which at one time the State would try to subordinate the Church and at another time it would be the Church assuming the superior role over the State. According to Okullu, “it was described as two kingdoms: one temporal, the other spiritual; one earthly, the other heavenly, bearing the spiritual sword.”⁸⁹ In the New Testament, the above problem surfaced when some Christians considered themselves to be above the earthly rulers and so not obliged to put themselves under State laws. Paul deals with this issue in his letter to the Romans when he exhorts “everyone to submit to the governing authority, for there is no authority except that which God has established. The authorities that exist have been established by God.” (Rom. 13:1ff, NIV Bible).

Christians have had several views about Church - State relationship. According to Okullu the first group is the *Calvinistic group of Christians*:

These are Christians who would prefer to adopt a Calvinistic view that because God is Lord of all, there ought to be a theocratic system of government. Whenever they are faced with a problem in society they cry: ‘make laws to ban it, or allow it.’ They would prefer to establish Christendom, a ‘holy’ nation, in which Christian ethics are enforced by State law. This view would see a separation of religious conviction from social and political life as sheer hypocrisy. This would be seen to be a commendable step until we begin to realize that in a society including several religions it would be virtually infringing the liberties of other people.⁹⁰

The second group of Christians is the separatist, sectarian type, according to Okullu:

The separatist, sectarian type with the view that all those not for us are against us so we share no part with them. To convert society, every individual must experience the inner conversion. For this group, religion and politics do not mix. Social issues and religious matters have to be kept

⁸⁷Okullu (n84) 52

⁸⁸Ibid.

⁸⁹Okullu (n84) 60

⁹⁰Okullu (n84) 62

separate. Emphasis is put on living a life of holiness for individuals as the only means of presenting God's challenge in society.⁹¹

Henry Okullu, identifies the separatist, sectarian type or group of Christians as the predominant in East Africa and hence in Kenya. This is the main approach to social issues in America. This may indicate that much of Kenyan Christianity is an offshoot of the American right wing evangelicalism. This is demonstrated by the inner conversion and living a life of individual holiness here unto God the creator. Any possibility of negating that existence as propagated by AIK may lead to religious tension as seems exhibited by the government's action to Atheists.

Okullu identified another category of people; this is a group that is "found mainly among the intellectuals, for whom faith has no meaning. The numbers are still small but steadily growing. They too, denying spirituality, hold the view that religion and politics are absolutely irrelevant to each other."⁹² This group may be classified in the category of *Atheists In Kenya (AIK)*, *The Free Thinkers of Kenya (FIKA)*, *Secularist of Kenya* and *Humanists* among others in such typologies. Considering that Okullu penned this writing in 1984, that group as he postulated though smaller in number have since grown. They are the subject of this investigation.

Mbiti argues for the religiosity of African world "Africans are notoriously religious, and each people have its own religious system with a set of beliefs and practices. Religion permeates into all the departments of life so fully that it is not easy or possible always to isolate it."⁹³ There was no compartmentalized entity perceived as 'religion.' According to Mbiti, "Religion can be discerned in terms of beliefs, ceremonies, rituals and religious officiants ..."⁹⁴ In Africa, *dereligionization* is characterized by the claims of "Secularism, Communism and Capitalism."⁹⁵

⁹¹Okullu (n84) 63

⁹² Ibid.

⁹³ Mbiti John S, *African Religions and Philosophy* (East Africa Educational Publishers 1969)1

⁹⁴Ibid.1

⁹⁵ Mbiti (n93) 265

These philosophical movements “despise, reject and even oppose religion.”⁹⁶ They are movements away from religion. According to Mbiti, “Secularism has an undermining effect upon religion, but it may well be to the good of religion if the latter injects religious principles into secular life instead of waging war against secularism. Need these two be at enmity, or is it not the duty of religion to justify and exert its presence in the secular world.”⁹⁷

Mugambi is of the view that, the existence of God in Africa is a non-issue:

It is this latter context that one may aspire towards an African theology. Here and in the other aspects of African life, one must be careful in identifying topics for a meaningful and relevant discussion. The existence of God, for example, has been the subject of lively debate for several centuries in Europe. In Africa, such a debate would be either meaningless or irrelevant to the philosophical and theological issues which have pre-occupied Africans both in the past and in the present.⁹⁸

Mugambi may have rightly contended that perspective before the end of the cold war and the collapse of the Soviet Union in 1989 when his book was published. It is however doubtful whether that may be the case today when the 2010 progressive Constitution expands the bill of rights of every individual as noted in *Article 32*.⁹⁹

The secularization so apparent in the Western world seems to emerge in modern Africa as noted by Pope John Paul II arguing that “...the rapid evolution of society has given rise to new challenges linked to the phenomena notably of family uprooting, urbanization, unemployment, materialistic seductions of all kinds, a certain secularization, and an intellectual upheaval caused by the avalanche of insufficiently critical ideas spread by the media.”¹⁰⁰

⁹⁶Mbiti (n93)

⁹⁷Mbiti(n93)

⁹⁸ Jesse N K Mugambi, *African Christian Theology: An Introduction* (Heinemann Kenya, Nairobi, 1989)5-7.

⁹⁹On freedom of conscience, religion, belief and opinion

¹⁰⁰John Paul II, *Ecclesia in Africa* no 76 (Paulines Publications Africa, Nairobi, 1995)60; The Church in Africa: *Ecclesia in Africa* (Paulines Publications Africa, Nairobi, 1995)35-39.

Miller, in a study of the Toba Indians of Argentina, is of the view that Western missionaries, by demonstrating a compartmentalized attitude to religion, are actually agents of secularization:

Christian missionary ideology ... represents a highly institutionalized operation in which supernaturalism's sphere of influence has been increasingly narrowed and circumscribed in the sending community (Western world) ... Generally few values uniquely its own, mission ideology reflects and even legitimates many of the values being forced at the same time upon the folk society by a colonial administration or a national government.¹⁰¹

1.9.1.3 Democracy, Human Rights and the Church in Kenya

Owuoche discusses the democratisation process in Kenya. He notes that international donors, the civil society and the church were major players behind the wave of democratisation in Kenya.¹⁰²

Owuoche further argues that the Colonial State developed in response to the requirements of the metropolitan state and the settlers, and not to any local democratic interest. The Colonial State's function was limited to the creation of law and order, and was not concerned with democratisation in Kenya. The Colonial State therefore was an instrument of domination and hence detached from the will of the majority as it promoted that of the settler minority.¹⁰³

Owuoche argues that just like the colonial state, the post – colonial period shows failure of imposed institutions and apparent contradictions in post – colonial governance. There were reversal waves to gains made. Reverse wave's pursuit of the interests of a few individuals, repressive structures that made it difficult to mold a democratic society. However, the international donors, civil society and the Church became catalysts for reforms and change, leading to gains in the democratic front such as reintroduction of multiparty politics in 1991, enhanced political freedoms, and clamor for constitutional reforms among others.¹⁰⁴

¹⁰¹Elizabeth Isichei, *A History of Christianity in Africa: from antiquity to the present* (SPCK, London, 1995)262, as quoted from E. S. Miller, 'The Christian Missionary: Agent of Secularization,' *Missiology: An International Review*, 1973, p. 106.

¹⁰²Solomon Owuoche, *The Church in the Struggle for Democracy in Kenya* (Mvule Africa Publishers 2010)39-44

¹⁰³Ibid. 45

¹⁰⁴Owuoche (n103)

The agitation for democratisation in Kenya lead to religious suppression and victimization by the state for instance when Arch Bishop David Gitari and Patrick Rukenya, criticized President Moi for failing to re-appoint his vice president Saitoti (now late). The aged Moi was soon to retire; they allege that Moi declined to re-appoint his vice in a bid to replace him with his preferred successor. This infuriated the head of State sending intelligence officers to question Arch Bishop Gitari.¹⁰⁵ Such human rights violations is noted by Magesa in his assertions that:

The Catholic claims all the rights listed in the Universal Declaration of Human Rights.... The right to freedom of opinion and expression; the right to freedom of assembly and association; the right to participate in decision – making; the right to rest and leisure; the right to choose one’s way of life – including marriage or celibacy; the right of freedom of conscience; the right to privacy; the right to due process; and the right to prompt and effective remedy for justice incurred.¹⁰⁶

In recognizing the contribution of the Catholic Church to the State and human rights in Africa, Tarimo identifies different purposes of the State and the Church that “the state is created to defend social structures that stand for the common good. The Church on the other hand is instituted by God to contribute to the building of value systems upon which a sound human society may be built.”¹⁰⁷ Tarimo observes “the teaching of bishops’ pastoral letters focuses mainly on the conversion of the spirit and commitment to social justice and advocacy.”¹⁰⁸ Atheism is not factored in such pastoral letters.

Gitari makes the point that, there is cost in political agitating for the rights and freedoms of the society, that it is a struggle which demands “courage, a lot of faith, a lot of prayer, and it is dangerous.”¹⁰⁹

¹⁰⁵David W Hendon and Aaron Tyler, ‘Notes on Church – State Affairs’ in *Journal of Church and State* (Oxford University Press 2003) Vol. 45, no 1 pp 201. <http://www.jstor.org/stable/23920184><01-02-2018.

¹⁰⁶J N K Mugambi and Laurenti Magesa (eds), *The Church in African Christianity: Innovative Essays in Ecclesiology* (Initiatives Publishers 1990)104.

¹⁰⁷Aquiline Tarimo, ‘The State and Human Rights in Africa’ in J N K Mugambi and Frank Kuschner –Pelkmann (eds), *Church – State Relations: A Challenge for African Christianity* (Acton Publishers 2004)66-67.

¹⁰⁸ Ibid. 68

¹⁰⁹David M Gitari and Ben Knoghton, ‘On Being a Christian Leader: Story Contesting Power in Kenya’ in *Transformation* (Sage Publication 2001) Vol. 18, no 4 pp 255. <http://www.jstor.org/stable/43053955><02-02-2018.

Ayanga critiques some of the generally accepted elements of Globalisation; ‘sameness or uniformity.’¹¹⁰ In its place, Ayanga proposes ‘difference and diversity.’¹¹¹ Ayanga avers:

Difference refers to aspects or characteristics that distinguish one entity from another. It implies diversity and variety in human beings, their experiences and their environment. Whereas difference does not mean inferiority or superiority, it does, however, mean that people respond differently to issues. Theologically, it means that God meets people at their point of need and in their specific situations. In other words there can be no uniform response to issues, whether spiritual, physical or economic in nature. Thus there is need to understand difference in the global world, not as a reason for separation and suspicion but rather as a blessing and a forum for interchange.¹¹²

Taylor, relating Church and State relation with the family unity expounds Genesis 2:18 “it is not good that the man should be a lone.” According to Taylor:

First, every man must learn to live happily together with his neighbor. Secondly, a man cannot pick and choose who his neighbours will be. His community – whether it is family, or village or nation – consists of the people who are there, not merely the people whom he would choose as his companions. He therefore has to find a way of living together with all sorts of people, including those whom he does not like, those with whom he disagrees, those whose interests are different from, or opposed to his own.¹¹³

1.9.1.4 The Tension between Eurocentric and African Christianity

Okullu, aver that “many leaders in Africa declare that their countries are secular states.”¹¹⁴

Conversely, this secularism was planted by colonialists and missionaries with Christianity:

The missionaries who brought Christianity rid Africa of all its traditional values and religious concepts in order to have a clean plate on which to put the new faith. Enthusiastically propagated and strongly backed by colonial laws in many parts of Africa, particularly East Africa, these colonial states appeared to be founded on the strong foundations of Christianity. But alas, Christianity had not penetrated deeply enough into the hearts of the new adherents to form a basis for a national life after the collapse of colonialism. Christianity had not become a national religion capable of providing the people with basic moral capital. Thus it is not a wild exaggeration to state that many African people now find themselves in a moral wilderness and are trying to build states without values.¹¹⁵

¹¹⁰Hazel Ayanga, ‘Globalisation: A Theo-religious Response’ In Laurenti Magesa (ed), *African Theology Comes of Age: Revisiting Twenty Years of the Theology of the Ecumenical Symposium of Eastern African Theologians (ESEAT)* (Paulines Publication Africa 2010)168-169.

¹¹¹Ibid. 169-170.

¹¹²Ayanga (n111)169

¹¹³T.V. Taylor, *Christianity and Politics in Africa* (Penguin Books 1957)35.

¹¹⁴Henry Okullu, *Church and Politics in East Africa* (Uzima Press 1974)8

¹¹⁵ Ibid. 8-9.

Lonsdale analyses the role denominationalism plays in ideological conflict in Kenya. He writes that protestant have been either conservative evangelicals or modernists (liberals). Whereas the evangelicals tended to emphasize faith and individual piety, the liberals tended to emphasize the ethical implications of a social gospel. Lonsdale critiques the view that the liberals were more amenable to Kenyan nationalism. Both ‘Christianity’ tended to legitimate colonial rule. In that regard, it was the conservative evangelicals who sharpened the contradictions that led to nationalism. Whereas, he argues, the liberals tended to champion enculturation—based on the view that Eurocentric Christianity and the political structure that had erected it would uproot traditional religion—the conservatives were intolerant of traditional religion and thus the policy of indirect rules that manipulated and maintained traditional structures. The liberals, on the other hand, patronized, with some exceptions, the westernized, educated elite. Lonsdale also reveals that neo-colonialism is maintained through the NCKK. Liberal in orientation, it had been a factor in Kenyan nationalism; a potent power in the maintenance of neo-colonial relations in Kenya.¹¹⁶

Kamuyu Wa-Kange’the, claims that the history of the mission church in Kenya is but the tragic tale of white racist enmity toward the liberation struggle of African people. The Agikuyu people concretely exemplify how African values can be a powerful means of resistance.¹¹⁷

According to Okesson, Kenyan theologians understanding of ‘culture’ “is for the purpose of opposing western hegemony: contending that western civilization has corrupted the way people

¹¹⁶John L. Stanley Booth –Clibbon and Andrew Hake, “The Emergent Pattern of Church and State Co-operation in Kenya” in Edward Fashole – Luke, Richard Gray, Andrian Hastings and Godwin Tassie (eds), *Christianity in Independent Africa* (Indian University Press 1978)267-284.

¹¹⁷Kange’the K, ‘The Suppression of African Patriotism and Nationalism by the Mission Churches 1900-1950’ in Ogbu Kalu (ed), *African Church Historiography: An Ecumenical Perspective* (Evangelische Arbeitsstelele Oekumene Schweiz 1988)157-179.

on the continent look at religion, politics, and everyday life.”¹¹⁸ Therefore, according to Okesson, Kenya’s scholars need to proactively interrogate with challenges of “modernity, secularism, urbanization, materialism, democracy, and other themes of discourse: not as Western issues, but only to the extent they have been ‘turned to face Christ’ and re-interpreted within contemporary contexts.”¹¹⁹

1.9.1.5 The African Traditional Religion (ATR)

According to Mbiti African traditional religion is essentially monotheistic and well – equipped to function as a stepping stone to Christianity.¹²⁰ Mbiti central thesis is that the old Africans – due to the providence of God – have always known the Creator. For Mbiti, then, God’s revelation has been more extensive than the Bible would suggest. Mbiti does not undermine the Bible’s authority. Indeed, he wishes to define a hermeneutic that would substantiate his focus on New Testament eschatology. If, he argues, African conceptions of God and biblical conceptions of God ‘are two wavelengths’ they are not contradictory wavelengths. Their correspondence involves their necessary movement toward each other in the broad dynamism of salvation history. He records the fact that the proliferation of Christianity in Africa, especially ‘the Southern two – thirds’ of the continent, is due to the Pan – African phenomena – ATR. ATR has facilitated Africans’ acceptance of the gospel and is thus an essential mode of general revelation.¹²¹ If the old Africans due to the providence of God have always known the creator

¹¹⁸Gregg A Okesson , ‘Drinking Chai with a Sociologist’ Review Article for Christianity, Politics and Public Life in Kenya, by Paul Gifford’ in *Transformation* (Sage Publication 2012) Vol. 29, no 1 pp 21.

<http://www.jstor.org/stable/90008032?02-02-2018>.

¹¹⁹Ibid. 23.

¹²⁰John Mbiti, ‘The Encounter of Christian Faith and African Religion’ In M. Wall and Martin E. Marty (eds), *Theologians in Transition* (Crossroads 1981)53-59.

¹²¹John Mbiti, ‘The Encounter of Christian faith and African Religion’ In Dean Ferm (ed), *Third World Liberation Theologies* (Orbis Books 1986)199-204.

God, why would their children and grandchildren dispute the existence of the creator God?
Where did things go wrong?

According to Mbiti, one should view traditional religion “as if [it] had prepared the spiritual ground for the planting of Christianity.”¹²² Thus Mbiti looks at religion in terms of God, sin, and salvation.¹²³ If traditional religion prepared the spiritual ground for the planting of Christianity; similarly, Christianity prepared the temporal ground for the planting of Atheism. This is because in FGD with AIK their opposition of religion was mainly to classical foreign religions such as Christianity and Islam.

Ogot argues that the Padhola, a so – called Nilotic speaking people of Eastern Uganda were essentially a monotheistic people independent of Christianity and Islam. According to Ogot, “the monotheism introduced by the latter –day higher religions such as Christianity and Islam in the area represented neither a revival, nor an innovation, but an attempted merger of the differently derived concepts of God.”¹²⁴ Ogot observes that Padhola, in encountering Christianity, retained their traditional religion as an Old Testament and only appeared to convert.¹²⁵ If as Ogot contends in relation to the Padhola, that they never converted to higher religions (Islam and Christianity), but appeared to convert; is it then strange that their members conversion to other beliefs such as Atheism is anything to wonder? Does not this indicates that, just like the sower, not all seeds falls on good soil!

¹²²John Mbiti, ‘God, Sin, and Salvation in African Religion’ (1989)99, 4 *The A.M.E. Quarterly Review*, p. 2.

¹²³Ibid. 7

¹²⁴Bethwell Ogot A, ‘On the Making of a Sanctuary: Some Thoughts on the History of Religion in Padhola’ In T.O. Ranger and I.N. Kimambo (eds), *The Historical Study of African Religion* (University of California Press 1976)122.

¹²⁵Ibid. p 122-136.

According to Kibicho, the problem of African theology involves; the tension between Africanisation (acculturation) and Christianization (inculturation).¹²⁶ Whereas certain African theologians hold that African values must be Christianized, Kibicho notes how Christianity is enriched by African Traditional Religion. His focus, then, is on Africanisation. In his discussion of African Traditional Religion, Kibicho, begins with a discussion of God and moves down to the ancestral spirits and then to human kind. Like Mbiti he also stresses the ‘communalism’ of African Traditional Religion. Communalism, asserts Kibicho, is redemptive and counters the Eurocentric religion that is too individualistic.¹²⁷ One object of AIK is to have a community of like people that will fellowship, interact and share their concerns. This in a sense brings the aspect of communalism, community which is African and not necessary western. Let us examine Church – State relations in Sub – Saharan Africa.

1.9.2 The Church – State Relationship in Africa

1.9.2.1 Clash of Christianity and Traditional Culture

Idowu notes the ferment over the place of the church in Africa. He asserts that the relation of the Eurocentric missiology to imperialism has caused nationalist to dismiss the church. That many of the missionaries of the 19th and early 20th centuries were black. Certain of these blacks were recaptives.¹²⁸ Black missionaries also promulgated Christianity that later spread Anglophone literacy, which strengthened African nationalism. According to Idowu, white missionaries’ historic attempt to plant Christianity by uprooting traditional culture led to irruption of this

¹²⁶Samuel Kibicho G, “African Traditional Religion and Christianity” In *A New Look at Christianity in Africa* (WSCF Books 1972)14-21

¹²⁷Ibid.

¹²⁸Recaptives were Africans who, in the 19th century, were liberated from slave ships in the coastal waters of West Africa by the British and American Navies. Resettled in Contexts such as Sierra Leone and Liberia, recaptives associated Christianity with emancipation.

culture in modified form in the independent churches.¹²⁹ If the spread of Anglophone literacy and the irruption caused by uprooting of traditional culture, then Christianity, Colonialism and Civilization may rightfully be concluded as the foundation of Atheism in the Sub-Saharan Africa. This is because outside Christianity, Islam and ATR; Atheism may be an external religious and ideological culture that threatens all the predominant religions.

According to John and Karefa-Smart, African traditional culture is characterized by the close relationship between the visible and the invisible realms; a connection which accentuates community rather than individualism.¹³⁰ What is, more, the authors argue that if 'the church does not take the rot in African soil now, it will either grow into a deformed or dwarfed representation of what God intended it to be; or worse, it will atrophy and die.'¹³¹ The 'rot in Africa in African soil' warned by the authors is not Atheism; yet, Atheism may also be included among the 'rot' that might 'deform, dwarf, atrophy and cause Africa to die' if not addressed as early as possible.

1.9.2.2 Colonialism, Imperialism and African Resistance

James illumines the problems that obstructed the Ghanaian peoples' independence from Britain as well as the problems of 'independence.' For James, colonialism is legitimated through myths, as is resistance to colonialism. He notes that the African elite have legitimated its right to independence in terms of the Eurocentric myths that have oppressed them. The remedy to this blind alley, claims James, rests with the masses, who carry the truly liberating myths.¹³² If the

¹²⁹Bolaji Idowu E, 'The Predicament of the Church in Africa' in C. G. Baeta (ed), *Christianity in Tropical Africa: Studies Presented and Discussed at the Seventh International African Seminar*, University of Ghana, April, 1965 (Oxford University Press 1968) 417-440.

¹³⁰Smart - Karefa, John and Rena, *The Halting Kingdom: Christianity and the African Revolution* (Friends Press 1959) 76.

¹³¹ Ibid. 79

¹³²James C L R, 'Colonialism and Nationalism Liberation in Africa: The Gold Coast Revolution' in Norman Miller and Roderick Aya (eds), *National Liberation in the Third World* (The Free Press 1971) 102-136.

colonial solution was through the masses; how will the ignorant masses counter logically, doctrinally and persuasively the advancing Atheistic scientific and enlightening ideology while the religious masses are warned, refused by their leadership to engage AIK? Except the apologists who have the call, training and courage; the rest of the Christians are naïve, ignorant and fearful of engaging AIK; rather they attack them instead as indicated by the responses in chapter four.

Busia's analyses the movement for independence. He examines the way in which colonial rule undermined traditional authority. He focuses on the Ashanti and the notion of indirect rule, "under the British administration the chief has become a subordinate authority. This is constantly in evidence in his relations with the police, the military and other officials of the central government."¹³³ In the same way colonial rule which was partly Christian undermined traditional authority, it seems then Atheism is seen undermining the religious authority.

Fanon establishes a cultural and political paradigm that defines the insurrectionist values he deems necessary for the resistance to and abolition of colonialism in Africa. Fanon lends substance to critics of the African theologians who correlate elements of traditional religion and (Eurocentric) theology too easily. Fanon argues that the alienated African intellectual attempts to bend the realities of the dynamic culture of the African poor to theories of Africanity that, abstracted from the defunct practices of yesterday, exist in bourgeois thought only. To Fanon:

Culture has never been the Tran lucidity of custom; it abhors simplification. In its essence it is supposed to custom, for custom always the deterioration of culture. The desire to attach oneself to tradition or bring abandoned traditions to life again does not only mean going against the current of history but also opposing one's own people... In an underdeveloped country during the period of struggle traditions are shot through by centrifugal tendencies. This is why the intellectual often runs the risk of being out of date.¹³⁴

¹³³Busia K A, 'Colonial Administration and Social Change in Ghana, 1900 -1920's' in Wilfred Cartey and Martin Kilson (eds), *The African Reader: Colonial Africa* (Vintage Books 1970)1140.

¹³⁴Frantz Fanon, *The Wretched of the Earth* (Grove Press 1968) 224.

If intellectuals are alienated by their societies because they espouse some ‘centrifugal tendencies’ then AIK should not be mistaken for the far left ideological position they stand for. Fanon commends them as being a head of time, while the society may be behind time.

Fetter argues that the continent “cannot easily escape the heritage of a century and a half of colonization.”¹³⁵ But we cannot blame our failures on the past for centuries. The past should enable us learn lessons to avoid similar mistakes in our survival today and in the future. Why should anybody blame the rise of Atheism in Sub – Saharan Africa on colonization, Civilization or Christianity? If it was possible then, since when did Africans attained independence? Even after half a century do we still point figures to the west? We cannot take the blame in the ‘rotting’ of our cultures? Is Atheism a heritage of colonization?

According to Rodney, Africa, at the advent of olden colonialism, had not reached the stage of ‘class-ridden feudalism.’ “When Europe and Africa established close relation through trade, there was already a slight edge of Europe’s favor—and edge representing the difference between the fledgling capitalist society and one that was still emerging from communalism.”¹³⁶In short, Rodney’s guiding hypothesis is that Europe’s developmental edge of Africa explains Africa’s underdevelopment. Africa’s subjugation by the West is not the result of the alleged inferiority of blacks, but is an accident of history, which reveals the depth of human cruelty. The victim mentality we make ourselves as Africans always inhibits our endeavor to progress. This same victim mentality perceives Atheism as a western endeavor to secularize religious Africa.

¹³⁵Bruce Fetter (ed), *Colonial Rule in Africa: Readings from Primary Sources* (The University of Wisconsin Press 1979) 20.

¹³⁶Walter Rodney, *How Europe Underdeveloped Africa* (Howard University Press 1982)70

1.9.2.3 Acculturation and Inculturation Tensions

Ethiopia's roots go back into the 4th Century and the Ethiopian church is an enduring example of longevity of African Christianity. Haberland highlights that *Kebrā Nagast* "is a collection of ancient oriental legends...Tailored to suit the Kingdom of Ethiopia and its dynasty."¹³⁷ Such national churches also wither away with the withering regime; *Nagast* seems to have proved the contrary. However, there are persecutions in Ethiopia over sects not tolerated; AIK could easily suffer a similar fate in Kenya.

According to Kalilombe, the Catholic Church in Malawi was somewhat xenophobic as a result of its de-privileged position in the wake of Enlightenment. It has tended to be afraid of diversity and to demand strict conformity to Vatican polity. Vatican II, however, modified that orientation in opening the church to diversity and inviting Third World Christians to make Christianity their own. According to Kalilombe, the sudden change in direction appeared somewhat disingenuous to the Malawian people. They, he asserts, wish to minimize the control of the Vatican in order to assume control of their ecclesial future.¹³⁸ The Vatican may load over the Malawian church, would the national also load over other smaller sects and institutions like AIK rising up?

Clarke's text is useful in the study of Church – State relationship in Africa as it informs historic data on the development of Christian faith in Africa. Clarke rightly concludes that these churches were "movements many European and American missionaries both black and white from the 1800s onward."¹³⁹ These churches, writes Clarke, "were also a direct, conscious attempt to

¹³⁷Haberland E, 'Christian Ethiopia' in Rolad Oliver (ed), *the Middle Age of Africa History* (Oxford University Press 1976) 9.

¹³⁸Patrick Kalilombe A, 'The Presence of the Church in Africa' in Sergio Torres and Virginia Fabella (eds), *the Emergent Gospel: Theology from the Developing World. Papers from the Ecumenical Dialogue of Third World Theologians*, Dares Salaam, August 5-12 (Geoffrey Chapman 1978)22-30.

¹³⁹Peter Clarke, *West African Christianity* (Edward Arnold 1986)190

assert the cultural and spiritual values and rights of Africans which missions were either unaware of or chose to ignore.”¹⁴⁰

1.9.2.4 African Liberation Theology

Ankrah, representing Uganda, examines the troubled church – state relationship that has produced African self-rule. He argues that Christian missionaries are not unlike colonial mercenaries as both sought to undermine African self-determination. Today, reveals Ankrah, self-determination is still in danger and must be accommodated in tension with ‘flag independence’—i.e. neocolonialism. In his definition of neo-colonialism Ankrah quotes Kwame Nkrumah; “the essence of neocolonialism is that the state which is subject to this, is, in theory, independent and has all the outward trappings of international sovereignty. In reality its economic system and thus its policy is directed from the outside.”¹⁴¹

Ankrah wonders where the church stands in regard to ‘flag independence.’ According to Ankrah, an element in the church refuses to deal with the question, having assumed that politics are impertinent to ‘the gosselling’ of the word of God.’ For Ankrah, the church has tended to preach peace without its necessary counterpart, justice. Nonetheless, notes Ankrah, theologies, equipped with a social analysis that refuses to conceal contradictions, are demanding justice, as well as peace. Ankrah argues persuasively for an African theology of liberation.¹⁴²

Uganda, due to the horrific legacy of Idi Amin, is a context in which the relevance of the theme of liberation is glaringly apparent. Twaddle’s essay deepens an understanding of that context as he links ecclesial tensions among missionaries to the political conflicts that produced the rise of

¹⁴⁰ Ibid.

