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TITLE:

**THE DEBATE FOR AND AGAINST STATE REGULATION OF
CHURCHES IN KENYA**

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DECLARATION

I declare that this thesis is my original work and has not been presented before for a degree in this or any other University.

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This thesis has been submitted for examination with my approval as University supervisor.

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DEDICATION

This work is dedicated to all those who believe in God. Only He can grant one the patience and grace to endure it all.

ACKNOWLEDGMENT

I thank God Almighty for enabling me to complete this task.

My sincerest gratitude goes to my family and friends. Their prayers, support and words of encouragement made it all bearable. Who wouldn't be grateful?

I acknowledge the remarkable input of my supervisor. Her insightful guidance and wisdom has been tremendous.

I thank all the participants of the study. They gave me their invaluable time and shared information in the most sincere way.

May God bless you all.

LIST OF ABBREVIATIONS

CoK-----	Constitution of Kenya 2010
NCCCK-----	National Council of Churches of Kenya
EAK-----	Evangelical Alliance of Kenya
VAT-----	Value Added Tax
EU-----	European Union
KEC-----	Kenya Episcopal Conference
UK-----	United Kingdom
USA-----	United States of America
CCA-----	Churches and Congregations Act 2002
KLRC-----	Kenya Law Reform Commission
NGO-----	Non-governmental Organization
NIS-----	National Intelligence Service
KRA-----	Kenya Revenue Authority
AGM-----	Annual General Meeting
ICCPR-----	The International Covenant on Civil and Political Rights
CBOs-----	Community-based Organizations
ARK-----	Alliance of Registered Churches of Kenya
OAIC-----	Organization of African Instituted Churches
AFCK-----	African Foundation Churches of Kenya
NAO-----	National Audit Office

LIST OF CITED CASES

Kenya

1. Criminal Appeal Case No.97/2011 *Mary Juma Deya.v.R* (2014) eKLR.
2. Kisumu Civil Appeal No.93 of 2015 *Paul Auma Orwa and Another .v. Registrar of Societies and 4 Others* (2016) eKLR.
3. Judicial Review Miscellaneous Application No.77 of 2013 *Republic .v.Registrar of Companies & 2 Others ex parte Bishop Dr.Morris Mwarandu & Another* (2014) eKLR.
4. High Court Petition No.444 of 2012 *Absolom Ndungo & 26 Others.v.A.G. & 2 Others* (2013) eKLR.
5. Judicial Review Case No.451 of 2013 *Republic .v. Registrar of Societies ex-parte Joseph Kamuti M'bataru (suing on behalf of and as Secretary of East African Pentecostal Church of Kenya)*.
6. High Court Constitutional and Human Rights Petition No.395 of 2012 *Silas Misoi Yego & 2 Others .v. Minister of State, Provincial Administration and Internal Security & 8 Others* (2014) eKLR.
7. High Court Constitutional Petition No.14 of 2014 *East Africa Pentecostal Churches Registered Trustees & 1754 Others.v.Samwel Muguna Henry & 4 Others* (2015) eKLR.
8. High Court Civil Case No.285 of 2014 *Board of Trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani & 12 others* [2014] eKLR.
9. Civil Appeal No.4 of 1982 *Arthur Gatungu Gathuna v African Orthodox Church of Kenya* [1982] eKLR.
10. High Court Constitutional and Human Rights Petition No.469 of 2013 *Jesus Care Centre Ministry International & Another .v. Registrar of Societies & 3 Others* (2014) eKLR.

11. Judicial Review Case No.138 of 2010 *David Mulei Mbuvi & 13 Others .v.Registrar General & 2 Others.*
12. See High Court Civil Case No.513 of 2007 *Bishop Rev.Silas Yego & 3 Others.v.David Mulei Mbuvi & 5 Others (2008) eKLR.*
13. High Court Civil Suit No.2824 of 1997(OS) *Jane Nyambura Joshua.v.Apostlic Faith Church (2004) eKLR.*
14. Environmental Land Court Case No.130 of 2013 *Registered Trustees of Maximum Miracle Center.v.Andrew Mlewa Mkare (2013) eKLR.*
15. High Court Petition No.82 of 2012 *Nyakamba Gekara.v.A.G & 2 Others (2013) eKLR.*
16. Nakuru Industrial Court of Kenya Cause No.439 of 2013 *Robert Mboya Nyaringo.v.Kenya Forest Service & Another (2014) eKLR.*
17. High Court Miscellaneous Civil Application No.890 of 2004 *Jesse Kamau & 25 Others. Attorney General (2010) eKLR.*

Estonia

1. The Administrative Law Chamber of the Supreme Court Case No.3-3-1-39-07, 17 October 2017(RT 11 2007, 36,291).
2. The Tartu DC Case No.3-07-701, 2 May 2007.
3. The Harju County Case No.4-05-936/1, 25 October 2006.

United States of America

1. *Watson.v.Jones* 80 U.S. 679 (1872).
2. *Gonzalez.v. Roman Catholic Archbishop of Manila* 280 U.S.1 (1929).
3. *Serbian Eastern Orthodox Diocese.v.Milivojevich* 426 U.S. 696 (1976).
4. *United States.v.Ballard* 322 U.S. 78(1944).

United Kingdom

1. *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth ex parte Wachmann* (1992) 1 WLR 1036.
2. *Gilmour v. Coats* (1949) AC 426.
3. *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77.
4. *Re South Place Ethical Society* (1980) 1 WLR.
5. *R (Williamson & Others) v. Secretary of State for Education and Employment and Others* (2005) UKHL 15.
6. *Williamson v. the UK* No. 2700/95 Decision of the Commission of 17 May 1995.
7. *Eweida and Others v. UK* (2013) ECHR 37.

LIST OF INTERNATIONAL INSTRUMENTS

The African Charter on Human and People's Rights.

The Universal Declaration of Human Rights, 1948.

The International Covenant on Civil and Political Rights.

STATUTES

KENYA

Constitution of Kenya 2010.

The Judicature Act, Chapter 8 Laws of Kenya.

Societies Act, Chapter 108 Laws of Kenya.

The Penal Code, Chapter 63 Laws of Kenya.

The Trustees (Perpetual Succession) Act, Chapter 164 Laws of Kenya.

The Trustee Act, Chapter 167 Laws of Kenya.

The Registration of Documents Act, Chapter 285 Laws of Kenya.

Income Tax Act, Chapter 470 Laws of Kenya.

The Public Benefit Organizations Act No.18 of 2013.

The Non-Governmental Organizations Coordination Act No.19 of 1990 (repealed).

The Constitution of Kenya (repealed).

Value Added Tax Act No.35 of 2013.

Stamp duty Act, Chapter 480 Laws of Kenya.

ESTONIA

Constitution of the Republic of Estonia 1992.

Churches and Congregations Act 2002.

Non-profit Associations Act of Estonia 1996.

UNITED KINGDOM

Charities Act 2011(Chapter 25).

Income Tax Act 2007(Chapter 3).

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ABSTRACT

The Church in Kenya has become commercialized. People become members of a particular Church depending on the set of products and services that Church is selling and how well it is selling it. Such services are fashioned to meet the ever-changing needs in our society as well as people's preferences. Some sell prosperity while others simply take advantage of their congregants' ignorance. Some congregants will pay the religious leaders because they want to obtain spiritual favour.

This paper looks at the approaches Kenya uses to regulate the Church. It is focused on the current law that governs registration process and the challenges encountered. The self-regulatory mechanisms put in place by Churches and how effective they are is also considered. The study looks at the issue of regulation, that is, whether the State should regulate the Church and if so, to what extent it should regulate.

The findings from this study show that majority of Churches in Kenya want the State to regulate the Church but with the involvement of the Church in the process.

I argue that there is need to enact specific legislation to govern the religious sector in order to bring about transparency and accountability by religious leaders.

CHAPTER ONE: A GENERAL OUTLINE

1.1 INTRODUCTION

Freedom of conscience, religion, belief and opinion is a fundamental right envisaged in the Constitution of Kenya (CoK)¹. This freedom is not only guaranteed by the CoK, but also by International and Regional Instruments² that Kenya is bound by virtue of Article 2(6) Constitution of Kenya. This Article provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya. Freedom of religion has ensured that churches enjoy autonomy³ as the State does not interfere with the affairs of the Church. This means that churches have a right to self-governance and to issue regulations to administer them.⁴ With such autonomy, the Church in Kenya has played a big role in generating and sustaining public discourse on democracy and change.⁵ This was especially during the one-party system in the

¹ Article 32 reads, (1) *Every person has the right to freedom of conscience, religion, thought, belief and opinion.*

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

(3) *A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.*

(4) *A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion.*

² Article 18 of The Universal Declaration of Human Rights reads “*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.*”

Article 8 of The African Charter on Human and People's Rights reads “*freedom of conscience, the profession and free practice shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.*”

³ Mark E.Chopko and Michael Moses in, ‘Freedom to be a Church: Confronting Challenges to the Right of Church Autonomy’ (2005) 3 The Georgetown Journal of Law & Public Policy 387 refer to church autonomy as the right of churches to be free of control by the government.

⁴Merilin Kiviorg, ‘Church Autonomy in Estonia’ Available at http://www.academia.edu/3244433/Church_autonomy_in_Estonia accessed 4 November 2014.

⁵Galia Sabar-Friedman, ‘Church and State in Kenya, 1986-1991: The Churches’ involvement in the ‘game of change’ (1997) 96 African Affairs 25-52.

Moi regime as the Church was one of the institutions that enjoyed immunity from government control.⁶ Religious leaders were able to act as government watchdog without necessarily establishing a political party. The Church was able to play the role that would ordinarily be played by the opposition parties. The Church made a tremendous contribution in the Constitutional debate between 1992 and 1996 as it called for the revision of the Constitution.⁷ Furthermore, Kenya is a multi-religious State. Majority of Kenyans profess a belief in God, be it through Islam, Christianity, Buddhism or Hinduism.⁸ Religion remains a great influence on our culture, politics and public policy.⁹ Most State functions commence with a word of prayer. Occasionally, the Head of State invites religious leaders to hold a National prayer for our country Kenya. Hence in Kenya, religion and government are closely intertwined as there is some level of cooperation.¹⁰ However, the State does not regulate the activities of the Church and the two are separate. No particular religion is favored by the State and there is no established State Church. Such is the level of autonomy that the Church in Kenya enjoys.

With the right to religious freedom and church autonomy, allegations of physical and sexual abuse by religious leaders using dishonest activities to collect funds from

⁶ David Throup stated; "...only church leaders have the freedom to criticize the government without risking detention in Kenya."(See Sussy Gumo, Abwire Akuloba and Simon Gisege Omare, 'Religion and Politics in the Contemporary Kenya' (2012)8 European Scientific Journal 29.

⁷ Adams Oloo and Walter O.Oyugi, 'Democracy and Good Governance in Kenya: Prospects and Obstacles.' Available at www.dpmf.org/images/democracy-adams.htm accessed 23 February 2015.

⁸ Theuri M.M., 'The Relationship between Christianity, Education, Culture and Religion in Kenya since Political Independence in 1963' (2013) 3(16) Research on Humanities and Social Sciences 52.

⁹ Ibid at 53.

¹⁰ In addition, celebration of National holidays such as Madaraka day and Jamhuri day commence with a word prayer from religious leaders from the various religious sects in Kenya. National prayer days are held occasionally.

members of the congregation have been made.¹¹ Some religious leaders ask for money in exchange for healing and other services that are by tradition free.¹² Other religious leaders receive media attention simply for asking their congregants to engage in behaviors that can only be described as strange.¹³ Moreover, freedom of religion has witnessed a proliferation of churches in Kenya. Churches are opening up at an alarming rate.¹⁴ Almost every street and building in Nairobi is a host to at least one church. Former cinema halls, such as the Shan Cinema and Nairobi Cinema, are now fellowship houses. Most local media houses broadcast live sermons on Sunday. So much is this broadcast rampant in Kenya that the Communications Authority of Kenya included religious programmes in the programming code gazetted in 2016.¹⁵ Churches are slowly being turned into commercial entities and are making headlines for all the wrong reasons due to lack of transparency and accountability by some

¹¹ Holly Yan, '3 ex-Catholic order leaders accused of hiding sex abuse allegations.' Available at <http://edition.cnn.com/2016/03/16/us/pennsylvania-catholic-order-ex-leaders-charged/> accessed 5 October 2016.

A story has been done about six preachers who are outrageously wealthy and the source of their wealth is allegedly linked to church funds. See <http://stories.avvo.com/nakedlaw/bizarre/6-outrageously-wealthy-preachers-under-federal-investigation.html> accessed 5 October 2016.

¹² On 2nd November 2014, News Anchor John Allan Namu, of KTN Channel, a local media house, did a report titled 'Prayer Predators' on Salvation Healing Ministry, one of the Independent churches in Kenya. The Pastor asks for Kenya shillings three hundred and ten (Kes.310) as seed money in exchange for prayer. See <http://www.standardmedia.co.ke/ktnhome/video/category/47/the-inside-story> accessed 4 November 2014. The Kenya police stepped in to conduct investigations on the issue. However, not much came out of the investigations since he was never charged and the Church continues to run.

¹³ A religious leader described as Reverend Njohi of Lord's Propeller Redemption Church made headlines in March 2014 for banning his female congregants from wearing underwear to church. Allegedly, the Reverend informed his female congregants that they needed to be free in body and spirit in order to receive Christ. (See <http://www.christianpost.com/news/kenyan-pastor-bans-female-congregants-from-wearing-underwear-in-church-115528/> accessed 2 December 2014.)

¹⁴ The Assistant Registrar of Societies confirmed during an interview that the number of churches currently registered run into thousands. The exact figure could not be confirmed as the Department registers other non-religious societies. Currently, registration of churches has been suspended but before the suspension, the Registrar of Societies would receive approximately 240 new applications in a month. (Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

¹⁵ Section 12 of The Programming Code for Free-To-Air Radio and Television Services in Kenya gives guidelines on religious programmes.

religious leaders.¹⁶ Religion is now a major industry in Kenya. More often than not, the funds collected from members of congregation or received in form of donations go unaccounted for as these members rarely question how the funds are utilized.¹⁷ This leads to misappropriation of funds which results in wrangles within the Church.¹⁸ Some religious leaders are seen to lead such lavish lifestyles while their congregants struggle to make ends meet. Furthermore, religious leaders carve out titles for themselves and as a layperson, it is easy to get confused.¹⁹ Question that arises then is: does the right to religious freedom allow this blatant abuse of church autonomy by some religious leaders?²⁰ There is a vacuum in terms of regulation

¹⁶ Collins Chris, Coates Thomas J and Szekeres Greg in, 'Accountability in the Global Response to HIV: Measuring Progress, Driving Change' (2008) 22 AIDS 105-111 are of the view that the notion of accountability implies that institutions and individuals are answerable for their commitments and responsibilities.

¹⁷ On 26th March 2015, Dennis Onsarigo of KTN Channel did an investigative report, titled 'The Lead' on the Archdiocese of Kisumu. The Catholic Church was unable to account for millions of Kenya shillings received from the Vatican for purposes of constructing Convents in various Dioceses. The Archbishop of Kisumu, Zachaeus Okoth using the names of Fathers and Brothers in the other Dioceses, allegedly obtained the money. Available at www.standardmedia.co.ke/.../holy-graft-part1-kenyan-archbishop accessed 27 March 2015.

¹⁸ See Kisumu Civil Appeal No.93 of 2015 *Paul Auma Orwa and Another .v. Registrar of Societies and 4 Others* (2016) eKLR which is an appeal arising from High Court Judicial Review No.26 of 2013 dismissing the appellants' motion for judicial review. The appellants made an application in High Court seeking an order for Certiorari to quash the decision of the Registrar of Societies approving new constitution for the African Israel Nineveh Church. The genesis of the matter is that Rt. Rev. John Mweresa Kivuli II, the grandson of the founder of the African Israel Nineveh Church upon his election as High Priest of the Church, mismanaged the Church and misappropriated its funds. This was in contravention of the constitution of the Church. The members realized that the constitution was the root cause of their wrangles and as a result a civil suit was instituted: *Vihiga Senior Resident Magistrates Court Civil Case no.107 of 1998*. In the suit, court gave an Order that the constitution of the Church be amended.

¹⁹ Reverend Wellington Mutiso, the EAK Secretary General in 2012 says that in the mainstream churches and established Pentecostals, there are stipulations regarding what theology school one should have attended and the level reached before he or she can become a Pastor, Apostle, Reverend and so on. 'Kenyan Church seeks self-regulation to rein in errant pastors' Available at <http://www.ajabufrica.com/ajabublog/?p=816> accessed 3 November 2014.

²⁰ Jose Zalaquett in 'Does "religious freedom" include the right to convert or scam others?' is of the view that, "*unrestricted religious freedom opens the door to abuses, but so does the lack of religious freedom. Finding that balance is tricky*" <https://www.opendemocracy.net/openglobalrights/jos%C3%A9-zalaquett/does-%E2%80...> Accessed 22 November 2014.

hence con artists are masquerading as religious leaders. This is not just a Kenyan experience. Some African countries are undergoing a similar phenomenon.²¹

Governments are established to serve the needs of the governed and promote public good.²² As such, it must ensure the protection of the population's fundamental rights and freedoms.²³ This aspect of regulation is in the public interests in order to prevent exploitation of unsuspecting members of the public. Religious leaders should ensure that there is transparency and accountability in the manner the Church is run. Transparency and accountability are key features of good governance. Transparency according to Rosemary and McGee²⁴ “*signifies openness of the governance system through clear processes and procedures and access to public information by citizens*”. They define accountability as “*the process of holding actors responsible for their actions.*” With accountability, leaders are held responsible for their actions such

²¹ On 15th August 2013, Tapang Ivo Tanku, a CNN correspondent, reported that Cameroon's President Paul Biya made an order that nearly 100 Pentecostal churches be closed. The President cited criminal practices by the pastors, which threaten the security of West African Nation. The report further indicated that the targeted Pentecostal churches are transforming their private homes into churches. <<http://edition.cnn.com/2013/08/14/world/Africa/Cameroon-churches/>> accessed 7 November 2014.