¹⁴¹ Kodowo Ankrah E, ‘Church and Politics in Africa’ in Kofi – Appiah Kubi and Sergio Torres (eds), *African Theology Enroute* (Orbis Books 1979) 156.

¹⁴² Ibid.161.

Amin. Twaddle reveals that distinct factions sought to weaken or to use these schools to their advantage regardless of whether they were Roman Catholic. Roman Catholicism, then, neither overcame tribalism nor other obstacles to national culture, but was a vehicle of partisan interest.¹⁴³ The church can be an instrument of partisan interest.

Small in relating theology to black consciousness argues that South African blacks who accept white values as normative too often reject themselves as a result. Rejection here is tantamount to self-hatred, which is the retrogressive element in the liberation struggle and its most pernicious contradiction.¹⁴⁴

Thebehali critically examines the close relationship between British aggression and Christianity. Thebehali notes that few 19th century white missionaries were able to extricate their theology from the expropriating mores of the civilization that produced them. Thebehali notes that Europeans in Africa greatly impeded inculturation because to their hostility to African culture.¹⁴⁵ Conversely Atheists are hostile to the missionary religion.

Markwell reveals that Johnson's grandparent was a recaptives who associated Christianization with liberation. Johnson believed that Africans could amplify the universality of the gospel by way of values gleaned from African culture.¹⁴⁶ Is there anything African in Atheism?

¹⁴³Michael Twaddle, 'Was the Democratic Party in Uganda a purely confessional party?' in Edward Fashole – Luke, Richard Gray, Adrian Hastings and Godwin Tasié (eds), *Christianity in Independent Africa* (Indiana University Press 1978) 255-266.

¹⁴⁴Adam Small, 'Blackness Versus Nihilism: Black Racism Rejected' In Basil Moore (ed), *the Challenge of Black Theology in South Africa* (John Knox Press 1973) 11-17.

¹⁴⁵David Thebehali, 'Has Christianity any Relevance and any Future?' in *A New Look at Christianity in Africa* (WSCF Books 1972)40-45.

¹⁴⁶Mateiv Markwell, 'Harry Sawyerr's Patron (Bishop T. S. Johnson)' in Mark Glasswell and Edward W. Fashole – Luke (eds), *New Testament Christianity for Africa and the World: Essays in Honour of Harry Sawyerr* (SPCK 1974) 179-197.

1.9.2.5 African Traditional Religion (ATR) and Ethics

According to Ayandele, the independent churches are “held in irrational, uncharitable, and jaundiced contempt by the more elitist Western –oriented churches.”¹⁴⁷ For Ayandele, the elitist churches offer no moral leadership in the wake of the crises of the continent. The masses, he argues, tend not to look to the elitist church for direction, but to African traditional religion (or the independent churches). Is AIK an extension of elitism?

Ayandele asserts that Christian’s scholars alienated from the masses assume that the meaning of African Traditional Religion is conspicuous, “Scratch the African Pastor and you would discover {however} that he has greater faith in the charms and amulets he wears surreptitiously and in the ‘witchdoctor’ to whom he pays nocturnal visits than in the Holy Bible and Jesus Christ.”¹⁴⁸ The pity, for Ayandele, is that many Christians fail to see that Christianity and African Traditional Religions are not adversaries. Biblical Christianity, he argues, is not deprived of its salvific power when it is Africanized. Can we say Christianity and Atheism are adversaries?

According to Sanneh, African Traditional Religions (ATR) “have penetrated both Christianity and Islam and endowed them with a tolerant, absorptive capacity...in this sense Traditional Religions have performed a universal mission towards Christianity and Islam.”¹⁴⁹ If ATR has penetrated Christianity and Islam any Atheism influences?

Here, Sanneh argues that African Traditional Religion opens one’s understanding to the distinct ways in which African people read the Bible. According to Sanneh, African Traditional Religionists are far more tolerant of pluralism than Western Christians. Thus, argues Sanneh,

¹⁴⁷Ayandele EA, ‘Address by Professor E A Ayandele, Principal, University of Ibadan, Jos Campus, on Sunday, 31 August, 1975’ in Edward Fashole – Luke, Richard Gray, Adrian Hastings and Godwin Tasie (eds), *Christianity in Independent Africa* (Indiana University Press 1978) 606.

¹⁴⁸Ayandele (n148) 612.

¹⁴⁹Lamin Sanneh, *Western African Christianity: The Religious Impact* (Orbis Books 1983) 87.

Africans are more Biblical than the totalitarian “form of European Christianity.”¹⁵⁰ For Sanneh, the good news of redemption and salvation is but a crystallization of salutary values found in African Traditional Religion. For Sanneh, then, the acculturative process indicates the broadness of God’s historic presence, while the inculturative process specifies the redemptive message peculiar to Christianity—a message of liberation from all forces that would truncate health and well-being. If ATR is pluralistic, can we say the religious people who oppose Atheists are mainly not followers of ATR?

1.9.2.6 African Humanism, Socialism, Negritude and Pan Africanism

Arguments advanced are African humanism by Kenneth Kaunda, African Socialism by Julius Nyerere, Negritude ideology by Leopold Senghor and Pan Africanism by Kwame Nkrumah.

Kaunda exemplifies that African heads of states are involved in the struggle to define the meaning of Christianity in Africa. Here, Kaunda addresses the third assembly of AACC. He notes the political unrest of the period of ‘independence’ and espouses a position not unlike that of Luther’s notion of the ‘Two Kingdoms’ ‘the church is the custodian of the moral supremacy in the states while government is the custodian of justice.’ He also discusses Africanization, *quazambianization*, which, he explains, is not a racist praxis, but one that may make a contribution to world culture. Kaunda discusses world culture in terms of his definition of humanism—an orientation based on both Gandhi’s definition of *Satyagraha*, and Christian and socialist principles.¹⁵¹

¹⁵⁰Lamin Sanneh, ‘Reciprocal Influences: African Traditional Religions and Christianity’ in Deane William Fern (ed), *Third World Liberation Theologies: A reader* (Orbis Books 1986) 233.

¹⁵¹Kenneth Kaunda, ‘The Challenge of our stewardship in Africa’ in *the Struggle Continues: Lusaka 1974* (All Africa Conference of Churches 1975) 65-67.

Here Kaunda explores his humanist philosophy, arguing for a single human entity called human race. He cites South Africa as a context where humanism is not practiced. ‘*Humanism*’ writes Kaunda, ‘Harnesses the powers of historical destiny, whilst apartheid is fighting against history have been swept aside.’ Kaunda asserts that humanism is a religious orientation that is Catholic as it rings true to the best insights to the world’s religions. For Kaunda, religion is edifying to the extent that it proclaims the dignity of human kind. He claims that respect of human rights is mandated by God, whose image human beings bear.¹⁵²

African-ness, argues Kaunda, is a spirituality deeply rooted in the African memory of “birth and death, harvest and famine, ancestors and unborn.”¹⁵³ It is the cultivation of that memory, asserts Kaunda that will produce African theology.¹⁵⁴ As president of Zambia, he favors religious tolerance, which he defines in terms of Zambian humanism.¹⁵⁵ Kaunda defines his African humanism— which is essential to his commitment to non-violence and revelatory of his Christian values. Yet Kaunda, having given himself over the hard social analysis regarding the liberation struggles of Zimbabwe, felt compelled to support the armed struggle there. Revealing a sobriety not unlike that of the new guard, Kaunda writes:

Passive resistance may strengthen an oppressive authority if it diverts the people’s righteous anger into easily controlled channels. On the other hand, directed armed struggle, besides costing many lives, may set back the cause a long way by giving government the excuse to rid itself to its most dangerous opponents. According to Ecclesiastes, to everything there is a season, and so is resistance. I believe there is a time to use the method of passive resistance and a time to use those of armed struggle. And...discussion can only move forward if my critics allow that this is at least a tenable position which should be subjected to keen analysis rather than head shaking.¹⁵⁶

¹⁵²Kenneth Kaunda, ‘Spirituality and World Community’ in Aylward Shorter (ed), *African Christian Spirituality* (Orbis Books 1978)117-125.

¹⁵³Kenneth Kaunda, ‘The Religious Phenomena of African-ness’ in Aylward Shorter (ed), *African Christian Spirituality* (Orbis Books 1978)45.

¹⁵⁴Ibid. 45-50.

¹⁵⁵Kaunda (n155) 45-50.

¹⁵⁶Kenneth Kaunda, *Kaunda on Violence* in Colin Morris (ed) (Sphere Books Limited 1982) 28-29.

Kaunda, a celebrated symbol of reconciliation, argues that the harshness of African realities may make it necessary to resort to violence.

For Nyerere, Christianity, in so far as it reveals the word of God, is infallible; but socialism, created essentially by human beings, is fallible. Socialists, then he argues, should be open to other views, eschewing self-righteous dogmatism in favor of genuine dialogue. Having explored what may be called the distinction between faith and religion, Nyerere offers his definition of socialism: “the basic purpose is the well-being of the people, and the basic assumption is an acceptance of human equality.”¹⁵⁷

For Senghor, African socialism is an eclectic blend of communalism, French socialism, Marxist-Leninism, and the theosophy of Pierre Teilhard de Chardin. According to Senghor:

In contrast to the classic European, the Negro African does not draw a line between himself and the object; he does not hold it at a distance, nor does he merely look at it and analyze it. After holding it at a distant [sic], after scanning it without analyzing it, he takes it vibrant in his hands, careful not to kill or fix it. He touches it, feels it, and smells it. The Negro African is like one of those third day worms, a pure field of sensation.¹⁵⁸

Here, Senghor defines *negritude* as a universal humanism that eschews racialism, though it represents the subjectivity of the African personality. *Negritude*, for Senghor, is the ethos of Africa and diaspora—what he calls “a certain active presence in the world, or better, the universe.”¹⁵⁹ This humanism moreover is derived from Africans’ essential concern to promote forces that expand fullness of life.

Neuberger examines the pan-African ideology of Nkrumah. Although Nkrumah’s dream of a unified region of Africa exists in thought only, the theory itself would prevent the spread of neo-

¹⁵⁷Julius Nyerere, ‘The Varied Parts of Socialism’ *Chap. 5 in Ujamaa: essays on Socialism* (Oxford University Press 1981) 78.

¹⁵⁸Leopold Senghor S, *On African Socialism*. Translated and with an Introduction by Mecer Cook (Fredrick A Praeger 1964) 72.

¹⁵⁹Leopold Senghor S, ‘Negritude: A Humanism of the Twentieth Century’ in Wilfred Cartey and Martin Kilson (eds), *the Africa Reader: Independent Africa* (Vintage Books 1970) 184.

colonialism. Neuberger's analysis deepens insight into the ideology of Church – State relationship whose pan-Africanism is similar to Nkrumah's.¹⁶⁰

Considered to be an important paradigm of African philosophy — *consiencism* is also relevant to Church – State relationship because it explores the issue of Africanization, i.e., inculturation and acculturation. Unlike class struggle in Africa, however, *consiencism* succumbs to the myth of the African socialism, which is related to *negritude*. Specifically, *consiencism* presents a theoretical base for the notion of the African personality. For Nkrumah, African personality would “enable African society to digest the western...and the euro-Christian elements in Africa and develop them in such a way that they fit into the African personality.”¹⁶¹ According to Nkrumah, the African personality “is itself defined by the cluster of humanist principles which underlie the Traditional African Society.”¹⁶² Let's examine the global scene.

1.9.3 The Church - State Relationship Globally

1.9.3.1 During The Antiquity

The Church - State relationship globally can be traced together with that of human rights. These two human experiences stretch back to Antiquity. During antiquity, it was necessary to clearly establish the relation between a particular single individual and the political society within which one lived to ensure the individual was protected against the arbitrary or oppressive conduct of those exercising state power. In antiquity, however, as Lawrence Zimba points out in his book, *Zambia Bill of Rights*, human rights which were called ‘natural rights of man’ were protected

¹⁶⁰Benjamin Neuberger, ‘A Comparative Analysis of Pan – Africanism’ in Richard A Davis (ed), *African Philosophy: An Introduction* (University Press of America 1984)245-263.

¹⁶¹Kwame Nkrumah, *Consciencism: Philosophy and Ideology for Decolonization* (Monthly Review Press 1970)79.

¹⁶²Ibid.

only to the extent that rules felt morally prohibited from infringing them. Indeed, only much later did human rights become legally enforceable individual rights of the citizen.¹⁶³

1.9.3.2 During the Ancient Greece Period

Ancient Greece is ordinarily held to be the birth place of the idea of human rights and Christian religion. Greek philosophers argued that in any society there were two kinds of law; the law of God and the law of man. Man's law, it was argued, should not contradict the law of God or the law of nature. Temporal rulers were not allowed to engage in action which would take away basic rights of man in contravention of the law of God. In the early Greek states, the citizens enjoyed political and civil freedoms such as equal respect for all, equality before the law and freedom of speech. In Greek thought, these were part of the higher law which temporal rulers had to ensure was reflected in secular law.¹⁶⁴

1.9.3.3 During the Ancient Roman Period

During the ancient Roman period, however, there was a change in emphasis to the effect that the higher law from which human rights flowed was derivable from the law of nature and was not necessarily God – ordained. During the ancient Roman period, the idea began to take root that there were basic rights of man which political rulers could not divest man since those rights were derivable from the law of nature or constituted part of universal 'human reason.' This shift in emphasis, the secularization in the conception of human rights made during the ancient Roman times was extremely significant in the development of human rights as we know them today. However, although the ancient Romans made this significant contribution, their conception and practice of human rights was much circumscribed in that human rights applied only to free men;

¹⁶³Lawrence Zimba, *Zambian Bill of Rights: An Historical and Comparative Study of Human Rights in Commonwealth Africa* (East Africa Publishing House 1984)1.

¹⁶⁴*Ibid.*3

not women, slaves and foreigners – in a very similar manner to the way the rights were circumscribed in ancient Greece.¹⁶⁵

1.9.3.4 During the Ancient Middle Ages

Further progress in the conception of human rights was made by Christian philosophers in the Middle Ages who argued that man possessed innate human dignity because he was God's creation. Laws by earthly rules could not negate human dignity.¹⁶⁶

1.9.3.5 During the Feudal Period (17th and 18th Centuries)

The language of human rights was used in the revolutions against feudalism in the 17th and 18th centuries. The rising middle classes argued through their philosophers such as John Locke that, in the formation of a Government, men entered into a 'social contract' by which some individual rights were surrendered for the establishment of the community. However, some basic rights particularly those of life; liberty and property were retained by the individual. Any Government which did not respect such basic rights, it was argued, could be resisted since such a Government had failed to fulfill part of its 'social contract.'¹⁶⁷

To Montesquieu, a French philosopher, the most inhibition to the complete appropriation of mankind liberty by the citizen was the uncontrolled power exercised by Government. Hence Montesquieu popularized the doctrine of 'separation of powers.' Political power, theorized Montesquieu, had to be fragmented into the three (3) pillars of State, these are; the executive, the legislature and the judiciary. Each of the arms of Government had its distinct function and was not supposed to negatively interfere with the work of its sister arms of Government. The three

¹⁶⁵Zimba (n165) 4-5

¹⁶⁶Zimba (n165) 6-7; Mbondenyi (n5)24

¹⁶⁷Makau Mutua, "The Banjul Charter: The Case for an African Cultural Fingerprint" in Abdullahi An Na'im (ed), *Cultural Transformation and Human Rights in Africa* (Zed Books Ltd 2008) 69; Migai Akech, *Administrative Law* (Strathmore University Press 2016)6-7.

arms should also act as checks and balances *inter se* if separation of powers was achieved, the resultant Government would be limited Government which would not threaten liberty, a basic human right. Paul Martin, in *Human Rights and Religion: New thinking* avers that, “since the enlightenment, secularism and related theories of church – state relations such as *laicite* in France have been used to exclude religions from the public sphere.”¹⁶⁸

Because to the rising middle classes of England, America and France the feudal regimes neither lived up to the ‘social contract’ nor abided by the doctrine of separation of powers, such Governments were challenged and overthrown. This was the genesis of the Bill of Rights and the declaration of independence.¹⁶⁹ Kenya adopted same rights as a colony. Clearly, the above Revolutions, all of them major landmarks in world history, were in one way or the other precipitated by abuses of human rights. All of which cured by the UN in 1992 as noted below:

Persons belonging to national or ethnic, religious and linguistic minorities have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.¹⁷⁰

Contemporary Human rights have a relatively recent history. States and Governments, whose primary purpose is that of protecting individuals and enabling them to realize themselves, turned against them. After Hitler and Mussolini were defeated in the Second World War, the U.S. and European governments systematically introduced the notion of a catalogue of the individuals’

¹⁶⁸Zimba (n165) 9; Akech (n169) 8; J Paul Martin, ‘Human rights and Religion: New Thinking’ in *Human rights Quarterly: A Comparative and International Journal of the Social Sciences, Humanities, and Law* vol. 34(3) (John Hopkins University Press, Maryland August 2012) 896.

¹⁶⁹Chris Maina Peter, *Human Rights in Africa: A Comparative Study of the African Human and People’s Rights Charter and the New Tanzania Bill of Rights* (Greenwood Press 1990)54 ; English Bill of Rights of 1689, the American Declaration of Independence of 1770 and the French Declaration of the Rights of man and of the Citizen, 1789.

¹⁷⁰Zimba (n165) 11; Mbondenyi (n5) 36-37; Bas de Gaay Fortman, ‘Minority Rights: A major Misconception?’ in *Human rights Quarterly: A Comparative and International Journal of the Social Sciences, Humanities, and Law* vol. 33(2) (John Hopkins University Press 2011) 271. These was cured when in 1992, the United Nations adopted the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities.

and groups' inalienable rights and freedoms which states and governments were forbidden to derogate from. Posner states as follows:

A second important feature of international human rights law is its origin in the mid-twentieth century, a time when the state was becoming more powerful and increasingly ubiquitous. Human rights focuses on the relationship between the government and the individual (and occasionally groups), both to protect the individual from the power of the state and to identify the positive responsibility of the state to concern itself with socioeconomic welfare of its population.¹⁷¹

Thus one of the Post-Second World War concerns of the League of Nations and later of the United Nations was to come up with a list of basic rights and freedoms of the individual. These rights which were alluded to in the UN Charter itself were enshrined and confirmed in what is called the UDHR, 1948. The fundamental rights and freedoms of the countries which became decolonized after WWII were modeled on the UDHR. Kenya is part of this tradition.¹⁷² The UDHR itself was based on general principles and fundamental rights articulated and popularized during the 18th century when the rising middle classes in Europe overthrew feudal regimes. The middle classes had argued that there were certain basic, fundamental rights relating to liberty and equality of all persons which the feudal state could not legitimately deny its citizens. It is on this count that Antonio argues that “the Western Liberal Tradition has been the dominant influence shaping the UDHR and has governed its interpretation and application.”¹⁷³ This same Western Liberal Tradition impacts religion.

The study therefore examines a way out that would be appropriate for introducing inter-faith relations, if found appropriate and acceptable, as a mechanism for the resolution of religious tension in Kenya. This has not been done before in the Kenyan legal and institutional

¹⁷¹Zimba (n165) 11; Mbondenyei (n5) 19-20; Eric A. Posner, ‘The Twilight of Human Rights Law’ in *Human rights Quarterly: A Comparative and International Journal of the Social Sciences, Humanities and Law* Vol 37(4)(John Hopkins University Press 2015)1105-1109.

¹⁷²Zimba (n165) 12-15; Mbondenyei (n5) 38-39.

¹⁷³Antonio Virgilio Faria De Oliveira –E- Costa, *Universality and Cultural Relativity in the African Charter of Human and People’s Rights: Tension Between Individual and Group Rights* (PhD Dissertation, Boston College, the Graduate School of Arts and Sciences, Department of Theology, May 2005)1.Unpublished.

mechanisms. The subject of Church and State relations discussed by a number of writers; indicates a lack of literature addressing the challenge of Atheism/Atheists as social reality in Kenya. Most literature examine challenges of the Slums; Islamic resurgence; Youth and young adults; Ethnicity; tribalism, nepotism and ethnic cleansing; the Pastoralism; the Family; Globalization; and Inter –Cultural Living. In relation to the Kenyan context it can be concluded that in all these challenges to the Church, the rise of Atheism as a religious challenge seems absent in the literature.

However Bishop Henry Okullu, Jesse Mugambi, John Samuel Mbiti and Pope John Paul (II) mentioned and referred the existence of Atheism, Secularism manifestations in bypassing without interrogating the subject critically. Mugambi in particular denied it as not an African but a Western/European challenge. Bishop Okullu noted of a small group of people existing among the University intellectuals but leaving it at that. Although Mbiti and Pope John Paul (II) recognized the influence and threat of Atheists and secularists to African cultures, they also did not discuss it further. All other Kenyan scholarly writing avoided discussing this subject among the themes examined. It is this gap this study fills by examining The Place of Atheists In Kenya (AIK) Society from a Legal and Christian perspectives, through examining Kenya’s social context, Church presence in Kenya, and the inter-play of democracy, human rights and the church in Kenya among the themes reviewed.

1.10 Limitations

There are several limitations to the subject of study. First, the nature of the subject itself in our Kenyan context is rare. Second, the challenge of the nature of study and availability of informants; they are not many. Finally, the study is so sensitive the informants may not be ready to come out for research; they may simply be not available. Field research to test the findings of

the key informants will be limiting due to time constraints and unavailability of financial resources. The researcher hopes to overcome these challenges through his regular associations with some AIK society leaders and members.

1.11 Chapter Breakdown

The study consists of five chapters. Chapter one has given an overview of the study, its objectives and justification. Chapter two provides the historical background and context of Church – State relationship in Kenya. It basically responds to the question as to how has the legal system addressed religious diversity and plurality historically. Chapter three examines the global, regional and Kenyan legal and institutional framework governing the place of Atheists in Kenya. Chapter four focuses on the Atheists in Kenya Society (AIK) as a case for investigation. It responds to the question as to how has the legal system navigated the existence of multiple religious views in Kenya. The main purpose is to draw an image of the procedural aspects of registration and the extent to which these meets the human rights and natural justice principles entrenched in the Kenyan Constitution. The last chapter attempts to draw lessons learnt by identifying study findings and recommendations for legal and institutional programming.

CHAPTER TWO:

KENYA BACKGROUND AND CONTEXT

2.1 Introduction

The last chapter introduced the place of Atheists in the Kenyan legal system. The chapter introduced the study and specifically the chapter noted that the Kenyan 2010 Constitution do not explicitly recognize Atheists as a group. This chapter, attempts to locate the place of Atheists from a historical perspective. The chapter notes the Constitution embodies an enduring tension between the desire to respect religious freedom on the one hand and to a void institutionalization of any particular religion. This chapter situates the church – state relationship within a historical background and context. The chapter reviews key events in Kenya’s political history in a bid to examine AIK Society rise in Kenya. This chapter is divided into nine main parts. The first part describes the pre-colonial period, it shows the advent of Christian missions into Africa; the takeover of Africa by the colonial powers and the coming of European traders and explorers. The second part analyzes the colonial period it demonstrates the setting up of the East Africa protectorate; the building of the Uganda railway; massive church growth; the spread of Civilization, Christianity and Commerce to Kenya’s interior; Kenya became a colony; church became autonomous; first world war and second world war arose as well. The third part is the post –colonial period, it reveals the first years of independence and a decade of decolonization. The fourth part is the pre-2010; this part shows the decade of bilateral Aid; the NGOs decade; the collapse of Soviet Union and a decade of partnership. The fifth part is the Post- 2010, this illustrates the era of constitutional dispensation. The sixth part is history of church state relations in Kenya; this part traces the relations of the church to the state since colonial, Kenyatta and Moi

regimes. The seventh part is the church state relations in Sub- Saharan Africa and the last part is the church state relation globally; this part indicates relations in France, Britain and America. The chapter concludes with some reflection on the problems examined in the chapter. The report given below is based on the author's archival research. This archival research indicates that the 3 C's of Dr. Livingstone; Civilization, Commerce and Christianity became the foundation on which Atheism germinated in the continent of Africa and now specifically in Kenya. The background to examination of the growth and the future of these three forces is what this section of the project will attempt to trace from its origin to the present subject under discussion. Atheism is not then new as such in the Continent of Africa or in Kenya *per se* rather, Kenyan Africanisms and their religiosity informs their resistance to any ideology that propagates none belief. Belief is assumed and not a subject of discussion. The data collected was analyzed and it will address the research question; *how has the legal system addressed religious diversity and plurality historically?*

2.2 Church and State during Pre – Colonial Period

There are three main cardinal events during this period. First, there was the Advent of the protestant missions on the Kenyan Coast in 1844-1880. The mission agencies were preparatory agents for the European powers later claim for 'spheres of influence' during the partition of Africa. Further they opened avenues for European explorers and traders. The returnee liberated slaves at the coast of Kenya were from India, "learning 'three Rs' and trades in the institution and government farm at Pachora. Most of them were eventually baptized."¹ Second, there was the takeover of Africa by the colonial powers in 1878 -1900. The critical period was 1884-85 in this period, the Berlin Conference on colonial question was fulfilled; the mission preparatory agenda where Christianity, Civilization and Commerce were realized. It was impossible to

¹Bengt Sundkler and Christopher Steed, *A History of the Church in Africa* (Cambridge University Press 2000)552

separate the three.² The last incidence was the coming of European Traders and Explorers to Africa in 1878-1914. Apart from missions, European traders and explorers also laid the foundation for colonization. Their reports about Africa ‘gave mission societies in Europe some idea of the great need of interior Africa.’ Unfortunately these reports were read by trading companies and European politicians. The scramble for Africa was a scramble for wealth and fame for European powers. This ushered in the colonial period in our history.³

2.3 Church and State during Colonial Period

Several historical events characterize this period: first, the British set up the East Africa protectorate in 1895. The Kenya’s British monarch takeover of IBEA Company realizing missions, explorers and traders vision of the gospel, fame and wealth.⁴ Second, the Building of the Uganda Railway from Mombasa to Nairobi (1899) and (Kisumu) Lake Victoria in 1895-1901. This activity was very important in opening up interior of Kenya to mission societies, traders and explorers which became the backbone of Christianity, Civilization and Commerce, the 3Cs of Dr David Livingstone.⁵ Third, there emerged a period of rapid church growth in Africa – including Kenya in 1878-1914. First the buying of slaves by missionaries to be freed; they were hence accused of encouraging indirectly slave trade. Second, the uprooted residents from many tribes became black Europeans instead of Christian Africans; they despised old ways because they are Christians and civilized.⁶ This may be seen as the germination of Atheism in Africa. Fourth, there was the Spread of Civilization (education), Christianity and Commerce to the Interior of Kenya in 1900-1914. Livingstone considered the African peoples to be in pitiable

² Jesse N K Mugambi, *From Liberation to Reconstruction: African Christian Theology after the Cold War* (East African Educational Publishers 1995)205.

³ Jonathan Hildebrandt, *History of the Church in Africa: A Survey* (Africa Christian Press 1996)136.

⁴ John Baur, *2000 Years of Christianity in Africa: An African History 62 -1992* (Paulines Publication Africa 1994)254.

⁵Ibid. 254-255.

⁶Hildebrandt (n3)181-191

condition not only because of the threat of being captured as slaves, but also because of their poverty. He therefore appealed to the public at home to extend their concerns to the problems he had witnessed. The appeal was not heard by missionaries only. Hence the concern to end slave trade was followed up by Christians and also by other groups who were interested in trade and exploration. This led to establishment of missions and trading facilities along the railway line which were not controlled by missionaries.⁷ Fifth, Kenya became a Colony in 1919. There was the expansion of Christianity to the interior due to the railway line and witness, Commerce due to occupation of the white highlands by the settlers and Civilization due to introduction of education by the missions and the government.⁸ Sixth, there was the development of Autonomous church in East Africa in 1914-1960. The WWI and WWII brought about the independence of the Church as the war interrupted foreign missionary activities leaving the church in the able hands of the locals which led to her phenomenal growth.⁹ Seventh, there came The First World War (WWI) in 1914-1918. There was the participation of Africans in the war leading to attainment of experience in modern military, a gate way to agitation for independence at a later time. A great number of missionaries were recalled leaving the church to be managed by converted Africans. This was the foundation for independent church later.¹⁰ Eighth, After WWI Germany East Africa was given to Great Britain as a mandated territory in 1918-1939. Uganda, Kenya and Tanzania were under British Colonial Rule. The war brought much needed experience to Africans that were recruited to defend the colonial powers; this war was the gate way to independence later in the 60s. There was growing agitation to independence

⁷Baur (n4) 254-260

⁸Bengt & Steed (n1) 556-561

⁹Hildebrandt (n3) 226

¹⁰Hildebrandt (n3) 226-227

by the church and the African states in all spheres including schools.¹¹ Ninth, then arose The Second World War (WWII) in 1939-1945. Whereas the war gave Africans military experience, it also ushered in agitation for independence which came later in 1950s and 60s. Indigenous clergy took over church leadership, this was significant in increasing voices that agitated for independence and those that will expand the missionary work to the interior of the country. There was increased translation of the Bible into vernacular languages.¹² Lastly, in 1945-1960, most large denominations in East Africa became fully autonomous. During this period churches participated in nation building through building of schools, hospitals and polytechnics for the emerging African population; still the realization of the 3 Cs of Livingstone.¹³ This ushered in the post –colonial period which comes next.

2.4 Church and State during Post-Colonial Period

Two main historical events characterize this period: First, 1960-1975, the first years of political independence; was a time of East Africa Church rise and development. During this period, church opposed the ‘oathing’ administered by the ‘MAUMAU’ and also agitated for inculturation of the gospel into vernacular languages. There was an increased evangelization and church growth.¹⁴ Next was the decolonization decade in 1960 -1970. In this era, there was negotiated constitutional settlements with former colonies; a negative economic impact; maintenance and sustenance of preferential trade and cultural agreements, discouraging African countries from opting out of the respective club: among these linguistic and colonial clubs include British (Anglophone); French (Francophone); Portuguese (Lusophone) and Arab

¹¹Hildebrandt (n3) 227-236

¹²Hildebrandt (n3) 236-238

¹³Hildebrandt (n3) 238-240

¹⁴Hildebrandt (n3) 242-246

(Arabophone). Decolonization would not restore dignity of Africans unless the structures of dependence were dismantled and replaced by more egalitarian ones.¹⁵

2.5 Church and State during Pre -2010 Period

There are four main historical events during this period that demand examination. First, was the decade of Bilateral Aid in 1970-1980. There was Independence euphoria disillusionment; militant intellectuals vigorous support for liberation of South Africa and Zimbabwe. Energy crisis as a result of Arab cartels of petroleum products affected African economies. Demand for better services and standard of living by citizenry. Currency devaluations due to drop in commodity prices and buying policies of respective transnational corporations. Others include African rise in IMF and World Bank indebtedness; tropically prolonged droughts; equatorially dwindling forests owing to lumbering and human settlement.¹⁶ Second, the NGO decade in 1980-1990 and the emergence of non –governmental organizations as Africa’s direct aid –dispensers, a direct consequence of the investors failure to recover their investments through bilateral and multilateral agreements guaranteed by African governments. The NGOs became direct agents to dispense and monitor the aid provided by governments, corporations, churches and philanthropic (altruistic) individuals in Europe and North Africa.¹⁷ Third was the 1989 Soviet Union Collapse. This resulted in Political upheavals where African continent entered the new world order as a region receding into ethnic fragmentation and economic disintegration. Christian churches found themselves unable to adjust themselves to the new world order. In Africa, they were used to criticizing communism as a godless ideology, but with the demise of Soviet Union, there was no longer scapegoat. Communism used to be blamed for most of the violence in Africa, but the new world order has brought more violence than the continent has ever experienced. African

¹⁵Mugambi (n2) 212-214

¹⁶Mugambi (n2) 214-216

¹⁷Mugambi (n2) 216-218

churches, foreign missionary agencies and Para-church organizations have been caught up in this mess, bringing about a crisis of Christian witness leading to the tension on religion and secularism we have till today.¹⁸ Lastly, there came Partnership decade in 1990-2000. As 1980s came to an end ushering 1990s, most NGOs began to critically evaluate their work and question their assumptions. They found that their methods had not yielded success. Where did they go wrong? They evaluated their work; consensus emerged that NGO personnel could cooperate most efficiently and effectively in Africa in partnership, rather than competition, with African leaders and experts. Thus there emerged such themes as ‘Partnership in Development’ ‘Partnership in Mission’ ‘Partnership for Progress.’ This period historically brought in multiparty democracy ushering in the 21st millennium era.¹⁹

2.6 Church and State during Post – 2010 Period

The Era of the New Constitutional Dispensation in 2000-2018. There was the realization of democracies through changes in regimes and new constitutional dispensations and its implementation to date. The realization of the supreme power vested in the people and delegated to the presidency and other constitutional bodies created by the new constitution. Power and resources devolved to counties and creation of new political and administrative structures to enhance service delivery and representation. There is the question of indebtedness, population growth in terms of environmental problems and the challenge of brain drain, capital flight and their relation to sustainable development.²⁰

¹⁸Mugambi (n2) 206

¹⁹Mugambi (n2) 218-221

²⁰Eric Masinde Aseka, *Africa in the 21st Century* (Zapf Chancery 1996)55-59.

2.7 The History of Church – State Relations

2.7.1 During the Colonial Era

During the colonial and long before independence; both the Anglican and the Presbyterian Churches had developed a close and semi-established relationship with the State. Prominent clergymen, Arthur of CSM in 1920s, and Beecher of CMS in 1940s were nominated to represent African legislative and executive interests.²¹ The churches had been co-opted into the policy-making processes of the State. The onset of the ‘Mau Mau’ emergency in 1952, with then ‘Mau Mau’ fighters’ avowedly anti-Christian ideology and the prominent role played by Kikuyu Christians in resisting the revolt, ensured that the mission societies and their successor African-controlled churches were identified with the colonial order.²² This was particularly true of the CMS. In his *Social history and Christian mission*, Max Warren, General Secretary of CMS pointed out that:

Readers of Sir Michael Blundell’s autobiography – *So Rough a Wind* – will find opposite page 192 a photograph taken at the new Legislative Council in Nairobi Kenya, in 1951. In the foreground is Michael Blundell standing at the Despatch Box. In the background sits the Speaker under the Royal Arms. On the Speaker’s right is the Governor –General in full uniform. On the Speaker’s left is the Bishop of Mombasa in convocation robes. In those days the boundaries of Mombasa coincided with the political territory of Kenya. The photograph is good documentary evidence of the reality of the Anglican quasi-establishment.²³

Adrian Hastings notes the Bishop of Mombasa’s residence in Nairobi as located, ‘immediately outside the gates of Government House.’²⁴ This affiliation with the colonial regime and the subsequent lack of nationalist approval meant that the main denomination, including the Roman

²¹David Throup, ‘The Politics of Church – State Conflict in Kenya 1978 -1990’ in Holger Bernt Hansen & Michael Twaddle (eds), *Religion & Politics in East Africa: The Period Since Independence* (EAEP 1995)144; quoted in C G Rosberg and J Nottingham, *The Myth of ‘Mau Mau’ : Nationalism in Kenya* (London, 1966)110-112, 143 and 222-223; and E.S. Atieno Odhiambo, ‘ A portrait of the Missionaries in Kenya before 1939’ *Kenya historical Review* 1 (1973)1-14; Anne King, J W Arthur and African interests’, and B.E. Kipkorir, (ed), *Biographical essays on Imperialism and collaboration in colonial Kenya* (1980)87-159.

²²Ibid; as quoted in J M Lonsdale, ‘Mau Maus of the mind: Making Mau Mau and remaking Kenya’, *Journal of African History* 31 (1990), pp. 393-421.

²³Throup (n21) 144; as quoted in A. Hastings, *A History of African Christianity, 1950-1975* (London, 1953)20

²⁴Ibid. 44; as quoted in A. Hastings, *A History of African Christianity*, p.20.

Catholics, were unwilling to become embroiled with the post-independence State, once the nationalists were in leadership. In contrast, ecumenical NCCCK influences were much loud during winding years of colonial rule. In Lonsdale’s words, “the NCCCK was free to be ‘alongside’ the new African politics... in a way in which the local churches would have found difficult even if their leaders had thought it desirable.”²⁵

2.7.2 During Kenyatta Era

Throughout the Kenyatta era, Church – State relationship in Kenya remained amicable. By independence in 1963, the NCCCK developed a co-operative relationship with the national leadership. However, there were limitations to such relationship. Mboya, in his book of collected speeches, *Freedom and after*, for example, ‘in the same breath complained that the churches were slow to take up African grievance under colonialism, congratulated them when they did, and warned the church after independence to ‘preoccupy itself entirely with religious matters.’²⁶ Despite their hesitancy to become embroiled in politics, in 1969 the churches had spoken out against the ‘oathing’ campaign among the Kikuyu, which began following the assassination of Tom Mboya. While the secular press remained silent, unwilling to antagonize the government, the September 1969 issue of the NCCCK –sponsored *Target newspaper*, Henry Okullu editorial, headlined ‘killing our unity’, juxtaposed with a photograph of the administration of the sacrament, under the caption ‘Taking the oath.’²⁷

This protest had been endorsed by all the churches, who issued statements condemning ‘oathing,’ which soon ceased when action was taken against forced administration. As Kevin

²⁵Throup (n21) 44; as quoted in J M Lonsdale, S Booth –Clibborn and A. Hake, ‘The Emerging Pattern of Church and State co-operation in Kenya’ in E. Fashole –Luke, R. Gray, A. Hastings and G. Tasie, eds. *Christianity in Africa* (1978)269-270.

²⁶Throup (n21) 145; as quoted in T. Mboya, *Freedom and after* (1963) 22-23, quoted in Lonsdale et al., ‘Emerging Patterns’, p. 270.

²⁷Throup (n21) 280-281

Ward pointed out, “the churches’ response to the ‘oathing’ crisis showed the peculiar strength of the conservative evangelical tradition in repudiating the secular power- as incompatible with God’s prior claims on Christian allegiance.”²⁸ No church leader, for example, spoke out the following month when the opposition KPU banned and leadership jailed without trial of the increasing Erastian influence of the state, Lonsdale, Booth –Clibborn and Hake warned that:

The indigenous Kenyan tradition of evangelical Revival, clear –sighted in crisis and prophetic in its defense of Christian autonomy when need arises, is, because of its very suspicion of hierarchy and organization, peculiarly ill-fitted to perceive, let alone guard against, such routine envelopment.²⁹

In 1972, Henry Okullu warned the churches of the danger of living in “time of Constantine ... who put the Church in his pocket by offering government protection.”³⁰ Henry Okullu had criticized the government on several occasions, castigating the pervasive materialist ethos and growing social inequality of Kenya’s ‘man eats man’ society. When AACC Sierra Leonian Rev Carr Burgess, outspoken secretary – general had earned Njonjo’s condemnation for criticizing Kenya’s lukewarm condemnation of racialism in South Africa. The government eventually banned Carr from re-entering the country when he attempted to organize a human rights conference, which Njonjo feared would be highly critical to Kenya.³¹ Less influential church bodies also aroused the Attorney- General’s (AG) suspicion, most notably Kenya’s small community of Jehovah’s Witnesses, who refused State allegiance.³² Church- State relations were in the main amicable. One reason for this was that CPK, PCEA and the Roman Catholics after independence was predominantly ethnic Kikuyu churchmen and their congregations in Central Province, whose lay members often held influential positions in the government. This is different during Moi times as shown below.

²⁸Throup (n21) 282

²⁹Throup (n21) 146; as quoted in Lonsdale et al., 284

³⁰Throup (n21); as quoted in *Henry Okullu, Church and Politics in East Africa* (Nairobi, 1974, PP.3-6 and 12-13

³¹Weekly Review, 3 October (1986) 19-20

³²Ibid. 19

2.7.3 During Moi Era

There were little visible changes at the primary period of Moi presidential regime. Njonjo continued to exert considerable influence within the government to the benefit of the church.³³ Mwai Kibaki, the new vice-president also stood with the church.³⁴ After the foiled coup (1982), by 1983, the major churches had lost their two most influential defenders.³⁵ By 1985, four church leaders had already been profiled as governments ardent critiques they included Bishops Okullu Henry, Muge Alexander Kipsang, Gitari of CPK and Njoya of PCEA.³⁶ Despite Archbishop Kuria's attempt to reaffirm the CPK's loyalty to the government, assuring President Moi that the Anglican denomination backed the single party state and that they would not act in opposition to the demands of the State or identify themselves with dissidents; however, church-state relations remained poor. The revitalized KANU did not know how to accommodate conservative evangelical churchmen. Provocative sermons by Njoya, Muge, and Okullu did little to improve the situation as they continued to castigate corruption and political harassment of the churches. On 5 October 1986, Njoya in a sermon heavily laden with comments on current political issues called for a debate among all Kenyans, including 'fugitives, dissidents and malcontents.' Even worse, the Presbyterian minister had criticized growing social inequalities and corruption, and had prayed for Odinga and Njonjo – the two arch-dissidents of Kenyan politics – and described the confrontation between the NCCK and KANU as one between the righteous and the unrighteous, with "the righteous wanting to maximize reason in economics, politics, and community, and the unrighteous wanting to maximize their own power and wealth

³³Weekly Review, 25 April (1980) pp. 4-8

³⁴Weekly Review, 17th June (1983) pp. 3-7

³⁵ Weekly Review, 4 May (1983) pp. 4-9

³⁶Weekly Review, 25 April (1980) p.16

unreasonably and by unreasonable means.”³⁷ President Moi responded in kind, denouncing ‘subversion in the church,’ when he welcomed a delegation from the African Gospel Church (AGC) of Kericho district to his Kabarnet home six days later, while Assistant minister for Foreign Affairs Ochola Mak’ Anyengo condemned Njoya for promoting the interests of Charles Njonjo. Many politicians doubted Njoya’s loyalty to the regime, despite his support of the one-party state, and identified the cleric with the *Mwakenya* dissidents. The churches had moved a long way from their politically quiescent in the first years after independence.³⁸ The queuing controversy came to life again in November 1986, when AG Muli finally introduced the Constitutional amendments in 1986. Opposition to it was spearheaded by B.M. Kariuki, Chair Law Society of Kenya (LSK), although the churches did point out those changes to the constitution should only have been introduced after a protracted public debate.³⁹

The NCKK also issued a memorandum, signed by Bishop Lawi Imathiu of the Methodist Church and NCKK General-Secretary John Kamau. Unlike some CPK bishops, Imathiu had adopted a conciliatory line during the queuing controversy, attempting to mediate between the NCKK and KANU. The NCKK memorandum warned that:

The constitution of Kenya was formulated after almost four years of careful considerations about the necessary elements that would guarantee and safeguard democracy and the interest of all Kenyans. It is important to recall that the political scenarios within which the constitution was formulated assumed a multi-party state. It therefore provides checks and balances which, if tempered with, will undermine the very basis of the stability they are meant to safeguard. If that was the case for a multi-party state, it is even more so for a one-party state.⁴⁰

Despite Imathiu’s caution, Mombasa KANU chairman Sharriff Nassir seized the opportunity to criticize the churches once again. Minister of Labour Peter Okondo also joined the fray. President Moi urged spiritual leaders to confine religion to churches and leave politics to

³⁷Weekly Review, 10 October (1986)3-4

³⁸Weekly Review, 17 October (1986) 3-5.

³⁹Weekly Review, 21 November (1986)4-9.

⁴⁰Weekly Review, 28 November (1986)6-7; Weekly Review, 5 December (1986)7-11.

politicians.⁴¹ The situation of the main protestant churches became even worse towards the end of 1986, Dr. Walter Osewe, an NCCCK staff got charged with allegations of dissident *Mwakenya* membership. Osewe confessed that he had been recruited to enlist prominent clergymen in the CPK, PCEA and Roman Catholic Churches. This seemed to encourage David Onyancha, the MP of West Mugirango, to call for a full security investigation into the affairs of NCCCK and its relations to *Mwakenya*.⁴² The 1988 general elections and the subsequent KANU election brought queuing again before political national conversations. Once more, Bishop Muge claimed of rigging in Nandi District affecting moderate Minister Kosgey Henry.

Catholic Bishop Ndingi Mwana a Nzeki pointed out that queues could be manipulated and intimidated even more easily than voters in a secret-ballot election. Minister for National Guidance and Political Affairs James Njiru, CPK Bishop David Gitari's old foe in Kirinyaga, however, informed the press immediately after the final round queuing was no longer an issue.⁴³

In 1982-83, the attempted coup and Njonjo downfall; it became prudent that the church leadership had the sole mandate to critique the government without risking jail. CPK, PCEA and Roman Catholic Churches filled the spaces emptied by the silencing of vocal political opposition. KANU's rise to pre-eminence has produced a more paranoid era in Kenyan politics. Church-State conflict was unheard of during Kenyatta's presidency but confrontation between the clergy and political leadership were much more regular during Moi presidency.⁴⁴ The Roman Catholic Church voice, Bishop Ndingi Mwana a N'zeki, of Nakuru diocese has been as willing to speak out political matters as any of the CPK or PCEA leaders, attracted much less criticism than Gitari, Muge, Okullu, Kuria, or Njoya. The Roman Catholic Church advantageously

⁴¹Weekly Review, 28 November (1986) 3

⁴²Weekly Review, 12 December (1986) 7-12.

⁴³Weekly Review, 22 April (1988) 4-8.

⁴⁴Weekly Review, 8 May (1987)4-12; 5 August (1988) 3-13; 4 October (1988) 3-13; 11 November (1988)4-8.

presented a unified front to secular leadership by realizing Episcopal Pastoral Letters signed by the entire Kenyan church leadership or delivering pastoral statements through the chair of KEC rather than through individual sermons as done by protestant clergy. As a result, these comments were regarded as the official view of the whole Catholic Church. Politicians who would have condemned individual Priests or bishops hesitated to attack the whole Catholic hierarchy.⁴⁵

The PCEA has been viewed with suspicion ever since the beginning of the Njonjo affair in 1983, when a prayer meeting at Ruringu in Kiambu district was denounced for appearing to support the disgraced minister. The situation had deteriorated after Njoya's 1984 sermon at Saint Andrew's Church in Nairobi. Although he had criticized the former Attorney General as a self-righteous individual, whose arrogant behavior in power had led to his downfall, many politicians perceived his remarks as an attack upon the processes leading to the ex-minister's disgrace and a manifestation of Kikuyu ethnic solidarity by the PCEA clergyman, and perhaps by his distinguished, Kikuyu-dominated congregation and the whole PCEA.⁴⁶ On the other side Archbishop Kuria sought to moderate the remarks of his more outspoken colleagues, especially Bishop Okullu and Bishop Muge whom many had expected to be close to President Moi and his associates, the primate had even less control over disputatious bishops than the PCEA elders had over Njoya. Muge, Okullu, and Gitari could only be disciplined by their own diocesan synods. The Archbishop himself, ever since the queuing controversy of October 1986, had attempted to rebuild relations with KANU, but his efforts had been undermined by criticism of the party and other bishops and church leaders.⁴⁷

Okullu was in the news once more at the end of 1989, when he drew a sharp comparison between 1989 Eastern Europe political happenings culminating in the overthrow of Ceausescu's

⁴⁵Weekly Review, 26 February (1988) 30-31.

⁴⁶Weekly Review, 3 May (1985) 7-8; 6 March (1987) 5-6; and 27 March (1987) 5-6.

⁴⁷Weekly Review, 12 January (1990) 8; 2 February (1990) 15; and 18 May (1990) 10.

dictatorship in Romania, and the prevalence of the dictatorship and one-party rule throughout Africa. The Bishop predicted that African dictators would experience a similar fate within the next five years. Timothy Njoya was even more outspoken in a New Year's Eve sermon to his former congregation at Saint Andrew's Church, asserted that recent events in Eastern Europe demonstrated that one-party states failed to meet the demands of their people and were inherently undemocratic, unpopular and corrupt tyrannies.⁴⁸ The sermon provided an opportunity for KANU leaders to defend one-party rule and to castigate plural-party democracy that it will drive the country into fragmentation and ethnic conflict. Elijah Mwangale, demanded Njoya be detained, while Mark Arap Too and Biwott denounced the PCEA cleric for making 'tribal and prejudicial statements under the cover of 'theology.' Reuben Chesire even demanded that Njoya should be defrocked.⁴⁹

PCEA Moderator George Wanjau attempted to adopt an air of quiet indifference to the uproar, although he did try to dissociate the church from Njoya, saying that the sermon had merely expressed the Clergyman's own opinion rather than the official attitude of PCEA, and former moderator John Gatu explained that, 'it would be a grievous mistake to assume that whatever a church minister says is the view of the entire congregation or even the church in question.' But both refused to condemn Njoya. Indeed, Wanjau acknowledged that the clergy had a duty to "continue speaking the truth and not to remain quiet while things went wrong."⁵⁰

Politicians in contrast, could not resist widening the scope of their attacks to denounce other unruly clerics as well as Njoya. Bishops David Gitari, Alexander Muge, and Henry Okullu had been particularly persistent critics of the ruling party, castigating the failings of the political establishment. The NCKK also posed an easy target under its new chairman, Okullu. Aringo, for

⁴⁸Weekly Review, 5 January (1990) 5-6; and 12 January (1990) 3-9.

⁴⁹Weekly Review, 12 January (1990) 3-5.

⁵⁰Ibid. 5

one, denounced Bishop Okullu and declared that the NCKK was riddled with ‘anti-government agitators’ and had been transformed into an opposition faction. He urged churches loyal to the regime to consider their membership, only to attract the withering condemnation of the new NCKK secretary-general Samuel Kobia, who dismissed his remarks as ‘utter nonsense.’⁵¹ The prospects of church-state reconciliation in 1990 appeared dim. Muge even suggested that the three main Protestant churches – the CPK, the PCEA and the Methodists should form a union to strengthen their influence, enabling them to speak out against social evils. This proposal was immediately condemned by Ochola Mak’Anyengo who claimed that Muge had advocated the union “for political reasons intending to form an opposition against KANU.”⁵²

In April 1990, Henry Okullu returned to his critique of one-party rule and called again for open dialogue on the country’s political and economic future. This could only be achieved by repealing section 2 (A) establishing single party political rule.⁵³ The Bishop was supported in opinion by Kenneth Matiba and Charles Rubia.⁵⁴ Two prominent clergymen however supported KANU; Bishops Muge and Methodist Lawi Imathiu, both defended single party leadership, arguing that a democratic system might divide Kenyans on ethnic lines. ‘Tribalism’ rather than ‘ideology’, they contended, might differentiate the upcoming parties. The two bishops did however, acknowledge that powerful constitutional checks and balances were required to limit the power of the president and KANU. At present MPs owed their allegiance more to the party than to their electors, and the 1986 constitutional reforms, forced through by KANU, had denied many Kenyans the right to choose their rulers through democratic elections.⁵⁵

⁵¹ Ibid.

⁵² Ibid. 6; Weekly Review, 6 April (1990)17-18.

⁵³ Weekly Review, 4 May (1990) 6-9. Referring to 1982 constitutional amendment establishing a de jure one-party state was repealed. The bishop also proposed that future presidents should be limited to two five- year terms

⁵⁴ Weekly Review, 11 May (1990) 6-12; and 18 May (1990) 21.

⁵⁵ Ibid.

2.8 The History of Church – State Relations in Sub- Saharan Africa

There are three typologies of relations between the state and mainstream religious organisations in Africa post-independence period: Haynes lists as follows:

The first is the apparent *severance of good relations between church and state*, for example in the Marxist – Leninist countries of Ethiopia, Angola and Mozambique; the second is a situation of *religious pluralism*, as in South Africa, Ghana and Zambia; and finally, there are instances of *extremely close relations between Church and State*, for example between the main Islamic reformist body and the government in Sudan.⁵⁶

The point to note is that in each of the above apparently different situations the claimed ideology of the regime in power was relatively unimportant in comprehending the kind of the relationship between secular and religious institutions. What emerges is that religious leaders were often as concerned with their own personal positions as with the corporate status and prosperity of their religious organisations. This is not always the case. Haynes, in examining the ‘*hegemony, state and church in Africa*’ argues that, “in the process of democratization leaders of orthodox Christian churches – especially the Roman Catholic and Mainstream Protestant have been important participants.”⁵⁷

That participation however, has been hampered by what Haynes, calls ‘*clientelism, state and religious organizations.*’ He notes in this context three ways in which a network of reciprocation involving Church institutions in Sub- Sahara Africa:

First, religious leaders will normally.... Cooperate with state power for both pecuniary and spiritual advantage. Threats and rewards may be issued by the state’s representatives to religious personnel. The aim either way is to ensure compliance with state objectives of societal control. Second, churches have been greatly influenced by what Gifford refers to as the ‘Big Man model’ of politics (Gifford 1993:310). ... Third, some leaders of African religious organizations profit from their relationships with foreign non –governmental organizations (NGOs).⁵⁸

The types of the current African governments are predominantly the legacy of the colonial powers. Nevertheless the two main colonial powers in Africa, France and Britain, as Africa’s

⁵⁶ Jeff Haynes, *Religion and Politics in Africa* (East African Educational Publishers Ltd 1996)5.

⁵⁷Ibid. 6

⁵⁸ Haynes (n56) 10-11

well known colonial masters were democracies, while the institutions they created were little more than domination instruments. They grafted a network of Administration on to pre-existing traditional setup; control and protection were very closely inter-linked.⁵⁹

Colonial regime tried to impose belief tactically in their endeavor to achieve secular dominion. Nevertheless, church relations with common African and the colonial regime may be considered a straight forward relationship of dominion and independence. Africans maximized church belief as an avenue of adjusting the relation between them and colonial regime to their benefit in any appropriate way. Independent churches and African modes of Islam were used by leaders as their religious vehicles for themselves and their followers. They were used to examine the radical advancement of ideology and urbanization which the westerners came with.⁶⁰

Western religion, similarly, was used by the colonial regime to dominate African cultures, with both oppressive and delivering functions, “they were agents of both European superiority and political domination and the purveyors of modernization, especially education, which was quickly recognized by Africans as the key to advancement in colonial society.”⁶¹ We should regard church functions in secularism in current Africa as coming from the myriad changes occasioned by Western colonization.

The function of Western religion as an avenue of oppression during the colonial regime was not simply one of undifferentiated support of temporary secular power. Whether the colonial regime was foreigner controlled or not is important for comprehension of the relations between religious missionaries and colonial powers. If large numbers of foreigners were present (as in Kenya and South Africa), then a complex relation developed between them, religious missionaries and

⁵⁹C. Young, ‘The African Colonial State and its Political Legacy’ in D. Rothschild and N. Chazan (eds), *The Precarious Balance: State and Society in Africa* (Westview 1988)41.

⁶⁰Haynes (n56) 24; this functioned as statements of social, political and economic interaction as well as important foci of community aims and strategy.

⁶¹Haynes (n56) 24-25

colonial powers. Where substantive numbers of foreigners were absent (as in most of West and West – Central Africa and Uganda), religious missionaries and colonial powers tended to have mutually complementary relations.⁶²

Yet, because the different Christian denominations were in direct rivalry for followers, there was competition between them.⁶³ They at times announce ceasefire before their common target the Islamic resurgence. When Islamic resurgence appeared a threat to Christian hegemony, Christian denominations took steps through European civilization as a way to undermine its attraction. When Islamic resurgence by religious affiliation and culturally hegemonic, however, even the education attraction was usually inadequate, before communities and tradition unity, to attract more than very small numbers of people to convert.⁶⁴ Let's examine global church relations.

2.9 The History of Church – State Relations Globally

2.9.1 An Exploration of France

French constitution's preamble states that 'France is a secular and indivisible republic.' This secular ideal originated in the long struggle of French kings to escape the yoke of the Catholic Church.⁶⁵ On the eve of the revolution of 1789, Catholicism pervaded French society. The revolution however, caused the old regime to collapse and the constitutional monarchy that followed immediately made the political system secular. The legitimacy of the monarchy lost its religious foundation-from then on it was based on a contract struck between the king and the people.⁶⁶ Citizens now defined themselves as belonging to the nation as a community, and their

⁶²Haynes (n56) 25

⁶³A.C. Burns.*History of Nigeria* (George Allen &Unwin 1929)261

⁶⁴A. Adu Boahen, *African Perspectives on Colonialism* (James Currey 1987)49-54; I Lapidus, *A History of Islamic Societies* (Cambridge University Press 1988); S Sheikh –Abdi, *.Divine Madness: Mohammed Abdulle Hassan of Somalia, 1856-1920*(Zed Books 1993).

⁶⁵Daniele Hervieu – Leger, 'France' in Robert Wuthnow (ed), *The Encyclopedia of Politics and Religion* Vol.I. (Congressional Quarterly Inc 1998) 268.