On 10th July 2014, BBC Africa reported that Burundi had tabled a Bill in Parliament intended to curb proliferation of churches. The new regulation is so as to protect the public from abuse by some Preachers. <<http://www.bbc.com/news/world-africa-2824519>> accessed 6 November 2014.

Malawi is equally experiencing the issue of some religious leaders using the Church to defraud Followers. The Nation Online reported: ‘Should proliferation of Churches be regulated?’ <<http://mwnation.com/proliferation-churches-regualted/>> accessed 6 November 2014.

On 18th October 2015, Paul Ogemba of Nation Media Group reported that members of Christ is The Answer Ministries (CITAM) have accused retired Bishop Boniface Adoyo and two other church elders of defrauding them of millions of shillings in a land buying project. <http://www.nation.co.ke/news/Bishop-and-church-elders-caught-up-in-land-scam/-/1056/2918822/-/rfomik/-/index.html> accessed 23 November 2014. This matter currently pends before court.

²²“Locke's Political Philosophy”,*The Stanford Encyclopedia of Philosophy* (2010) <<http://plato.stanford.edu/entries/locke-political/>> Accessed 30 October 2015.

²³ Article 21(1) Constitution of Kenya reads, “*It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.*”

²⁴ Rosemary McGee and John Gaventa, “Review of the Impact and effectiveness of transparency and accountability initiatives. Available at<http://www.transparency-initiative.org/wp-content/uploads/2011/05/synthesis_report_final1.pdf> accessed on 27 June 2016.

that there are penalties or consequences for failing to follow laid down procedures. The Penal Code²⁵ governs crime in Kenya but it has not proved sufficient to deal with those who peddle falsehoods for gain.²⁶ Criminal law is meant to prohibit and forbid certain acts. It acts as a deterrent as such cannot regulate certain activities. Is regulation by the State the solution to this emerging issue? If so, how then does the State do that without restricting the right to religious freedom? Should the Church instead put in place concrete self-regulatory mechanisms to avoid inviting State regulation upon itself?

Churches in Kenya are registered as religious societies.²⁷ To operate as a Church in Kenya, one must register it under The Societies Act²⁸, which governs the process of

²⁵ Chapter 63 Laws of Kenya.

²⁶ Take for instance the case of Pastor Deya and the miracle babies' saga. Deya, a self-proclaimed bishop of a Church in South London and who is alleged, together with his wife, Mary Deya, to have stolen babies in Kenya has been battling deportation since 2007. See generally <http://www.theguardian.com/uk/2011/sep/21/pastor-extradited-kenya-accused-babies>

His wife, on the other hand, was charged with and convicted of child stealing contrary to section 174(1) of the Penal Code.< see Criminal Case No.97/2011 *Mary Juma Deya.v.R(2014)eKLR* > Once she is released upon serving her sentence, she can choose to go engage in priesthood as there are no laws to bar her.

²⁷ Section 2(1) of the Societies Act defines society as: *any club, company, partnership or other association of ten or more persons, whatever its nature or object, established in Kenya or having its headquarters or chief place of business in Kenya, and any branch of a society, but does not, except in paragraphs (i) and (ii) of section 11(2)(f) of this Act, include—*

(a) a company as defined by the Companies Act (Cap. 486), or a company registered as a foreign company under Part X of that Act;

(b) any corporation incorporated by or under any other written law;

(c) a registered trade union within the meaning of the Trade Unions Act (Cap. 233), including a branch of a trade union registered under that Act, a probationary trade union within the meaning of that Act and a trade union or a branch of a trade union whose application for registration has been made and not determined;

d) a company, firm, association or partnership consisting of not more than twenty persons, formed and maintained with a view to carrying on business for profit;

(e) a co-operative society registered as such under any written law;

(f) a school registered under the Education Act (Cap. 211), Advisory Council, Board of Governors, District Education Board, School Committee or similar organization established under and in accordance with the provisions of any written law relating to education;

(g) a building society as defined by the Building Societies Act (Cap.489);

(h) a bank licensed under the Banking Act (Cap. 488);

registration. The power to register is vested in the Registrar of Societies. This Act was passed without the proper policy framework to guide its implementation thus the various stakeholders have not been engaged so as to come up with policies to guide the registration process.²⁹ It was enacted before the promulgation of the Constitution of Kenya 2010, at a time when public participation was not a Constitutional requirement and failure to exercise it was not a breach.³⁰ There are associations which fit the definition of a society under section 2(1) of The Societies Act. However, the section proceeds to exclude such associations as they are registered under other legal frameworks. Therefore, there are other legislations that are deemed relevant particularly if one wants to run a non-profit organization or an association for the benefit of the public. For instance the 1990 NGO Coordination Act³¹, which continues to be in operation pending the implementation of The PBO Act, governs the NGO sector. An organization can register under this Act but it cannot operate as a Church since it will be recognized as a body corporate.³² The Societies Act has

(i) any international organization of which Kenya is a member, or any branch, section or organ of any such organization;

(j) any combination or association which the Minister may, by order, declare not to be a society for the purposes of this Act;

²⁸ Chapter 108, Laws of Kenya.

²⁹ Report of the Committee on the Review of the Societies Act Cap 108 Laws of Kenya, November 2015.

³⁰ Ben Sihanya, ‘Constitutional Implementation in Kenya, 2010-2015: Challenges and Prospects (FES Kenya Occasional Paper No.5, October 2011, Revised 5 December 2012).

³¹ The PBO Act No.18 of 2013 is intended to repeal this Act. But the date of commencement of the PBO Act has not been set thus the NGO Coordination Act continues to govern the NGO sector.

³² Section 2 states “*Non-Governmental Organization*” means a private voluntary grouping of individuals or associations, not operated for profit or for other commercial purposes but which have organized themselves nationally or internationally for the benefit of the public at large and for the promotion of social welfare, development charity or research in the areas inclusive of, but not restricted to, health, relief, agriculture, education, industry and the supply of amenities and services;

Section 12(3) states: *A registered Non-Governmental Organization shall by virtue of such registration be a body corporate with perpetual succession capable in its name of—*

(a) suing and being sued;

excluded a corporation in its definition of a society. The PBO Act is more specific on the organizations which are recognized as public benefit organization and the ones that are not.³³ Other associations opt to register as community-based organizations (CBOs) in the Ministry of Labour and East Africa Affairs whereas others opt to register as companies limited by guarantee under the Companies Act.³⁴ Conversely, to be recognized as a religious society, meaning devotion to religious teaching and worship as Churches do, an association must be registered under the Societies Act.³⁵ This avoids duplication across multiple registration frameworks.

With the law governing registration of religious societies, as is currently, any person willing to register a Church can. Societies, under which churches fall, are required to file annual returns failure to which they are guilty of an offence.³⁶

By registration under the Societies Act, the law already provides some form of regulation. Churches have also put some self-regulatory mechanisms in place by

(b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;
(c) entering into contracts; and
(d) doing or performing all such other things or acts necessary for the proper performance of its functions under this Act,

³³ Section 5(2) of The PBO Act No.18 of 2013 states: *For greater certainty, a public benefit organization does not include- (d) a religious organization which is primarily devoted to religious teaching or worship;*

(e) a society within the meaning of the Societies Act;

³⁴ Act No.17 of 2015.

³⁵ Section 4(1) of the Societies Act deems a society which is not registered as an unlawful society. However, confusion has been witnessed before as seen in Judicial Review Miscellaneous Application No.77 of 2013 *Republic .v.Registrar of Companies & 2 Others exparte Bishop Dr.Morris Mwarandu & Another (2014) eKLR*.in which the issue was whether the Church was registered as a Company or a society. The Applicant argues that the registration of the Church as *Redeemed Gospel Church Inc* qualified it as a limited liability company incorporated under the Companies Act due to the use of the word “Inc” which means incorporated. He argued that the term meant it was a profit making organization and as such misleading. The Court dismissed the application as there was no proof that the Church was incorporated under The Companies Act.

³⁶ Section 30 Societies Act, Chapter 108 Laws of Kenya.

having Umbrella Bodies.³⁷ However, membership is not compulsory hence not all churches subscribe to these Bodies. Some opt to regulate themselves as Individual churches.³⁸ Hence, the doctrines and regulatory mechanisms by these Umbrella Bodies only apply to its members. Churches have such varied doctrines and teachings that perhaps self-regulating might be problematic.

Can regulation be avoided in modern times? The term regulation has been synonymous with the words ‘to control’, ‘to limit’, ‘and to restrict’.³⁹ However, the term is finding its way back in society in a positive approach. The term according to Oliver James *has taken on a more specific meaning as achieving public goals using rules or standards of behavior backed up by the sanctions or rewards of the State.*⁴⁰ Barak Orbach states that the term enables, facilitates or adjusts activities with no restrictions.⁴¹ Regulations increase efficiency in the operation of laws.⁴² Regulation in this sense can take either the form of statutory regulation or the form of government policies.⁴³ Whichever route is taken, whether State regulation or self-regulation, there

³⁷ Umbrella Body is a religious Body consisting of a number of religious societies that come together because they share a common doctrine.

³⁸ Some independent churches such as the Nairobi Chapel have clear structures and policies in place. Mavuno Church which is a sister church to Nairobi Chapel uses a reputable auditing Firm to audit its account, the church invites KRA every 3 years to audit its accounts. This information is open to the public and is also posted in its website <<http://www.mavunochurch.org/>> accessed 9 November 2014. However, this is just one Church.

³⁹ Black’s Law Dictionary (8th edn, 2004) defines it as the act or process of controlling by rule or restriction.

⁴⁰ Oliver James, ‘Regulation inside Government: Public Interest Justifications and Regulatory Failures’ (2000) 78 Public Administrations 327.

⁴¹ Barak Orbach, ‘What is Regulation?’ (2012)30 Yale Journal Regulation Online 4 <<http://ssrn.com/abstract=2143385>> accessed 20 November 2014.

⁴² Ibid.

⁴³ Ibid.

should be rules to guide the conduct of churches. As William Pitt the Elder, 1st Earl of Chatham⁴⁴ in a speech to the UK House of Lords in 1770 aptly put it,

Unlimited power is apt to corrupt the minds of those who possess it; and this I know my lords, that where the laws end, tyranny begins.

1.2 STATEMENT OF THE PROBLEM

The Societies Act was enacted in 1968 so as to make provision for the registration and control of societies.⁴⁵ Churches in Kenya are classified as societies hence are registered under this Act.⁴⁶ Though there exists this law governing registration of churches, the process fails to adequately address the issue of transparency and accountability by religious leaders. The lack of accountability does not only concern their actions but also the funds collected from members of congregations.

Churches are required to file annual returns. The penalty provided for failure to do so is vague⁴⁷; thus some may opt not to file returns. This shall be discussed in detail in Chapter Two of this study. Since members of congregation hardly question how funds are utilized, religious leaders may take advantage in order to enrich themselves

⁴⁴ British Prime Minister 1766-1768.

⁴⁵ Societies Act, Chapter 108 Laws of Kenya.

⁴⁶ Above n27.

⁴⁷ Section 30 reads:(1) *Every registered society shall furnish annually to the Registrar, on or before the prescribed date, such returns, accounts and other documents as may be prescribed.*

(2) *If any return, account or other document furnished under subsection (1) of this section is incomplete in any material particular, it shall be taken not to have been furnished for the purposes of subsection (1) of this section.*

(3) *Any registered society which contravenes subsection (1) of this section shall be guilty of an offence.*

(4) *Any person who wilfully makes or orders or causes or procures to be made any false entry in or omission from any return, account or other document furnished under this section shall be guilty of an offence and be liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding one year, or to both such fine and such imprisonment.*

at the expense of these members of congregation. The legal principles relating to regulation of churches are underdeveloped hence conduct of some religious leaders as well as lack of accountability goes unpunished. Equally, the self-regulatory mechanisms in place are not sufficient enough to protect persons from all forms of abuse by errant religious leaders since the said mechanisms are applied only to churches that are members of the Umbrella Bodies.

Consequently, the administration of the Church can no longer go unchecked. The right to freedom of conscience, religion, thought, belief and opinion as is provided under Article 32 of the CoK is not absolute particularly when that right is exercised by a Church registered under the law.⁴⁸ The coming into play of a new constitutional order calls for transparency as well as accountability of all persons whenever applying or interpreting any law.

The problem to be addressed by this research is whether State regulation of the Church will ensure there is transparency in the manner it is run and accountability by religious leaders.

1.3 JUSTIFICATION OF THE STUDY

The study is justified on the basis that, although there exists a provision for registration of churches, it is not sufficient enough to ensure that churches are run in a manner that do not scam the population. Churches are multiplying as many people have come to the realization that the registration process is easy and that they can acquire wealth through it. Additionally, the provisions of the Penal Code alone have

⁴⁸ See High Court Petition No.444 of 2012 *Absolom Ndungo & 26 Others.v.A.G. & 2 Others (2013)* eKLR. This case has been discussed in Chapter 3 of this study.

not sufficiently dealt with the criminal acts carried out by some religious leaders. This paper seeks to address whether this issue can be resolved by regulation by the State or by concrete self-regulation of churches.

The research could not have come at a better time than this following the ongoing efforts at reforming the regulation of churches in Kenya. This research will therefore go a long way in informing the stakeholders of the key areas that need to be considered so as to guarantee transparency and accountability in the way churches are run. Finally, it will inform government interest in formulating a generic legislation on regulation of the Church that conforms to the principles and values of the Constitution of Kenya.

1.4 OBJECTIVES OF THE STUDY

The main objective of this study is to determine whether churches should be regulated by the State. The study will seek to determine whether regulation will curb commercialization of churches by some religious leaders. From this general objective, specific objectives were derived as follows:

- i. To examine the current legal framework governing registration of churches in Kenya.
- ii. To examine the self-regulation mechanisms currently in place by both Umbrella Bodies and Independent Churches.
- iii. To assess whether State regulation will ensure transparency and accountability within the Church.

1.5 RESEARCH QUESTION

The research sought to answer three key questions:

- i. Is the current legal framework governing registration of churches adequate to tackle lack of transparency and unaccountability by some religious leaders?
- ii. Is self-regulation of Churches currently in place adequate to deal with errant religious leaders?
- iii. Will State regulation of churches deal with the issues mentioned above?

1.6 HYPOTHESIS

In undertaking this research, the following hypotheses were set out to be tested:

1. The lack of adequate laws governing registration process is the reason there is a proliferation of Churches in Kenya, as they are increasingly becoming a hub for wealth creation.
2. The absence of substantive regulation of churches is the cause for exploitation of congregants.
3. Desperation and illiteracy leads some congregants to follow their religious leaders blindly.

While registration goes a long way to ensure that a Church is recognized as a religious society, that in itself is not sufficient to deal with the lack of accountability and transparency by some religious leaders. A church is not an individual; it is an institution and ought to be operated as such. There is need for a sound legal approach to the challenges presently facing the church.

It is also posited that the regulation of churches will largely deal with the problem of abuse of members of congregation by some religious leaders and commercialization of churches.

1.7 THEORETICAL FRAMEWORK

Sociological jurisprudence is relevant to this study as we are concerned with how changes in law will make changes in the society. This school is based on what society needs and desires in contemporary times. Since we live in a dynamic society, the law ought to adapt itself to these changing conditions.⁴⁹ Each society has its values. It should be the aim of the law to protect and promote these values. Roscoe Pound's theory of social engineering sees law as a tool for solving societal problems.⁵⁰ Social Engineering is based on the notion that laws are used as a means to shape society and regulate people's behavior. His view agrees with Von Jhering's which states that the law is intended to serve the needs of the society.⁵¹ In addition, Ann Seidman and Robert Seidman hold the view that one should start off with a detailed examination of what is currently going on in the society and then proceed to see in what way change in the law can change the behavior, which constitutes the social problem.⁵² Thus, it can be argued that the need to regulate the Church is necessitated by the need to ensure that the religious leaders do not exploit persons on the one hand, and the need

⁴⁹ Roscoe Pound, 'The Scope and Purpose of Sociological Jurisprudence' (1911) 25 Harvard Law Review 140-168.

⁵⁰ Ibid; Sai Abhipsa Gochhayat, 'Social Engineering by Roscoe Pound: Issues in Legal and Political Philosophy'. Available at < <http://ssrn.com/abstract=1742165> > accessed 9 November 2015.

⁵¹ William Seagle, 'Rudolf Von Jhering: Or Law as a Means to an End' (1945) 13 The University of Chicago Law Review 84.

⁵² Casey Atkins, Interview with Ann Seidman and Robert Seidman, Professors, Faculty of Law, Boston University (Boston University School of Law, 2012) Available at http://www.bu.edu/law/news/bob_seidman_memoriam.shtml > accessed on 27 November 2014.

to ensure that members of the public do not lose faith in religious societies on the other.