⁶⁶Ibid.

religious affiliation could not be used to prevent them from participating in politics. The proclamation of the principle of religious freedom in *Article 10* was a decisive step in this political transformation.⁶⁷ Religious minorities were gradually granted all the rights associated with citizenship. The rights of Protestants for representation as well as their admission to all employment-were rapidly established. Jewish emancipation was effected in September 1791.⁶⁸ The constitution adopted in September 1791 guaranteed freedom of religion, but Catholicism in the society was supreme. The national assembly repeatedly voted down church demands that Catholicism be recognized as the state religion.⁶⁹ *The 1789 civil constitution of the clergy* obliged priests to swear an oath of loyalty to the new regime, splitting them between those who rallied around the new regime and those who increasingly fought it. French Catholicism divided into two factions. The hardening of resistance to the new regime, the increasing repression of those opponent clergy, and the authoritarian radicalization of the revolutionary regime drew France into a religious conflict of astounding violence. Many clergy were among those who lost their heads to the guillotine during the reign of terror (1793-1794).⁷⁰

Until the end of the 19th century, the struggle against the political and social power of the Catholic Church was at the middle of the republican struggle to develop a nation. 1905 separation of the church and the state law, approved in a climate of ideological war, constituted at the time the final struggle in this confrontation and the beginning of the reconciliation made possible when the catholic masses sided in force with the republic. Until World War II, however, French political life carried traces of this religious struggle. On one side was Catholic France, traditional and political conservative; and on the other were a republican and a progressive

⁶⁷ Article of the Declaration of the Rights of Man and the Citizens (1789)

⁶⁸Leger (n65)

⁶⁹Leger (n65)

⁷⁰Leger (n65)

France, where the protestant French minority and the French Jews freed by the revolution found their place.⁷¹

The dramatic political conflict over the wearing of the Islamic head covering by Muslim students in the public schools and secular mobilization against the Pope's 1996 visit to France to commemorate the baptism of Frankish king Clovis I in 496, are changes to note. There are many reasons for this pacification. The first-along historical lines-was the stabilization of the republican regime and the definitive adherence of Catholics to the republic regime which was pledged in the trenches of World War I, in this respect the Catholic hierarchy had clearly renounced its entire direct political role (no bishops have intervened in elections since 1965).⁷²

This moral judiciary advanced by the Roman Catholic denomination but also practiced by evangelical and Jewish minorities is significant to the redefinition of relationship between secularity and religious under way today. The principal question is no longer the independence of the state from the Catholic Church. It is how the state can function to integrate the republic in a multicultural France in which Islam has become the second religion in the nation. In this new age, new alliances are established that form new connections between religion and politics.⁷³

2.9.2 An Exploration of Great Britain

Great Britain, comprising England, Scotland, and Wales, is the 'mainland' part of the United Kingdom. Generalizations about the country's religion and politics must take account of the variations between the three regions in respect to their histories and cultures. Many of the variations stem from their individual responses to the protestant reformation of the 16th century, during which King Henry VIII (and later queen Elizabeth I) defied papal power in Rome and

⁷¹Leger (n65) 268-269

⁷²Leger (n65) 269

⁷³Leger (n65) 270

asserted the independence of the English church; the Roman Catholic counter reformation that followed; and the evangelical revival of the eighteenth century.⁷⁴

The power of Anglicanism was bolstered by 16th cen., legislation that severely penalized Roman Catholics and Evangelicals who dissented from the Anglican Church. In 17th cen., further legal penalties were imposed on the growing numbers of protestant dissenters until 1689, when the *Act of Toleration* granted limited religious liberty to all protestant sects. Catholics had to wait until 1829 for their legal emancipation, and Jews until 1845.⁷⁵ Both Anglican and the Scottish Church are established in the sense of enjoying privileges and responsibilities that are specified in law. Their status gives the unparalleled access to agencies of the state at national and local levels, although neither of them is aligned with any political party.⁷⁶

The Church of Scotland is recognized by the British state. The fact that many of its lay and clerical office holders are elected to their positions means that the Church of Scotland's official pronouncements are widely regarded as the most authoritative expression of Scottish opinion. Its general assembly comes close to functioning as an unofficial Scottish national identity and of Scotland's relative independence from England and the British state.⁷⁷ By comparison, the Anglicans relations with the British Kingdom are closer and more complex. The Church of England has never served as a 'state church' nor has it even been a department of state. Yet its position is erastian - that is upholding state supremacy in church affairs- in the sense that it is subordinate to parliament and to the crown. The monarch is both British Kingdom head and superior leader of the Anglican. This is why Anglican clerics Officiate at most state ceremonies, the 26 most senior bishops have seats in the House of Lords, the church's own legal system is

⁷⁴James A. Beckford, 'Great Britain' in Robert Wuthnow (ed), *The Encyclopedia of Politics and Religion* Vol.I. (Congressional Quarterly Inc 1998) 308

⁷⁵Ibid.

⁷⁶Beckford (n74)

⁷⁷Beckford (n74) 308-309

recognized as valid, the prime minister is involved in the selection of the new bishops and archbishops, and chaplaincy services in prisons and the military are dominated by Anglican priests. Thus, although the state does not finance the church, parliament monitors its economic activity and retains the right to debate proposed changes in doctrine, worship, and finances.⁷⁸

Problems for the Church of England include the perception that parliament interferes in the church's internal affairs, that it is not free to select its own leaders, and that the state expects the 'national church' to endorse or legitimize government policies. Problems occur for the state when leading Anglicans voice strong criticism of government policies or when representatives of other churches and faiths complain that the Church of England receives excessively privileged treatment from the state.⁷⁹

Neither English nor Scottish law provides for the freedom of religion or for the separation of religion and state. On the contrary, the two established churches enjoy special privileges and responsibilities, whereas members of other religious groups are excluded from certain opportunities. The fact that United Kingdom is a signatory to such conventions⁸⁰ both of which guarantee the freedom of religion within certain limits, does not in itself override English and Scottish legislation. Until these treaties are incorporated into Acts of parliament, those seeking remedy against perceiving restrictions on their religious freedom can only cite the treaties in general support of their cases.⁸¹ The existence of the two established churches, the lack of constitutional guarantees of religious freedom, and the growth strength of non-Christian religious minorities combine to create a highly distinctive nexus of politics and religion in Great Britain.⁸²

⁷⁸Beckford (n74) 309

⁷⁹Beckford (n74)

⁸⁰The European convention of human rights and the international covenant on civil and political rights

⁸¹Beckford (n74)

⁸²Beckford (n74) 310

2.9.3 An Exploration of America

The most celebrated formal interaction of religious movement with politics has been the civil rights movement that prospered after the *Brown vs. Board of Education* decision by the U.S. Supreme Court in 1954. The Brown decision, which outlawed racial segregation in public schools, went against the "separate but equal" notion that had governed educational policies in America. It inspired millions of Americans to use the moment in efforts to win and enlarge assurance of civil rights for all Americans.⁸³ Thomas Jefferson penned a classic description of religious freedom:⁸⁴

no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or beliefs; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.⁸⁵

The Church and State or Religion and Politics separation principle advances the human rights contest by allowing the separate development of these two spheres mutually reinforcing effect. President Thomas Jefferson (served 1801-1809) summed it up on his aphorism 'Divided we stand, united we fall,' by which he meant dividing the sphere of state authority from that of religion there by erecting a wall of separation between the church and the state would bring ruin in both institution, but dividing them into mutual antagonistic sphere would be equally damaged. The well-being of human being demand that they flourish spiritually and politically.⁸⁶

⁸³Martin E Marty, 'United States of America' in Robert Wuthnow (ed), *The Encyclopedia of Politics and Religion* Vol.II (Congressional Quarterly Inc. 1998) 754.

⁸⁴Religious freedom is a two-pronged idea, granting people the right to practice their faith as they choose and to be free from supporting an established religion.

⁸⁵Paul J Weber, 'Freedom of Religion' in Robert Wuthnow (ed), *The Encyclopedia of Politics and Religion* Vol.I (Congressional Quarterly Inc. 1998) 270.

⁸⁶Lamin Sanneh, 'Separation of Church and State: a Principle advancing the struggle for human rights' in Robert Wuthnow (ed), *The Encyclopedia of Politics and Religion* Vol.II (Congressional Quarterly Inc. 1998) 687.

This principle of non-territoriality was carried to the New World and enshrined in the law.⁸⁷ Life is the creator's gift, unearned and undeserved and liberty is a piece with that -the unconditioned, unqualified abatement of divined omnipotence to make room for human choice and freedom.⁸⁸ In response to the Jewish experience in Nazi occupied lands, and the contribution of WCC, UNGA passed UDHR in late 1948. Article 18 on *religious freedom* states ⁸⁹ “everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion and belief and freedom, either alone or in a community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”⁹⁰

⁸⁷Declaration of Independence (1776) but the assertion in the Declaration that all citizens are endowed by their Creator with certain inalienable rights among which is life, liberty and the pursuit of happiness concludes where it did not begin.

⁸⁸Ibid, 687

⁸⁹Stimulated in parts by a desire to their missionaries in colonial territories, an ecumenical group of mainline Protestants held a conference at Oxford, England, in 1937, during which they developed a common position on religious liberty as a global problem. The statement noted a close link between religious liberty and a just, stable international order. After World War II the first assembly of the World Council of Churches (WCC) was held in Amsterdam in early 1948. The statement issued a notice linking religious freedom to peace and urged the religious liberty become part of the new international bill of rights.

⁹⁰Weber (n85) 274-275; Freedom of religion is now seen as important universal human rights, but attempts to define exactly what it requires in practice have run into a number of difficulties. Five very different, but sometime overlapping cultures have such different ideas that this area has become a complex one to negotiate: First, a western secular tradition sees religious freedom as rooted in separation of church and state and disestablishment along the American model. Secularists are concerned that nonbelievers be treated equally and that no tax monies or government influence be used to support religion. Second, a Zionist Jewish tradition believes that Israel is a special case calling for government support of Judaism because of the close identification of the Jewish faith with the land of Israel, especially Jerusalem, throughout history. Further, the unique record of persecution of Jews in other lands supports the idea of Israel as a separate Jewish state. Third, a Christian tradition holds that government support for religious ideas and institutions helps preserve important cultural values and identities and is not incompatible with religious freedom as long as other religions are protected and no individuals are coerced or disadvantaged because of their faith. Long prevalent in England and Latin America, this idea is emerging in Eastern Europe as newly freed nations try to return or compensate for religious properties confiscated during the Communist years and to reestablish their national cultures. Fourth, a Marxist tradition, still powerful in China and several smaller nations, sees religion as a competitor to the state, a social institution to be controlled and limited, and at best a necessary evil to be tolerated only until it withers away. This tradition is willing to accept the freedom of conscience as an ‘inner freedom’ but rejects any social role or rights for religious institutions. Lastly, an Islamic tradition rejects the very idea of separation of church from state and in some cases even the legitimacy of a secular state. Allah is Lord of all, and where possible, Islamic law, shari’a, is to be the primary source of justice. Of particular concern to Muslim is any major acknowledgement of freedom of non-Muslim to proselytize or convert Muslims. The memory of the Christian crusades and Western colonialism make this issue particularly sensitive and radically at variance with the Christian view that religious freedom entails the right of churches to evangelize and individuals to change faiths. A growing Hindu nationalism takes a negative view of evangelism parallel to that in Islamic tradition.

2.10 Conclusion

This chapter set out to examine the historical backdrop of the church – state relations in Kenya, Sub-Saharan Africa and globally. The chapter argues that although Dr David Livingstone's 3C's of Christianity, Civilization and Commerce were beneficial to the growth and development of church and state in Africa; nevertheless, neo-colonialism has continued to negatively impact the growth and development of the church and state in Africa. This is because, the Western imposition of democracy to African states; the imperial control of market and production of commodities and devaluation of African currencies due to imposition of Structural Adjustments Programmes; exploitation of natural and human resources through brain drain and continued huge loan granting and repayments. The chapter illustrates this by discussing these church state relations realities in the context of pre-colonial, colonial, post-colonial and neo-colonial independent African states. Here, the global colonial powers that partitioned Africa during the Berlin conference of 1884/5 are still in indirect control of the same churches and colonies; thus Impeding their growth and development. This confirms the adage that we received only the flag without independence (power).

CHAPTER THREE:

LEGISLATIVE AND INSTITUTIONAL FRAMEWORK GOVERNING THE PLACE OF ATHEISTS IN THE KENYAN LEGAL SYSTEM

3.1 Introduction

The last chapter discussed Kenya's background and context specifically the chapter tried to locate the place of Atheists from a historical perspective. The chapter notes the Constitution embodies an enduring tension between the desire to respect religious freedom on the one hand and to a void institutionalization of any particular religion. This chapter examines the legislative and institutional framework governing the place of Atheists In Kenya. The chapter notes that the Constitution seeks to accommodate religious diversity and pluralism by adopting a critical liberal constitutional approach; this approach maintains the status of dominant groups in society, by legitimizing and perpetrating conservative hegemony. The main objective of this study is to examine the place of Atheists in the Kenyan legal system. The study notes that the Constitution of Kenya 2010 does not explicitly recognize Atheists as a group. This chapter examines the existing legal and institutional mechanisms governing the place of Atheism in the Kenyan legal system. This chapter is divided into three main parts. The first part describes the legislative framework; this part shows legislation internationally, regionally and municipally. The second part examines case laws applicable in all the three legislative frameworks considered. The third part is institutional framework; this part also shows international, regional and municipal institutions in use. The chapter concludes with some reflections on the problems examined in the chapter. The report given below is based on the author's archival research. The data collected is analyzed and it addresses the research question; *what is the legislative and institutional framework governing the place of Atheists in Kenya?*

3.2 Legislative Framework

3.2.1 The International Legal Framework

3.2.1.1 *The United Nations Charter*

It enshrines major principles of global relationship.¹ It demands member countries to among others reaffirm “faith in fundamental human rights and in implementing or motivating regard for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”² It reflects “the awareness of safeguarding of human rights and fundamental freedoms.”³ Let’s examine the legal instrument underpinning this UN Charter.

3.2.1.2 *The Universal Declaration on Human Rights (UDHR)*

It is “a global instrument on human rights.”⁴ It acknowledges the “inherent dignity, equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world...” recognizes that “all human beings are born free and equal in dignity and rights and are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”⁵ It emphasizes that “all are equal before the law and are entitled without any discrimination to equal protection of the law.” Recognizes further that “all are entitled to equal protection against any discrimination in violation of this declaration and against any incitement

¹Janusz Symonides and Vladimir Volodin (eds), *A Guide to Human Rights: Institutions, Standards, Procedures* (UNESCO 2001)52-53.

²Ibid. 52-53. The United Nations Charter was signed on 26th June 1945 at the conclusion of the United Nations Conference on International Organization. It entered into force on 24th October 1945. Since this date, 24th October is universally celebrated as United Nations Day. The United Nations Charter is the constituting legal instrument of the Organization, defining the rights and obligations of Member States, and establishing the United Nations Organs and Procedures. The Statute of the International Court of Justice (ICJ), the principal judicial organ of the United Nations, forms an integral part of the Charter.

³Symonides and Volodin (n1) 52-53

⁴This International instrument was adopted and proclaimed by General Assembly Resolution 217A (111) of 10 December 1948; Chris Maina Peter. *Human Rights in Africa: A Comparative Study of the African Human and People’s Rights Charter and the New Tanzanian Bill of Rights* (Greenwood Press 1990)103-124. Text produced from: United Nations – Human Rights: A Compilation of International Instruments –ST/HR/1/REV.2 (1983), 1/3

⁵Article1.

to such discrimination”⁶ and also that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”⁷That “everyone has the right to freedom of thought, conscience and religion; this right includes freedom 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 and observance.”⁸That “everyone has the right to freedom of opinion and expression; this includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.”⁹ That “first, everyone has the right to freedom of peaceful assembly and association. Second, no one may be compelled to belong to any association.”¹⁰ Here member states are “charged with the responsibility to protect, safeguard and promote the enforcement of human rights in their own jurisdictions.” We also have the African Union (AU) legal framework.

3.2.2 The Regional Legal Framework

3.2.2.1 *The African Union Act (AU)*

It “promotes and protects human and peoples’ rights ... and the rule of law.” This is in accordance with “ACHPR and other relevant human rights instruments.”¹¹ It functions in “accordance with the principles of respect for human rights, the rule of law and good governance.”¹² The enforcement of the AU Act in national jurisdictions is what is problematic. How do we reconcile the efficacy of this Act with regional Acts such as EACC? Let’s examine the Charter as a legal instrument underpinning this Constitutive Act.

⁶Article 7

⁷Article 10

⁸Article 18

⁹Article 19

¹⁰Article 20

¹¹Article 3(h)

¹²Article 4(m)

3.2.2.2 *The African (Banjul) Charter on Human and Peoples' Rights (ACHPR)*

The “ACHPR¹³ aims to protect and promote fundamental human and peoples’ rights and freedoms and it affirms that all people are equal, and that they have several rights.”¹⁴ It obligates State Parties to “promote teaching and education in human rights and to ensure that its content is understood.”¹⁵ It provides for “the establishment of an African Commission on Human and Peoples’ Rights to monitor and ensure the promotion of human rights in Africa.”¹⁶ It is “an African instrument on rights.”¹⁷ It indicates that for Africans to achieve their aspirations, “they need freedom, equality, justice and dignity...” recognizing on the one hand, that “fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of peoples’ rights should necessarily guarantee human rights.” It indicates the “conscious of Africans duty for total liberation in which they undertake to eliminate ... all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions.” That “every individual shall be equal before the law and every individual shall be entitled to equal protection of the law”¹⁸ that “human beings are inviolable. Every human being shall be “entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”¹⁹

¹³The ACHPR was adopted on 28th June 1981 by the Organization of African Unity (OAU), the ACHPR entered into force on 21st October 1986. The Instrument is based on both the Universal Declaration on Human Rights (UDHR) and on the Charter of the OAU. Adopted 27 June 1981, OAU Doc.CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986).

¹⁴Anton Bosl and Joseph Diescho, eds. *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (Macmillan Education Namibia 2009) 391-408.

¹⁵Article 25

¹⁶Symonides and Volodin (n1) 29; the ACHPR was ratified in Kenya on 23rd Jan.1992.

¹⁷ Adopted 27 June 1981, OAU Doc.CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986); Bosl and Diescho (n14)391-408.

¹⁸Article 3

¹⁹Article 4

That “every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status...”²⁰ That “every individual shall have the right to have his cause heard. This comprises:(a) right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force ...”²¹ That “freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.”²²

That first, “every individual shall have the right to receive information. Second, every individual shall have the right to express and disseminate his opinions within the law.”²³ That “first, every individual shall have the right to free association provided that he abides by the law. Second, subject to the obligation of solidarity provided for in article 29 no one may be compelled to join an association.”²⁴ That “every individual shall have the right to assemble freely with others; and the exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.” That “all peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.”²⁵

Apart from the rights enshrined in the Charter, there are also duties attached to it. For instance “the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”²⁶ That “every individual shall have the duty to respect and consider his fellow beings without discrimination and to maintain

²⁰Article 5

²¹Article 7

²²Article 8

²³Article 9

²⁴Article 10

²⁵Article 19

²⁶Article 27

relations aimed at promoting, safeguarding and reinforcing, mutual respect and tolerance.”²⁷ The case study in chapter four in this project indicates the contrary whether with Christians or others. The AIK members are persecuted and discriminated against by both the state administration and the religious community in Kenya. It is essential to examine the municipal legal framework.

3.2.3 The Kenyan Legal Framework

3.2.3.1 *The 2010 Constitution of Kenya*

The Constitution of Kenya 2010 recognizes the incorporation and status of international law in municipal law as noted in “Articles 2(5) and 2(6) of the Constitution” which declares the general rules of international law, treaties and conventions ratified by the State to be part of Kenyan law. Therefore civil claims by AIK filed before the national courts invoke any of these relevant laws.²⁸ The Constitution of Kenya especially Articles 27, 32, 33, 36, 47 and 50 shall be examined in this study for purposes of laying a foundation as to the basis of “human rights violations” that may be contravened by the institutions to be examined and in order to lay a proper perspective as to what in the Bill of Right may be essential in safeguarding institutions such as AIK who are minority and marginalized. The People of Kenya passed their Constitution recognizing it as their law for all purposes and intent.²⁹ However, this law operates in regard to all other applicable laws including international and regional laws as examined previously;³⁰ treaties and conventions which are recognized as part of Kenyan laws.³¹ Whereas that recognition is to be noted, the Kenyan Constitution recognizes that “Kenya is a secular state.”³²

²⁷Article 28

²⁸Kenya has ratified the following relevant international treaties/conventions: Geneva Convention (20 September 1966), Covenant on Civil and Political Rights (1May 1972), International Covenant on Economic and Social Cultural Rights (1May 1972), African Convention on Human and Peoples’ Rights 910February 1992), Additional Protocols I and II to the Geneva Conventions (23February 1999).

²⁹Article 2(1)

³⁰Article 2(5)

³¹Article 2(6)

³²Article 8

The enforcement of the *Bill of Rights* in chapter four (4) of the Constitution is envisaged. *Article 27*³³ demands examination for violations in this study. The 2010 Constitution demands each one to “enjoy the fundamental rights and freedoms it recognizes and guarantees in the Constitution without distinction of any kind including but not limited to religion, conscience, belief, culture.”³⁴ Thus the “exclusion of individuals from enjoying rights on the basis of any of these distinctions may hence amount to discrimination.” This was what Justice C Mwita noted in AIK case. “The right to equality and non – discrimination, thus, does not exclude reasonable measures intended to protect or support individuals who were previously marginalized or historically disadvantaged. Such measures are generally referred to as affirmative action or ‘positive discrimination.’ Differentiation hence will not amount to discrimination if it is intended to redress imbalances in society and if it does not result in the violation of the right to equality and other associated rights.”

Article 27(6) of the Constitution captures this position by emphasizing that, “to give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programs and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. Therefore the right to equality and freedom from discrimination guarantees equality before the law as well as equal protection and benefit of the law.”³⁵ It is impractical however to get representation in all marginalized and minority groups in political offices. This right would be violated when, for example, a public authority like a government administrator in the performance of the functions of its office discriminates against any person or entity. The same could be said of a law that

³³On Equality and Freedom from Discrimination

³⁴Article 27(4)

³⁵Article 27(1)

treats people in a discriminatory manner in respect of access to justice, rights, opportunities and or any other human right privileges.

There is *Article 32*.³⁶ Generally; these rights entitle a person to “hold a belief, opinion or conviction, be it of cultural, religious, political or any other nature. Specifically, the rationale for entrenching freedom of conscience in the Constitution is to allow an individual to hold a thought or belief that is independent of a State’s or other entity’s control as such.”³⁷ “Freedom of conscience in its broader sense envisages the right to profess and practice one’s religion.” This “freedom” as contemplated under *Article 32(2)*, “envisages the right to manifest one’s religion or belief in public or in private, through worship, practice, teaching or observance. This includes observance of a day of worship. The freedom to maintain or change one’s religious affiliation or belief is anticipated in the enjoyment of this right.”³⁸ Thus the need to promote, protect and enforce and safeguard it. The 2010 Constitution proscribes discrimination based on belief or religious grounds. Therefore no one may be “denied access to any government service or the enjoyment of any right on the basis of their belief or religion. Likewise, a person shall not be compelled to act, or engage in any act, that is contrary to one’s belief or religion.”³⁹

There is *Article 33*.⁴⁰ This Article guarantees everyone “the right to freedom of expression.” The scope of this right includes “the freedom to seek, receive or impart information or ideas; freedom of artistic creativity; academic freedom and freedom of scientific research.” The enjoyment of this right, however, “precludes propaganda for war, incitement to violence, hate speech or advocacy of hatred.” In other words, “an individual can only enjoy the right to freedom of

³⁶On Freedom of Conscience, Religion, Belief and Opinion

³⁷PLO Lumumba and Luis Franceschi, *The Constitution of Kenya, 2010: An Introductory Commentary* (Strathmore University Press 2014)193; as quoted from O Nmehielle. *The African Human Rights System: Its Laws, Practice and Institutions* (2001)104.

³⁸Lumumba and Franceschi (n37)193; as quoted from J Harris, *et al. Law of the European Convention on Human Rights* (1998)361.

³⁹Article 32(4)

⁴⁰On Freedom of expression

expression subject to the rights and reputation of others.”⁴¹ The “right to freedom of expression is the cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion as it enables the society, when exercising its opinions, to be sufficiently informed.”⁴²

There is also *Article 36*.⁴³ Everyone is “entitled to the right to free association.”⁴⁴ This right envisages a number of components. For instance, “it contemplates the freedom of individuals to come together for the protection of their interests by forming a collective entity which represents them.” These interests may be of “political, economic, religious, social, cultural, professional or labour union nature.” This is a ‘two –fold’ right in that, while it precludes the compulsion of a person to join an association of any kind, it also denies one the “absolute right to become a member of an association.” In other words, “an association may decline to admit or continue the membership of an individual without necessarily infringing on his or her right to freedom of association. The right to freedom of association has also been interpreted to include the right to dissociation.”⁴⁵ The “right to freedom of association” has been violated with impunity in Kenya. Because of such incidents, “the 2010 Constitution provides some safeguards for the enjoyment of this right by organizations or groups” such as *Atheists in Kenya* (AIK) by ensuring that their registration is not withheld or withdrawn unreasonably.⁴⁶ Similarly, before an organization registration is cancelled, it ought to be granted fair hearing.⁴⁷ Justice Mwita noted a failure of fair

⁴¹Article 33(3)

⁴²Mbondenyi and Ambani, *The New Constitutional Law of Kenya 2010*, 195. As quoted from S Davidson. *The Inter –American Human rights System* (1992)310.

⁴³On freedom of Association

⁴⁴ Article 36; Article 10(1) which states, ‘every individual shall have the right to free association provided that he abides by the law.’

⁴⁵Mbondenyi and Ambani (n42) 198; as quoted from Communication 101/93, *Civil liberties Organization in Respect of the Nigerian Bar Association v Nigeria*, Eighth Annual Activity Report of the African Commission on human and Peoples’ Rights (Annex VI).

⁴⁶Article 36(3) (a)

⁴⁷Article 36(3) (b)

administrative action and fair hearing in AIK matter. Generally, any legislation purporting to “limit the right to freedom of association” should be objective enough to enable one to know, beforehand, “the circumstances under which this right” could be limited and the nature and extent of the limitation. As emphasized by the Commission below:⁴⁸

...authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the Constitution and international human rights standards; ... in regulating the use of the right to association, the competent authorities should not enact provisions which will limit the exercise of the freedom and such a regulation should be consistent with the state obligations under the Charter.⁴⁹

Lastly, there is *justice related right in Article 47⁵⁰ and Article 50⁵¹* the common thread cutting across this cluster of rights is the emphasis that the justice system ought to be accessible, expeditious, efficient and procedurally fair. Exorbitant or unreasonable fees should therefore not impede access to justice. Apart from the charter, the statute provides remedies to persons and institutions whose rights and freedoms have been violated. Let’s examine it next.

3.2.3.2 The Societies Act CHAPTER 108 Laws of Kenya

This study shall examine Sections 3, 7, 12 and 15 of the Societies Act, in a bid to illustrate the procedural, administrative and lawful steps taken by the registrar in registering, suspending and deregistering civil society organizations in Kenya. A Society includes “... association of ten or more persons whatever its nature or object, established in Kenya.”⁵² For AIK, it is domicile in Kenya. the Act indicates that only the AG “by order, prohibit any act specified therein – (a) by any person on behalf of or in relation to any society associated with such society; or (b) by any person on behalf of or in relations to any society which in the opinion of the Minister has objects

⁴⁸African Commission on Human and Peoples’ Right

⁴⁹Mbondenyi and Ambani (n42) 198; as quoted from ‘Resolution on the Right to Freedom of Association, adopted by the African Commission on Human and Peoples’ Rights’, at its 11th Ordinary Session, see *Documents of the African commission* 225.

⁵⁰The right to fair administrative

⁵¹The right to fair hearing

⁵²Article 2(1); Societies Act Cap 108, Laws of Kenya

similar to the objects of such society.”⁵³ In our context, AIK was outside the provisions in section 4(1), *unlawful society*. The Court disapproved that. On *cancellation or suspension of registration*, the Act states that,

Where, in respect of any registered society, the Registrar is of the opinion that the registration of a society should be cancelled or suspended on the ground that – (a) the society has in his opinion among its object, or is, in his opinion, likely to pursue, or to be used for, any unlawful purpose or any purpose prejudicial to or incompatible with peace, welfare or good order in Kenya; or (b) the interest of peace, welfare, or good order in Kenya would, in his opinion, be likely to be prejudiced by the continued registration of the society; or (c) the terms of the Constitution or of the rules of the society are, in his opinion, in any respect repugnant to or inconsistent with any law; or (d) the society has willfully, and after notice from the registrar, contravened any of the provisions of its constitution or of its rules, or has contravened section 20 of this Act [*Registered society to obtain consent of Registrar before amending name, constitution, etc.*]; or (e) the society has failed to comply, within the time allowed for compliance, with an order made under section 31(1) of this Act [*Registrar may call for information and accounts*] or.⁵⁴

Justice Mwita Judgment indicated a grievous violation of this section by the registrar of societies. There were no justified reasons as to why the society’s registration was suspended and subsequently deregistered. The Act emphasizes the fact that “the registrar may, in his discretion, give written notice in the prescribed form to the society calling upon the society to show cause, within such period as is specified in the notice, why its registration should not be cancelled or, as the case may be, suspended; and, if the society fails to show cause to the satisfaction of the registrar within the time specified, the Registrar may cancel or suspend the registration of the society.”⁵⁵ This was not done in the case of AIK as shall be indicated in the next chapter. Further, in the event a society registration is suspended, *the society can appeal from order of refusal, cancellation or suspension for registration*, the Act specifies as follows:

Any society which is aggrieved by the Registrar’s refusal to register it, or by his cancelling or suspending its registration under section 12 of this Act, may, within a period of twenty –one days, or such extended period as the Minister in any particular case may allow, from the date of the refusal, cancellation or suspension, and, where the society does so and is not a society of one of the kinds specified in paragraphs (i), (ii) and (iii) of the proviso to section 4(1) of this Act, it shall

⁵³Article 7(1)

⁵⁴Article 12(1)(a)(b)(c)(d)(e)

⁵⁵Article 12(1)(J)

not, pending the decision on the appeal, be an unlawful society, notwithstanding the said section 4(1).⁵⁶

AIK declined to appeal to the AG on the perception and suspicion that they may not in the circumstances be granted any fair hearing or fair administrative action. In that regard, AIK appealed to the Constitutional and Human rights Court for judicial review. Let's examine relevant case laws relating to this study.

3.3 The Relevant Case Laws Explored

3.3.1 The International Relevant Case Laws Examined

The international cases we will consider are those of USA and Canada. The Canadian Supreme Court has formulated the *Oakes test* with regard to assessing the limitation of rights.⁵⁷ Section 1 of the Canadian Charter lays out that the rights and freedoms set out are, "Subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."⁵⁸ In *R vs. Oakes*, Dickson CJ, a twofold test was laid out to assess whether a limitation of a right is reasonable. In the first stage, the government must establish that the impugned law has an important objective. The second stage proceeds to analyze the means used for achieving this objective. In the second step of the analysis, the court proceeds to analyze three things. Firstly, the court considers whether the means used to limit a right are rationally related to the intended objective. Secondly, the court assesses whether the limitation impairs the right or freedom. Thus, there should not be a less drastic alternative by which to achieve the intended objective. Lastly, the limitation must not have a disproportionately severe effect on persons to whom it applies. This criterion was broadly noted by Justice Mwita, in his determination indicating that, "the petition raises only one issue for determination, that is; whether the 1st

⁵⁶Article 15

⁵⁷Under the Canadian Charter of Rights and Freedoms; The Test was developed in the Canadian case of *R v Oakes* [1986]1 S.C.R.10.

⁵⁸*Ibid.*

petitioner's [AIK] suspension was procedural and lawful.”⁵⁹ The final decision confirmed unprocedural and unlawful. Certainly, *Article 24(1)*⁶⁰ of the Kenyan Constitution share some similarity with the criteria used in analyzing limitation under the *Oakes test*. For instance, the courts in the assessment of impugned conduct have to justify “the purpose of the limitation,”⁶¹ “the nature and extent of the limitation,”⁶² and the “relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”⁶³ All these considerations are taken into account in the Canadian jurisprudence of *Oakes*. However, the sequential method of analyzing rights in *Oakes* proved rigid and has been softened in subsequent cases by “the Canadian Supreme court.”⁶⁴

In the United States of America, courts have pronounced themselves in several cases pertaining to the constitutional protection of free exercise of religious belief. Let's discuss them chronologically below.⁶⁵ “In *Reynolds vs. United States (1879)*, George Reynolds, a Mormon official, believed polygamy was required by his religion. He was convicted for practicing polygamy and appealed, arguing that his free exercise of rights had been violated. The Supreme Court rejected his claim. The court reasoned that a person is free to believe whatever he wishes, but action can be regulated by government, and that polygamy violates social duties and is subversive of good order.”⁶⁶

“*West Virginia vs. Barnette (1943)* considered whether Jehovah's Witness children could be required to salute the American flag even though this act violated their religious beliefs. The

⁵⁹AIK case, Petition no 308 of 2016

⁶⁰On Limitation of Rights and fundamental freedoms

⁶¹Article 24(1)(b); COK, 2010.

⁶²Article 24(1)(c); COK, 2010.

⁶³Article 24(1)(e); COK, 2010.

⁶⁴*Edward Books & Art Ltd v The Queen* [1986]2SCR713

⁶⁵ Paul J Weber, ‘Freedom of Religion’ in Robert Wuthnow (ed), *The Encyclopedia of Politics and Religion* Vol.I (Congressional Quarterly Inc. 1998) 273.

⁶⁶ *Ibid.* p 273

court noted that the children’s refusal was peaceful and orderly and did not interfere with the rights of others. The justices were also troubled that the flag salute statute coerced children into professing a belief they did not hold. This case is particularly interesting because it reversed a decision the justices had made just three years earlier upholding a similar statute.”⁶⁷

“20 years later the court heard *Sherbert vs. Verner* (1963). Adell Sherbert, a seventh day Adventist, worked in textile mill in South Carolina. When she refused to work on Saturdays, because Saturday was her Sabbath, was terminated. She sought unemployment benefits but was denied, again because she refused to be available for work on Saturdays. In this case the Supreme Court began to work out a free exercise doctrine. After affirming that Mrs. Sherbert’s beliefs were sincere and a central component of her religious faith, the court looked to see whether South Carolina had a compelling state interest in denying her unemployment benefits. Finding that it did not, the court ordered the state to accommodate the needs of religious people in its unemployment benefit regulations.”⁶⁸

“The U. S Congress has since its inception provided Conscientious Objector (CO) status for citizens who oppose war in all circumstances because of their religious beliefs. Men granted C.O statuses are not required to serve in the military, but they may be required to perform alternative service in non-combatant roles. *Gillette vs. United States* (1971) presented a new issue. Mr. Gillette objected to the Vietnam War—though not to all wars—because he considered it unjust. He based his objection on humanist approach to religion—his deeply held beliefs about the purpose and obligations of human existence. The Supreme Court ruled that Gillette did not qualify for C.O status. Although congress had indeed distinguished between citizens who oppose all wars and those who oppose only the ‘unjust’ wars, the court ruled that there were pragmatic

⁶⁷Weber (n65)

⁶⁸Weber (n65)

reasons for doing so.” “The statute that grants C.O status is neutral and secular; it does not discriminate between religions since it affects only individual believers. In brief, relief from the duty to serve in the military is limited to those who conscientiously oppose all wars. Individuals are not allowed to pick and choose which war they fight.”⁶⁹

“Unusual or minority religions have always had a difficult time in America. The Amish, descendants in the Anabaptist tradition, attempt to live simple, peaceful lives in rural areas, having as little contact with the outside world as possible. They don’t use motor vehicles, electric motors, telephones or other modern inventions. They send their children to school until they can read; write and do arithmetic, usually through the eighth grade. They lived for many decades peaceably among their neighbours in Wisconsin until the state changed its law to require all students to attend school through their 16th birthdays, generally, the 9th or 10th grade. Amish parents refused arguing that their children not only did not need the extra years of schooling but that they might be tempted to abandon their faith if exposed to modern ideas not compatible with their way of life. Further, these were critical years in which children would learn farming and housekeeping skills they needed as adults in the Amish community.”⁷⁰

“In *Wisconsin vs. Yolder* (1972) the Supreme Court sided with the Amish, arguing that the state did not have a compelling state interest in the extra years of school and that there were alternative means to achieve its legitimate ends-the informal education given by Amish parents during their children’s adolescent years. In this case the free exercise claim was upheld. Justice William Douglas raised the issue of whether this right of the parents was contrary to the right of

⁶⁹Weber (n65)

⁷⁰Weber (n65) 274

children to be equipped to make their career choices when they become adults, but the court was not willing to pursue this line of argument.”⁷¹

“*Goldman vs. Weinberger* (1986) dealt with a Jewish military officer who was told he could not wear his yarmulke indoors. Capt. Simcha Goldman argued that his religion required him to wear the head covering and that he had previously worn it without infringing on anyone’s rights or disrupting military discipline. The Supreme Court reasoned that the military life has unique needs for uniformity and discipline and that what might be considered an infringement on religious liberty in civilian life could be subordinated to military discipline in the armed forces.”⁷²

“*Employment division, department of human resources of Oregon vs. Smith* (1990) is the most important case decided since *Sherbert vs. Verner*. Two native American’s who were counselors with a private drug rehabilitation agency were fired when their employer discovered that they had ingested peyote, an outlawed drug, at a religious ceremony in the native American church, of which both were members. Their applications for unemployment benefits were denied-because they had been fired ‘for cause’ - that is, for committing an illegal act and were thus ineligible. The Supreme Court upheld the state of Oregon’s right to refuse benefits, overriding the free exercise claim of the defendants.”⁷³ “What is most important about this case is not the outcome but the reasoning. Writing for the majority, Justice Antonin Scalia argued that ‘so long as state criminal statutes were general in nature and neutral toward religion they did not have to accommodate religious beliefs.’ Although *Sherbert* required the government to show a compelling state interest as to why its laws should outweigh a religious liberty claim, the majority’s opinion held that in the case of criminal statutes only a rational basis for the statute is required. The result is that religious liberty claims will always lose if the government can show

⁷¹Weber (n65)

⁷²Weber (n65)

⁷³Weber (65)

that its laws are a reasonable way to achieve otherwise legitimate goals.”⁷⁴ “Religious interest groups and denominations from across the political and religious spectrums found this decision an alarming threat to religious liberty and combined in an extraordinary coalition to petition congress for a law rejecting the *employment division vs. smith reasoning* and reinstating the *Sherbert vs. Verner* rule.”⁷⁵ “But in a 1997 case, *city of Boerne (Texas) vs. Flores, Archbishop of San Antonio*, the Supreme Court ruled, 6-3, that congress exceeded its power to regulate state activities when it dictated that state and court had to use a compelling interest and least restrictive means test in religious liberty cases. The current constitutional rule governing religious liberty cases is that statutes which are general in nature and are not specifically written to burden religions do not have to accommodate religious beliefs.”⁷⁶

3.3.2 The Regional Relevant Case Laws Examined

In the light of *Article 28*⁷⁷ the 2010 Constitution proscribes discrimination based on belief or religious grounds. Thus, no one may be “denied access to any institution, employment or facility, or the enjoyment of any right on the basis of their belief or religion. Likewise, a person shall not be compelled to act, or engage in any act, that is contrary to his or her belief or religion.”⁷⁸ While articulating this aspect, “the African Commission observed that freedom of religion has to be exercised in a way that does not violate the equal protection of the law. It therefore condemned the blanket imposition of Islamic sharia trials in Sudan and insisted on the right of everyone to be tried by a secular court if they wished.”⁷⁹ The Commission however, has been careful to point out that “freedom to manifest one’s religion or belief does not in itself include a general right of the

⁷⁴Weber (65)

⁷⁵After intensive lobbying by these groups, congress passed the *Religious Freedom Restoration Act of 1993*.

⁷⁶Weber (65)

⁷⁷On Human Dignity

⁷⁸Article 32(4)

⁷⁹Communication 48/90, 50/91 and 89/93, *Amnesty International, Comite Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex V) Para.73.

individual to act in accordance with his or her belief.”⁸⁰ Rather, while the right to hold religious beliefs should not. “In *Gareth Anver Prince vs. South Africa*,”⁸¹ “a South African citizen alleged that the Law Society of South Africa had refused to register him for practice, given his disclosure of two previous convictions for the possession of cannabis and his stated intention to continue to use it because its use was required by his Rastafarian religion. He alleged violation of, among other provisions *Article 8*⁸² which guarantees *freedom of religion and conscience*. The African commission held that the restrictions on the use and possession of cannabis were reasonable and a legitimate limitation of the right to freedom of religion.”⁸³ “Indeed, participating in one’s religion should not be at the expense of the overall good of the society. Religious minorities may freely choose to exercise their religion, yet that should not grant them unfettered powers to disregard the norms that keep the whole nation together.”⁸⁴ How will an individual determine overall good of society?

Similarly, In *Article 33*⁸⁵ the African Commission observed in “*Media Rights Agenda and Constitutional Rights Project vs. Nigeria*”⁸⁶ that freedom of expression is a basic human right, vital to an individual’s personal development, one’s political consciousness, and participation in the conduct of public affairs in ones’ country.”⁸⁷The case of “*The Law Offices of Ghazi Suleiman vs. Sudan*”⁸⁸ provided the Commission with an opportunity to clarify its jurisprudence on the right to freedom of expression as well as to underscore the important link between freedom of

⁸⁰Communication 255/2002, *Gareth Anver Prince V South Africa*

⁸¹Weber (n65)

⁸²Of the African Charter

⁸³Weber (n65)

⁸⁴Weber (n65)

⁸⁵On freedom of expression

⁸⁶Communication 105/93, 130/94 & 152/96, *Media Rights Agenda and Constitutional Rights Project v Nigeria*, Twelfth Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex V).

⁸⁷*Media Rights Agenda and Constitutional Rights Project vs. Nigeria* Para. 54.

⁸⁸Communication 228/99, *The Law Offices of Ghazi Suleiman v Sudan*, Sixteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights (Annex VII).

expression and the promotion and protection of democracy in Africa.” The case alleged that “Mr. Ghazi Suleiman, a Khartoum based lawyer and human rights advocate was barred from travelling to deliver a public human rights lecture in Sinnar, Blue Nile State, in South Sudan. The author complained of a violation of *Article 9*⁸⁹ which guarantees the right to freedom of expression.” In upholding the complaint, the African Commission observed as follows:

In adopting the Resolution on the Right to Freedom of Association, the African Commission noted that governments should be especially careful that “in regulating the use of this right, that the competent authorities should not enact provisions which would limit the exercise of this freedom ... [and that] ... the regulation of the exercise of the right to freedom of association should be consistent with State’s obligation under the African Charter on Human and Peoples’ Rights.” Mr. Ghazi Suleiman’s speech is a unique and important part of political debate in his country.⁹⁰

The Commission went on to affirm the views to the effect that:⁹¹

Freedom of expression is a cornerstone upon which the very existence of a society rests. It is indispensable for the formation of public opinion. It is also a condition *sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.⁹²

The above excerpt could therefore be taken to mean that when an individual’s freedom of expression is unlawfully restricted, it is not only the right of that individual to disseminate information that is being violated but also the corresponding right of others to receive information and ideas. Hence, speech that contributes to political debate must be respected and protected.⁹³ In light of the important role of the right to freedom of expression in the fledgling democratic institutions in Kenya today, these observations and findings of the African Commission must be received as landmark pronouncements. Municipal cases have advanced human rights protection as indicated below.

⁸⁹ Of the African Charter

⁹⁰ Communication 228/99 (n88) Para 46

⁹¹ Of the Inter –American Court of Human Rights

⁹² Communication 228/99 (n88) Para 49

⁹³ Communication 228/99 (n88) Para 50

3.3.3 The Kenyan Relevant Case Laws Examined

3.3.3.1 *Jesse Kamau & 25 others Versus the Constitutional Review Commission*

Twenty six clergy took the Government of Kenya⁹⁴ and the Constitution of Kenya Review Commission (CKRC) to court essentially seeking a determination that the legal establishment of Kadhis' courts in the 2004 Draft Constitution was unconstitutional.⁹⁵ The case was filed in 2004, but was concluded in 2010 after the CKRC had exhausted its mandate and been disbanded. Justices J.W. Nyamu, R.V. P. Wendo and M.J. Anyara Emukule decided as follows:⁹⁶ Firstly, the purported extension of Kadhis' courts through the enactment of the Kadhis' Courts Act beyond the former Protectorate areas was unconstitutional. Secondly, any form of religious courts offends the doctrine of separation of state and religion. Such courts should not form part of the judiciary. Thirdly, the constitutional enactment of Kadhis' courts elevates the Islamic religion of Kenya over other religions and offends the constitutional rights to worship and freedom from discrimination. Fourthly, financial support of Kadhis' courts from the public purse amounts to segregation and is sectarian, discriminatory and unjust. It amounts to separate development of one religion *vis – a – vis* other religions. It offends the general right to fundamental freedoms and specifically the right to worship and freedom from discrimination. Lastly, the provision in the constitution that supports the establishment of Kadhis' courts within and outside the ten mile coastal strip contradicts the provision on freedom of discrimination. As a result section 66 of the constitution (now repealed) was deemed by the court to be superfluous. The court however stated that it was Parliament and the people in a referendum who could expunge section 66 of the

⁹⁴Through the Attorney General (AG)

⁹⁵Abdulkader Tayob, 'Kadhis Courts in Kenya's Constitutional Review (1998-2010): A Changing Approach to Politics and State Among Kenyan Muslim Leaders' in *Islamic Africa* (Brill 2013) Vol. 4, no 1, pp 103-124. <http://www.jstor.org/stable/42636214><accessed02-02-2018.

⁹⁶Jamil Ddamulira Majuzi, 'Separating the Church from State: The Kenyan High Court's Decision' in "Jesse Kamau and 25 Others V Attorney General" (Judgment of 24 may 2010) in *Journal of African Law* (School of Oriental and African Studies 2011) Vol. 55, no 2 , p. 314-319. <http://www.jstor.org/stable/41709866><accessed02-02-2018.

constitution, and not the court. The court did not pronounce on (a) the constitutionality of any provision similar to section 66 in any Draft of the constitution and (b) the constitutionality of certain aspects of the *Bomas* Draft and the effect of an Islamic Agenda promoted within the 2004 Draft constitution. The court argued:

For avoidance of doubt this decision has been handed down on the basis that the role of the court is to interpret and declare the law and that the doctrine of separation of powers quite rightly prevents us from amending the law (which role rests with parliament) or the enactment of a new constitution including its content which role is vested in the people of Kenya.⁹⁷

The Jesse Kamau decision was nevertheless criticized. Even fellow judges stated the decision was a political ruling. They observed: “They (the three judges) knew how sensitive the issue is. The Kadhi court never affected any one apart from Muslims; this case is on *Bomas* Draft. How can they give a ruling of a case that has been overtaken by events?”⁹⁸ The Kadhis’ Court is however enshrined in the 2010 Constitution. This matter may still be unsettled, might explode in future Constitutional reviews again. This debate seems to rise again with Atheists in Kenya Society matter. The next case addresses exactly that.

3.3.3.2 Atheists In Kenya (AIK) and 1 other Versus Attorney General and 2 others,

Constitutional Petition no 308 of 2016 [2017]

The petition raises one issue for determination, that is; whether the 1st petitioner’s suspension was procedural and lawful. This petition challenges the decision by the respondents to suspend the 1st petitioner, *the Atheists in Kenya Society (AIK)*. The society was registered on 17th February 2016 under registration No. 47958. Two months later on 29th April, 2016, the 2nd respondent issued the impugned letter suspending it after the expiry of seven (7) days of that letter. The petitioners argued that the suspension was unjustified, done without notice or due process and illegal. Arguing that it contravened Articles 47 and 50 of the Constitution and

⁹⁷Jesse Kamau & 25 others V. Attorney General and the Constitution of Kenya Review Commission, Miscellaneous Civil Application no 890 of 2003 [2010]eKLR 89

⁹⁸Daily Nation, (May 28, 2010)1, 4

section 12 (1) of the Societies Act; contending a violation of their fundamental rights and freedoms; particularly (Art. 27),⁹⁹ (Art. 32),¹⁰⁰ (Art. 33)¹⁰¹ and (Art. 36).¹⁰²

The respondents on the other hand contended that the suspension was lawful and done in accordance with the law. That there was no violation of the petitioners' rights either under the Constitution or the law. In determination, Justice E C Mwitwa made the following decision: Firstly, the 1st petitioner being a society duly registered in accordance with the provisions of the Societies Act; hence acquires rights and thus have legitimate expectation that those rights would be respected, enhanced and protected, and that any action or decision affecting those rights would only be taken in accordance with the law. Secondly, constitutionally and statutorily, the show – cause demand why the society could not be suspended or any other action taken against it as may be necessary. It was contrary to law to simply notify the petitioners that the society stands suspended after seven (7) days as the second respondent purported to do. That was against the letter and the spirit of section 15 of the same Act. It violated the petitioner's rights under Article 47 of the Constitution¹⁰³ and Fair Administrative Act, 2015. Thirdly, the impugned action also rendered the requirement that no one should be condemned unheard valueless and threw the principles of natural justice out of the window. They condemned the petitioners unheard in violation of both the Constitution and the Law and therefore their action amounted to nothing. It is illegal, null and void. Lastly, the respondent's action was also unreasonable for reason of failing to observe the law and procedural fairness. It failed the test of legality.

There are four comments to be made from this case. First, that the action of the executive as represented by the respondents indicates its propensity for impunity. That impunity was incepted

⁹⁹Right to equality and freedom from discrimination

¹⁰⁰Freedom of conscience, religion, belief and opinion

¹⁰¹Freedom of expression

¹⁰²Freedom of association

¹⁰³Rights to Fair Administrative Action

and nurtured during the colonial and in successive regimes as was defended by the law in place then. That law has since been repealed by the promulgation of the 2010 constitution; thus Kenyans are in a new, open and democratic dispensation where the rule of law and the Bill of Rights are the backbone of our jurisprudence. Second, the case indicates that, the judicial arm of the government as demonstrated by the judgment by Justice Chacha Mwita can be trusted to implement the constitutional charter and in fact indicates a true custodian of the law as per Article 2(1) and the Bill of Right. Third, the case also indicates that our laws as made by the legislature are as effective and reliable as any other in democratic nations which uphold the rule of law and the Bill of Rights. Last, the judgment also indicates that our laws in letter and spirit demonstrate separation of law and religion that should be observed by state administrators in their exercise of state and public power. Let's look at the institutional framework.

3.4 Institutional Framework

3.4.1 The International Institutional Legal Framework

3.4.1.1 UN Commission on Human Rights (UNCHR)

Beginning in 1967, UNCHR¹⁰⁴ powers include “studying situations revealing a consistent pattern of violations of human rights.”¹⁰⁵ In 1979, that it shall “co-ordinate activities concerning human rights in the United Nations systems.”¹⁰⁶ That it shall “prepare standard setting instruments and establish national and local human rights institutions, fosters greater knowledge and awareness by the peoples of the world of their human rights.” Emphasizes promoting “human rights,

¹⁰⁴This is a subsidiary body of the Economic and Social Council (ECOSOC) and one of the principal organs of the United Nations (UN) in the field of human rights, the Commission is a functional body which meets once a year in Geneva, for a period of six weeks. It was established by ECOSOC on 16th February 1946 in pursuance of Article 68 of the Charter of the United Nations. Charged with the task of drawing up an International Bill of Human Rights (IBHR) to define the human rights and freedoms referred to in the Charter, and determining ways and means for its effective implementation, the mandate of the Commission led eventually to the drafting of the Universal Declaration of Human Rights in 1948 and of the International Covenants on Human Rights (ICHR) in 1966.

¹⁰⁵Symonides and Volodine (n1) 58-59

¹⁰⁶Ibid

undertakes and disseminates studies on various aspects of human rights, and urges all Governments to consider action to facilitate publicity regarding UNHR activities¹⁰⁷ and responsible for dealing with the complaints of individuals and organizations alleging violations.”¹⁰⁸

3.4.1.2 International Court of Justice (ICJ)

ICJ Member States have an obligation to “comply with the decision of the ICJ in any case to which [they are] a party.”¹⁰⁹ “Only States may be parties in cases before the Court.”¹¹⁰ The ICJ has thus had occasion to make important pronouncements on questions of human rights, in particular “on the right of asylum, the rights of aliens, the rights of the child among others.”¹¹¹ “Due to the fact that a great number of UNHR instruments contain provisions whereby any dispute between the States Parties relating to the interpretation, application or fulfillment of the instrument may be submitted to the ICJ, the Court has been involved in contentious cases with regard to human rights.”¹¹² “The limitation arises when only states can be parties before the Court.” Let’s look at AU institutional framework.

3.4.2. The Regional Institutional Legal Framework

3.4.2.1 The African Commission “on Human and Peoples’ Rights”

ACHPR objective is to “promote and protect the rights and freedoms of the individual in Africa.”¹¹³ “Establishes Rights and Duties on Human and Peoples’ Rights and measures of

¹⁰⁷Symonides and Volodin (n1) 58-59

¹⁰⁸Ibid

¹⁰⁹Article 94 of the Charter; The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice which is an integral part of the United Nations Charter.

¹¹⁰Article 35 of the Statute

¹¹¹There are reservations concerning the *Convention on the Prevention and Punishment of the Crime of Genocide*.

¹¹²Symonides and Volodine (n1) 260

¹¹³The ACHPR was established in 1987 following the entry into force of the *African Charter on Human and Peoples’ Rights (ACHPR)*. To this end, the Commission carries out studies and research, formulates and lays down principles and rules in the field, considers the activities undertaken by States Parties in implementing the Charter,

safeguard and the Commission promote human and peoples' rights and ensure their protection in Africa."¹¹⁴The mandate of the Commission is to "promote human and peoples' rights"¹¹⁵ The Commission shall "ensure the protection of human and peoples' rights under conditions laid down by the present Charter."¹¹⁶The limitation of the Commission may be that "it can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged."¹¹⁷ In that case "first, the Commission may ask the State concerned to provide it with all relevant information. Second, when the Commission is considering the matter, States concerned may be represented before it and submit written or oral representation."¹¹⁸In addition after having obtained from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of human and peoples' rights, the Commission shall "prepare, within a reasonable period of time from the notification referred to in Article 48, a

interprets the provisions of the Charter and promotes co-operation with other African and international institutions working in the same field. The Commission is composed of eleven members chosen 'from among African personalities of the highest reputation' and with recognized competence in the domain of human rights. Members, of whom no two can be of the same nationality, are elected by the Assembly of Heads of State and Government for a six - year period and serve in their personal capacity. The Commission meets twice a year and is serviced in its daily work by the Secretariat situated in Banjul, Gambia. Its activity also consists of the examination of any violation of rights guaranteed by the African Charter which is brought to its attention by means of communications from States Parties, individuals or non -governmental organizations, provided all local remedies have been exhausted. In response to such a communication and after carrying out all appropriate investigations and requesting from States Parties relevant information, a report, stating the facts, its findings and recommendations, is forwarded to the Assembly of Heads of State and Government, which decides on the appropriate action. If, after deliberation on a communication, the Commission suspects gross and massive violations of human rights, it draws the matter to the attention of the Assembly of Heads of State and Government, which can request the Commission to undertake in-depth investigation, followed by a report containing appropriate recommendation. The Commission has no legal enforcement procedure and therefore the compliance with the provisions of the Charter depends on the will of the Member States.

¹¹⁴Article 30

¹¹⁵Article 45(1) (a); and in particular : to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to Governments.

¹¹⁶Article 45(2)

¹¹⁷Article 50

¹¹⁸Article 51

report to the States concerned and communicated to the Assembly of Heads of State and Government.”¹¹⁹ Other entities national and local such as AIK also can make a request for interventions if their fundamental rights have been unduly violated in their States. This usually is considered by “the Commission and it is presented first before each session, the Secretary of the Commission shall make a list of the Communications other than those of States Parties to the present Charter and transmit them to Members of the Commission, who shall indicate which Communications should be considered by the Commission. Second, a communication shall be considered by the Commission if a simple majority of its members so decide.”¹²⁰ Such communication is never done haphazardly; there are applicable principles which underpin it as stated below:

The Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples’ Rights, as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the Parties to the present Charter are members.¹²¹

The conditions in Article 55 of the charter might hardly be realized on several counts: to which other institution within Africa with grievances of human rights violations are brought if not compatible with AU mandate? How would someone determine the civil language that AU would want grievances of rights violations to be illustrated? Let’s examine the AU court below.

3.4.2.2 The African Court on Human and Peoples’ Rights

The Court’s¹²² jurisdiction shall extend to “all cases and disputes submitted to it concerning the interpretation and application of the Charter, this protocol and any other relevant Human Rights

¹¹⁹Article 52

¹²⁰Article 55

¹²¹Article 60

¹²²In 1998, the OAU adopted a Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights. The creation of this Court is intended to complement and strengthen the role of the African Commission on Human and Peoples’ Rights established in 1987 to promote and

instrument ratified by the States concerned.”¹²³ The access to the Court shall include but not limited to “NGOs and Individuals the Court may entitle relevant Non – Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) [*ratification*] of this protocol.”¹²⁴

The evidence adduced in Court indicates that “(1) the Court shall hear submissions by all parties and if deemed necessary, hold an enquiry. The States concerned shall assist by providing relevant facilities for the efficient handling of the case. (2) The Court may receive written and oral evidence including expert testimony and shall make its decision on the basis of such evidence.”¹²⁵ Other things to be noted about this Court are that “(1) if the Court finds that there has been violation of a human or peoples’ rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation; (2) In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.”¹²⁶ There is “efficiency in the Court judgments.”¹²⁷ Notification of judgment “shall be transmitted to the Member States of the OAU and the Commission. The Council of Ministers shall also be notified and shall monitor its

protect human rights in Africa. The Court will have jurisdiction over cases submitted to it concerning the interpretation and implementation of the provisions of the Charter and other regional human rights instruments. Cases shall be referred to the Court by the African Commission, Member States and, on exceptional grounds, by individuals, groups of individuals and non –governmental organizations. The Preamble to the African Court on Human and Peoples’ Rights ‘reaffirms adherence to the principles of Human and Peoples’ Rights, freedoms and duties contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, and other international organizations.’ This protocol recognizes ‘the two fold objective of the African Commission on Human and Peoples’ Rights is to ensure on the one hand promotion and on the other protection of Human and Peoples’ Rights, freedom and Duties.’ It further recognizes ‘the efforts of the African Charter on Human and Peoples’ Rights in the promotion and protection of Human and Peoples’ Rights since its inception in 1987.’ The protocol is ‘firmly convinced that the attainment of the objectives of the African Charter on Human and Peoples’ Rights requires the establishment of an African Court on Human and Peoples’ rights to complement and reinforce the functions of the African Commission on Human and Peoples’ Rights.’