Furthermore, the researcher deemed the theory of religious economy to be relevant to the study. Adam Smith who believed in competition in religion advanced this theory.⁵³ Adam Smith argued for competing religious organization as it creates an open market in which religious groups engage in rational discussion about religious beliefs.⁵⁴ Rodney Stark, Roger Finke and William Bainbridge later expounded it.⁵⁵ They equate religion to a market-type setting in which “religious goods” are offered to consumers.⁵⁶ Religious persons and organizations, which are viewed as producers of religious goods, interact within a market framework of competing groups and ideologies in order to meet the demands of different religious consumers. Since there is an array of religion and religious products, the market becomes competitive thus the requirement of governmental regulation of religion.⁵⁷

⁵³ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (William Strahan and Thomas Cadell 1776).

⁵⁴ *Ibid* at 1368-92.

⁵⁵ Matt Cole and Walter E. Block, “Adam Smith on Religion and Economics” (2013) *Journal of Prices and Markets* 24.

In addition, Iannaccone in his Article, ‘Introduction to the Economics of Religion’, at page 1478 stated, “Smith argued that self-interest motivates clergy just as it does secular producers, that market forces constrain churches just as they constrain secular firms; and that the benefits of competition, the burdens of monopoly, and the hazards of government regulation are as real for religion as for any other sector of the economy.”

⁵⁶ Rodney Stark and William Bainbridge, *A Theory of Religion* (Peter Lang Publishing 1987).

⁵⁷ This theory can be read together with public interest theory of regulation which was first developed by Arthur Cecil Pigou and later on discussed in detail by Richard Posner. It holds that regulation is supplied in response to the demand of the public for the correction of inefficient or inequitable market practices. Regulatory intervention should occur in the interest of the public at large. Religious leaders soliciting for funds in exchange for prayer favors and sexual abuse are practices that the Society shuns. (See generally Richard A. Posner, ‘Theories of Economic Regulation’ (1974) *The Bell Journal of Economics and Management* 335.

1.8 RESEARCH METHODOLOGY

In undertaking this research, reliance was placed on both primary and secondary sources. Primary sources formed the basis of the study where interviews were conducted to establish the current legal framework governing the process of registration of churches in Kenya. For this part, the Assistant Registrar of Societies was interviewed. This was considered necessary as a Church has to be registered to be considered valid. Officials of a few selected Umbrella Bodies and Independent Churches were also interviewed. This was deemed relevant in order determine whether they are of the view that regulation of the Church by the State or self-regulation can be the solution to the problem of unaccountability and lack of transparency by some religious leaders. It was also imperative to find out the self-regulatory mechanisms in place and as such, the contributions of the officials would be invaluable based on their practical experience. The rationale for this is that the churches who are members of the Umbrella Bodies share a common doctrine thus the reason to get views from the Umbrella Bodies. Additionally, views of Churches that are independent since they do not fall within any Umbrella Body were considered. The Umbrella Bodies were selected based on the types of churches registered with them. Hence, the Umbrella Bodies selected were a representative of: Mainstream churches, Evangelical churches⁵⁸ Pentecostal churches⁵⁹ and lastly the Indigenous

⁵⁸ These Churches believe in a number of things namely: the Holy Trinity and salvation by faith: the Bible; the Deity; the death, resurrection and ascension into heaven of Jesus Christ; the return of Jesus Christ; and lastly, the born-again experience which is a spiritual birth. Pentecostals on the other hand is a subgroup of evangelicals who believe in the same doctrine as the evangelicals but then emphasize on speaking in tongues, prophecy miracle healings and seeing visions, things the evangelicals reject.

See generally Amos Yong, 'Evangelicals, Pentecostals and Charismatics: A Difficult Relationship or Promising Convergence?' Available at <https://fullerstudio.fuller.edu/evangelicals-pentecostals-%E2%80%A8and-charismatics/> accessed 9 July 2016.

⁵⁹ Ibid.

churches. Two independent Churches were also considered. Initially, six Umbrella Bodies and two independent Churches were selected for the interviews. Introductory letters were sent to the identified Bodies and independent churches together with the structured interview questions. Follow up phone calls and emails were subsequently made and physical visits to the respective offices of the selected interviewees in order to secure an interview appointment. Two of the interviewees did not respond to the letter or follow ups for appointments for the interview. One of the interviewees representing one of the Bodies selected for this study requested that the interview not be recorded, as it was yet to have a solid stand on the issue of regulation of the Church in Kenya. The interviewee was guaranteed that anonymity would be upheld. The information gathered from the interview session nevertheless has in some instances formed part of this study.

The researcher also relied on literary materials. The data sources included but not limited to legislation, dissertations, journal articles, judicial precedents, working papers and policy reports.

To supplement the primary data, the researcher conducted a comparative study by examining how other jurisdictions regulate the Church. The comparative method has been defined as the process of comparing different societies or groups within the same society to show whether and why they are similar or different in certain aspects.⁶⁰ Comparison has been recommended where there is need to establish and

⁶⁰ Adapted from Ishavirmani's *Comparative Method In Sociological Research*, available at <<http://www.oppapers.com/essays/Comparative-Method-In-Sociological-Research/188433.html>> accessed on 27 November 2014.

explain both differences and similarities between societies.⁶¹ Hence, comparative study was deemed necessary in order to determine whether there are some lessons that may be borrowed from other jurisdictions and incorporated into Kenya's practice.

Comparative study was undertaken through the review of literary materials. In particular, the researcher picked out the UK and Estonia. Firstly, Estonia because there are specific Statutes that handle only religious matters.⁶² To supplement this, religious associations are registered by the registration departments of county and city courts.⁶³ Secondly the United Kingdom provides the best bet in this area from which Kenya has to a great extent borrowed its legislations and practices due to its colonial ties.⁶⁴ In addition to this, the Church in the UK, other than the established churches, are subject to regulation by the Charity Commission and are exempted from paying taxes. The Charity Commission takes action where there is malpractice or misconduct.⁶⁵ In selecting these two jurisdictions, the researcher considered their basis of regulation of the Church as well as the successes and challenges met when applying the legal provisions. This has been discussed in detail in Chapter four of this study.

⁶¹ Ibid.

⁶² See generally Merilin Kiviorg, 'Religion and Secular State in Estonia' (2010) 1(1) *International Journal for Arab States* 261.

⁶³ Article 17 (3) CCA.

⁶⁴ Republic of Kenya, *The Judicature Act*, Chapter 8, Laws of Kenya. This legislation establishes the mode of exercise of jurisdiction in Kenya among them being certain Acts of Parliament of the United Kingdom.

⁶⁵ Frank Cranmer Notes on Church and State in The European Economic Area 2011 Centre for Law and Religion at 39 Available at http://www.law.cf.ac.uk/clr/networks/Frank%20Cranmer_%20Church%20&%20State%20in%20W%20Europe.pdf> accessed on 17 November 2015.

The Internet also formed an important source of information from which a number of scholarly articles were identified. Websites such as SSRN, Academia.edu and kenyalaw.org were categorized as Internet search.

1.9 LITERATURE REVIEW

Although there exists a wealth of literature of freedom of religion, there is an apparent scarcity regarding the extent of regulation of the Church that this paper seeks to address. The issue of regulation is a sensitive one as it borders on people's faith and freedom of worship. The question to be addressed is, if it is the State to regulate the Church, then to what extent can it do so without interfering with this freedom? What can be done to ensure transparency and accountability by religious leaders?

John Locke, an English philosopher, discussed the notion of separation of the Church and State as far back as the seventeenth century.⁶⁶ He is of the view that the government and religion have separate ends. He believes the Church to be '*a free society of men joining together of their own accord for the public worship of God*'⁶⁷ whereas the government exists to secure the things that can be enjoyed on earth such as life, liberty and property. The government achieves this through legislation to ensure conformity unlike religion which uses persuasion.⁶⁸ He goes on to say that the State has legitimate authority over the dominion of human conscience hence the two

⁶⁶ John Locke, *A Letter Concerning Toleration* (Oxford Clarendon Press 1968).

⁶⁷ Ibid at 67.

⁶⁸ Ibid.

should be kept separate.⁶⁹ In his book, he advocates for religious toleration since we are ‘mere mortal who cannot comprehend God’.⁷⁰ For this reason, he argues that the State has no right to coerce religious practice on people due to its lack of understanding of God. Secondly, he points out that the State can control people’s behaviour through the use of punishment as is the case in criminal matters but it cannot control our inner thoughts and beliefs.⁷¹ Thirdly, John Locke expresses the view that if the State imposes religious beliefs on its subjects and these subjects blindly accept those doctrines while ignoring their own reason, the said subjects will be locked from heaven.⁷² As a result, ‘*the function of the State and the Church must be distinguished*’.⁷³ He believes that no sect can reach that extent of teaching individuals to undermine civil laws because then their peace will be endangered.⁷⁴ He therefore recommends that the Church and the State must be distinct as the Church can promote values that undermine State supremacy leading to political destabilization of that State.⁷⁵ John Locke holds that in such situations, the State should step in to ensure that the Church does not promote such values.⁷⁶ Thomas Hobbes on the other hand advocates for the teaching of religious doctrines. In *The Leviathan*, Hobbes argues that the Sovereign, who has tremendous rights, can control people’s beliefs indirectly by determining what doctrines may be taught to the

⁶⁹ John Locke, *Two Treatises of Government and a Letter Concerning Toleration* (Yale University Press 2003)

(Despite his views on separation of religion and government, he was of the opinion that Catholics and atheists were dangerous due to their loyalty to the King.).

⁷⁰ Above n66 at 69.

⁷¹ Ibid.

⁷² Ibid at 71.

⁷³ Ibid.

⁷⁴ Ibid at 74.

⁷⁵ Ibid.

⁷⁶ Ibid.

public.⁷⁷ This ensures uniformity in religious practice.⁷⁸ This in the long run guarantees doctrines which are harmful to the peace and stability of the society are not taught. The incorporation of the Church as a department of the State, in Hobbes' view, makes this possible.⁷⁹

John Locke's arguments are relevant to this study. As discussed above, he is suggesting that civil laws should not be used to govern people's faith. His views on separation of religious and governmental institutions are valid. It helps ones understand the concept of separation of the Church and the State and the need for the separation. However, while John Locke advocates for this separation, he fails to mention how the Church should govern itself and the steps to be taken against errant religious leaders. He also fails to address what happens if the Church nevertheless promotes values that undermine State supremacy thus threatening political stabilization. Much as he admits that measures ought to be taken against such a sect, he is unclear of the types of measures to be applied, whether the measures should be given force in law and the extent to which they should be applied. These are the issues that this paper seeks to address. One has to appreciate the historical context in which John Locke's article was written.⁸⁰ He did not envision certain situations that

⁷⁷ Thomas Hobbes, *Leviathan, Or the Matter Form and Power of a Commonwealth, Ecclesiasticall and Civill* (Ian Shapiro ed, G.Routledge 1907).

⁷⁸ Ibid at 372.

⁷⁹ Ibid.

⁸⁰ This was in the seventeenth century when the conflict between the Crown and the Parliament as well Protestants, Catholics and Anglicans was witnessed. This led to civil war in the 1640s. With the death of Charles I, the monarchy, House of Lords and the Anglican Church were abolished. The Restoration of Charles II saw the return of the monarchy, House of Lords and the Anglican Church. It was a period marked by continuous conflict between the King and Parliament over religious toleration of Protestants and Catholics. These events influenced John Locke's writings. See generally William Uzgalis, 'John Locke' *The Stanford Encyclopedia of Philosophy* (Spring edn, 2016) <http://plato.stanford.edu/archives/spr2016/entries/locke/> accessed 6 October 2016.

arise due to our ever-evolving society. Under such circumstances, shouldn't the Church be subject to laws and regulation? Thomas Hobbes' views on the other hand are in essence advocating for the State interference of doctrines of the Church. Just like John Locke's works, one must bear in mind the time Thomas Hobbes wrote *The Leviathan*. It was during the English civil war and this may have influenced his writing. Nevertheless, his arguments are considered relevant to this study as it helps one recognize and understand the need for the protection of human rights and fundamental freedoms, especially the right to freedom of religion.

Adam Smith takes an economic approach in evaluating religious institutions.⁸¹ He observes that one of the methods religious institutions use to receive funds is through voluntary contributions of their audience members.⁸² He expresses the view that the institutions are also free to use other means as long they are within the law of the land.⁸³ Government regulation of religion is therefore deemed necessary due to the competitive nature of these institutions. A critical look at this view is that government regulation will affect the nature and even quality of the product; however he does not address how this will ensure transparency and accountability among religious leaders. Furthermore, his view tends to support the involvement of the State in regulation of the Church. However, he fails to adequately address how the State should go about it and the extent to which the State should be involved. This paper seeks to address these gaps.

⁸¹ Above n53 at Book V Chapter 1 part 3.

⁸² Ibid at 1361.

⁸³ Ibid.

Thomas Robbins examines government regulatory powers and church autonomy.⁸⁴ He argues that the activities of the Church form the basis upon which it receives public support.⁸⁵ The government will stand in support of religious freedom as long as such activities are legitimate; but if the activities are negative, then it forms the basis for the government to intervene and expand its prerogative in the area of religious organizations.⁸⁶ Church-State conflict is brought about by two issues: firstly by the expansion of the scope of the public authority and its mandate to regulate organizations and secondly by the varied extreme diversification of churches.⁸⁷ The society is becoming increasingly secular thus driving the State to regulate all manner of organizations and businesses; however religious organizations enjoy certain privileges such as tax exemption.⁸⁸ To enjoy such privileges, some religious organizations label their activities, including those that resemble those of secular organizations, as religious.⁸⁹ The author points out that churches engage in economic activities such as running a restaurant, owning properties and engaging in real estate business-what he calls religious entrepreneurship⁹⁰-while hiding under the banner of freedom of religion as is guaranteed by the Constitution. The Church no longer concerns itself with spiritual matters only and that some churches, especially the small and individual churches, recognize the pastor as the personal manager of the

⁸⁴ Thomas Robbins, 'Government Regulatory Powers and Church Autonomy: Deviant Groups as Test Cases' (1985) 24 *Journal for the Scientific Study of Religion* 237.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid* at 239.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid* at 242.

Church funds.⁹¹ Such a situation “*opens the door to a sometimes irresistible potential for abuse with a small probability of external interference.*”⁹² As such, Thomas Robbin asserts that financial accountability can be assured by putting in place *regulation that would beneficently promote the survival of churches by firming institutionalization. To protect the public as well as the churches themselves, the State must promote rationalization.*”⁹³ He indicates that churches are exempted from taxation in order to promote the beneficial social welfare services that are generally associated with churches.⁹⁴ Religious tax exemptions are meant to keep the Church and State separate because the funds are for the benefit of the public. This paper will indicate, in support of Thomas Robbins’ view, that the Church should be regulated. What remains unclear from Thomas Robbins’ article is whether government regulation should be limited to financial accountability and how that is to be implemented. Thomas Robbins neither addresses the issue of transparency by such religious leaders nor the self-regulatory mechanisms the Church has in place and whether if implemented it would ensure religious leaders are held responsible for their actions. This paper is going to address these issues.

Mark Chopko and Michael Moses in their article focus on self-governance of the Church which results from church autonomy.⁹⁵ While writing on the right of the Church to be free from government control, they argue that church autonomy is a

⁹¹ Ibid at 247.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid at 248.

⁹⁵ Mark E.Chopko and Michael F. Moses, ‘Freedom to be a Church: Confronting Challenges to the Right of Church Autonomy’ Georgetown Journal of Law and Public Policy 388.

right threatened by hostile regulatory mandates.⁹⁶ They assert that “*failure to recognize and guarantee the freedom of churches from government control is a mark of an authoritarian society and inconsistent with the notion of free people.*”⁹⁷

Churches have a right to be free from governmental control and this right can be inferred from various Constitutional provisions.⁹⁸ In concurrence with Chopko’s and Moses’ views, Douglas Laycock states:

[T]he church autonomy claims where it is the church that decides how it should be run and the government should not be regulating its internal operations. A church should not have to show a particular doctrinal basis for every internal management decision. The faithful or the hierarchy depending on church polity, ought to be entitled to run their own organization.⁹⁹

Mark Chopko and Michael Moses add that the constitutional guarantees neither make Church autonomy absolute nor a defense to commit crimes by Ministers of the Church; however they raise the issue that what remains unanswered is the question as to whether the Church should be civilly responsible for the crimes committed by their Pastors.¹⁰⁰ At this point, what remains unclear from these two authors is the nature of the crime and whether the crime was committed using the name of the Church. In addition, in what capacity is the individual the Minister of the Church; as an employee of the Church or one of the founders of the Church? In discussing the right

⁹⁶ Ibid at 391.

⁹⁷ ibid at 388.

⁹⁸ In Kenya, these provisions are covered in several Articles in The CoK. Article provides for freedom of conscience, religion, belief and opinion. This Article coupled with Article 33 which provides for freedom of expression and Article 36 which provides for freedom of association, confirm that religious liberty is a Constitutional guarantee. Furthermore, Article 8 CoK provides that there shall be no State religion. This creates the notion of separation of church and State. Citizens are left to exercise their religions without interference from the government.

⁹⁹ Douglas Laycock, *Religious Liberty: Overviews and History* (vol 1 Wm.B.Eerdmans Publishers 2010).

¹⁰⁰ Above n95 at 390.

to Church autonomy, Mark Chopko and Michael Moses assert that disputes involving Church self-governance are not subject to interference from the government.¹⁰¹ They base this argument on various court decisions such as *Watson.v.Jones*¹⁰², *Gonzalez.v. Roman Catholic Archbishop of Manila*¹⁰³ and the recent one of *Serbian Eastern Orthodox Diocese.v.Milivojevich*¹⁰⁴, all which point out that courts may not interfere with internal affairs of religious institutions and that such institutions should define their own doctrines and run their own affairs guided by their constitution and laws.¹⁰⁵ They proceed to argue that clergy malpractice also fall outside the provision since the government does not establish qualifications for ministers and as such “cannot enforce ministerial qualifications by providing a remedy when ministers fall short of them.”¹⁰⁶ For this reason, Church Ministers may not litigate their employment terms in court. Mark Chopko and Michael Moses express the view Church autonomy stems from freedom of religion hence the Church should govern itself according to its

¹⁰¹ Ibid at 407.

¹⁰² In this case, a dispute arose within the Church following internal division over slavery. The Church split into two factions and each faction sought control of the Third or Walnut Street Presbyterian Church. The General Assembly of the Church, being the body that deals with such issues, made a decision on which the true faction was. The matter was taken to court and the court overturned the decision of the General Assembly. An Appeal was lodged at the Supreme Court and it was held that the decision of the General Assembly regarding discipline, faith and church law are not subject to review by a civil court.

¹⁰³ This case involved a will which created a trust for the maintenance of a chaplaincy. A century after the execution of the will, the archbishop in charge of the diocese was asked to appoint as a chaplain, and assign an income, a ten-year old who was a descendant of the founders. The archbishop refused stating that under the cannon law of the Church, a ten-year-old did not qualify as a chaplain. The heirs of the ten-year-old sued in order to enforce the trust. The Supreme Court held that the function of determining the essential qualifications of chaplain fell within the Church authorities and as such could not interfere.

¹⁰⁴ A dispute arose regarding the dismissed bishop. The lower Court ordered his reinstatement holding that the Church failed to follow its own constitution and laws. The Supreme Court reversed the decision stating the Constitution allows religious organizations to establish their own rules and regulations for internal disputes.

¹⁰⁵ Above n95 at 411.

¹⁰⁶ Ibid at 421.

constitution and laws.¹⁰⁷ Their evaluation is based on well-established Churches with sound hierarchical and governance structure. These well-established churches have mechanisms that ensure transparency and accountability within the Church. However, they do not consider small and individual churches where the founders wear many hats. The constitution of such churches does not expressly bar the founders from being the trustees as long as they are appointed by members of that Church. These two authors do not address whether there should be self-regulatory mechanisms that should be applied to all churches, whether established or independent. Their analysis therefore is incomplete and that is the gap this paper seeks to address.

In a separate article, Mark Chopko evaluates the regulatory demands that the Church faces today.¹⁰⁸ He expresses the view that the Church is not above the law as it operates within a Constitutional regime.¹⁰⁹ For this reason, the Church is subject to numerous laws and regulations.¹¹⁰ He identifies areas in the religious sphere that the State has stepped in to regulate.¹¹¹ Firstly, he states that there have been instances where the government has applied the provisions of a public charitable trust on private charitable assets.¹¹² The argument the government has used to carry out such an action is that the public support together with community service creates a public charity subject to control of the Attorney General.¹¹³ The government considers such charities as a trust for the community thus requiring the approval of the government

¹⁰⁷ Ibid at 451.

¹⁰⁸ Mark E.Chopko, 'Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal' (2004)53 Catholic University Law Review 125.

¹⁰⁹ Ibid at 129.

¹¹⁰ Ibid at 134.

¹¹¹ Ibid.

¹¹² He gives an example of a hospital as one of the situations where this has been applied.

¹¹³ Above n.108 at 135.

before sale.¹¹⁴ Secondly, welfare services provided by the Church are exempt from tax.¹¹⁵ However, in some instances, that has been denied for failure of the institution to abide by the governing secular model or public policy.¹¹⁶ Thirdly, some religious agencies employ an individual on the basis of that individual's religious values and beliefs.¹¹⁷ Such religious institutions argue that in the same manner secular institutions have the right to employ an individual who shares the mission and vision of that institutions, so do religious institutions.¹¹⁸ If such religious institutions abandon their mission, which is religion, then they cease to be religious institutions.¹¹⁹ He argues that "*Religious organizations cannot condemn something as immoral, and then fund that very immoral act through their institutions. Indeed, they have a right not to propound a view contrary to their beliefs.*"¹²⁰ What Mark Chopko fails to consider is that the Church today carries out activities over and beyond what the Church institution is known for: religion. The activities are secular in nature calling for the intervention of the government since no institution is above law; as long there is a limit on the application of the law such that it does not interfere with doctrinal issues. In addition, these religious institutions offer such service to all regardless of one's faith. My argument is that Mark Chopko advocates for non-interference from the State; however he does not address how religious institutions,

¹¹⁴ Ibid.

¹¹⁵ Ibid at 136.

¹¹⁶ Bob Jones University, a religious University in the USA was denied tax exemption as it sanctioned racial discrimination which is contrary to public policy. Some Catholic hospitals in the USA practice medicine according to the religious tradition of the Church thus refusing to perform abortion procedures on individuals. Abortion in the USA has been legalized.

¹¹⁷ Above n108 at 137.

¹¹⁸ Ibid at 139.

¹¹⁹ Ibid.

¹²⁰ Above n.108 at 146-7.

offering services that the government is obligated to offer to its citizens, are supposed to be regulated and who should regulate them in the first place. He does not address how transparency and accountability is achieved in the absence of State intervention and that is the issue this paper considers.

Kenneth Cauthen is of the opinion that the concept of separation of church and State is valid only when one views the Church and the government as institutions.¹²¹ This is more so because the government does not appoint Bishops or pastors.¹²² Equally, the Church does not appoint government officials.¹²³ To that extent, separation is considered practicable; however complete separation and non-interference does not work. Martha Nussbaum equally agrees that separation of Church and State may be a bit hard to implement. She writes:

[N]obody really believes in separation taken literally across the board. The modern State is ubiquitous in people's lives, and if we really tried to separate church from the State all the way, this would lead to a situation of profound unfairness. Imagine what it would be like if the fire department refused to aid a burning church, if church did not have access to the public water supply or the sewer system, if the police would not investigate crimes on church property, if clergy could not vote or run for office.¹²⁴

Martha Nussbaum's observations are in consonance with Alan Snyder's.¹²⁵ He argues that each individual is unique and based on the Biblical doctrines, each individual is

¹²¹Kenneth Cauthen, "Church and State, Politics and Religion" Available at <http://www.bigissueground.com/atheistground/cauthen-churchstate.shtml> accessed 15 May 2015.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Martha Nussbaum, *Liberty of conscience: America's Tradition of Religious Equality* (New York 2008) at 11.

¹²⁵ See Alan Snyder, *If the Foundations are Destroyed: Biblical Principles and Civil Government* (The Lockman Foundation 2010) 49-79.

self-governed.¹²⁶ The government exists for the individual and not the individual for the government.¹²⁷ Snyder says that self-government began to erode the day Bishops considered themselves “*spiritual authorities*” over churches and established a system that included a manmade hierarchy of the Pope, the Archbishops, Bishops and Cardinals.¹²⁸ This hierarchy went against the principle of self-government bringing about a spiritual decline.¹²⁹ Spiritual decline saw erosion in individual self-control. People then started engaging in criminal activities forcing the government to step in in order to maintain peace and order in society.¹³⁰ Kenneth Cauthen, Martha Nussbaum and Alan Snyder all seem to point out that Church-State relations are inevitable. Both institutions operate within the provisions of the Constitution since each has autonomy appropriate to its sphere. Nevertheless, the two institutions cannot be seen as completely separate. The views of these scholars will be relied on as a guide to facilitating this paper.

From the foregoing views by different scholars, there is a consensus that the State and Church are separate institutions. However, the two associate with each other by virtue of the linkage of their activities. In addition, there are limits on what each institution can demand from the other. Despite several books and journals written on the doctrine of separation of the Church and State as well as regulation of the Church, none adequately addresses the challenges arising out of shortfall of the provisions in law in ensuring transparency and accountability by religious leaders, and that is the

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

gap this paper seeks to address. My study focuses on the extent regulation can be effected to bring about transparency and accountability without infringing on the right to religious freedom. By suggesting reforms to ensure there is a balance between religious freedom and regulation of the Church, this study will provide a valuable contribution by ensuring that no rights guaranteed by the CoK are infringed.

1.10 LIMITATIONS

The sample population selected may not be as broad to represent the entire Kenyan population. As indicated in the Research Methodology section, some of the interviewees identified did not respond to the request for an interview. Hence, the findings will not be a holistic reflection of the Kenyan population.

The Societies Act governs registration of societies and the law is applied equally to all religion. However, the researcher will focus on registration of the Church which is deemed to fall under Christianity. The findings will not represent other religious societies in Kenya.

The secondary research materials on how other jurisdictions have regulated the Church were limited. This is so as not many countries have been keen on the issue of regulation of the Church due to freedom of religion and association which are human rights.

Religion is a controversial issue.¹³¹ Hence, some interviewees, especially the religious leaders, may decline to be interviewed or may have guarded responses. As

¹³¹ See generally Paul Hedges(ed) in *Controversies in Contemporary Religion: Education, Law, Politics, Society and Spirituality* (Praeger 2014). The author writes that a majority of people believe religion to be a source of social division. Many wars and conflicts have arisen due to religious

shown in the Research Methodology section, some interviewees did not get back to the researcher whereas a representative of the one of the Bodies requested that it be not quoted.

The researcher has no interest in the moral arguments.

1.11 CHAPTER BREAKDOWN

This study will be composed of five Chapters:

Chapter One of this study introduces the topic and the legal issues to be discussed. It sets out an introduction of the study to be undertaken, the problem statement and the research methodology to be adopted in conducting the research.

Chapter Two will discuss the legal framework governing registration process of churches in Kenya to ascertain the extent to which the State is involved in regulation of Churches. The first part discusses the historical development of the Church in Kenya. It is deemed important to discuss this so as to know the background of the Church and to give a foundation to the topic in discussion. The second part discusses the current legal framework and the challenges encountered in an attempt to register and regulate churches. It further highlights the recent draft rules on Religious Societies that were withdrawn before gazettelement due to public outcry by religious leaders.

associations. Instances such as Israel-Palestine conflict, Boko Haram in Northern Nigeria (emphasis mine). Some heated debates center around religion, for example homosexuality, abortion and women's rights.

Chapter Three will discuss the rationales for and against regulation of churches in Kenya. In particular, the study will bring out the arguments for and against regulation of churches based on the views of data collected and analyzed.

Chapter Four will discuss other jurisdictions in comparative context with specific reference to Estonia and the UK. This will be in order to establish whether there are lessons that can be learnt and put into use in the Kenyan context.

Chapter Five will set out the conclusion and give recommendations based on the analysis of the study.

CHAPTER TWO: THE LAW ON REGISTRATION OF THE CHURCH IN KENYA

2.1 INTRODUCTION

This chapter discusses the legal regime governing registration of the Church in Kenya. Part I will provide the historical background of the Church, discussing its genesis and development up to the point when registration was introduced. Previous attempts to regulate the Church shall also be highlighted including the more recent trend by the government towards regulation. Part II will set out the current legal framework governing regulation of churches in Kenya as well as the challenges encountered in the process of registration.

2.2 HISTORICAL BACKGROUND AND DEVELOPMENT OF THE CHURCH IN KENYA

To appreciate the growth of churches in Kenya, it is deemed important to retrace its roots. The development of the church, especially the mainstream churches, can be traced to the early missionary work.¹³² The period from 1498 to 1905 was largely seen as the Missionary movement with missionaries from Europe and the United States of America settling in Africa in order to spread Christianity.¹³³ The notable missions were the Protestant Missions and the Roman Catholic Missions.¹³⁴ With progress in time, the missionary movement set a foundation for the growth and development of indigenous churches.¹³⁵ Historically speaking, the indigenous church

¹³² Zablon Nthamburi, 'The Beginning and Development of Christianity in Kenya: A Survey'. Available at <http://www.dacb.org/history/beginning%20and%20development%20of%20christianity%20in%20kenya.html> accessed 22 February 2015.

¹³³ Ibid at 3.

¹³⁴ Ibid.

¹³⁵ Ibid.

movement began in 1862.¹³⁶ However, the Indigenous church in Kenya came into being in 1914 and spread rapidly throughout the territory.¹³⁷ Denominations such as ‘Maria Legio’ emerged in 1963 from the Roman Catholic Church.¹³⁸ These indigenous churches were not founded by theologians or clerics but by lay people who questioned the authenticity of the mission-founded Church.¹³⁹ In an effort to ensure unity and cooperation among the churches, the Federation of Missions was formed in 1913.¹⁴⁰ At this point however, the Federation was mainly formed to promote effectiveness of missionary organizations. In 1943, it changed its name from Federation of Missions to Christian Council of Kenya to allow participation of African instituted churches as they had become rampant.¹⁴¹ In 1966, the name was changed to National Christian Council of Kenya to embrace nationalism.¹⁴² Eventually in 1984, it became National Council of Churches of Kenya to reflect that membership was by churches and not individuals.¹⁴³

It is important to bring out that during this era of growth of indigenous churches, Kenya was under the British rule. Mau Mau uprising was also witnessed from around 1952 forcing the colonial government to declare a state of emergency.¹⁴⁴ So as to regulate what the colonial master believed to be the emergence of unruly

¹³⁶ Ibid.

¹³⁷ Ibid at 5.

¹³⁸ Ibid at 7.

¹³⁹ See www.ncck.org.

¹⁴⁰ The Council ran alongside the United Conference of Missionary Societies which later became the National Christian Council of Kenya in 1966 and then National Council of Churches of Kenya in 1984. Available at <http://www.ncck.org/newsite2/index.php/about-ncck/our-journey> accessed 24 February 2015.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Julius Gathogo ‘Mau-Mau War and the Church in Kirinyaga, Kenya: Accounting for the tension and conflict (1952-1960) 40(2) *Studia Historiae Ecclesiasticae* 19.

organizations, the Societies Act was enacted in 1952.¹⁴⁵ Churches were considered as societies and were required to undergo registration.¹⁴⁶ That period can be said to mark the first regulatory regime. With this Act, most indigenous churches were suppressed during the Mau Mau Nationalism.¹⁴⁷ Denominations such as the African Independent Pentecostal Church of Africa, which was formed in the 1930s, was among the churches that were affected.¹⁴⁸ Such churches were conversely revived in 1963 when Kenya gained independence.¹⁴⁹ The Societies Act 1952 was repealed in 1963¹⁵⁰ when Kenya gained independence. The belief was that the Act had been enacted in an attempt to control what the colonial government deemed to be unlawful societies.¹⁵¹

The current Societies Act came into effect in 1968 to make provision for the registration and regulation of societies.¹⁵² As discussed in Chapter One of this study, a Church can provide other services that are considered to be for the benefit of the society. In such instances, the specific legislation will apply. However, to operate as a Church, an association must be registered under the Societies Act.¹⁵³ Since this Act was passed without the proper policy framework to guide its implementation, not much modification of the law has been experienced.¹⁵⁴ Due to increase in societies, it became apparent that the Societies Act alone could not cater for the whole sector as there emerged gaps in the law which put restrictions in the administration of all

¹⁴⁵ Kenya National Assembly Official Record (Hansard) 30 September 1997, pp 2597-98.

¹⁴⁶ Ibid.

¹⁴⁷ Bengt Sunkler and Christopher Steed, *A History of the Church in Africa* (Cambridge University Press 2000) at 1005.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid; Above n132 at 12.

¹⁵⁰ See Legal Notice No.678 of 1963.

¹⁵¹ Above n145.

¹⁵² See Legal Notice No.62 of 1968.

¹⁵³ See Above n27.

¹⁵⁴ Above n29.

societies.¹⁵⁵ To deal with this, the government enacted several legislations for specific sectors. For instance, in 1990 the NGO Coordination Act¹⁵⁶ was enacted to govern the NGO sector, Political Parties Act¹⁵⁷ was enacted in 2011 to regulate political parties and The Sports Act¹⁵⁸ enacted in 2013 to regulate sports sector. The Church though, still continues to be governed by the Societies Act. One sector that has faced hurdles when it comes to regulating is the religious organizations, in particular the Church. Kenya has previously attempted to regulate Churches. There is The Religious Bodies Regulation Bill which was drafted in 1996. It provided for registration, regulation and control of religious organizations. It was meant to address the issue of leadership squabbles and financial mismanagement within the Church. However, that piece of legislation was withdrawn. This was because religious leaders as well as politicians argued that such a law would control not only the Church but also people's faith.¹⁵⁹ In 2001, a motion was introduced in Parliament that a Ministry for Religious Affairs be established so as to deal with matters of religion.¹⁶⁰ The reason for this was that there was unnecessary delay in registration of churches due to many applications.¹⁶¹ The number of churches and religious organizations had increased and there was need to bring efficiency in the administration of the sector.

¹⁵⁵ Rahma Adan Jillo, 'NGO Reform in Kenya: Incorporating Best Practices' (2009) 11(4) The International Journal of Not-for-Profit Law 39.

¹⁵⁶ The PBO Act No.18 of 2013 stands to repeal The NGO Coordination Act as this Act was enacted to govern the non-profit making organizations, the NGOs included. However, by the time of writing this thesis, the commencement date of this Act was unknown. At the moment, the NGO Act still remains in force until such time when the PBO Act shall be implemented.

¹⁵⁷ Act no.11 of 2011.

¹⁵⁸ Act No.25 of 2013.