¹²³Article 3

¹²⁴Article 5(3)

¹²⁵Article 26

¹²⁶Article 27

¹²⁷Article 28

execution on behalf of the Assembly.”¹²⁸The execution of the judgment “shall be undertaken by the State Parties ‘to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.”¹²⁹ The next section discusses the domestic institutional legal framework.

3.4.3 The Kenyan Institutional Legal Framework

3.4.3.1 The Kenya National Commission on Human Rights (KNCHR)

The “KNCHR Act No 14 of 2011 (Rev. 2012)”¹³⁰ is “an Act pursuant to Article 59(4) of the Constitution of Kenya 2010.” In this Act “human Rights” means “the fundamental rights and freedoms protected under the Constitution, and the Laws of Kenya.”¹³¹ The guiding principles’ of the Commission are that, “in fulfilling its mandate, the Commission shall act in accordance with the values and principles set out in the Constitution and the Laws of Kenya, and shall observe and respect.... (c) all treaties and conventions which have been ratified in Kenya and in particular the fact that human rights are indivisible, interdependent, interrelated and of equal importance for the dignity of all human beings; and (d) the rules of natural justice.”¹³²

For the Commission to carry out her functions, “it must have the general functions and powers conferred in Article 252 where a complaint to a commission or the holder of an independent office may be made by any person entitled to institute Court proceedings under Article 22(1) and

¹²⁸Article 29

¹²⁹Article 30

¹³⁰The role and functions of national commissions are described in the United Nations Secretary –General’s report entitled ‘National Institutions for the protection and promotion of human rights,’ prepared at the request of the United Nations General Assembly resolution 40/123. Pursuant to this text, national commissions for human rights are designed to hear and investigate individual charges of human rights violations or discriminatory acts committed in violation of existing law. One of their most important functions is their systematic monitoring of existing government policy toward human rights and presenting suggestions concerning improvements in this regard.¹³⁰ Furthermore, national commissions are engaged in educating the public about important issues in the field of human rights as well as in monitoring State compliance with existing human rights law. Their organization varies from country to country as well as their procedures in investigation and resolution of complaints. National commissions for human rights do not have the power to take binding decisions in resolving a complaint. Therefore, to be effective, a strong connection between the law, the commissions and the courts is necessary.

¹³¹Article 2(1)

¹³²Article 7

(2) [*enforcement on the bill of right*].”¹³³ The Commission furthermore is “invested with investigatory powers which are carried out by public officers or investigating agencies of the government.”¹³⁴

The Commission however, despite all these enormous general functions and powers of investigations is nevertheless limited in jurisdiction, “the Commission shall not investigate – (a) a matter pending before any court or judicial tribunal; (c) a matter relating to relations between the State and any foreign State or international organization recognized as such under any international law; (d) a matter relating to the exercise of the prerogative of mercy; (e) a matter relating to equality and freedom from discrimination; (f) anything in respect of which there is a right of appeal or other legal remedy unless, in the opinion of the Commission, it is not reasonable to expect that the right of appeal or other legal remedy to be resorted to ; or (g) any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law.”¹³⁵

Similarly, the Commissions power is not limited by other provisions as the Act stipulates that “the Commission may investigate or carry out an inquiry into any matter despite a provision in any written law to the effect that the action is final or cannot be appealed, challenged, reviewed, questioned or called in question.”¹³⁶

On the aspect of *Complaints to the Commission*, the Act instructs that, “a complaint to the Commission may only be made by the person aggrieved by the matter complained of or on his behalf ...”¹³⁷ The form of complaint procedure is that, “a person wishing to lodge a complaint

¹³³Article 252(9) of the Constitution of Kenya

¹³⁴Article 28 of the Societies Act

¹³⁵Article 30

¹³⁶Article 31

¹³⁷Article 32

alleging violation of human rights may do so orally or in writing addressed to the secretary or such other person as may be duly authorized by the Commission for that purpose.”¹³⁸ However, the Commission as well has a discretion not to investigate complains, “the Commission may decline to investigate a complaint if the Commission considers that – (a) there are in existence adequate remedies under any written law or administrative practice; or (b) the complaint is trivial, frivolous, vexatious or is not made in good faith.”¹³⁹

The Act also charges the Commission to give notice if complaint is not investigated, “if the Commission decides not to investigate a complaint or to discontinue the investigation of a complaint, the Commission shall inform the complainant in writing of that decision and the reasons for the decision as soon as reasonably practicable.”¹⁴⁰

On representations if adverse findings are found, the Act commands that, “the Commission shall give any person, State organ, public office or organization against whom an adverse finding or recommendation is made an opportunity to make representations concerning the finding or recommendation before the Commission includes the finding in its report.”¹⁴¹ The Commission also “shall make notice of investigation to organization.”¹⁴² The hearing shall be “open to the public except where the Commission decides.”¹⁴³ The report to the complainant “shall be in writing.”¹⁴⁴ In case of any misconduct found, the Commission shall “report the matter to the appropriate authority.”¹⁴⁵

¹³⁸Article 33

¹³⁹Article 34

¹⁴⁰Article 35

¹⁴¹Article 36

¹⁴²Article 37

¹⁴³Article 38

¹⁴⁴Article 43

¹⁴⁵Article 44

3.4.3.2 The Kenyan Judicial System

The judicial authority in Kenya is derived from the people of Kenya and has been expressly vested in the Courts and tribunals established by or under the Constitution. The judicial officers are to work guided by principles such as justice to all without delay, just administration without regard to procedural technicalities, promoting and protecting the purpose and principle of the Constitution.¹⁴⁶ There is independence of the Judiciary institutionally and decisional. The separation of powers is to executive and legislature institutionally. Decisional in respect to “the idea that judges should be able to decide cases solely based on the law and facts, without letting the media, politics or other concerns sway their decisions, and without fearing penalty in their careers for their decisions.”¹⁴⁷

The High Court as the Institution is the third highest court in the hierarchy of the court system in the Constitution. The High Court’s composition, organisation and administration are provided in an Act of parliament. The court is presided over by a principal judge elected by the judges of the High Court from amongst themselves.¹⁴⁸ The High Court in the 2010 Constitution retains most of the powers bestowed on the High Court in the repealed Constitution. The High Court retains its original jurisdiction in civil and criminal matters. The High Court also has jurisdiction in matters relating to the enforcement of the Bill of Rights.¹⁴⁹ The High Court also retains its mandate to interpret the Constitution.¹⁵⁰ The High Court further has original or appellate jurisdiction to hear any matter conferred to it by legislation. The High Court also has supervisory jurisdiction over subordinate court, a person or authority with judicial or quasi –judicial function is the Registrar

¹⁴⁶Article 159.

¹⁴⁷Article 160; Lumumba and Franceschi (n37) 477.

¹⁴⁸Lumumba and Franceschi (n37) 477

¹⁴⁹Article 165(3)(b)

¹⁵⁰Article 165(d)

of Societies. Such function involves a calling for record of proceedings and may make orders or directions that would guarantee fair administration of justice.¹⁵¹

3.5 Conclusion

This chapter demonstrates that there are legislative and institutional framework governing the place of Atheists in Kenya? Legislatively for instance; the agitation against the Kadhis' court by the Christians never saw the light of the day in the promulgated Constitution. Although the Churches argued their matter persuasively; nevertheless, the courts' institutional and decisional independence never protected the Christians interest. This may be because Kadhis' Courts is enshrined in the constitution. This is illustrated by the recognition of Kadhis' courts as a subordinate court in Kenya with all privileges and powers of a court in Kenya. This could be one reason why the religious community is not enthusiastic seeking courts interventions in their agitations against the AIK society. On the other hand, the decision by Justice Chacha Mwita on the AIK indicates a contrary position in the sense that constitutional rights bestowed to the minorities and marginalized are protected and safeguarded by the Kenyan courts. This same protection and safeguard is also shown in regional and international legal decisions. It indicates that majorly there is greater protection for religion by the State. Incidences of State oppression and discrimination to minorities and marginalized groups do arise. However, the real place of Atheists in the Kenyan legal structure and system is still lacking despite numerous legislations.

¹⁵¹Lumumba and Franceschi (n37) 477

CHAPTER FOUR:

NARRATIVES ON REGISTRATION, SUSPENSION AND DEREGISTRATION OF ATHEISTS IN KENYA (AIK)

4.1 Introduction

The last chapter discussed the legislative and institutional framework governing the place of Atheists In Kenya. The chapter noted that the Constitution seeks to accommodate religious diversity and pluralism by adopting a critical liberal constitutional approach; this approach maintains the status of dominant groups in society, by legitimizing and perpetrating conservative hegemony. This chapter attempts to understand how the legal systems navigate the existence of multiple religious views in Kenya. The chapter notes the political suppression of certain groups such as the AIK, is disguised in the cloak of false constitutional and statutory validity. The chapter also notes in practice the desire to protect the dominant system of social and power relation triumph over the need to protect the right of minority groups. The main objective of this study is to examine the place of Atheists in the Kenyan legal system. The study notes that the Constitution of Kenya 2010 does not explicitly recognize Atheists as a group.

This chapter uses the specific example of the registration, suspension and deregistration of Atheists society in Kenya to illustrate the tension between the Atheists in Kenya Society (AIK) and the State on one hand and the Christians and Muslims on the other. The chapter draws on qualitative research methodology to examine the case study under investigation. The study entailed conducting Key In-depth interviews (KII) with experts and Focus Groups Discussions (FGD) in all categories. The data collected responded to the research question: *how has the legal system navigated the existence of multiple religious views in Kenya?* The study involved 28 Respondents who included Christian leaders, Muslim leaders, AIK members and the AG official.

Due to the sensitive nature of the research, the researcher avoided using real names of the participants but coded their names and presented them in Appendix G.

4.2 Research Methodology

The research question was the guide which the researcher used to gather data analyzed by themes. Following the recommendations advanced by Viggo Sogaard¹ and John Creswell,² the researcher read through the data to get a general sense that enabled him to group the data into various themes.³

After coding the information, the researcher identified patterns of agreement with the research question. This enabled him to interpret data based on the commonality of information given.⁴ Below is the categorization of the data based on the common themes that respond to the exploration of the process of registration, suspension and deregistration of Atheists in Kenya society.

4.3. AIK Knowledge and Perception in Kenya

There are several reasons why AIK was formed: to have a platform to interact, engage and express their fears and expectations; as an umbrella body to protect their interests;⁵ an organization for non-believers, so that they can come together, share their views.⁶ Also as space for identity, a form of support and the way of thinking for them to be authentic as non-religious people,⁷ to promote rational thinking and share their opinions, ideas and promote facts.⁸

¹Viggo Sogaard. *Research in Church and Mission* (William Eerdman 1996)184-186.

²John Creswell W. *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (2nd edn, Sage Publications 2003)190-192.

³Linda Bourque B, 'Coding' in Michael S Lewis –Beck, Alan Bryman, and Timothy Futing Liao (*eds*), *The Sage Encyclopedia of Social Science Research Methods* V.1 (Sage Publications 2004)132-136.

⁴Sharon Lockyer, 'Coding Qualitative Data' In Michael S Lewis –Beck, Alan Bryman, and Timothy Futing Liao (*eds*), *The Sage Encyclopedia of Social Science Research Methods* V.1 (Sage Publications 2004)137-138

⁵Respondent no 2 in Appendix G

⁶FGD (Atheists), Respondent no 14 in Appendix G

⁷FGD (Atheists), Respondent no 15 in Appendix G

⁸FGD (Atheists), Respondent no 16 in Appendix G

On the interests AIK is protecting Atheists face a lot of challenges. Like working in a place where prayers are mandatory or are run by religious people; discriminating them. They protect beliefs in atheism, skepticism, science and humanism.⁹ They defend stigmatization around non-belief; and provide a community for atheists.¹⁰

Respondent no 22 observes the religious community understanding of AIK belief as varied as well. The Respondent Views them unbelievers who use Christian and Islamic ideals to counter the same ideals. They have no ideals of their own.¹¹

Whereas Respondent 24 observes Atheists seem not to believe in God; observations indicate their keen worship of common sense and knowledge. They strive to enjoy limitless pleasure and happiness.¹² Respondent 20 observes them Atheists as obsessed to oppose the existence of God. They are ignorant of the Christian values and principles.¹³

Respondents 8 and 9 think that Atheists' belief is baseless because they have nothing tangible as evidence, since they talk from their mind of what they Think of God, they don't have a book which they can derive their conclusions from, and therefore they considers them confused.¹⁴ They view them as believing in nothing and hence are dangerous in the community.¹⁵

Respondents 1 and 4 rationalize AIK belief by describing Atheism as being more of disbelief than belief and so they have a total disbelief and disregard to any supernatural being, be it God or Angels or demons or whatever the religious people believe in and so they do not believe in any supernatural power but believe in material things. They see them as materialists who believe in

⁹Respondent no 2 in Appendix G

¹⁰FGD (Atheists), Respondent no 17 in Appendix G

¹¹FGD (Christian), Respondent no 22 in Appendix G

¹²FGD (Christian), Respondent no 24 in Appendix G

¹³FGD (Christian), Respondent no 20 in Appendix G

¹⁴FGD (Muslim), Respondent no 7 in Appendix G

¹⁵FGD (Muslim), Respondent no 8 and 9 in Appendix G

the material world and do not believe that there is anything that is outside the realm of the material and natural world that they live in today.¹⁶

The belief in God was exclusive whether with the religious apologists or the State official.¹⁷

Disbelief in God comes from the state of not being satisfied by the existing evidence on the existence of God. For there to be disbelief in God, proves that God actually exists.¹⁸

However, Respondent 1 elaborated much more that:

I believe that the belief in God is something entrenched in human beings and that's why you find out that even a hundred or two hundred years ago you look at any community in the world might not have dispensaries or boreholes or basic human needs but have a place of worship in every city or village you go to in the world and that shows you the nature of human beings searching for God. So this is deeply entrenched in *fithra* in a Muslim, natural disposition that a human being is driven to his God and keeps on searching for God. I believe that disbelief in God is created by doubts that are cast upon a person, maybe somebody asked God for bread and He didn't give him bread and decides that God doesn't exist.¹⁹

The registration of AIK ignited uproar by the religious community in Kenya. Respondent 2 believes that to date they are still reacting because they mainly think that AIK have been sent by the devil. They believe them to be devil worshippers or agents of the devil. Most religious groups think AIK goes against God and what they believe to be right. They have several misconceptions about them.²⁰ Respondent 14 testified that she was harshly condemned:

I am speaking of things told me when I said I am a non-believer, they said so you are a hoe, devil worshipper, illuminati. I used to know human beings as not being bad people but this experience got me to realize that people judge without trying to understand. Their first defence is wanting to attack, since the whole thing was from Christians, it got me question that they speak of love and wanting people to get better but how they behaved towards me whether you understand how your belief is about, what it preaches or whether you practice what you preach. It got me wondering that the people you condemn are actually the ones practicing what you are supposed to practice. A lot of people say they are Christian but if I ask them what they believe in or their Christian philosophy, they cannot give what their identity are about. They are evil.²¹

¹⁶Respondent no 1 and 4 in Appendix G

¹⁷Respondent no 1, 3,4 in Appendix G

¹⁸Respondent no 3 in Appendix G

¹⁹Respondent no 1 in Appendix G

²⁰Respondent no 2 in Appendix G

²¹FGD (Atheists), Respondent no 14 in Appendix G

Respondent 15 thinks the reaction of Christians from the church leadership, is because of their patronage nature denying others the right to worship as they feel.²² Respondent 16 thinks people like Christians believe there will come a time when people will stop believing and that will be the end of the world. There is stigmatization on realization they are atheists, their reactions are they did not want to be there anymore. They stop talking to them, or having any connection with them. It affects them emotionally.²³

Respondent 17 experienced rejection and stigma narrating his colleagues describing him ‘the lost one’, usually attacks them too because according to him his colleagues believe in God challenged making them think.²⁴

Respondent 18 vividly remembers the incidence:

I remember when news got out that AIK had now been registered as a society, the church leadership called a conference with an objective to warn the government, believers to be wary of a society that had been formed that is out to influence negatively the values to our nation. There were also major interviews on the roads about atheists. And most of the opinions pointed out that we as atheists are rebels, people who are lost or we needed to be prayed for. Most of their reaction was based on the ignorance regarding atheism.²⁵

Respondent 15 urged religious people not to see them as the evil ones’ or the lost ones but accept them as good people in the society.²⁶ Respondent 18 shared the following thoughts:

While processing the process of registration and the suspension of AIK I noted that the reason for AIK suspension and deregistration was because it was a threat to national security. I tried to reason as to why they would come up with this as a strong defence. This got me thinking that perhaps they had observed some radical situation where they see that if someone is bold enough to challenge what a lot of people see or believe, they will be quick to take it as a defence to protect the nation. While inferring to what the constitution says, it comes out that we are a tolerant state. There are also a lot of religious groups that influence decision making. My main concern is on how the constitution is being interpreted. The Judiciary, lawyers and that should be the most sober people in the implementation, interpretation and execution of the law guiding us on the law making process with the understanding that there are different belief systems. As for AIK, It is growing but slow, because we are in a highly religious state and a religious background. I would like to see a situation where people are more rational and objective with regards to the law and difference in beliefs.²⁷

²²FGD (Atheists), Respondent no 15 in Appendix G

²³FGD (Atheists), Respondent no 16 in Appendix G

²⁴FGD (Atheists), Respondent no 17 in Appendix G

²⁵FGD (Atheists), Respondent no 18 in Appendix G

²⁶FGD (Atheists), Respondent no 15 in Appendix G

²⁷FGD (Atheists), Respondent no 18 in Appendix G

There were several reasons why the religious community reacted negatively to AIK registration according to Respondent 2. Among them the understanding that, there is duality in religion; that is if you are not with them, you are against them. To most Christians, it is either God or the devil. So duality is drawn in between. They consider AIK of the devil.²⁸

There is the issue of ‘cognitive dissonance’ which occurs when people believe in something and then one comes up with something different notes Respondent 19. Here religious community were ignorant of atheism, thus they react to protect what they believe.²⁹

There is a belief that most Christians profess Christianity but do not understand what they profess as per Respondent 13. Their reaction informs that. Some of them are accommodative and others with a very strong cognitive dissonance do not understand that people are different.³⁰

Atheism is unstoppable and it is growing according to Respondent 14. It is backed by scientific facts. Religious reaction may be because they know that when people start questioning, they would not answer.³¹

There is the sense of power welding with the Christians which is now challenged thus feeling threatened due to fear for displacement by AIK as explained by Respondent 15. Religious upbringing exposed them to studies without mention of atheists. Developing a misconception about atheists, lack of exposure and understanding about the atheists could lead to intolerance.³²

During the FGDs and KII, there was a notable fear by the religious community of AIK. Their fears centered on corruption of morals and future generations. According to Respondent 22:

Yes I fear atheists because being a Christian, there is a way we are expected to conduct ourselves in the society according to the Christian teachings and atheists coming in and questioning the way

²⁸Respondent no 2 in Appendix G

²⁹FGD (Atheists), Respondent no 19 in Appendix G

³⁰FGD (Atheists), Respondent no 13 in Appendix G

³¹FGD (Atheists), Respondent no 14 in Appendix G

³²FGD (Atheists), Respondent no 15 in Appendix G

these ideals which have been in place over time, will definitely bring issues like disorienting the principles put upon children in a society. I just fear for the future generation.³³

Moral corruption, fear of Atheists that they will corrode the morals if they are let to have roots in Kenya; alleging Atheists advocate for teenage sex which is against Christianity as noted by Respondent 26. Atheist worship money and they are good with anything whether bad or good.³⁴

There was fear for the present or contemporary generation, says Respondent 11, feared they are going to destroy their generation.³⁵

Respondents 25 feared for their family because atheists will influence their kids and tell them that there is no God.³⁶ Respondent 4 wondered at their age, they do not know where their children will be, they belief in God and they have no complain about it. Atheism might affect their children, the generation they are talking about do things differently; deviancy, they may have homosexual children whom they do not know or an Atheist while they do not know. These forces are there and there is need to be cognizant of.³⁷

Atheism is anti-religion according to Respondent 23 because they do not believe in God. And just because they do not believe in God do not make God bad. They fight against God because they have not chosen God. They want to be registered, then what? What intentions do they have after registration?³⁸

However, restrictive measures were proposed by Respondent 7 in a bid to limit the AIK registration and influence. That before registering the Atheists, they should be given conditions

³³FGD (Christian), Respondent no 22 in Appendix G

³⁴FGD (Christian), Respondent no 26 in Appendix G

³⁵FGD (Muslim), Respondent no11 in Appendix G

³⁶FGD (Christian), Respondent no 25 in Appendix G

³⁷Respondent no 4 in Appendix G

³⁸FGD (Christian), Respondent no 23 in Appendix G

like more than one million signatures to prove that they are a society. The special conditions should be given because they contradict the constitution.³⁹

Not all religious people feared AIK. Respondents 10, 12, 1, and 6 thought that AIK have nothing to hold on. They are outsiders.⁴⁰ In fact according to Respondent 28, tolerance, how tolerant an individual is to fellow human beings. It does not matter whether they are believers, Christians and so forth.⁴¹

It was not all religious people who feared Atheists, in fact the Christian apologist, Respondent 3 argued reasonably as indicated below:

Atheism is not a contemporary concern. It has always been around and it depends a lot on who is being addressed. If you believe in a particular God and anyone who disbelieves in that same God is an atheist. The concept is much older than the earlier church, the earlier apologists, the likes of Agustin, Justin Martyr and their persecution. The ancient philosophies, someone like Socrates who was tried on the basis of many things; poisoning young minds etc. and he dealt with that particular issue like the belief in the Greek god, and if you propagated anything different, you were treated as a non-believer. So where we are as a country, if we would like to exercise human rights, we must be prepared to grant the possibility of other people to believe differently from us. We can persuade them, and nobody should be prevented from persuading somebody to think differently because God has made us rational beings, and should not interfere with any discourse and debate would be contrary to what God has endowed us. I would encourage a lot of debates, more friendly discussions, and more dialogue on the provisions of the constitution on matters of religion. We cannot legislate right or wrong, good or bad in a document, rather develop supplementary documents that can help address difficulties that emerge from what the constitution provides.⁴²

The religious communities understanding of AIK in Kenya is varied. According to Respondent 20, Atheists are not a new group in the world and since Kenya is a developing country, it is expected to happen and if it has not, then it will soon. It is one of the challenges we have to deal with in technology or the westernization in African values and culture. Despite religious opposition to the registration, AIK will still grow. Nothing wrong registering them only that they seem to pervert religious values.⁴³

³⁹FGD (Muslim), Respondent no 7 in Appendix G

⁴⁰FGD (Muslim), Respondent no 10, 12, 1 and 6 in Appendix G

⁴¹FGD (Christian), Respondent no 28 in Appendix G

⁴²Respondent no 3 in Appendix G

⁴³FGD (Christian), Respondent no 20 in Appendix G

This is a group that has been made to exist according to Respondent 22 by virtue of the constitution not categorical on whether the country is religious; as the constitution provides that Kenya is a 'no state religion.' AIK have also come from this concept of liberal democracy where every individual has freedom or right to do whatever they want to do in a particular jurisdiction.⁴⁴

Apologist Respondent 3 who has debated Atheists aver that:

I have interacted one of their patrons, debated him twice at the University of Nairobi in 2010 when they were just beginning and later on a TV programme three years ago on Family TV and a lot of my friends who have attended their meetings have come to me and asked about my thoughts on some of the issues that they deal with. I have also interacted with them through the media when the issue of registration came up and recognized that a bulk of the church was a bit shaken and hostile towards that registration and I stood out with a lone voice that there is really nothing wrong with registering them and of course I was regarded as the lost sheep but I still think that there is nothing threatening or demeaning about registering them be it from a logical view, faith view or constitutional view.⁴⁵

AIK society applied for registration like any other association as narrated by Respondent 4; documented their constitution; state received application on 5th July 2015. Verifications and vetting was done by the National Intelligence Service (NIS) as normal procedure. Positive response given having nothing adverse found in their application; certificate was processed and issued on 17th Feb 2016. After the registration there was church resistance, they were against the registration; AG suspended the Association. AIK went to court. The court finding was as per the judgment issued. That, for the AG to deregister the AIK, the due process was to be followed. The court lifted the suspension by the AG so as to allow a proper procedure of deregistration to be followed that is the position at the moment.⁴⁶

Christian apologist's Respondent 3 is interested in anything that tends to touch faith and evidences for belief from a critical angle. They are attracted to the debate by their desire to know

⁴⁴FGD (Christian), Respondent no 22 in Appendix G

⁴⁵Respondent no 3 in Appendix G

⁴⁶Respondent no 4 in Appendix G

why the church would be antagonistic to the registration of the group. Any Christian apologetic is glad to engage with any individual who believes differently because it is one of the best evangelistic tools.⁴⁷

The church nevertheless was vehemently resistant to AIK registration as explained by Respondent 3. Many factors may have contributed to that. Historically the church is unprepared or adequately equipped to engage with critical oppositions and contented itself with very basic belief and basic doctrinal allegiance and mostly it doesn't look beyond that circle. The church is also unaware of the biblical mandate to engage with people who believe differently from them. They are unaware that 1st Peter 3:15 says that they should "be prepared to answer anyone who asks for a reason for the hope that they have with gentleness and respect." They are also unaware of Isaiah 1:18 which says "Come now, let us reason together" which actually is a biblical mandate. Isaiah 41:21 which also challenges, "Present your case, set forth your argument challenges God to the Israelites." Jude 1:3 which says "contend for the faith that was once for all delivered to the saints."⁴⁸

The church is actually ignorant of these mandates elaborates Respondent 3 and when an issue like AIK comes up, it poses an unnecessary threat when God Himself is challenging the church to engage. The churches also fear anything that is antagonistic to their faith, anything that would derail or challenge their faith they view it as dangerous. The church also follows their leaders' views since they view them as their representatives, who are very vocal and charismatic. Ignorance of the constitutional provision tends to drive quick reactions without thinking through the implications and the church does not take into account of the freedom of expression and freedom of religion. The clashes between the Bible which is absolute and the constitution which

⁴⁷Respondent no 3 in Appendix G

⁴⁸Respondent no 3 in Appendix G

is subject to change would prompt the church to regard the Bible as being superior to any other book.⁴⁹

Atheists are not genuine, contend Respondent 27. They are not realistic. They are led by their own self-interest; they want to be known as founders to be recorded in history. They want to compare themselves with Jesus Christ; may be questioning how Jesus' name stayed relevant through all the generations. They want to leave history but in a bad way by controversies. They could be Christians who want to confuse others.⁵⁰ These discussions lead to an examination of AIK constitutional recognition, inclusion and or exclusions.