¹⁵⁹ Ken Opala, 'The Church in Crisis' *Daily Nation (Kenya)* (Nairobi, 17 December 1997) <<http://www.culteducation.com/group/983-international-church-of-christ/9958-the-church-in-crisis.html>> accessed 3 November 2014.

¹⁶⁰ Kenya National Assembly Official Record (Hansard) 28 November 2001, pp 3349-56, Motion on Registration of Churches/Religious Organizations.

¹⁶¹ Ibid.

Such a Ministry was never established. In 2007, the then Justice and Constitutional Affairs minister Martha Karua, wanted to introduce a Bill that would see churches pay taxes.¹⁶² It never materialised.

2.3 CURRENT LEGAL REGIME

Churches in Kenya are classified as societies.¹⁶³ They are deemed to be not-for-profit making purposes hence are registered under the Societies Act.¹⁶⁴ Registrar of Societies, who derives her powers from section 8 the Act, registers and regulates Societies.

The Act does not expressly state who may register a Church.¹⁶⁵ This means any person, regardless of their theological background, can register a Church. The absence of a requirement invites all persons including con artists to apply for registration. In practice however, it is restricted to any religious leader with training in theology.¹⁶⁶ The religious leader in this case is an Apostle, Bishop, Imam or Pastor.¹⁶⁷ One of the questions put forward to the interviewees representing the Umbrella Bodies and independent churches is whether religious leaders should undergo theological training. All the interviewees strongly agreed that the training is necessary. Reverend Father Joseph Mutie stated that the training is essential in order

¹⁶² Samuel Otieno, Ernest Ndunda and Stephen Makabila, 'Kenya: Churches Won't Allow State to Regulate Them' *The Standard* (Nairobi, 16 April 2007) <<http://allafrica.com/stories/200704160020.html>> accessed 3 November 2014; Nation correspondents, 'Kenya: Karua Seeks Law to Regulate Churches' *Daily Nation* (Nairobi, 16 April 2007) <<http://allafrica.com/stories/200704161044.html>> accessed 3 November 2014.

¹⁶³ Above n27.

¹⁶⁴ Chapter 108 Laws of Kenya.

¹⁶⁵ Section 9 of the Societies Act provides that "*every society shall, in the prescribed manner and within twenty-eight days after the formation thereof, make application to the Registrar for registration of for exemption from registration from registration under this Act.*"

¹⁶⁶ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

¹⁶⁷ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

to get biblical exposition and be exposed on the Biblical teachings.¹⁶⁸ Gerishon Odare of Alliance Registered Churches in Kenya stated thus:

Religious leaders should undergo theological training so as to understand what they are teaching the people. Leaders should do spiritual deliverance that is not questionable. All teachings and doctrines should be in line with the Bible and one can only learn that from school. Some preachers don't even know the history of the Church so going to Bible school will allow them to get the basic Biblical foundation, know how many languages are mentioned in the Bible and to have a better understanding of the scriptures. It is also through theological training that one gets to be identified as a Vicar, Reverend or ordained Minister based on the level attained.¹⁶⁹

Similarly, Reverend Benedict Mutuku Munyao of African Foundation Churches of Kenya was of the view that:

Preaching is a calling from God but then one should go to training to get the skills and knowledge to spread the word. There is a difference between theological training and Biblical training. Theological school is expensive and some people cannot afford that. If one cannot afford that then he can attend Biblical/basic training. This ensures those called by God are not cut off from spreading His word. One is also issued with a certificate in Biblical training.¹⁷⁰

The registration of a church undergoes the following process:

In making an application for registration of a Church, the applicant must submit four sets of documents, in duplicate, to the Registrar of Societies.¹⁷¹ These documents include: Form A which is the Application form, Form B which is the Notification of the registered office of the Society, A constitution/rules to govern the Society. This is

¹⁶⁸ Interview with Rev. Father Joseph Mutie in Nairobi, Kenya (29th June 2016).

¹⁶⁹ Interview with Gerishon Odare in Kiserian, Kenya (30th June 2016).

¹⁷⁰ Interview with Reverend Benedict Mutuku Munyao in Nairobi, Kenya (30th June 2016).

¹⁷¹ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

in line with section 9 of the Societies Act and Rules 2 and 3 The Societies Rules.¹⁷² In practice, a theological Certificate is also one of the documents required to be submitted.¹⁷³ Registration fees of Kenya shillings Two Thousand is made.¹⁷⁴ Where the constitution/rules of the society are not in English language, two copies of the translation of the constitution/rules into the English language is attached in addition to two copies of the constitution/rules in the language in which they were made.¹⁷⁵ If the Church makes an application to register a branch, then what is submitted are: a copy of the Headquarters constitution/rules, Form A, Form B, a recommendation letter from the Headquarters and a copy of the theology certificate of one of the officials.¹⁷⁶ The submitted Forms are then forwarded to the National Intelligence Service (NIS) offices for vetting and once cleared, the Church is issued with a certificate of registration, which is Form C, and as such can perform its objects as

¹⁷² Section 9 of the Societies Act provides that “*every society shall, in the prescribed manner and within twenty-eight days after the formation thereof, make application to the Registrar for registration or for exemption from registration from registration under this Act.*”

Rule 2 reads: “*Every application made for registration or exemption from registration under section 9 of the Act shall-*

- (a) *be made in duplicate in Form A in the Schedule to these Rules;*
- (b) *be typewritten;*
- (c) *be signed by three of the officers of the society;*
- (d) *be sent to the Registrar together with the prescribed fee;*
- (e) *be accompanied-*
 - i. *subject to any direction of the Minister, by two type-written or printed copies of the constitution or rules of the society; and*
 - ii. *by a notification in duplicate of the situation of the registered office and postal address in Form B in the Schedule to these Rules signed by three officers of the society.*

Rule 3 reads: “*Where the constitution or rules of the society were not made in the English language, there shall be attached to the application two copies of a translation of the constitution or rules into the English language in addition to the two copies of the said constitution or rules in the language in which they were made.*”

These Forms are in the Schedule to the Societies Act. Templates of these documents can also be accessed from the Official website of the Attorney-General of Kenya which is <http://www.attorney-general.go.ke>.

¹⁷³ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

¹⁷⁴ Ibid.

¹⁷⁵ Rule 3 of The Societies Rules.

¹⁷⁶ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

enshrined in its constitution/rules. This entire process takes about one hundred and twenty days.¹⁷⁷ This procedure was confirmed during an interview with Assistant Registrar of Societies.

A society can apply for exemption from registration under the Act.¹⁷⁸ Exemption from registration will be allowed for churches that are very well organized and with good structures of governance such that there is minimal supervision from the Registrar of Societies.¹⁷⁹ Such exempted society is not required to file returns; however it should periodically update the Registrar of Societies in case it amends its names or objects, becomes a branch of any organization established outside Kenya or dissolves itself.¹⁸⁰ In practice though, this is hardly the case as the Churches fail to notify the Registrar of Societies.¹⁸¹ But then the Registrar of Societies has powers to revoke the exemption where the objects of the Church become controversial or in case of leadership wrangles,¹⁸² a fact which was confirmed by the Assistant Registrar of Societies.¹⁸³ Exemption from registration was last issued in the 1970s and it was for the mainstream churches.¹⁸⁴ It is no longer issued in as much as the Act makes a provision for it.¹⁸⁵

¹⁷⁷ Section 4(2) Societies Act.

¹⁷⁸ Section 9 Societies Act.

¹⁷⁹ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016). The Assistant Registrar of Societies gave the Catholic Church as one of the churches that was exempted from registration under the Societies Act.

¹⁸⁰ Section 21 Societies Act.

¹⁸¹ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

¹⁸² Section 13 Societies Act.

¹⁸³ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

¹⁸⁴ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

¹⁸⁵ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

The Societies Act under section 19 makes it a requirement for every society to capture in its constitution/rules specific matters. These matters are outlined in the Schedule to the Act.¹⁸⁶ It is the constitution/rules of the Church that will govern issues such as terms of office of the officials as well as succession.¹⁸⁷ When an official dies or leadership wrangles arise within the Church, an Annual General Meeting (AGM) is held to elect new officials.¹⁸⁸ Despite the guidelines in the constitution/rules of the Church, at times the wrangles are not resolved and the parties end up in court.¹⁸⁹

Once the Registrar of Societies issues the certificate of registration, the Church is deemed to be a registered society.¹⁹⁰ However, since it is not recognized as a legal person, it is not capable of owning property in its name.¹⁹¹ In the circumstances, if a Church wants to acquire some assets, there must be appointed persons who are then

¹⁸⁶ These matters include the name of the society and its objects; persons to whom membership is open; subscription fees if any; method of suspension or expulsion of members; titles of officers and terms of office; frequency and dates of the AGM; custody and investments of funds and property of the society; formation of branches if branches may be formed; manner of amending the name or constitution/rules of the society and the manner of dissolution of the society and disposal of its property on dissolution.

¹⁸⁷ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

¹⁸⁸ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

¹⁸⁹ See High Court Civil Case No.513 of 2007 *Bishop Rev.Silas Yego & 3 Others.v.David Mulei Mbuvi & 5 Others (2008) eKLR* which was in court due to leadership wrangles. The plaintiffs made an interim application seeking injunctive orders against the defendants from purporting to be AIC Church officials and dealing with Church assets. The Applicants argued that they were the bona fide officials having been duly elected for a 5-year term through elections. The Defendants on the other hand also argued that they were the duly elected officials. The Judge in granting the relief conditional to the suit being heard and disposed of within 60 days of the Ruling, pointed out that there was an obvious leadership struggle within the leadership of A.I.C. between the plaintiff's camp and the defendant's camp which needed to be resolved either amicably or through litigation.

¹⁹⁰ Section 10(3) Societies Act reads: "*Upon registering a society or exempting it from registration, the Registrar shall issue to the society a certificate of registration or exemption from registration in the prescribed form.*"

¹⁹¹ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

registered as trustees to hold the property in trust for the benefit of the Church.¹⁹² High Court Civil Suit No.2824 of 1997(OS) *Jane Nyambura Joshua.v.Apostlic Faith Church (2004) eKLR* best demonstrates this. In this case, the Originating Summons was struck out since the defendant lacked the legal capacity to be sued as it was registered under the Societies Act (Chapter 8) Laws of Kenya. The Trust is also established to aid in mobilization of funds through donations. The trust will be incorporated under the Trustees (Perpetual Succession) Act.¹⁹³ The trustees prepare a Trust Deed and present it to the Registrar of Documents for registration in line with Registration of Documents Act.¹⁹⁴ The registration under the Registration of Documents Act gives it the effect of a simple trust and not a body corporate.¹⁹⁵ To be registered as a body corporate, the trust must make an application to the Cabinet Secretary for Lands by presenting a certified copy of the registered Trust Deed and a petition for incorporation of the trust.¹⁹⁶ Once a certificate of incorporation is issued, it is deemed a body corporate. In The Environmental Land Court Case No.130 of 2013 *Registered Trustees of Maximum Miracle Center.v.Andrew Mlewa Mkare(2013)eKLR*, the defendants raised a preliminary objection that the plaintiff's suit against him was bad in law since the plaintiff is not a legal person capable of suing or being sued. The defendant argued that under the Societies Act, when a society is suing it can only do so in the names of the three officials. The preliminary objection was dismissed as the Judge found that the plaintiff is a body incorporated

¹⁹² Ibid.

¹⁹³ Chapter 164 Laws of Kenya.

¹⁹⁴ Chapter 285 Laws of Kenya.

¹⁹⁵ Cyrus Maina, 'Establishment of a Charitable Foundation in Kenya.' Available at <http://kenyanlawyer.blogspot.co.ke/2010/11/establishment-of-charitable-foundation.html> accessed on 7 October 2016.

¹⁹⁶ Section 3 Trustees (Perpetual Succession) Act.

under the Trustees (Perpetual Succession) Act. Some choose to register the trust as companies limited by guarantee under the Companies Act.¹⁹⁷ The names of the trustees must be provided in the constitution/rules of the Church.¹⁹⁸ It is advisable that a copy of the Trust deed be submitted to the Registrar of Societies though this is not a requirement.¹⁹⁹

Once registered, the Church is exempt from various forms taxes. Firstly, the Church, through the appointed trustees, can proceed to apply for tax exemption certificate at the KRA offices.²⁰⁰ For the income of the Church to be exempt from tax, the Commissioner of Income Tax must be satisfied that the income is to be expended either wholly in Kenya or in circumstances that will benefit the residents of Kenya.²⁰¹ The tax exemption is valid for five years but the Commissioner of Income Tax may revoke the certificate if there is a just cause.²⁰² The tax exemption certificate is issued within sixty days of making an application.²⁰³ Secondly, social welfare services are also exempt from VAT.²⁰⁴ To be classified as a social welfare service, an

¹⁹⁷ Faith Kisinga Gitonga, 'Kenya' (2010) 12(2) The International Journal of Not-for-Profit Law 21. Section 7(1) of The Companies Act states that: *a company is limited by guarantee if it does not have a share capital; the liability of its members is limited by the company's articles to the amount that the members undertake, by those articles, to contribute to the assets of the company in the event of its liquidation; and its certificate of incorporate states that it is a company limited by guarantee.*

¹⁹⁸ Section 19 Societies Act.

¹⁹⁹ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

²⁰⁰ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

²⁰¹ Income Tax Act, First Schedule paragraph 10.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ This is captured under The Value Added Tax 1st Schedule Part 2 which reads: *The supply of the following services shall be exempt supplies— paragraph 11(b): The supply of social welfare services provided by charitable organizations registered as such, or which are exempted from registration, by the Registrar of Societies under section 10 of the Societies Act(Cap. 108), or by the Non-Governmental Organizations Co-ordination Board under section 10 of the Non Governmental Organization Coordination Act, (Cap. 134) and whose income is exempt from tax under paragraph 10 of the First Schedule to the Income Tax Act, (Cap. 470),and approved by the Commissioner of Social*

organization must show that it is registered under the Societies Act or the NGO Coordination Act and in addition, that its income is exempt from tax as is approved by the Commissioner of Social services.²⁰⁵ Most services offered by the Church fall here. Thirdly, the trustees can apply to be exempt from stamp duty in line with provisions section 52(2) (b) of the Stamp Duty Act.²⁰⁶

A registered Church is expected to file annual returns. This is done by filling Form I, which must be properly signed by the three officials of the Church, that is, the Chairman, the Secretary and the Treasurer.²⁰⁷ The annual return should be done on or before 31st March of each year.²⁰⁸ The Form, which is in the Schedule to the Act, should capture any changes in the Church since its registration or since its filing of the last annual return. These changes include: the name of the Church; the objects of the constitution/rules of the Church; the people to whom membership is open; the organization established outside Kenya of which the Church is a branch or to which it is affiliated, the titles of its officers and; land or premises the Church owns.²⁰⁹

Payment is then made according to the number of members in the Church, the

Services: Provided that this paragraph shall not apply where any such services are rendered by way of business.

²⁰⁵ Ibid.

²⁰⁶ Section 52 of the Stamp Duty reads: (1) *Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable with stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale.* (2) *Notwithstanding the provisions of subsection (1), a conveyance or transfer, or an agreement for a conveyance or transfer, operating as a voluntary disposition of property shall not be chargeable with any duty, if the conveyance or transfer is in favour of—*

any body of persons incorporated by special Act and that body is by its Act precluded from dividing any profit amongst its members and the property conveyed is to be held for the purposes of an open space or for the purposes of its preservation for the benefit of Kenya; or

any body of persons established for charitable purposes only or the trustees of a trust so established.

²⁰⁷ Section 30(1) Societies Act.

²⁰⁸ Rule 13 Societies Rules.

²⁰⁹ Schedule to the Societies Act.

minimum amount being Kenya shillings two hundred and the maximum Kenya shillings one thousand.²¹⁰ This is a means for the State to generate revenue as the payments collected go to the government of Kenya through the Ministry of Finance.²¹¹ The Registrar of Societies or Assistant Registrar of societies audits these annual returns. Failure to file annual returns is an offence.²¹²

There have been recent developments regarding the issue of regulation of the Church in Kenya. In January 2016, the Attorney General unveiled the proposed the Religious Societies Rules 2015 calling for views of the public and interested parties before gazettment.²¹³ These Rules were meant to ease religious society registration and regulation.²¹⁴ Some of the notable Rules which caused a public outcry by religious leaders included the requirement that a religious society be a member of an Umbrella religious society and the umbrella society must be registered with a membership of not less than two thousand five hundred religious societies;²¹⁵ submit a copy of its Constitution containing its statement, doctrine of faith, programmes, ministries, charitable and education activities as well as the list of the people coordinating these activities;²¹⁶ a religious society be open to the Registrar of Societies' inspection at any time;²¹⁷ a religious leader to have a theological certificate from a registered and accredited theological institution;²¹⁸ a religious leader to submit a declaration of

²¹⁰ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

²¹¹ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

²¹² Section 30(3) Societies Act.

²¹³ The Societies (Religious Societies) Rules 2015.

²¹⁴ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

²¹⁵ Rule 9 of The Societies (Religious Societies) Rules 2015.

²¹⁶ Rule 5(1) (b) of The Societies (Religious Societies) Rules 2015.

²¹⁷ Rule 8 of The Societies (Religious Societies) Rules 2015.

²¹⁸ Rule 6(1) The Societies (Religious Societies) Rules 2015.

familial relations of the religious leaders and officers and;²¹⁹ a religious society have at least one third of its officers be Kenyan citizens and where it has foreign leaders and officers, then it must submit for each leader and officer four documents namely: a certified copy of the work permit and alien identification card issued under the Kenya citizenship and Immigration Act 2011, one passport photograph and letter of recommendation from the relevant embassy.²²⁰ These Rules were never published and stakeholders were asked to go back to the drawing board.²²¹

At the moment, registration of new Churches has been suspended.²²² The legislative drafters within the Office of the Attorney General are currently working on a law which is intended to repeal the current Societies Act.²²³ The same is at the initial stages of drafting.²²⁴

2.4 CHALLENGES ENCOUNTERED

As mentioned earlier in this study, The Societies Act was passed without a proper policy framework to guide its implementation. Policy framework is intended to provide a proper guidance on the legislative process. Currently, there are no clear written policy guidelines. As a result of this lacuna, there is a myriad of challenges encountered not only during the registration process but also in administration of the already registered churches to ensure that they comply with the law. The challenges encountered are both legal and administrative.

²¹⁹ Ibid.

²²⁰ Rule 4 of The Societies (Religious Societies) Rules 2015.

²²¹ Editorial, 'Kenya: Withdrawal of Proposed Rules on Religion Timely' *Daily Nation* (Nairobi, 12 January 2016). <http://allafrica.com/stories/201601130640.html>> accessed 5 February 2016.

²²² Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

²²³ Ibid.

²²⁴ Ibid.

The legal challenges encountered include:

Other than religious organizations, the church having being classified as such, the other societies registered under the Societies Act include private members club and welfare associations.²²⁵ This poses a risk as there is a proliferation of the societies being registered.²²⁶ As discussed earlier, over the years, specific legislations have been enacted to govern the various societies. However, the Church is still governed by the Societies Act. As such, effective and efficient monitoring to ensure that Churches comply with legal requirements is a tall order.

One of the requirements for registration of a Church is possession of a theological certificate by the religious leader. However, this is not pegged on any provision of the law but practice that has existed over the years.²²⁷ Section 11 of the Societies Act outlines grounds upon which the Registrar may refuse to register a society and lack of theological certificate is not among them. This means that if the Registrar exercises the powers bestowed upon her by this section and refuses to register a Church on the ground of lack of a theological certificate by an applicant, this applicant has the right to appeal. Section 15 of the Act grants the applicant this right to appeal to the Minister within thirty days of the refusal. An applicant aggrieved by the decision of the Minister has the right to appeal to the High Court within thirty days of the decision.

²²⁵ Section 2(1) Societies Act.

²²⁶ See Above n14. The number could be higher if all types of societies are included.

²²⁷ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

The provisions of the Societies Act do not explicitly state what happens when a church fails to file annual returns. The consequences of failure to file annual returns are captured in section 30 of the Act.²²⁸ In addition, a person who makes false entry or omission from a return is fined Kenya shillings ten thousand or imprisoned. The Rules on the other hand state that *“a registered society or officer guilty of an offence against these Rules shall be liable to a fine not exceeding two thousand shillings, or in the case of an officer, to imprisonment for a period not exceeding three months.”*²²⁹ The lack of strict penalties has seen most churches violate this legal requirement.²³⁰ This legislative position was confirmed during an interview with the Assistant Registrar of Societies. As a result of the gap in the law and in the absence of clear written policy guidelines or regulations on churches, the officers at the department of the Registrar General within the Office of the Attorney General have over the years administratively developed a system of ensuring that Churches file annual returns. For instance, if a Church fails to file its annual returns, any transaction dealing with the Church will not be approved. The application for amendment of the constitution/rules of the Church or change of its name or the application for a Marriage License or marriage books will not be approved. Despite this, some

²²⁸ Section 30 reads:(1) *Every registered society shall furnish annually to the Registrar, on or before the prescribed date, such returns, accounts and other documents as may be prescribed.*

(2) *If any return, account or other document furnished under subsection (1) of this section is incomplete in any material particular, it shall be taken not to have been furnished for the purposes of subsection (1) of this section.*

(3) *Any registered society which contravenes subsection (1) of this section **shall be guilty of an offence.***

(4) *Any person who wilfully makes or orders or causes or procures to be made any false entry in or omission from any return, account or other document furnished under this section shall be guilty of an offence and be liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding one year, or to both such fine and such imprisonment.*

²²⁹ Rule 17 Societies Rules.

²³⁰ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

churches still fail to comply. The exercise of this power has to be done with caution and parties have to be notified before the cancellation of a marriage license or refusal to grant one. This was demonstrated in *Judicial Review Case No.138 of 2010 David Mulei Mbuvi & 13 Others .v.Registrar General & 2 Others*. In this matter, the African Inland Church of Kenya, held elections and two factions of leadership emerged within the Church, one consisting of the Applicants and the other the interested party. Each faction claimed to have been validly elected thus submitted a notice of change of officials to the Registrar of Societies. The Registrar of Societies made a decision to register the faction led by the interested party and the Applicants contested this. Thereafter, leadership wrangles emerged within the Church. Sometime in 2010, the Senior Deputy Registrar General published in the Kenya Gazette a decision cancelling the Applicants' licenses to celebrate marriages. The fourteen Applicants moved court seeking an order of certiorari to quash the decision of the Senior Deputy Registrar cancelling the licences granted to them to celebrate marriages as Church Ministers under the African Christian Marriage and Divorce Act, Chapter 151 Laws of Kenya. The Applicants claimed that they were not granted a hearing before the cancellation nor were they were given reasons for the cancellation. They also claimed that the Senior Deputy Registrar's decision was ultra vires of section 6(1) of the African Christian Marriage and Divorce Act which confers the power to license or cancel licenses of Church Ministers to celebrate marriages on the Registrar General and not the Deputy Registrar General or registered Church officials. In arriving at the decision to issue an order of certiorari to quash the Deputy Registrar's General decision, The Judge held that the Deputy

Registrar General had not informed the Applicants the reasons for her decision prior to making a publication in the Gazette Notice. The Judge also pointed out;

It is not disputed that the minister's power to license church ministers or to cancel such licensees was delegated to the Registrar General vide Legal Notice No.569 of 1956. However, it is my view that this delegation was done to the Office of the Registrar General and not to the person occupying the office of the Registrar General personally. Any other interpretation of the Gazette Notice No.569 of 1956 would lead to an absurdity as it is common knowledge that the Registrar General occupies a public office which oversees the operations of several departments serving different needs of Kenya citizens from all over the country. In the performance of her administrative duties, the Registrar General is assisted by officers working in the office of the Registrar General for example the Registrar of Companies, the Registrar of Births and Deaths, the Registrar of Marriages, Registrar of Societies among others. It would therefore be illogical to expect the Registrar General to personally attend to all administrative tasks appertaining to her office. Some of the decisions and statutory functions of the Registrar General would of necessity be executed by authorized officers in that office not because of any delegated powers but because those officers are part and parcel of the office of the Registrar General.²³¹

The Societies Act gives the Registrar of Societies power under section 31 to call for information and accounts of any society. In particular, section 31(1) (e) empowers the Registrar to require any registered society to furnish him with audited accounts whenever he deems fit.²³² From the wording of this section, the Registrar of Societies exercises his powers when it is necessary, meaning it is not mandatory for the

²³¹ Judicial Review Case No.138 of 2010 *David Mulei Mbuvi & 13 Others .v.Registrar General & 2 Others* at 6.

²³² Section 31(1)(e) states: *Where the Registrar has reasonable cause to believe that circumstance have arisen which render it expedient for the proper performance of his functions under this Act so to do, he may, order by ordering in writing, require any registered society to furnish him with- duly audited accounts of the society covering such period as he deems necessary for the purpose for which the order is made;*

Registrar to have the audited accounts of each and every registered Church on a regular basis.

Churches undergo registration process but are not regarded as legal entities thus cannot own property.²³³ This means any property the Church acquires is vested in the appointed trustees who can mismanage it.²³⁴ Ideally, the officials of the Church should not be the trustees but in some instances one finds that the officials are still the appointed trustees.²³⁵ This presents not only a conflict of interest but also a great challenge since the Church will depend on the goodwill of appointed trustees instead of the law to protect the property acquired. Furthermore, since trusts are registered under a different legal framework, the mandate of the Registrar of Societies does not extend to the management of property acquired by the Church through the trustees. This leads to difficulties in establishing a uniform regulatory system. The Trustee Act²³⁶ aims to ensure that incorporation of trusts will not be used for the personal gain of the trustees.²³⁷ For instance, the trustees cannot acquire or dispose of movable property without the consent of the Cabinet Secretary for Lands. However, if the officials of the Church are still the appointed trustees, then it is immaterial that the

²³³ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

²³⁴ See High Court Constitutional and Human Rights Petition No.395 of 2012 *Silas Miso Yego & 2 Others .v. Minister of State, Provincial Administration and Internal Security & 8 Others (2014) eKLR* where the applicants sought temporary injunction restraining the 4th to 8th respondents from interfering with quiet possession of premises allegedly owned by the Church. The 4th to 8th respondents were the former pastors and trustees of the Church. Among the many grounds that the applicants raised was that the 4th to 8th respondents had not only occupied the Church property but also taken funds belonging to the Church and utilized those funds in ways that are inconsistent with the objectives of the Church. The Petitioners were the Officials of the Church as well as the trustees of the Church.

²³⁵ Ibid.

²³⁶ Chapter 167 Laws of Kenya.

²³⁷ Section 3(1) states: *This Act, except where otherwise expressly provided, applies to trusts including, so far as this Act applies thereto, executorships and administratorships constituted or created either before or after the commencement of this Act.*

consent of the Cabinet secretary is obtained. How is transparency and accountability ensured if the Church officials are still the appointed trustees?

Registered churches are required to have an updated register of its members. This is in line with section 25 of the Societies Act. However, the Act as is currently does not make a provision for submission of the updated register to the Registrar General. Most of the disputes that arise are because of uncertainty on who the officials are.²³⁸

In addition, it is not a legal requirement that those seeking registration of a Church submit identification papers with their application forms. This gives leeway for officials to engage in unscrupulous activities such as giving false information on the number of members so as to pay less when filing annual returns.

The administrative challenges on the other hand include:

The office of the Registrar of Societies has for a long time operated using a manual registry. The automated system was recently introduced in order to create a database, though this is yet to be fully effected. The documents submitted when making an application for registration of a Church are hard copies. These are then filed and stored in the registry. With increase in applications, lack of storage space cannot be ruled out. Files also get misplaced and since the system is not a fully automated one, a skeleton file is opened and the applicant asked to submit application forms once

²³⁸ High Court Constitutional Petition No.14 of 2014 *East Africa Pentecostal Churches Registered Trustees & 1754 Others.v.Samwel Muguna Henry & 4 Others*(2015)eKLR; High Court Civil Case No.285 of 2014 *Board of Trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani & 12 others* [2014] eKLR; High Court Petition No.444 of 2012 *Absolom Ndungo & 26 Others.v.A.G. & 2 Others* (2013) eKLR; Civil Appeal No.4 of 1982 *Arthur Gatungu Gathuna v African Orthodox Church of Kenya* [1982] eKLR are just some of the cases that have ended up in court due to leadership wrangles.

again.²³⁹ The manual system also poses the problem of double registration since the database is not up to date. This problem was brought out in Judicial Review Case No.451 of 2013 *Republic .v. Registrar of Societies ex-parte Joseph Kamuti M'bataru (suing on behalf of and as Secretary of East African Pentecostal Church of Kenya)* in which the ex-parte applicant received notice from the Registrar of Societies requiring it to change its name or risk deregistration. Justice W.Korir in delivering the judgement stated: “Looking at the names of the ex-parte Applicant and that of the recipient of the letter namely East African Pentecostal Churches, one can say that the ex-parte Applicant ought not to have been registered in the first instance...” When asked about double registration, the Assistant Registrar of Societies said:

With the manual system it has been a challenge keeping a track record of all societies registered. Churches form one of the many types of societies registered under the Societies Act. The introduction of the automated system will deal with this because information on all registered societies will be available electronically. There have also been instances in which some Organizations have registered as CBOs under the Department of Social Security & Services in the Ministry of Labour and East Africa Affairs only to come and register afresh as a Church under the Office of the Attorney General and Department of Justice. In such instances, the names of the officials stated in the application forms will be the same as the ones used to register the organization as CBO. Our systems are not linked therefore it becomes difficult to tell especially if the names of the officials stated are not the same as the ones in the CBOs. This issue of double registration comes out later when wrangles arise within the Church and the matter is rushed to court to determine who the true officials are. Others also opt to register as a limited liability company for purposes of carrying out their activities but then carry on as a Church. If an organization does not register under the Societies Act but proceeds to carry on as a Church, it will be considered to be an unlawful society.

²³⁹ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

Any person who intends to register a Church must visit the offices of the Registrar of Societies at Sheria House, Nairobi. The office of the Registrar of Societies is currently situated in Nairobi and is expected to serve all societies in the country. There are no regional offices and there are no plans underway for the establishment of these regional offices. This poses a risk of some churches operating yet they are not registered. This in the long run makes it hard to monitor even the churches already registered. Furthermore, it hampers fast and effective delivery of services.²⁴⁰ The Constitution of Kenya calls for a devolved government so that services are taken closer to the people.²⁴¹ Absence of regional offices hampers fast and easy access of services by those interested in opening a Church.

2.5 CONCLUSION

This chapter has delved deeper into the historical development of the Church in Kenya, the legal framework governing registration of the Church and the challenges encountered in the process. In particular, the registration process under the Societies Act has been discussed. The process however faces numerous statutory and administrative challenges which have been demonstrated in this chapter. The proposed Societies (Religious Societies) Rules 2015 that were withdrawn has been

²⁴⁰ See High Court Constitutional and Human Rights Petition *No.469 of 2013 Jesus Care Centre Ministry International & Another .v. Registrar of Societies & 3 Others (2014) eKLR*. The 1st petitioner, a society based in Malindi, received a letter from the Registrar of Societies, through its founder the 2nd petitioner, requiring him to show cause why his certificate of registration should not be cancelled. A period of 21 days was granted. The letter was sent by registered post and was received two months from the date of postage, after the expiry of 21days.A second letter was sent to the petitioner's advocate but before the advocate could proceed, a third letter was received by the 1st petitioner being the notification of cancellation of registration. The Registrar stated in the letter that the petitioner had failed to respond to the complaints raised in the initial letter. The petitioner stated in his argument that all the three letters were received late.

²⁴¹ See Chapter 11 Constitution of Kenya 2010.

highlighted specifically the sections that religious leaders took issues with. What stands out from the discussion in this chapter is that the Societies Act faces countless problems thus a new legal framework needs to be adopted in order to deal with the current challenges.

In the next chapter, I propose to deal with the rationales for and against regulation of the Church. The self-regulatory mechanisms put in place by the Umbrella Bodies and the Independent Churches shall also be discussed based on the information gathered in the field. I will endeavor to bring out the deficiencies raised through data collection with a view to making recommendations on whether the Church can be regulated without interfering with the freedom of religion.

CHAPTER 3: RATIONALES FOR AND AGAINST STATE REGULATION

3.1 INTRODUCTION

The legal framework governing registration of churches in Kenya has been discussed in the preceding chapter as being largely unsatisfactory and inadequate to regulate the Church. As discussed, initially, the main purpose of the Societies Act was to ‘control’ societies, especially those deemed to be unlawful. However, this changed at independence in 1963. The current Societies Act was enacted in 1968 so as to allow for registration and regulation of societies.

Having conducted interviews with four Umbrella Bodies namely: Organization of African Instituted Churches (OAIC), Alliance of Registered Churches of Kenya (ARK), African Foundation Churches of Kenya (AFCK) and National Council of Churches of Kenya (NCCCK), one independent Church: Seventh-day Adventist and; the Office of the Attorney General and Department of Justice, this paper now turns to the arguments in favour of and against State regulation of the Church. The analysis will draw mostly from the fieldwork undertaken in this study. The main aim was to collect relevant information to address whether the Church should be regulated and to what extent it should be regulated. The study sought to determine whether State regulation will ensure transparency and accountability by religious leaders. The question to be addressed is how to hold these leaders accountable without interfering with the freedom of religion? In regulating the Church, it is anticipated that religious leaders will be held accountable for their actions.

It is imperative to point out that freedom of religion has two components: The first is absolute and cannot be restricted under any circumstances. In Kenya, this is captured under Article 32 of the CoK.²⁴² The second is the freedom to manifest one's religion, which is not absolute and can be restricted if prescribed by law and if necessary.²⁴³ If the restriction is prescribed by law it means it is based on the law and that law is applied in such a way that this freedom can still be exercised.²⁴⁴ The freedom to manifest one's religion, whether exercised by an individual or a religious organization must be exercised with due regard to the rights and freedoms of others.²⁴⁵ As such, manifestations of a particular belief may legitimately be limited where they threaten to infringe on the rights of others or other aspects of social order.²⁴⁶ The provisions of Article 24 of the Constitution of Kenya coupled with

²⁴² Above n1.

²⁴³ Article 18(3) of The International Covenant on Civil and Political Rights reads: "*Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others*" Kenya is bound by this instrument by virtue of Articles 2(5) and (6) of the CoK.

²⁴⁴ See Nakuru Industrial Court of Kenya Cause No.439 of 2013 *Robert Mboya Nyaringo.v.Kenya Forest Service & Another* (2014) *eKLR*. The Judge in entering judgment in favor of the claimant held that the decision by the respondents not to accord and afford the claimant the right to observe his Sabbath day and compel him to attend training on Saturday was unconstitutional as it contravened Article 32 of the CoK. The respondents failed to take into account justification of the limitation under Article 24 CoK in imposing the Sabbath day training sessions upon the claimant. The respondents had to establish as provided under Article 24 CoK the importance of the limitation as well as the nature and extent of the limitation.