4.4 Constitutional Recognition, Inclusion and Exclusion of AIK

Respondent no 28 observes contradictions in the Constitution:

The constitution is somehow confusing if you look at the preamble which recognizes the supremacy of God Almighty and yet the constitution denies that Kenya has no state religion, thus giving all religion and groups an equal footing giving the atheists the freedom to form and choose anything they wish to practice as a religion. Additionally, I think the constitution recognizes atheism in their bill of rights but the rights should not be abused in any way that will be harmful to the society. The atheists oppose the law since they don't have codes of wrong and right. And I would suggest that the constitution be amended to make it clear that Kenya belongs to a particular religion.⁵¹

The constitution is clear; especially national anthem stating 'Oh God of All Creation' avers Respondent 20; which means the constitution recognizes God. However, the constitution is not going to marginalize any community, that's why atheists claim to be a community in order to fall into the constitution yet they are not a community. The court allows swearing by the Bible or Quran while pledging truthfulness and if atheists don't, they will be lying?⁵²

AIK are not included and they should not be included according to Respondent 27; because they want to erase the history of the country just like their president saying 'oh God of all creation' be

⁴⁹Respondent no 3 in Appendix G

⁵⁰FGD (Christian), Respondent no 27 in Appendix G

⁵¹FGD (Christian), Respondent no 28 in Appendix G

⁵²FGD (Christian), Respondent no 20 in Appendix G

removed from the constitution and national anthem. They are trying to disorient everything that has been in place in centuries. They argue that if one doesn't like how they are treated or pushed, they should join them and that is dangerous since they have no checks for right and wrong.⁵³

The constitution is supreme and recognizes all groups in Kenya as per Respondent 6; the Hindus, the Buddhist etc., including the Atheists themselves. This is captured in the preamble of the constitution accommodating all groups with different beliefs.⁵⁴

The charter recognizes Atheists as an individual but doesn't recognize the movement because they throw stones to the creator and the constitution doesn't allow one to attack another and their faith says Respondent 7. The Atheist attack God and yet the constitution in the national anthem declares God as the sole Creator. Since the movement doesn't respect God and therefore, it is not recognized.⁵⁵

The constitution does not have atheists in mind because atheists are outsiders and have not been historical in this country declares Respondent 1. Every community in Kenya is historically known to be community of believers and atheists considered as outsiders and are not recognized by the Kenyan constitution.⁵⁶

However Respondent no 3 rejected that argument contending that:

Yes it does because it has put everybody on an equal plane where one is not supposed to discriminate anyone and their belief though the AIK would argue since they have been protected against discrimination, the constitution has the mandate to show that the national documents are not discriminative in themselves, like the national Anthem that says "Oh God of all creation.." This discriminates them since they don't believe in that or any god. But then the line cannot be removed since it will discriminate the believers of God. And since God is supreme, He cannot be legislated. So if someone's belief in God doesn't change ones disbelief in God, do not waste your energy in preaching about your disbelief, that would just mean your belief is at stake and you want people to change to your belief. Having missionary mind doesn't make you a true Atheist.⁵⁷

Atheists in Kenya is a registered society under the Society's Act Cap 108, they are a legally

⁵³FGD (Christian), Respondent no 27 in Appendix G

⁵⁴FGD (Muslim), Respondent no 6 in Appendix G

⁵⁵FGD (Muslim), Respondent no 7 in Appendix G

⁵⁶Respondent no 1 in Appendix G

⁵⁷Respondent no 3 in Appendix G

recognized society registered by the government of Kenya states Respondent 2. Meaning they are now part of a society that the law recognizes and allowed them to operate. The question of legality is not an issue because their registration process followed the same process that churches followed to become registered. They are recognized by the law and the constitution (Article 32 and 36). This is the first time an atheist society received a certificate in Kenya in 2016.⁵⁸

Respondent 13 believes the Constitution is secular:

I have been an atheist for a while and have not been through the whole constitution but some sections of it. In my view, I would say that the constitution is secular and cannot be categorically taken to represent a specific group let's say Christians, non-Christians or, Muslims. Although some sections of the constitution target one or the majority of the religious group which is Christianity, I think we as atheists are included too wholly represent a bigger picture of a God-believing nation is in the preamble of the constitution. Generally, it represents everyone.⁵⁹

It should be secular; some sections of the constitution are not secular concurs Respondent 14.

There is need to push for a more secular law constitution. There are some clauses which they are not comfortable with. It does not matter if one is religious, traditional, an atheist, basically the constitution covers everyone, and it should be a secular document.⁶⁰

Respondent 2 believes the law and the constitution protected their registration interference by the registrar contending that:

In my view the registration was a decision by a state officer, who is the registrar of societies. If it was for the registrar to make the decision without considering the law and the constitution, we would not have been registered. When we got registered, we got registered because the registrar of societies did not have an option. We had a party, called a godless party and the media carried the story of the godless party. The religious groups lead by a certain Bishop questioned the government why they would have such a group. They held a press conference to suspend this group. Two months after getting the certificate, a letter from the Attorney General of being suspended was issued. The reason was that we were a threat to peace and order of the country. That was using the law to flip issues.⁶¹

In some clauses at the Preamble, it looks like it is excluding them observes Respondent 16.

Because 'the people of Kenya are acknowledging the supremacy of God,' while Atheists do not

⁵⁸Respondent no 2 in Appendix G

⁵⁹FGD (Atheists), Respondent no 13 in Appendix G

⁶⁰FGD (Atheists), Respondent no 14 in Appendix G

⁶¹Respondent no 2 in Appendix G

‘acknowledge the supremacy of God’ because they do not believe in God, that looks like an exclusion. But then it states in Article 8 that ‘there is no state religion,’ meaning atheists are included.⁶²

When the writers of the constitution were working on a framework religion was the majority observes Respondent 16, as the aspect of none believe is a recent activity or new. The statement itself, when one interprets it as it is, looks like the non-believers or atheists are excluded. The constitution is great and everything out of it agree much with the lifestyle that Atheists live, things they stand for and agree with, in that they are included, and hence it is both sided. The exclusion is for a small section but a big part of the constitution includes them. It is not therefore exclusive.⁶³

The constitution is an inheritance from our colonial masters’ way of doing things observes Respondent 18. When we adapted it, the predominant way of looking at things was Christian, so even the people who drafted the constitution have an adaptation and thinking of the Christian mind set, the assumption was that their way of looking at things was everybody’s way. For instance one is a Christian, educated in the western way of looking at the world and comes back claiming to have been taught the right way of looking at things, assuming that everybody else is looking at the world similarly, influencing the writing of the charter.⁶⁴

Apologist Respondent 1 is of a yes and no position:

Yes they are included since an atheist as an individual has a right to practice whatever his philosophy is, his way of thought or what he believes. But when you infringe on the rights of others in the belief of God like when the AIK were calling for the removal of Islamic and Christian religious education (IRE & CRE) from schools, you are against the constitution. They are also excluded because of the distrust the Theist have against Atheist because there is no moral value for the atheist. They basically do anything without any remorse or any regard for a higher

⁶²FGD (Atheists), Respondent no 16 in Appendix G

⁶³FGD (Atheists), Respondent no 17 in Appendix G

⁶⁴FGD (Atheists), Respondent no 18 in Appendix G

being. What brings us together as Kenyans is our belief in a higher being that we are responsible for our actions which were brought to book on judgment day.⁶⁵

If the constitution says they have a right to be registered, they should be granted and if the constitution prohibits their registration, then they should prohibit advises Respondent 3. But in this case, constitutionally, they should be registered. The best Christians are those who grant others their rights even though they are not in the same interest religiously. The best leaders and judges are not from one particular religion, but those in that religion, they would be fair to others from different beliefs.⁶⁶

Some of these beliefs might demand the society going back to the basics of Western vs. African ideologies comments Respondent 4. Therefore the constitution that demonstrates western ideology down troding African ideology exhibits a different morality in religion and administration. John Samuel Mbiti avers that ‘Africans are notoriously religious,’ that every aspect of belief in life religion was there. However, the church - state separation is another thing yet they do not want to lose what they already have. They are torn between ideological contradiction that are there and the dynamism of the society as it grows and develops. As Africans, they want to keep what was theirs without losing while there is clash of ideology rendering them in dilemma.⁶⁷

4.5 Constitutional Entrenchment of Religion and Secularism

The constitution accommodates all groups notes Respondent 22, and has given an equal footing to all religions because it did not declare a state religion since that could make other religions unfit.⁶⁸

⁶⁵Respondent no 1 in Appendix G

⁶⁶Respondent no 3 in Appendix G

⁶⁷Respondent no 4 in Appendix G

⁶⁸FGD (Christian), Respondent no 22 in Appendix G

The constitution is clear on ‘state has no religion’ remarks Respondent 20, all religions are accommodated. However, some think atheism is not a religion since it is opposed to religion neither is it a community.⁶⁹

The constitution accommodates religious diversity avers Respondent 26, since it has not chosen any of the many religions as a state religion. Those who do not belong to any religion are not criminalized too. The constitution is also not clear about this people who do not belong to any religion yet it should be clear so as to avoid them causing chaos between the Theists and Atheists. Atheists do not have guidelines and if they are not contained, they may become hazardous.⁷⁰

The preamble recognizes God’s supremacy contends Respondent 8, and hence all groups that recognize God are captured within and by that, it accommodates all the religions in Kenya and also the laws capture individuals whether they are believer or non-believers as the people of Kenya.⁷¹

The constitution accommodates both believers and a non-believers note Respondent 9, since non-belief is not a crime as long as there is no discrimination whatsoever or attack to one’s faith.⁷²

It does envision all religions contend Respondent 1. Kenya is very open to religions which are more than a hundred if not thousands of them practiced in Kenya; the two main religions being the Islamic and the Christian faiths. The Kenyan atheists are a contradiction in terms of religion, civic belonging and collective identity of Kenya.⁷³

⁶⁹FGD (Christian), Respondent no 20 in Appendix G

⁷⁰FGD (Christian), Respondent no 26 in Appendix G

⁷¹FGD (Muslim), Respondent no 8 in Appendix G

⁷²FGD (Muslim), Respondent no 9 in Appendix G

⁷³Respondent no 1 in Appendix G

If it does not, then it should note Respondent 3. It should accommodate all belief whether from Kenya or even out of Kenya since Kenya is a global culture and attracts beliefs from other parts of the world. The constitution does not and it should address enough expression in light of how the rest of the world could affect us as a people.⁷⁴

Respondent 4 wondered whether AIK is a religion or a belief; since what they are talking in their constitution is bringing atheists together; the association is for people to understand them. The constitution includes all groups.⁷⁵

The Kenyan people are very conservative and hold religion very closely says Respondent 1 and do not appreciate any illogical challenge to their belief.⁷⁶

The fact that Kenya is not a state religion remarks Respondent 3, does not mean that it is a secular state because secular means ‘pertaining to this world’ if one says Kenya is a secular state, one is actually saying that everyone in Kenya is living in accordance to the secular world standards. The truth is a bulk of Kenyan population are deeply religious, just like Mbiti says in his book ‘*African Religions and philosophy*’ that Africans are notoriously religious and if that is the definition of who we are then secularism is a very small component and therefore can’t equate lack of religious legislation to secularism.⁷⁷

Respondent no 4 expressed the frustrations, ostracization they face while carrying out mandated duties contrary to their faith:

These are perspective of different people it goes deeper and deeper into philosophical issues. The former registrar refused to register the AIK; was a staunch Christian due to his faith. It took someone to come to advise him that we are doing work just register them. When they were registered -the day they were registered, they had a celebration. Sensitive things like this when they areSome of this also when there is a sensitive issue like this the backlash falls on desk officer who signed I-----It’s shown in the media when you go to the church you are scolded, ostracized by other Christians that you are using the office to destroy Christianity. In fact they

⁷⁴Respondent no 3 in Appendix G

⁷⁵Respondent no 4 in Appendix G

⁷⁶Respondent no 1 in Appendix G

⁷⁷Respondent no 3 in Appendix G

were communicating their success to the rest of the world and Africa possibly their colleagues in West Africa struggling same registration that it is possible now we have been registered - we have gotten roots. You are here every day /Sunday you are an elder of the church but you have an office where you have been given responsibility to discharged a duty to the public but when the backlash hits it is you the desk officer who suffers and not the AG they followed the person who registered them and signed their certificate the following day in the evening the news is that the certificate you displayed signed I-----do hereby -----for example even if it were me you are asked by other Christian so you are the person who registered them!⁷⁸

The state is a secular state states Respondent 16; the education system on the other hand is aggressively promoting a religious system through curriculum and examination. This indoctrination makes kids not to question since they are not taught anything outside religion. Religion should be either scrapped or not compulsory in the school curriculums to adhere to a secular state.⁷⁹

Kenyan Respondent 24 noted, regardless of their diversity, ethnicity, and interests, have that one supreme person who is God who is above them and is for all of them. This helps when one is lonely; they know that they have God with them. Which is opposite with believing there is no God. It humbles them.⁸⁰

The preamble remarks Respondent 23 acknowledges the existence of a supreme being that they seek help and blessing from. If the supreme law of the land recognizes the existence of a supreme being, Kenyans should follow the law and acknowledge the existence of God.⁸¹

‘We the people of Kenya’ contends Respondent 28, should guide everyone into accepting what the preamble states since it is all Kenyans who are declaring that. Historically, they have been doing that until recently when this group of atheism came up. Africans were not atheist. Every group had a god. They believe in God and atheism will not cover that.⁸²

⁷⁸Respondent no 4 in Appendix G

⁷⁹FGD (Atheists), Respondent no 16 in Appendix G

⁸⁰FGD (Christian), Respondent no 24 in Appendix G

⁸¹FGD (Christian), Respondent no 23 in Appendix G

⁸²FGD (Christian), Respondent no 28 in Appendix G

The statement was honored in breach notes Respondent 10, since the constitution recognizes everything was created and there is a God but it is in silence.⁸³ The statement, says Respondent 11 recognizes the supremacy of the Almighty God of all creation which is the core of all religions.⁸⁴

Part of the preamble, Respondent 2 contends; excludes AIK:

You have to understand that a preamble is not a constitution. You cannot make a ruling based on a preamble. If you go to court you will only cite articles of the constitution. The preamble basically introduces what our country is all about. I personally do not recognize that part of the preamble. It does not capture my aspirations as a Kenyan. The preamble captures a lot of things rather than just believing in the supremacy of God, there is a part it talks of respecting diversity. I don't believe in the supremacy of God, but the part of diversity speaks importance to me. That part excludes atheists. I feel that when the constitution was being written, it would have been fair if we were included.⁸⁵

If there is a review Respondent 2 declares, and now that AIK is a registered society, then there is need to get rid of the word God in the constitution. God is unneeded in the constitution. The constitution should appreciate many other things. Religion is personal and as long as everybody is respecting the law.⁸⁶

AIK too believed Africans before modern religious introduction were deity worshippers as

Respondent 19 indicates below:

Personally, I can't say that I have looked into or studied the cultures before we were all forced into an unhealthy marriage of being together called the nation of Kenya. Because before the coming of the colonialists, there was a way on how we used to do our things. I have not or maybe if anyone of you knows of any African set up that did not believe in deities, I would want to hear, like the African way of looking at things. I am thinking, when people were coming from this background of subscribing to deities or African way of looking at things, it is clear that Christianity and Islam were an easy sale. When they were putting this in, there is an assumption that 'we as Africans have a subscription to a deity' so everybody will buy unto it because we are coming from that kind of background. That is my thinking of it.⁸⁷

'We the people of Kenya acknowledge the supremacy of God', Respondent 13 avers is unfortunate for the constitutional drafters to include such a clause because in a statement that 'we

⁸³FGD (Muslim), Respondent no 10 in Appendix G

⁸⁴FGD (Muslim), Respondent no 11 in Appendix G

⁸⁵Respondent no 2 in Appendix G

⁸⁶Respondent no 2 in Appendix G

⁸⁷FGD (Atheists), Respondent no 17 in Appendix G

believe in an almighty God’, they should have gone ahead to specify which God because there are so many gods. Hindus have thousands of gods, Africans have different gods. If such a statement should be in the constitution they should be bold enough to tell which God that ‘we’ believe in who created the whole creation.⁸⁸

The 2010 Constitution of Kenya and the national anthem notes Respondent 1; are held very dearly, believe that Atheists are outsiders may appear as exaggerated and provocative but it is because Kenya has historically been a nation of believers. The constitution of Kenya does not accommodate Atheists, therefor agrees with the constitution.⁸⁹

The Constitution includes and excludes everybody, claims apologist Respondent 3:

The constitution includes and excludes everybody. It is very respectable but completely irrelevant to any rational discourse to matters of truth because it has contradictory positions, ambiguous statements, and democratic rhetoric. The constitution leads in matters like nationalism and patriotism but not religion since it is contradictory. When it says there is ‘no state religion’ and that very preamble insinuates some ‘religion,’ and the national anthem requires us as religious people that claim loyalty to the ‘God of all creation,’ we have gods that are not all creation. So Kenya already pronounces itself to have allegiance to that God of all creation but then says that Kenya has no religion. For instance, the Bill of Rights in Article 27 states ‘there shall be no discrimination against religion whatsoever’ but again in Article 24 it says that ‘the Bill of Rights will be applicable to any individual except the Islam and that makes the provision so useless. Additionally, the same constitution allows freedom for religion and practices and freedom for expression yet there is other religion that would say that one to become rich, they have to kill someone and yet the constitution criminalizes murder. I can say we are happy we have the freedom but we can do better to ensure ones freedom doesn’t harm another.⁹⁰

Acknowledging the supremacy of God; remarks Respondent 4 that one beliefs and the fact that there are articles do not contradict.⁹¹ The fact that our taxes are being used in a certain religion (Kadhis’ Court) contends Respondent 18, violates the constitution by itself. Religion and the state should be separate. If prayers are done on public holidays, atheists should be allowed to seek intervention from science and rational thinking on what to do. There is need to remove that stigma of atheists being arrogant. Still seeking evidence of the existence of God, only this will

⁸⁸FGD (Atheists), Respondent no 13 in Appendix G

⁸⁹Respondent no 1 in Appendix G

⁹⁰Respondent no 3 in Appendix G

⁹¹Respondent no 4 in Appendix G

make AIK believe in God.⁹²

The constitution just ensured, avers Respondent 27; that there would not be a tyrannical religion or people under the name of religion because historically, some people have done more harm than good in the name of religion. Therefore the constitution just put the safety of Kenyans first. There is no religion that is preferred to another, no competition, all are equal.⁹³

The constitution, Respondent 22 notes does not recognize any particular religion since every individual is entitled to choose any religion of ones' choice own and to force one to embrace a particular religion, will bring dictatorship.⁹⁴

They do not recognize any specific religion says Respondent 20, but that does not mean that they have no religion. It just gives freedom to everyone to choose any religion they would want to and this helps to maintain peace among people with different religions.⁹⁵

The Article comments Respondent 25; protects the common '*mwananchi* (citizen).' Having a 'state religion' would mean that they do not have a right to choose and this would definitely bring rebellion and chaos.⁹⁶

It was, avers Respondent 12 a state of hypocrisy portrayed by the drafters of the constitution though they were in totality. They could probably not declare the nation to a certain religion since they considered the interests of all religions.⁹⁷ The statement, says Respondent 6, is contradicting because it goes in line with the preamble statement.⁹⁸

The missing thing, contends Respondent 7, in the constitution is the blasphemy laws that would criminalize blasphemy and defaming of any religion and also prohibit hatred and incitements

⁹²FGD (Atheists), Respondent no 18 in Appendix G

⁹³FGD (Christian), Respondent no 27 in Appendix G

⁹⁴FGD (Christian), Respondent no 22 in Appendix G

⁹⁵FGD (Christian), Respondent no 20 in Appendix G

⁹⁶FGD (Christian), Respondent no 25 in Appendix G

⁹⁷FGD (Muslim), Respondent no 12 in Appendix G

⁹⁸FGD (Muslim), Respondent no 6 in Appendix G

among different religions. And of course this will put aside the Atheists, after all they are just very few people who lack direction and can get direction from Muslims.⁹⁹

Basically, says Respondent 2; the state is not supposed to pass any law or policies that have a religious motive. Like when writing school curriculums, one finds that C.R.E is put as a religious study, but Muslims demand to be included too. This is what it means.¹⁰⁰

The ‘no state religion’, remarks Respondent 14, means that no current institutions or facilities will employ any religious principles or processes in their operations. That means that all religions should not have any say in the government or its processes. Yet one sees the Kadhis’ courts which have a say in the judicial system, and one comes to see that it is contravening the constitution in that essence because it states that ‘there shall be no state religion.’¹⁰¹

While having a national day of prayer, comments Respondent 15; where there is a Christian, Muslim and a Maasai traditionalist coming to pray It is already upholding some of the religions more than others. They should let everyone pray to their God on the national day of prayer.¹⁰²

The lawmakers who were writing the constitution, according to Respondent 16 might have wanted to create a society where no group is favored over another because of their beliefs. The idea behind this works well to avoid issues of discrimination, and protecting the rights of individuals in their specific belief systems. But then looking at the current situation, there is a way every religion is given privilege, most of our country acknowledges Yahweh (Christians and Jews) and Allah (Muslims). In essence, one wonders if it is the constitution not being followed or

⁹⁹FGD (Muslim), Respondent no 7 in Appendix G

¹⁰⁰Respondent no 2 in Appendix G

¹⁰¹FGD (Atheists), Respondent no 14 in Appendix G

¹⁰²FGD (Atheists), Respondent no 15 in Appendix G

what? Because if there is not going to be a state religion, then it means that issues of God should be a bit secondary to our activities, policies etc.¹⁰³

Commenting on the Kadhis' court, Respondent 17 explains that the interpretation basically is that, nothing should be funded from taxpayers' money using religion; the Kadhis' court judges basically receive their salaries from taxpayers' money. There should be no taxpayers' money or resources used on any religion.¹⁰⁴

4.6 Contradictions and Inconsistencies in the Constitution

There are no factual contradictions or inconsistencies in the constitution remarks Respondent 1, but it depends on how somebody interprets it. If Atheists argued that they are not a religion, how can they allege the government is not accommodating them as a religion and yet use Article 8 that the government shall not have a state religion while they do not consider themselves as a religion? Therefore the fallacy and the inconsistency are in the atheists' side and not in the constitution.¹⁰⁵

As a constitutional matter requiring proper interrogation says Respondent 4, there may not be any reasonable response to that enquiry.¹⁰⁶ The constitution acknowledges says Respondent 21, there is a God and because of this, Kenyans can choose the kind of religion they would like to follow. They are simply saying, they will force one to believe there is a God, but they will let one choose God they will serve. And God is not for a specific religion. Therefore, it says they acknowledge that there is an existence of a supreme being and they will not criminalize one for choosing to believe or not believe the existence of a supreme being.¹⁰⁷

¹⁰³FGD (Atheists), Respondent no 16 in Appendix G

¹⁰⁴FGD (Atheists), Respondent no 17 in Appendix G

¹⁰⁵Respondent no 1 in Appendix G

¹⁰⁶Respondent no 4 in Appendix G

¹⁰⁷FGD (Christian), Respondent no 21 in Appendix G

The constitution, Respondent 24 notes does not contradict itself because it recognizes that there is a supreme God which is universal and that is the same thing in the article ‘there being no state religion.’ It is up to one to decide on a religion to choose.¹⁰⁸ There are no contradiction notes Respondent 26, because one is religion and the other one is God. It acknowledges God but doesn’t recognize a particular religion because God is not a religion.¹⁰⁹

The constitution contends Respondent 8, is not perfect and should take a stand and declare one religion as the state religion and thus rule by its book since the books cannot be changed. It portrays high level of hypocrisy because they recognize God but do not allow God to take control.¹¹⁰ Respondent 9 affirmed that no it is not contradicting because God is not a religion. God is supreme and is not associated to just one religion. All religions believe in one God.¹¹¹

There is a contradiction, says Respondent 10, especially during the swearing in process or rather in court proceedings, they either swear by the Bible or the Quran and yet there is no state religion. That also portrays hypocrisy.¹¹²

According to Respondent 2, the writers of the constitution had to put that preamble as a matter of just pleasing majority of the people but there is a big contradiction. Our Bill of Rights makes Kenya a secular state. The ‘no state religion’ creates the idea that we are secular.¹¹³ It contradicts itself.

Respondent 18 is of the view that there cannot be a God without a religion. They should have told them which God since some religions like Hinduism have no supreme God. By them stating

¹⁰⁸FGD (Christian), Respondent no 24 in Appendix G

¹⁰⁹FGD (Christian), Respondent no 26 in Appendix G

¹¹⁰FGD (Muslim), Respondent no 8 in Appendix G

¹¹¹FGD (Muslim), Respondent no 9 in Appendix G

¹¹²FGD (Muslim), Respondent no 10 in Appendix G

¹¹³Respondent no 2 in Appendix G

that there is an Almighty God, Hindus believe in several gods. They should have probably said they believe in gods, not just one since they have many gods.¹¹⁴

Respondent 19 states that when they bring in their personal views as Christian, Muslim or deity believer into law; then the problem or contradiction arises from that. This is because one wants to please a group of people. So issues are being mixed up here. When you want the law to serve everybody, then remove anything that has to do with emotions because religion is very emotive. The problem of contradictions comes in when you bring in an emotive element to make people happy, it should be removed to be just and fair. Bringing God and religion contradicts whatever you want to achieve.¹¹⁵

Respondent 13 notes that it is very contradictory, in that they can't have a religion without God. A religion is based on a supernatural being or a deity. So when the constitution in the preamble says 'we recognize the supremacy of God,' we ask ourselves which God and we can't say it was speaking for everyone, most likely it is representing Christians who were the majority at that time. So for Article 8 that says that 'there shall be no state religion,' you come to ask yourself then why did the preamble say that we 'believe in the supremacy of God.' Hence it is highly contradictive.¹¹⁶

The statement in Article 8 of the constitution according to Respondent 1, is talking about the nation professing a single faith just like the nation of Zambia having proclaimed that it is a Christian nation or Gambia claiming to be an Islamic country. This is what the constitution says that the government shall not undertake one religion and make it superior to others.¹¹⁷

¹¹⁴FGD (Atheists), Respondent no 18 in Appendix G

¹¹⁵FGD (Atheists), Respondent no 19 in Appendix G

¹¹⁶FGD (Atheists), Respondent no 13 in Appendix G

¹¹⁷Respondent no 1 in Appendix G

Respondent 9 conceives the contradiction in the constitution that ‘there shall be no state religion’ while practically there are three key religions in Kenya; It is very unfortunate.¹¹⁸ Respondent 14 is pleading for something to be done about the national anthem, especially the first stanza, ‘*ee mungu nguvu yetu*’ (*Oh God of All Creation*). It does not augur well with non-believers. For morality, it has to come from an individual, you just have to learn.¹¹⁹

4.7 Growth and Future of Religion and Secularism in Kenya

According to Respondent 20, It will not be the first time Christianity faces hostility if the constitution or any other person claims there is no Christian God. Atheists are not a threat to Christianity and Kenya as a whole. It will not be affected by atheism or any opposition.¹²⁰ Christianity is not going anywhere according to Respondent 22. It is here to stay now and in the foreseeable future because currently it has greater numbers in Kenya and is most dominant. Atheism are opposed to Christian ideals yet they themselves have no ideals and therefore they are not headed anywhere.¹²¹

Respondent 28 think Christians will reduce in number in future if atheism is left to manipulate minds. Arguing that AIK like chaos and disorder by nature. They do not want to follow a set of rules or laws. Christianity is based in family and the atheists attack the family and if a family is attacked, Christianity is affected. Children are in great danger if parents aren’t going to raise them straight because they are exposed to media and influences which these atheists use to spread their immoral perception.¹²²

The government should register whatever group and their beliefs according to Respondent 11. Muslims have Quran which gives them jurisprudence. Islam has a bright future since they are not

¹¹⁸FGD (Atheists), Respondent no 19 in Appendix G

¹¹⁹FGD (Atheists), Respondent no 14 in Appendix G

¹²⁰FGD (Christian), Respondent no 20 in Appendix G

¹²¹FGD (Christian), Respondent no 22 in Appendix G

¹²²FGD (Christian), Respondent no 28 in Appendix G

deterred by anything. Atheists have no future at all and their leadership is a confused lot and cannot convince anyone but themselves because they are driven by material things and luxury.¹²³

History has a lot to do with religion in Kenya aver Respondent 2. Religion has done a lot in Kenya, for instance in schools, hospitals, etc. Generally in Africa it will take a long time to have a decline in these majority religious groups.¹²⁴

According to Respondent 14, before Christianity and Islam came, there were other religions which went extinct, so the same will happen even if it may take a bit of time. All religions will eventually go to extinction as a way in which other religions have gone.¹²⁵ Respondent 15 believes it depends with what purpose it is serving. If something comes to replace this purpose then definitely it will diminish.¹²⁶ However, Respondent 1 thinks it does not affect Islam in any way since Muslims are not afraid of intellectual discourses and are not afraid of being challenged but in Kenya at large, there would be moral breakdown if atheism spreads since it will bring demise to moral and cultural values that Kenyans hold so dearly.¹²⁷

The religious apologist says Respondent 16; away from observing a downward trend of the number of believers, there is a group called apologetics who are more informed in their belief. These are people who argue for their belief and tend to marry it with facts and science with time we are going to observe a significant population who have an education and are in the most complex fields of science, sociology etc. It is going to be a more interesting battle with time, for those who hold the faith dearly; they are going to marry the two. There are things that they see

¹²³FGD (Muslim), Respondent no 11 in Appendix G

¹²⁴Respondent no 2 in Appendix G

¹²⁵FGD (Atheists), Respondent no 14 in Appendix G

¹²⁶FGD (Atheists), Respondent no 15 in Appendix G

¹²⁷Respondent no 1 in Appendix G

that non-believers use to say that there is no God. So Apologetics are just going to say but this shows that God is existent and all that.¹²⁸

It will evolve to something else according to Respondent 17. They will come with creative ways to explain their God. Religion should not be abolished in any way. Some people are good just because there is God; they stay ignorant because there is a God.¹²⁹

Disbelief in God doesn't affect Christianity in any way according to Respondent 3, because such has always been there for ages. In fact these religions emerge and propagate their faith in a context where a lot of people are considered pagan. The future results of belief are never quite solely in the hands of those living today, it is like a continuum, and the legacy of any propagation or any expression out lives itself and the answer to that is with posterity rather than them today.¹³⁰