²⁴⁵ See Article 24(1)(d) CoK.

²⁴⁶ This was brought out in High Court Petition No.82 of 2012 *Nyakamba Gekara.v.A.G & 2 Others* (2013) *eKLR* where court had to consider whether the Petitioner's freedom to manifest his religion under Article 32 CoK would affect the freedom of other parents to hold Parent-Teacher Association meeting on a Saturday. It was established that membership of PTA was not mandatory and that the meeting has been held on Saturdays over the years with SDA parents in attendance without complaint. The Petition was dismissed.

Article 25 demonstrate that freedom to manifest one's religion is subject to limitation.²⁴⁷

Before examining the rationales for and against state regulation of the Church, the next section takes a brief discussion on the merits and demerits of self-regulation *vis-à-vis* State regulation of the Church. This is deemed necessary as it will offer basis and guidance when delving into the arguments.

3.2 SELF-REGULATION VIS-À-VIS STATE REGULATION

According to Robert Baldwin, Martin Cave and Martin Lodge, regulation is often seen as an activity that restricts behavior and prevents the occurrence of certain

²⁴⁷ **Article 24 states:** *1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—*

(a) the nature of the right or fundamental freedom;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—
(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied

Article 25 states: *Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—*

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
(b) freedom from slavery or servitude;
(c) the right to a fair trial; and
(d) the right to an order of habeas corpus.

undesirable behavior.²⁴⁸ The term encompasses three main components: *legislation* which is a specific set of commands because the rules are defined; *enforcement* as appropriate actions are initiated against the rule violators and; *adjudication* where consideration is made if the rules are breached and the appropriate sanctions for such breach are determined.²⁴⁹

In State regulation, the standards are set by law and there are penalties in case of breach.²⁵⁰ The regulatory State involves seeking solutions not only in national policy but also in a political context.²⁵¹ Self-regulation on the other hand is seen to take place when individuals or an independent body exerts control over its own membership and their behaviour.²⁵² This process of self-regulation may be constrained through statutory rules or oversight by a governmental agency.²⁵³ Others are of the view that the government intervenes but at a minimal level and the extent of intervention depends on what it is to be regulated.²⁵⁴ Thus, self-regulation cannot be devoid of State intervention.²⁵⁵

The benefits of self-regulation of the Church vis-à-vis State regulation include:

The religious leaders have the opportunity to set standards which they agree to be bound by. Such standards are developed by the experts in that field-in this case the

²⁴⁸ Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, OUP 2012) at 3.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid* at 377.

²⁵¹ *Ibid.*

²⁵² *Ibid* at 137.

²⁵³ *Ibid.*

²⁵⁴ Ayers I. and Braithwaite J., *Responsive Regulation: Transcending the Deregulation Debate* (OUP 1992).

²⁵⁵ In the case of the Church in Kenya, it is the State that is involved in the registration process.

religious leaders-as they concentrate on what they know will work and what is acceptable by the members.²⁵⁶ Since it makes use of the expertise of those to be regulated, a common objective is achieved. As shall be shown, the religious leaders who took part in this study and were in favour of State regulation of the Church confirmed that the regulation would work better if the stakeholders are involved in its formulation.

The formulators of the rules are detailed in their analysis as they know that the rules will apply to them.²⁵⁷ This in turn ensures commitment and compliance. In the same breadth, the State has always been criticized for deficiency in information when designing rules due to absence of input of those the rules are meant to affect.²⁵⁸

Flexibility of self-regulatory mechanisms has been lauded as the mechanisms can easily adapt to societal changes.²⁵⁹ One of the religious leaders who were interviewed mentioned that if members fail to abide by the mechanisms then the Umbrella Body revise the rules.²⁶⁰ A provision of the law on the other hand would have to go through a rigorous process of amendment or repeal. Implementation of rules should not be done in isolation. It should take into account the existing legal framework. For instance, the Societies Act (Chapter 8) Laws of Kenya already makes a provision for registration of the Church. Therefore, if the churches were to formulate their own rules, that must be considered.

²⁵⁶ See Michael D.C., 'Federal Agency of Use of Audited Self Regulation as Regulatory Technique' (1995) 47 *Administrative Law Review* 171.

²⁵⁷ *Ibid* at 181-2.

²⁵⁸ *Ibid*.

²⁵⁹ *Ibid*.

²⁶⁰ Interview with Rev.Father Joseph Mutie in Nairobi, Kenya (29th June 2016).

Despite the benefits of self-regulation in comparison with State regulation, it encounters shortcomings such as:

The Stakeholders may take care of their interests rather than that of the public. It thus requires an independent body to oversee or supervise the self-regulatory bodies to ensure that the public gets to benefit.²⁶¹

Enforcement in case of violation of standards may prove challenging.²⁶² Unless self-regulatory body is backed up by the State, the extent to which the body can ensure compliance is difficult. This fact was also pointed out by one of the religious leaders as shall be shown later in the discussion. Non-compliance creates a loss of public confidence and distrust of the self-regulatory body. In the long run people may shy away from donating to legitimate causes.

Issues of accountability arise since the decisions taken by the self-regulatory body may not be transparent or could be viewed as favorable to one party.²⁶³

3.3 ARGUMENTS FOR STATE REGULATION

It is argued that human beings are inherently selfish and the motive for their actions is driven by the desire to meet their selfish interests. Such selfish need is explained by their basic instinct to self-preservation and will thus do whatever they can to ensure survival.²⁶⁴ Adam Smith equally agrees that it is self-interest that drives the clergy

²⁶¹ Sinclair D., 'Self Regulation versus Command and Control? Beyond False Dichotomies' (1997) 19 Law and Policy 4.

²⁶² Ibid.

²⁶³ Black J., 'Constitutionalising Self Regulation' (1996) 59 Modern Law Review at 26.

²⁶⁴ See David Gardner, 'Thomas Hobbes and Niccolo Machiavelli: A comparison.' Available at <http://www.e-ir.info/2010/09/01/thomas-hobbes-and-niccolo-machiavelli-a-comparison/> accessed 5 July 2016.

just like it does the secular producers.²⁶⁵ In *The Leviathan*, Thomas Hobbes holds that every person's self-preservation conflicts with the other person's.²⁶⁶ It is this instinct of self-preservation that Thomas Aquinas attributes to the need for human laws to which everyone is subject and must abide by.²⁶⁷ Human laws are required so as to promote human virtue and this is done through an aid Aquinas describes as 'the discipline of law.'²⁶⁸ Furthermore, religious leaders spending Church funds on themselves is not a rare occurrence. As Adam Smith observed, during the Reformation in the sixteenth century, there were developments of towns and trade thrived.²⁶⁹ This afforded the Church officials the luxury to spend on themselves.²⁷⁰ Charity, which the church was known for, diminished.²⁷¹ Hierarchical structures, which the Church was known for, loosened.²⁷² This has been the trend even in the modern times and cases of self-appointed clergy have emerged mostly due to personal ambition.²⁷³ Consequently, it is not surprising that self-interest can motivate one to spread false teachings and this if left unchecked is what germinates unaccountable leaders. Since unaccountability can lead to friction in society due to undesirable attributes, it has to be suppressed through training or penalty. The law is required to deal with such emerging issues. One can therefore argue that by the law

²⁶⁵ Above n53 at 1363.

²⁶⁶ Above n77 at 79-80.

²⁶⁷ 'Aquinas' Moral, Political, and Legal Philosophy' *Stanford Encyclopedia of Philosophy* (September 2011) <http://plato.stanford.edu/entries/aquinas-moral-political/> accessed 5 July 2016.

²⁶⁸ Ibid.

²⁶⁹ Above n53 at 1389-1397.

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Efe Azino, 'Proliferation of Churches and Corruption in Nigeria: Understanding the Irony' Available at https://www.academia.edu/6468351/Proliferation_of_Churches_and_Corruption_in_Nigeria_Understanding_the_Irony?auto=download accessed 8 July 2016.

being in existence to regulate the Church, religious leaders can be held accountable for the actions that go beyond what is legally acceptable. The law guides the individual on what he or she can engage in without stepping on another's toes. In concurrence with Adam Smith on diminishing role of the Church, Alan Snyder observed that self-government, which every individual possesses, began to erode the day Bishops considered themselves as "*spiritual authorities*" over churches.²⁷⁴ This led to a spiritual decline leading to engagement in criminal acts by the individual. The government thus had to step in to ensure peace and order.²⁷⁵

Much as members of the Umbrella Bodies come together under one Body because they share the same dogma, differences cannot be ruled. This factor was brought out during an interview with Gerishon Odare of Alliance of Registered Churches of Kenya. He confirmed that it is not all the time that the members will share the same views.²⁷⁶ Hence the need for the law.

From the interviews conducted, 60 percent (3 out of 5) of the interviewees were of the view that the State should regulate the Church. In response to the question to what extent the State should regulate the Church, Gerishon Odare of the Alliance Registered Churches of Kenya (ARK) responded as follows:

To a great extent so as to avoid occult. The State needs to step in because of the nature of the current issues facing the Church. However, it should employ those who know about the doctrines, the faith and history of the Church. It

²⁷⁴ Above n125 at 72.

²⁷⁵ Ibid.

²⁷⁶ Interview with Gerishon Odare in Kiserian, Kenya (30th June 2016).

should pick a spiritual person to assist with that. You set a thief to catch a thief.²⁷⁷

Gerishon Odare's foregoing views demonstrates that those to be regulated know what is likely to work if applied as the religious leaders hence their involvement is key. This in the long run ensures commitment by the religious leaders.

A religious leader, who found the interview ongoing and agreed to contribute to this study, also added his sentiments in favour of State regulation as follows:

When someone goes beyond what is accepted spiritually, then how do you punish him or her? There is no law and if as the official of the Umbrella Body you apply the rules, then the affected member(s) will ask why it is that his Church is being targeted and why you did not also punish your Church. They will say you are applying favoritism. So the State should formulate a law so that people are answerable to a higher authority when they go wrong.²⁷⁸

The foregoing sentiments were echoed by Reverend Father Joseph Mutie of Organization of African Instituted Churches (OAIC) when he added that members who fail to abide by the self-regulatory mechanisms set down by the Body cannot be prosecuted as the Body does not have such powers. The best the Body can do is *“to continue to sensitise members, understand their culture and then revise the rules since the Churches are members on a voluntary basis and cannot be compelled to abide.”*²⁷⁹ On whether the State should regulate the Church, he was of the following view:

The State should regulate the church to a moderate extent. African Instituted Churches, sometimes called African Indigenous Churches do not have structures like the mainstream churches. For most, it is a divine call and the leaders get to have a congregation who listen to them. So when the State comes in, they need to understand that the Churches have their cultures, doctrines and rules which guide them. Most of the churches are homegrown, have the African route, some leaders are illiterate but with the divine call are

²⁷⁷ Interview with Gerishon Odare in Kiserian, Kenya (30th June 2016).

²⁷⁸ Comment by a religious leader within the Alliance Registered Churches of Kenya (30th June 2016).

²⁷⁹ Interview with Rev.Father Joseph Mutie in Nairobi, Kenya (29th June 2016).

able to gather masses because they are held in high esteem by the community. So the State should talk of regulation from an informed opinion. Don't impose regulations that will only work in paper but on the ground it serves no purpose. Look at the FGM law for example. The law prohibits FGM but some communities are still practising it, why? Therefore the State should talk to the religious leaders and involve them.

The three interviewees who were in favour of State regulation of the Church also agreed that the said regulation will ensure transparency and accountability in the Church as well as curb abuse and financial misappropriation by some religious leaders, but only to a moderate extent. One of the concerns raised by Reverend Father Joseph Mutie of Organization of African Instituted Churches (OAIC) was:

One cannot be completely sure. There will be transparency and accountability but there are limitations. Just like corruption. Corruption exists and we have laws against it.²⁸⁰

Gerishon Odare of the Alliance Registered Churches of Kenya (ARK) responded as follows:

For mainstream churches, I'll put it at ninety percent success on missionary donations because mainstream churches have a sound structure especially on hierarchy, so yes financial misappropriation can be curbed. For the Pentecostals, maybe twenty five percent because such Churches belong to individuals. For Pentecostals, you find most are owned by a family, a husband and wife. Doctrinally, it's not bad but it should not be like that. Therefore it is not a guarantee that State regulation will ensure full transparency and accountability within the Church because Pastors will find a way to deal with it. It will increase nepotism within the Church, as most will get their families to run the Church. And remember congregants believe in their Pastors and will obey them.²⁸¹

²⁸⁰ Interview with Rev. Father Joseph Mutie in Nairobi, Kenya (29th June 2016).

²⁸¹ Interview with Gerishon Odare in Kiserian, Kenya (30th June 2016).

Out of the four Umbrella Bodies that participated in this study, two Bodies accepted that members share the same view on the issue of regulation of the Church by the State. This is for the reason that any matter that affects the Body is discussed with all members before a decision is finally arrived at. The members are called for a meeting so as to reach a consensus. Rev.Father Joseph Mutie thus:

The Church is an institution. We need to come together and voice opinion of different Churches as one. At the end of the day we are all working towards one goal and that is to serve the Lord.²⁸²

Reverend Benedict Mutuku Munyao of African Foundation Churches of Kenya who responded in the affirmative said:

We have a *Chama*. The Father of each church reports to the Body. It is the Father who opens branches of his Church. It is the Father we consult incase a branch has an issue or a meeting should be held. The father then passes on the message to the others.²⁸³

In responding to the question whether the State should regulate the Church, the Assistant Registrar of Societies concurred that:

It can be said that the State regulates the Church but to a minimal extent. We cannot regulate the administration and doctrines of the Church because that would be interfering with the freedom of religion. There are certain procedures that we follow when registering a Church that are not covered in law as such. Such procedures have existed due to practice over the years. Hence we cannot be strict when applying them because they do not have the backing of the law. However, there have been changes and developments in our society over the recent years. These changes also affect religious institutions, changes such as money laundering, tax evasion and terrorism are alive in this society. Some people are using religion to take advantage of Kenyans. What we have done as practice over time needs to be given the

²⁸² Interview with Rev.Father Joseph Mutie in Nairobi, Kenya (29th June 2016).

²⁸³ Interview with Reverend Benedict Mutuku Munyao in Nairobi, Kenya (30th June 2016).

force of law so that those who fail to abide face the consequences of such failure.²⁸⁴

From the above views the respondents of this study shared in favour of State regulation, a conclusion may be drawn from Wesley Hohfeld's scheme of analysis. In his scheme of analysis, he states that a right has a corresponding duty. According to his analysis, the right holder will be entitled to legal protection when he or she asserts his or her claim.²⁸⁵ For citizens to enjoy such rights, it must be clear on whom the duty to ensure such protection is vested upon-in this case it is the State.²⁸⁶ The duty is bestowed upon the State to ensure that this right is enjoyed. Moreover, Thomas Robbin argues that churches are exempt from taxes so as to promote social welfare activities.²⁸⁷ It can therefore be concluded that members of the public have an interest in monitoring that Church funds are not being mismanaged.

As discussed earlier, the freedom to manifest religious beliefs whether by an individual or by a group is not absolute. This right must be exercised with due regard to the rights and freedoms of others taking into account the public at large. Therefore it can be said that the society has the right to defend itself against abuses committed in the name of freedom of religion. It is the duty of the government to offer this protection. As Pope Paul VI proclaimed, religious communities have the right to

²⁸⁴ Interview with Joanne Ogolla in Nairobi, Kenya (15th June 2016).

²⁸⁵ Wesley Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale Law Journal 710.

²⁸⁶ Ibid.

²⁸⁷ Above n84; In Kenya social welfare services are exempt from VAT provided that firstly the Organization is registered under the Societies Act or exempted from registration under the Societies Act and secondly its income is exempt from tax under the Income Tax Act as approved by the Commissioner of Social Services. The Commissioner grants the income tax exemption because the organization has shown that the income will either be wholly utilized in Kenya or will benefit the residents of Kenya. Therefore it is only logical that members of the public have an interest by ensuring the funds do not end up in private hands. Monitoring sets in regulations.

govern themselves in line with their own norms provided that they live in accordance with their religious principles and observe the ‘just demands of public order.’²⁸⁸ He further proclaimed:

The right to religious freedom is exercised in human society: hence its exercise is subject to certain regulatory norms. In the use of all freedoms the moral principle of personal and social responsibility is to be observed. In the exercise of their rights, individual men and social groups are bound by the moral law to have respect both for the rights of others and for their own duties toward others and for the common welfare of all. Men are to deal with their fellows in justice and civility. Furthermore, society has the right to defend itself against possible abuses committed on the pretext of freedom of religion. It is the special duty of government to provide this protection. However, government is not to act in an arbitrary fashion or in an unfair spirit of partisanship.²⁸⁹

Furthermore as Justice Majanja in delivering a Judgment observed:

The right and freedom to worship is not absolute and when it is exercised in association with others through the means of a voluntary organisation such as a church, its exercise is limited to the extent dictated by membership of that society. I will only reiterate what I in *Rev Peter Gachara and Others v Attorney General and Others Nairobi Petition No. 299 of 2011 (Unreported)*, “*The [Church] is a place of worship for members of the public, but as a church it functions within an organisational structure. In my view therefore, that organisation and the persons who serve in it are subject to internal rules and regulations which they agree to abide by when they agree to join that church. Freedom of worship or religious activity does not operate in a void or vacuum.*”²⁹⁰

²⁸⁸ Declaration on Religious Freedom-Dignitatis Humanae, Proclaimed by His Holiness, Pope Paul VI on December 7, 1965 at the second Vatican Council. Available at < <http://www.christusrex.org/www1/CDHN/v10.html>> accessed 15 October 2016.