According to Respondent 4, even when they were not registered they were still meeting but in a limited way – may be not publicly. There are other practices that affect the youth and children but destructive.¹³¹ They are challenging religious faiths notes Respondent 2, authenticity of the bible, and the belief in God. There will be a lot of friction between AIK and other religions. There will be conflict.¹³²

There are two things about believers according to Respondent 16; believers who are more peaceable and are the ones who understand their faith more and make more convincing cases for their faith. These actually do not view atheism as something strange. They point out some parts of their scriptures that say that there would be people who would challenge them of God. This strengthens their faith. The other groups are believers by association; they have not grown in the

¹²⁸FGD (Atheists), Respondent no 16 in Appendix G

¹²⁹FGD (Atheists), Respondent no 17 in Appendix G

¹³⁰Respondent no 3 in Appendix G

¹³¹Respondent no 4 in Appendix G

¹³²Respondent no 2 in Appendix G

faith and are hypocrites. They shun you from being a non-believer because they think you want to rebel or escape the kind of responsibilities that the faith needs, yet non-believers are more secular.¹³³

According to Respondent 17, the presence of many atheists bringing many churches down and cause unemployment for pastors because many churches today are like a business.¹³⁴ It will depend with an individual understanding note Respondent 18; some guys will be okay you being an atheist; others will just not want to talk to you.¹³⁵ Respondent 19 contends that the presence of someone who causes a lot of cognitive dissonance forces you to do a lot of retrospection; it is a way of making society to ascend to betterment.¹³⁶ Religion does more harm than atheism according to Respondent 13; religion teaches people to stop thinking. Atheism does more good than religion and is good.¹³⁷

Respondent 21 believes Atheism will bring chaos, disorder and confusion. They have no checks or standards. They suggest that they should believe in man rather than a God and yet no man can be a savior, but God.¹³⁸ Belief in God, remarks Respondent 22, ensures that there is order and harmony in a society. If all this are put in man's hand, it will cause chaos and disorder. Atheists do not recognize the government since they are against the laws of the government which are meant to create harmony and coexistence in a society.¹³⁹

According to Respondent 20, Atheists have roots now and later in years to come, they will have grown and that would be the basis of chaos. Atheists are not bad people, but whatever they are advocating for is what is bad. There are some Christians who are bad. Atheism is literally

¹³³FGD (Atheists), Respondent no 16 in Appendix G

¹³⁴FGD (Atheists), Respondent no 17 in Appendix G

¹³⁵FGD (Atheists), Respondent no 18 in Appendix G

¹³⁶FGD (Atheists), Respondent no 19 in Appendix G

¹³⁷FGD (Atheists), Respondent no 13 in Appendix G

¹³⁸FGD (Christian), Respondent no 21 in Appendix G

¹³⁹FGD (Christian), Respondent no 22 in Appendix G

fighting Christian values which they will eventually come to succeed. Media, TV and video games are advocating violence, immorality and disorder which are a dangerous recipe to chaos.¹⁴⁰

Religion is spread all over and atheism cannot disorient it says Respondent 12. Atheists have no future at all. Atheists are more scandalous than even the politicians thus have no future at all and they cannot disorient religions.¹⁴¹

If they (religious) remove God in their lives ever Respondent 2, they start seeing the world for what it is and for what it needs to be and for the things that need to be done. They will start seeing that they are human beings who need to be supportive of each other. Given the mandate, they would be happy if they removed God and focused on their human nature.¹⁴²

Respondent 18 says the future will be bright. There is nothing like the coming of Christ. They are given a place to think outside the box and new things will rise from this.”¹⁴³ There are shitty religious people, there are shitty atheists, says Respondent 19. So Goodness or badness of humanity has nothing to do with the existence of a deity but one as human being, and one’s philosophies. It is just about creating a safe environment that accommodates everybody.¹⁴⁴

The future is bright says Respondent 13, because the more non-believers, they shall start focusing on things that make sense like education, science e.tc. Countries like in the west that are highly non-religious, they are well developed than Kenya, higher levels of education, better systems, less corruption which means that the growth of atheism is for the betterment of everyone.¹⁴⁵

¹⁴⁰FGD (Christian), Respondent no 20 in Appendix G

¹⁴¹FGD (Muslim), Respondent no 12 in Appendix G

¹⁴²Respondent no 2 in Appendix G

¹⁴³FGD (Atheists), Respondent no 18 in Appendix G

¹⁴⁴FGD (Atheists), Respondent no 19 in Appendix G

¹⁴⁵FGD (Atheists), Respondent no 13 in Appendix G

According to Respondent 14, this is going to have unforeseen impact as structures around religion where people have come up either motivated by the promise of reward to engage in whatever they do. Most atheists try to be in touch with science and innovation or having information. People are going to be more motivated to want to investigate why we would have disbelief when we have been raised in a highly religious environment. If pursued objectively, it could be a very good thing to have people interested in science since it is good for them. Religion tries to bring people to behave morally. AIK ethics might erode if people are not guided well, that will come back to their law. With the spread of disbelief there is going to be a lot of institutions that are out of balance.¹⁴⁶

On the issue of morality comments Respondent 15, the constitution is clear on the issue of penal code to guide those who engage in unethical behavior unlike some things which religion advocates for. Many atheists are intellectual people who consider reason and rationality, thus with more atheists, there will be more people who would want to question things and get better understanding how things work. This will lead to better decisions in things like elections and their life. It eliminates the dogma of falling for things anyone tells you. It also motivates people to work hard to better their life, because religion tells people there is a better life.¹⁴⁷

According to Respondent 16, AIK proponents admit to have met even more rational Christians and with education, people will be highly informed.¹⁴⁸ However Respondent 17 believes, with more atheists more good people unlike the pretense in Christians who sin knowingly and repent. Atheism is a calling.¹⁴⁹

¹⁴⁶FGD (Atheists), Respondent no 14 in Appendix G

¹⁴⁷FGD (Atheists), Respondent no 15 in Appendix G

¹⁴⁸FGD (Atheists), Respondent no 16 in Appendix G

¹⁴⁹FGD (Atheists), Respondent no 17 in Appendix G

Respondent 1 considers Atheists are just a handful of people who are not even committed cannot stand in a logical debate with Muslims or Christians who have an idea of science. Therefore Atheists have no future in Kenya.¹⁵⁰

Respondent 4 conceives a clash of civilization, Ideology - in Islam vs. Christianity - now Atheists vs. religion. These dynamics are there perhaps the issue of dominance who will dominate -is it the same people or man?¹⁵¹

4.8 Conclusion

This chapter has demonstrated that there is ideological tension in Kenya between the religious community and the rising of Atheists. The project argues; despite the fact that the Constitution of Kenya 2010 contains elaborate human rights provisions geared towards the protection and respect for all Kenyans, nevertheless, the place of Atheists continues to be in question. This is because of the following reasons: firstly, the Constitution of Kenya 2010 does not explicitly recognize Atheists as a group. Secondly, the Constitution embodies an enduring tension between the desire to respect religious freedom on the one hand and to avoid institutionalization of any particular state religion. Thirdly, the constitution seeks to accommodate religious diversity and pluralism by adopting a critical liberal constitutional approach; this maintains the status of dominant groups in society, by legitimizing and perpetrating conservative hegemony. Fourthly, in practice the desire to protect the dominant system of social and power relations triumph over the need to protect the right of minority groups such as AIK. Fifthly, the political suppression of certain groups such as the AIK is disguised in the cloak of false constitutional and statutory validity. Lastly, contrary to the dictates of positivism; Church and State in Kenya are inseparable

¹⁵⁰Respondent no 1 in Appendix G

¹⁵¹Respondent no 4 in Appendix G

and legal questions need to be understood against the backdrop of such socio-economic and political contexts.

Kenyan laws are effective as demonstrated by the court decision and thus the new Kenyan political, economic and legal dispensation is rising in moving the country judicially and legislatively forward. This is very commendable. This chapter therefore tried to shed light on the process leading towards AIK registration, suspension and deregistration. The role and influence of the religious community in Kenya as regards church and state relationship is quite significant here and in fact very significant. The country must balance all these voices as a thriving democracy. To separate the Church from the states influence and vice versa will mean neutrality, observance to the rule of law and the Bill of Rights on the part of the State. Without which there is likely to be violations of rights and freedoms of some groups within the state.

CHAPTER FIVE:

SUMMARY, FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The last chapter discussed how the legal systems navigate the existence of multiple religious views in Kenya. The chapter noted the political suppression of certain groups such as the AIK, is disguised in the cloak of false constitutional and statutory validity. This chapter attempts to identify lessons drawn from the place of Atheists in Kenya. The chapter notes that, contrary to the dictates of positivism; Church and State in Kenya is inseparable, and legal questions need to be understood against the backdrop of such prevailing socio-economic and political context.

The main objective of this study was to examine the place of Atheists in the Kenyan legal system. The study notes that the Constitution of Kenya 2010 does not explicitly recognize Atheists as a group. However, the specific objective of this study was to examine the process of registration, suspension and deregistration of Atheists in Kenya from a legal and Christian perspectives. In order to achieve this goal, mixed research approach was adopted these include doctrinal, case study and empirical research methodologies was carried out among selected Christians, Muslims and other leaders as well as examination of archival and doctrinal documents concerning Atheists, constitutional and statutory as well as international treaties and conventions. The research was a case and empirical study, and data was collected primarily through existing doctrinal documents, focus groups and ethnographic interviews. Interviews were done in five categories; Christian leaders, Muslim leaders, Atheists members, public servant and judicial officer who actively participated in the AIK debates/dialogue; registration, suspension and deregistration process as well as judicial judgment.

The findings revealed that the entrenchment of secularism and progressive Bill of Rights in the Kenyan constitution has ignited the resurgence of minorities and marginalized groups such as Atheists in Kenya (AIK) and thus necessitating its potential growth. Pre – colonial; Atheism was unheard of and in fact unthinkable concern. Mbiti argued that ‘Africans are notoriously religious’, whereas Mugambi contended that non – belief in God was a Western concern and not an African priority. However, Bishop Okullu recognized existence and germination of Atheism way back in 1980s among Kenyan intellectuals. During colonial and post-colonial, Atheism is found to be streamlined within the three C’s of Civilization, Christianity and Commerce. The findings of the study raised several lessons for the Church to learn regarding how to handle the Atheists in Kenya debate and legal recognition. The lessons from the research analysis will help the Church to appropriately engage inter- faith and other societal issues in the future.

This chapter is divided into three sections. The first section provides a summary of the research findings and conclusions. The second section gives recommendation on legislative and institutional programming. The last section concludes the study providing possible recommendations for further research in the light of the study. The data collected was analyzed and it will address the research question: *What lessons drawn from the process of registration, suspension and deregistration of AIK Society?*

This study attempts to respond to the following objectives:

1. Examine the place of Atheist in the Kenyan legal system: this objective permeates all the chapters in the project. This is the ground tour objective examined; thus achieved.
2. Locate the place of Atheists from a historical perspective: This objective examined in chapter two on background and context.

3. Examine the legislative and institutional framework governing the place of Atheists in Kenya: This objective examined in chapter three; also achieved.

4. Understand how the legal systems navigate the existence of multiple religious views in Kenya: This objective examined in chapter four, the case study; also achieved.

5. Identify lessons drawn from the process of AIK registration, suspension and deregistration: This objective examined in this chapter five; also achieved.

The study as well attempts to examine the following Research Questions:

1. What is the place of Atheists in the Kenyan legal system? Each chapter attempted to examine this question. The Constitution of Kenya 2010 does not explicitly recognize Atheists as a group.

2. How has the legal system addressed religious diversity and plurality historically? Chapter two on Kenya's Background and Contexts responds to this question; discussing Kenya's, Africa and Global historical background and context.

3. What is the legislative and institutional framework governing the place of Atheists in Kenya? Chapter three discusses it from Kenyan, regional and international legal and institutional framework; also recent cases during and after 2010 constitutional passage examined; as well as the Constitution, statutes and international instruments.

4. How has the legal system navigated the existence of multiple religious views in Kenya? Chapter four case studies provide narratives of the respondents and informants.

5. What lessons drawn from the process of registration, suspension and deregistration of AIK? Chapter five captures the findings and recommendations in regard to this question.

Finally the study also attempts to argue the following hypotheses:

Despite the Constitution containing elaborate human rights provisions geared towards protection and respect for all Kenyans, the place of Atheists continues to be in question. Because: first, it does not explicitly recognize Atheists as a group. Second, it embodies an enduring tension between the desire to respect religious freedom and avoiding institutionalization of any particular state religion. Third, it seeks to accommodate religious diversity and pluralism by adopting a critical liberal constitutional approach; this maintains the status of dominant groups in society, by legitimizing and perpetrating conservative hegemony. Fourth, the desire to protect the dominant system of social and power relations triumph over the need to protect the right of minority groups such as AIK. Fifth, the political suppression of certain groups such as the AIK is disguised in the cloak of false constitutional and statutory validity. Last, contrary to the dictates of positivism; Church and State in Kenya are inseparable and legal questions need to be understood against the backdrop of such socio-economic and political contexts. From the objectives and the research questions responses highlighted above, it clearly demonstrates that the hypothesis was proved sufficiently.

5.2 Summary of Research Findings and Conclusion

The study attempts to examine the place of Atheists in the Kenyan legal system in order to establish whether the procedures applied in their registration, suspension and deregistration conform to the Bill of Rights under the Constitution and particularly administrative action that is procedurally fair and lawful. The argument advanced in this study indicates whereas the Bill of right and the rule of law are central in an exercise of any administrative action, but more often the executive have always failed to uphold them leading to such miscarriage of justice and violation of the citizens' rights. The study collected data from Nairobi and Eldoret Counties

using In-depth interviews and FGDs. The target respondents were the AIK and religious members. Key respondents included a judicial officer and four (4) experts who engaged closely with AIK. The study was guided by the hypothesis listed above. From the case study, it is evident that fair administrative action was not adequately premised in the Bill of Rights principles and section 12(1) of the Societies Act.¹ What is coming out is that the tension between AIK and the religious community in Kenya will always remain a contentious and persistent conflict even in the foreseeable future. Therefore, initiating early amicable dialogue where matters of belief and non-belief are freely and honestly discussed in public forums will mitigate the hatred, misunderstanding and conflict that arises due to ignorance of belief and non-belief. Whereas the Constitution may not necessarily contradict itself, the public perception indicates that one could not reconcile the preamble opening statement of ‘God’s Supremacy’ and Article 8 on ‘No State Religion.’ Further, in normal practice as well, all three arms of the government have to abide by Article 2(1) where the constitution binds all persons and all State organs at both levels of government. This is problematic when there is perception of entrenchment of Religion and Secularism in the charter.

The following Key Findings emerging from the study can be used to provide action plans for the church and legal academy in Kenya.

1. AIK Knowledge and Perception in Kenya:

Many peoples knowledge of AIK can be described as poor, misleading, distorted and confusing. Similarly, their perception of AIK is that, they are devil worshippers, illuminati, stigmatized, rejection, evil and a threat to national security, peace, and harmony in Kenya as illustrated by the Registrar of Societies letter suspending their registration.

¹Principles of freedom of discrimination; freedom of conscience, religion, belief and opinion; freedom of expression; freedom of association; fair administrative action and fair hearing

2. Constitutional Recognition, Inclusion and Exclusion of AIK in Kenya:

Whereas most religious groups argue for exclusion and non – recognition of AIK, the AIK contend for inclusion and recognition using Article 8 on “No State Religion” to support their legitimacy.

3. Constitutional Entrenchment of Religion and Secularism:

Both religious groups claim for Constitutional Entrenchment. Whereas the Religious Groups argue for “Acknowledging the Supremacy of God of All Creation” in the Preamble and “Oh God of All Creation” in the National Anthem and the Kadhis’ Court to support their arguments; the AIK as well contend for Article 8 on “No State Religion,” Article 32 on “Freedom of Conscience, Religion, Belief, and Opinion,” and Article 56 on “Minorities and Marginalized” to advance their arguments. This precipitates tension.

4. Contradictions and Inconsistencies in the Constitution:

The public perception indicates that one could not reconcile the Preamble and the National Anthem opening statements of “God’s Supremacy” and “Oh God of All Creation” respectively on one hand; and Article 8 on “No State Religion” on the other.

5. Growth and Future of Religion and Secularism in Kenya:

The tension between AIK and the Religious Groups in Kenya will always remain a contentious and persistent conflict even in the foreseeable future.

5.3 Recommendations

The findings summarized above are relevant to the Kenyan situation. As alluded earlier in the significance of the study, the researcher still cautions the theologians and legal scholars to be more informed in political – social matters that impact the church and the country in one way or

another. Atheistic agenda is a tangible reality in Kenya and Africa. Thus, must become a central focus of the church and academic institutions.

The following general recommendations are offered on the basis that the findings emerging from the study can be used to provide action plans for the church and legal academy in Kenya.

5.3.1 The Immediate Recommendations

1. The Christians must in each of their congregations prioritize discipleship of their faithful, particularly children and the youth. Christians have to understand the doctrine of their faith so that they can defend core values just like religious apologists. No budgetary implications as this are part of the normal church programs.
2. The Church and the State should protect minority and marginalized groups in order to safeguard their identity and existence and in order to enhance tolerance, religious pluralism and diversity in the country. This can be relied if the Church and all arms of government observe the rule of law and the Bill of Rights. No budgetary implications here. This shall be in compliance with Article 10 (1) (a) (b) (c) on National Values and Principles of Governance.

5.3.2 The Medium Term Recommendation

3. The Church must develop a clear strategy for dialoguing Atheists especially here in the capital city where they have a vibrant membership. Each church should have a department on Atheists Apologists dialogue. Those who dialogue Atheists require appropriate apologetic training. Congregations must be taught basic ideas about Atheism/Atheists; Agnosticism/Agnostics; Humanism/humanists, Secularism/Secularists etc. Ignorance of what Atheism/Atheists often creates Atheists-phobia. There are budgetary implications here including qualified personnel recruitments, deployments, remunerations' and training, office settings/establishments and literature development, procurements and housing for use in trainings etc.

5.3.3 The Long Term Recommendations

4. The Kenyan Church through NCCCK, KCCB, Evangelical Association of Kenya (EAK) ; Parliament, State Law Office (AG) and other key human rights organizations such as the KNCHR and the Kenya Human Rights Commission (KHRC) should initiate dialogue process whose objectives are (a) to review its response to the entrenchment of Secularism in the Constitution, (b) to evaluate the possibility of the amendment of the current constitution to ensure state and religion are separated and to guarantee equality of all faith, and (c) to discuss the ways of normalizing Christian (Religious) – Atheists relations which were adversely affected by the 2010 referendum. There is budgetary implications here as dialogue will entail meetings requiring venues, logistics, communications, security, incentives, publicity, literature, hire of experts or consultants, rapporteurs, setting up a taskforce such as The Building Bridges type etc.
5. The Church and all the above institutions should lobby for the passage of legislation which regulates Inter – Faith Relations. The issues that the Church was raising during the process of entrenchment of Secularism in the Constitution should be isolated and processed to be addressed by the Inter – Faith Relations Law. Budgetary implications in organizing public hearings, seeking memoranda from stakeholders, experts, public and implementation of the law including setting an Inter – Faith Relations Authority (IFRA) or commission or whatever institutions to be charged with the oversight responsibilities. The researcher hesitates recommending funding to support a religious institution to separate Religion from State.

5.4 Recommendations for Further Research

The findings have also shown that legal institutions, religious scholars, churches and volunteer legal scholars can engage further in exploring the subject of Law and Religion particularly the entrenchment of religion and secularism in the constitution. Below are some of the areas of concern that the researcher recommends:

1. Research considered the views of Christians and their leaders in the entrenchment of secularism in Kenya's constitution, aimed at providing Christian and legal perspectives in the constitutional charter. The researcher therefore invites missiologists, Islamicists and legal scholars in academia to engage this study from a Muslim perspective.
2. The correlation between geographical establishment of AIK in the Capital city and the spread of Secularism.
3. The Church to evangelize and carryout God's mission in the face of clear accommodation of AIK and Secularism in the constitution. This research can examine Church response to the future of AIK growth.

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APPENDICES

Appendix A: Information Sheet

Background

The researcher is a Masters of Laws student at Nairobi University. Currently researching to complete LLM Project, focusing on *Examination into the Process of Registration, Suspension and Deregistration of Atheists In Kenya (AIK) Society from a Legal and Religious Perspectives*.

This research attempts to examine the extent to which the Constitution of Kenya accommodates religious diversity. The research is driven by the desire to understand the ways in which the legal framework in Kenya reflects the multiple interests within a multi-religious, tolerant and contemporary Kenyan society. The research uses the example of the *Atheists In Kenya Society (AIK)* to explore this question. The study hopes to make significant contribution in ensuring justice in Kenya.

Appendix B: Consent Note for All Participants

Dear Respondent (s),

The researcher wishes to interview you on the *Registration, Suspension and Deregistration of Atheists in Kenya from legal and Religious Perspectives*. The interview concentrates on current issues around the perceptions of *Atheists In Kenya*. The interview takes 45 minutes. The researcher wishes to tape – record the proceedings to obtain an accurate record of your views. The data obtained from this research shall only be used in the Project with occasional use in academic journals, books, media, reports, or at conferences.

Appendix C: Interviewees Distribution Matrix

A) INSTITUTION (FGD)	TARGET	REMARKS
ATHEISTS IN KENYA	7	male/female ratio

		6:1;most female declined to participate in the study
CHRISTIANS	9	Male/female ratio 3:6; low male participation.
MUSLIMS	7	no female participant.
B) INDEPTH INTERVIEWS		
AG – STATE LAW OFFICE/REGISTRAR	1	
AIK PRESIDENT	1	
JUDGE – ANALYSE CASE	1	
CHRISTIAN CLERGY	1	
MUSLIM CLERIC	1	
TOTAL	28	

ORG/GROUP/INTERVIEWEE: -----**PLACE:** -----**DATE**-----

TIME:..... **SEX:** **AGE:**

Appendix D: Interview Guide for Key Informants

Salutation: thank you for accepting my interview.

1. Kindly briefly tell me something about your work?
2. When were you employed?(note the name of the institution)
3. What is your role in your organisation?
4. How did you come to know about Atheists In Kenya (AIK)?
5. What motivated you about AIK?
6. What does AIK belief?
7. What is your view about belief or /disbelief in God?

8. Do you believe or disbelieve in God?
9. The Kenyan 2010 Constitution states the following “*We, the People of Kenya – ACKNOWLEDGING the supremacy of the Almighty God of all creation.... God Bless Kenya.*”

Our Constitution further, in *Article 8* states, “*there shall be no state religion.*”

Article 9 (1) (a-d) lists the national flag, anthem, coat of arms and public seal as national symbols of the republic. The national anthem in particular, states, “*Oh God of All Creation, Bless this, our land and Nation*”

Do you think that the *Preamble* and the *national anthem* as a *national symbol* contradict *Article 8* on the idea that Kenya has no State religion? What is your view?
10. In your view, is there a contradiction between the belief in God and the statement in *Article 8* that ‘there shall be no state religion?’
11. How do you explain the factual contradictions and inconsistencies in the Constitution?
12. When the Constitution speaks of belief in God, do you think it envisions all the multiple religions in Kenya? Please explain?
13. Do you think that the Constitution has Atheists in mind?
14. Why in your view do you think that they are included or excluded?
15. What are the perspectives of your colleagues and friends regarding the process of the entrenchment of Non Belief in the Kenyan Constitution?
16. How does the presence of Non Belief in Kenya affect Christianity or Islam now and in the future?
17. How does the presence of Non Belief in Kenya affect Atheists in Kenya now and in future?

Appendix E: Guiding Questions for FGDs – Christians and Muslims

1. What do you think about Atheists In Kenya (AIK)?
2. What do you think Atheists Belief?
3. Do you have any fears? If so what are the reasons for your fears?
4. Does our Constitution recognize Atheists? Please explain?
5. In what way do you think the Constitution accommodates religious diversity and non – belief?
6. The Preamble of our Constitution has the following words, “*We, the People of Kenya – ACKNOWLEDGING the Supremacy of the Almighty God of all creation.*” What is your point of view on this statement?
7. Also Our Constitution in Article 8 states, “There shall be no state religion.” Please explain your understanding on this Article?
8. Does the Constitution contradict itself by stating on the one hand ‘the supremacy of God’ and on the other hand ‘no state religion?’ Please explain?
9. What in your view is the future of Christianity and Islam considering that the Non Belief will be spread all over the country?
10. What in your view is the future of the Non Belief considering that Atheists will be spread all over the country?
11. Do you have any other thoughts you would like to share?

Appendix F: Guiding Questions for Focus Group Discussions – Atheists

1. In your view, does the law in Kenya include Atheists?
2. Why do you think Atheists are excluded or included?

3. The Preamble of our Constitution has the following words, “*We, the People of Kenya – ACKNOWLEDGING the Supremacy of the Almighty God of all creation.*” Please explain your understanding on this Article?
4. Our Constitution further states in *Article 8* states, “*There shall be no state religion.*” Please explain your understanding on this Article?
5. Does the Constitution contradict itself by stating on the one hand ‘the supremacy of God’ and on the other hand ‘no state religion?’ Please explain?
6. Why was AIK formed?
7. What interest does AIK protect?
8. What was other faith (Christians, Muslims, others) reaction to the formation of AIK?
9. Why did they have to react that way?
10. How will the presence of Atheists In Kenya (AIK) affect your neighbors the from other faith (Christians, Muslims, others)?
11. What in your view is the future of Christianity and Islam considering that the Non Belief will be spread all over the country?
12. What in your view is the future of the Non Belief considering that Atheists will be spread all over the country?
13. Do you have any other thoughts you would like to share?

Appendix G: Coded List of Respondents and Informants

I. Key Informants

Description

Place and Date of Interview

1. Engineer and Muslim Leader /Scholar

Nairobi Town – 29/7/2018

- | | |
|--|--------------------------|
| 2. IT Expert and Atheist Leader/Scholar | Nairobi Town - 6/8/2018 |
| 3. Communication Expert and Christian Leader/Scholar | Eldoret Town – 2/8/2018 |
| 4. Registrar General | Nairobi Town – 22/8/2018 |
| 5. High Court of Kenya Judge | Nairobi Town – 24/8/2018 |

II. Focus Group Discussions (FGDs)

Muslim participating Leaders

- | | | |
|----------------------------------|--------|--------------------------|
| 6. Male, Supkem Council Member, | 35 Yrs | Nairobi Town – 29/7/2018 |
| 7. Male, Supkem Council Member, | 30 Yrs | Nairobi Town – 29/7/2018 |
| 8. Male, Supkem Council Member, | 40 Yrs | Nairobi Town – 29/7/2018 |
| 9. Male, Supkem Council Member, | 45 Yrs | Nairobi Town – 29/7/2018 |
| 10. Male, Supkem Council Member, | 50 Yrs | Nairobi Town – 29/7/2018 |
| 11. Male, Supkem Council member, | 48 Yrs | Nairobi Town – 29/7/2018 |
| 12. Male, Supkem Council member, | 38 Yrs | Nairobi Town – 29/7/2018 |

Atheists In Kenya Society Members (AIK)

- | | | |
|--------------------------|--------|-------------------------|
| 13. Male, AIK Society, | 24 Yrs | Nairobi Town – 4/8/2018 |
| 14. Male, AIK Society, | 24 Yrs | Nairobi Town – 4/8/2018 |
| 15. Male, AIK Society, | 20 Yrs | Nairobi Town – 4/8/2018 |
| 16. Male, AIK Society, | 21 Yrs | Nairobi Town – 4/8/2018 |
| 17. Female, AIK Society, | 34 Yrs | Nairobi Town – 4/8/2018 |
| 18. Male, AIK Society, | 34 Yrs | Nairobi Town – 4/8/2018 |
| 19. Male, AIK Society, | 36 Yrs | Nairobi Town – 4/8/2018 |

Christian Participating Leaders

- | | | |
|-----------------------|--------|-------------------------|
| 20. Male, SDA Church, | 25 Yrs | Nairobi Town – 4/8/2018 |
|-----------------------|--------|-------------------------|

21. Female, NPC Church,	23 Yrs	Nairobi Town – 4/8/2018
22. Male, PAG Church,	31 Yrs	Nairobi Town – 4/8/2018
23. Female, Catholic Church,	30 Yrs	Nairobi Town – 4/8/2018
24. Male, Protestant,	40 Yrs	Nairobi Town – 4/8/2018
25. Female, Catholic Church,	23 Yrs	Nairobi Town – 4/8/2018
26. Female, Protestant,	24Yrs	Nairobi Town – 4/8/2018
27. Female, Protestant,	25 Yrs	Nairobi Town – 4/8/2018
28. Female, Protestant,	25 Yrs	Nairobi Town – 4/8/2018

[Appendix H: The 2009 Kenya Census: Table 12 Religious Population](#)

[Appendix I: NACOSTI Research Permit and Identification](#)