²⁸⁹ Ibid at para 7.

²⁹⁰ High Court Petition No.444 of 2012 *Absolom Ndungo & 26 Others.v.A.G. & 2 Others (2013) eKLR at para 28.*

3.4 ARGUMENTS AGAINST REGULATION

Those who voluntarily join themselves to a church do so with the implied consent to its faith, discipline, law and self-organization.²⁹¹

When the State involves itself in Church matters, it invites Constitutional issues upon itself. The CoK under Article 32 provides for the freedom of conscience, religion, belief and opinion. Furthermore, Articles 33 and 36 which guarantees one the freedom of expression and association are fundamental to the right to freedom of religion. Aggressive efforts by the State to regulate the Church will raise constitutional issues. As such, it is constitutionally impermissible for the State to interfere with the absolute right.²⁹²

William Marshall is of the view that the relationship between the Church and the State is not solely governed by the Constitution.²⁹³ There are other non-legal norms based on custom, tradition and the role each institution plays in the society.²⁹⁴ These norms set informal constraints as to how these two institutions should relate.²⁹⁵ Therefore, by the Constitution placing limits on the right to manifest in one's religion hence granting the State Constitutional authority to regulate religious organizations does not mean that such authority should be employed to its fullest extent. The case of *United States.v.Ballard*²⁹⁶ shows that there is a risk of the government interfering

²⁹¹ *Watson.v.Jones* 80 U.S. 679 (1872) at 728-29. In this case, the Supreme Court recognized that decisions about Church law, discipline and faith are not subject to civil court review.

²⁹² However, as has been discussed, the other component of the freedom of religion which is the freedom of manifestation is not absolute and thus the State can restrict it.

²⁹³ William P. Marshall, 'Government Regulation of Religious Organizations: The example of Religious Fraud.' Available at < http://web.law.columbia.edu/sites/default/files/microsites/attorneys-general/marshall-charitiespaper_0.pdf > accessed 19 October 2016.

²⁹⁴ *Ibid* at 5.

²⁹⁵ *Ibid*.

²⁹⁶ 322 U.S.78(1944).

with right to religious freedom if it fails to distinguish between the absolute right and the right subject to limitation. In this particular case, Ballard the leader of a religious group known as 'I Am' Movement claimed among other things that he was possessed with supernatural powers including the power to heal the sick. His wife Edna and son Donald who were part of the movement also claimed that they had healed hundreds of people. Federal government stepped in when they solicited funds on the basis of religious claims. The government prosecuted Edna and Donald (as Ballard himself died before conclusion of the case) for mail fraud and conspiracy. They were convicted and when the matter came before the Supreme Court the issue was whether the jury could deliberate on the truth of the accused' religious beliefs as part of fraud. Court held that the jury could not deliberate since granting the jury to evaluate the validity of religious claims would amount to a violation of religious liberty. The Judge maintained, "*prosecutions of this character easily could degenerate into religious persecution.*"²⁹⁷ However, the Court concluded that the government could still prove fraud by concentrating on the Ballards' sincerity in maintaining those beliefs and whether they acted in good faith. If shown that they did not act in good faith then the conviction could be sustained.

From the foregoing case, what the Court is saying is that when a religious institution or leader makes certain promise in exchange for money without believing it to be true then it amounts to fraud. However, how does a person who does not share someone's belief get to determine if that person's belief is genuine? Fraud that centers on religion is weighed delicately. When the State makes a decision that certain religious

²⁹⁷ Ibid at 95.

practice or belief is not religiously based then the State is likely to be accused of using its power to limit the right to religious freedom. For this reason, one can argue that the State should not regulate the Church as it runs the risk of employing its fullest authority.

John Locke, an English philosopher, argues that since the State uses force whereas religion uses persuasion, there should be separation of the State and religion as the two have distinct ends.²⁹⁸ As was shown in High Court Miscellaneous Civil Application No.890 of 2004 *Jesse Kamau & 25 Others.v.Attorney General (2010)* eKLR in which the petitioners petitioned the High Court and argued that section 66 of The Constitution of Kenya (repealed) was unconstitutional as it violated the principle of separation of Church and State. The Court held *inter alia* that section 66 violated this principle since Kenya is a secular State. It declared that section 66 was discriminatory and contrary to section 82.²⁹⁹ However, the Judges were quick to point out that it is not the role of the court to expunge section 66 but that of Parliament and the citizenry in a referendum. The court granted a declaration that any form of religious courts should not form any part of the Judiciary in The Constitution as it offends the doctrine of separation of state and religion.

As Reverend Benedict Mutuku Munyao of African Foundation Churches of Kenya responded to the question to what extent the State should regulate the Church:

The State should not regulate the Church. It is the church that should regulate the State because we are neutral. Our congregation has people from all walks

²⁹⁸ Above n66 at 67.

²⁹⁹Section 66 established the Kadhi's courts whereas section 82 offered protection from discrimination on the grounds of race, tribe, place of origin or residence, political opinion, colour, creed or sex.

of life and covers all tribes in Kenya. The State and the church are separate; *we are not funded by the State but by members of the church so why should the State regulate the church?* Instead the church should be regulated by an Umbrella Body, in case there is a problem, it reports to the government. Tithe is voluntary. It is God's principle. If a member wants to support their leader why should the person be stopped or the money be taxed? A leader is employed by God; it is a calling so why should the government interfere with it? Laws exist but if the laws are not in your heart then you will still break them.³⁰⁰

In view of his disagreement on State regulation, Reverend Benedict Mutuku Munyao said that the State can neither ensure transparency nor accountability in the Church. He further stated that regulation by the State will not curb abuse and financial misappropriation by some religious leaders. His words thus:

All laws come from the Bible. The Church is not led by the State but by the spirit of God or God himself. So it is God who can bring transparency in the Church and not the State. Man of God can be transparent if he is truly genuine. Followers should be the ones to guide or tell the Pastors if he goes wrong. It is followers who can ensure that and not the government. It is tithe and offering that builds the Church. Let the Church work and regulate itself. However, it should follow the law of the land. As a Church, do not officiate a marriage or open branches and you have not yet registered. It will help if there are Umbrella Bodies to monitor. It is the Umbrella Body that should take the registration form to the Registrar of Societies, follow up and once a certificate of registration is issued the Body hands it to the Church. This allows cohesion of the Church.³⁰¹

Another argument against State regulation is that the government is less likely to have the knowledge and expertise on the subject of religion. As Mark Chopko and Michael Moses contend, in issues involving the Church, the government is not as competent as the Church.³⁰² The reason the proposed Regulations by The office of the

³⁰⁰ Interview with Reverend Benedict Mutuku Munyao in Nairobi, Kenya (30th June 2016).

³⁰¹ Ibid.

³⁰² Above n95 at 407.

Attorney General never took off is because religious leaders said that they were never involved in formulation of the same yet the Rules would affect them.³⁰³ One of the best ways to deal with this issue is to involve the religious leaders, as they are the stakeholders. As Gerishon Otachi put it, “...*set a thief to catch a thief.*”³⁰⁴ The Rules as the leaders argued, were not tailored to fit their needs. As has been discussed under section 3.2 above, involvement of stakeholders ensures commitment and compliance on their part.

The respondents of the study have set up mechanisms to ensure the operation of the Churches. Seventh-day Adventist Church (SDA), one of the independent churches, stated that it has a coordinated leadership structure that is reviewed regularly and leaders chosen every five years through elections. This Church applies the chain of command system in its leadership and further financial reports on the Church finances are made regularly.³⁰⁵ For the Umbrella Bodies, all the four that participated in this study indicated that background check of the particular church is done before the church can be registered with the Body. Thereafter, a follow-up is done on a quarterly basis to ensure that members abide by the Constitution. Two out of the four Umbrella Bodies that participated in this study indicated that if a member fails to abide by the laid down rules, then that member is deregistered.³⁰⁶ One Body however stated that if a member fails to abide by the rules then the Body continues to sensitize

³⁰³ Editorial, ‘Kenya: Withdrawal of Proposed Rules on Religion Timely’ *Daily Nation* (Nairobi, 12 January 2016) Available at <http://allafrica.com/stories/201601130640.html> accessed 5 February 2016.

³⁰⁴ Above n277.

³⁰⁵ Interview with Paul Chepkwony in Nairobi, Kenya (22nd June 2016).

³⁰⁶ Alliance of Registered Churches in Kenya and African Foundation Churches of Kenya.

the member and the initial rules are revised so as to accommodate the changing circumstances.³⁰⁷ NCKK as a Body approaches the issue of self-regulatory mechanisms differently. This particular Body lets the members develop their own mechanisms so as to ensure that they own the process. The Body simply does a follow up to ensure that the members abide by those mechanisms.³⁰⁸ It can be argued therefore that self-regulatory rules are flexible and easier to amend so as to respond to the members' needs and ensure compliance. If the Church is not satisfied with the terms of one particular Body, it is free to move and register with another Umbrella Body. Government rules on the other hand are not as easy to amend. In self-regulation, it does not mean that the government involvement is entirely wanting. Where it operates, it usually does so with the support or sanction of the State.³⁰⁹ The challenge is when religious leaders are left to self-regulate, do they remember to act in the interest of the public as opposed to private interests?

3.5 CONCLUSION

The first part of this chapter briefly discussed the right to freedom of religion so as to provide a clear understanding of this freedom which has two parts: one which is absolute and the other which is subject to limitation. This was deemed relevant as the argument for and against State regulation anchored on the limitation as it established the constitutional basis for regulation.

³⁰⁷ Above n279.

³⁰⁸ See www.nckk.org

³⁰⁹ Ian Bartle and Peter Vass, 'Self-regulation and The Regulatory State: A survey of Policy and practice.' Available at http://www.bath.ac.uk/management/cri/pubpdf/Research_Reports/17_Bartle_Vass.pdf accessed 6 April 2016.

The second part briefly looked at the merits and demerits of self-regulation vis-à-vis State regulation of the Church in order to understand the essence of regulation.

The third part of this chapter discussed the arguments in favour of State regulation. Three out of the five interviewees who were in favour of State regulation all have one thing in common: let the State regulate the Church; however, involve the religious leaders if the laws are to work effectively.

The fourth part dealt with the rationales against State regulation. The main argument against State regulation is that the State and the Church are separate and in addition, the State does not fund the Church therefore it should not regulate it. The self-regulatory mechanisms formulated by the various Umbrella Bodies and the independent churches picked for this study was considered. What comes out in clear terms is that the mechanisms work because members choose to adhere to them. Nevertheless, there are no strict penalties for lack of adherence.

Whether in favour of State regulation or against, the religious leaders in responding to the questions all pointed out that their congregants look up to their leaders. An individual worships in a particular Church as that Church offers something that the others do not.

CHAPTER 4: COMPARATIVE STUDY ON REGULATION OF CHURCHES

4.1 INTRODUCTION

In this chapter, the study undertakes a comparative look at the regulation of the Church in order to call for transformation of the current legal regime. The jurisdictions selected for the purpose of this study are Estonia and The UK. The reasons for selecting these two jurisdictions are: Estonia has statutes that govern registration of churches despite being considered one of the most secularized States in the world.³¹⁰ The Country has enacted the Churches and Congregation Act 2002, which governs registration of religious associations, the Church being one of them.³¹¹ In addition, the Church in Estonia is viewed as important as it has played a big role in shaping its statehood, culture, values and identity.³¹² Secondly, the UK not only because of our colonial ties but also the existence of the Charity Commission as it regulates charities. There is existence of a State church in the UK.³¹³ The other churches are independent and are classified as unincorporated voluntary associations.³¹⁴ There is a requirement that all independent churches that wish to be exempted from paying taxes be registered with the Charity Commission and comply with charity law.³¹⁵ In addition, such independent churches are categorised as

³¹⁰ Rammel Atko and Marko Uibu, 'Outside Conventional Norms: Religion and Non-Religion in Estonia' (2015)8 RASCEE 5-20.

³¹¹ Above n65.

³¹²Merilin Kiviorg, 'Religion and the Secular State in Estonia' Available at www.iclrs.org/content/blurb/files/Estonia.pdf accessed 10 November 2015.

³¹³ Above n65.

³¹⁴ Mark Hill, 'Church Autonomy in the United Kingdom' (Second European/American Conference on Religious Freedom, University of Trier, Germany, May 1999).

³¹⁵ Above n65.

charities since the advancement of religion is considered to be a charitable purpose.³¹⁶

The Charity Commission is concerned with how the Church manages money and property.³¹⁷

In undertaking a comparative approach to this study, it is hoped that Kenya can benefit from comparing the law and practice from the two jurisdictions, offer different perceptions, experiences, legislative approaches and practices for dealing with regulation of the Church. These alternatives may offer us new avenues for further developing, improving, or even reforming our current legal regime and practice. Nevertheless, even as we borrow from these two jurisdictions, their historical and cultural practices have been borne in mind as they have played a big role in shaping their identity and choices. Hence, the lessons have been borrowed albeit cautiously.

4.2 ESTONIA

Estonia is located in the Eastern Europe.³¹⁸ It is a multi-religious State with Christianity being the predominant religion. However, it is considered as a largely secularized State and one of the least religious States in Eastern Europe.³¹⁹ It is a member of the European Union accession having taken place in 2004.³²⁰ Estonia is governed in line with the terms of the Constitution of Estonia, which was adopted by referendum in 1992. Estonia views Church-State relations as a partnership where the

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ Merilin Kiviorg, 'Religious Education in Estonia' Available at < http://www.uni-trier.de/fileadmin/fb5/inst/IEVR/Arbeitsmaterialien/Staatskirchenrecht/Europa/Konferenz_2010/Estonia.pdf> accessed on 10 November 2015.

³¹⁹ Ibid.

³²⁰ Sergei A.Mudrov "The Issues of Efficient Governance in the Area of Church-State relations-Belarus and Estonia" Available at http://sympa-by.eu/sites/default/files/library/mudrov_church-state.pdf accessed 13 November 2015.

two cooperate, especially in the restoration of Church buildings with cultural values.³²¹

A brief historical background on religion in Estonia is essential. Religion in Estonia stems back to the thirteenth century when the Northern Crusades arrived in the territory and the then occupants were converted into Christianity, the motive being political rather religious.³²² Catholic rulers thereafter claimed the territory until the Reformation when it became a Lutheran country.³²³ This remained the trend until 1918 when Estonia gained independence and the Church then was seen to play a big role in shaping its culture, morals and identity.³²⁴ The period of independence was short-lived as 1940 witnessed its annexation by the Soviet Union leading to implementation of antireligious society.³²⁵ Church leaders as well religion were controlled using secular Soviet rituals.³²⁶ This led to marginalization of religion and the big role the Church played as initially witnessed diminished.³²⁷ Religion was not completely eliminated however the Church kept a low profile and the connection it had with the society declined.³²⁸ This ran on until the 1980s when the State policy on religion loosened allowing religious movements to enter Estonia thus reviving religious energy.³²⁹ However, beginning of the 1990s, this energy had worn off and

³²¹ See generally Merilin Kiviorg, *Religion and Law in Estonia* (Kluwer Law International BV 2011) at 68-69.

³²² Atko Remmel, '(Anti) religious Aspects of the Cold War: Soviet religious Policy According to the Example of the Estonian SSR' in Tonu Tannberg (eds), *Behind the Iron Curtain. Estonia in the Era of the Cold War* (Frankfurt am Main: Peter Lang 2015) at 359-92.

³²³ Ibid; Above n310 at 6.

³²⁴ Ibid.

³²⁵ Ibid at 7.

³²⁶ Ibid.

³²⁷ Ibid.

³²⁸ Above n322 at 370; Ringo Ringvee, 'Religious Freedom and Legislation in Post-Soviet Estonia' (2001) *BYU Law Review* 631.

³²⁹ Ibid.

once again there was a decline in religious beliefs and practices.³³⁰ The ultimate goal of the Soviet Union had been to eradicate religion.³³¹ As such, there is a generation that grew up with little or no knowledge about religion.³³² Since Estonia had been considered atheist for a long time and in a state of religious illiteracy, people had forgotten the basic religious terms thus the necessity to educate them with the help of the law.³³³ This is the basis of regulation.

Freedom of religion is protected by the Constitution of Estonia as well as international instruments incorporated into the law of Estonia.³³⁴ The international instruments form part of Estonian law following provision of Article 3 of the Constitution.³³⁵ In addition, Article 123 provides that if Estonian legal acts or other legal instruments contradict foreign treaties ratified by Parliament, the provisions of the foreign treaty shall be applied.³³⁶ This means that the international instrument adopted into the Estonian legal system are superior in force to its national legislation.

Article 40 of The Constitution of the Republic of Estonia reads:

Everyone has freedom of conscience, religion and thought. Everyone may freely belong to churches and religious societies. There is no state church. Everyone has the freedom to exercise his or her religion, both alone and in community with others, in public or in private, unless this is detrimental to public order, health or morals.

³³⁰ Ibid.

³³¹ Above n321 at 53.

³³² Ibid.

³³³ Ibid.

³³⁴ Constitution of the Republic of Estonia 1992.

³³⁵ Article 3 reads: *The powers of state shall be exercised solely pursuant to the Constitution and laws which Iare in conformity therewith. Generally recognised principles and rules of international law are an inseparable part of the Estonian legal system.*

³³⁶ Ibid.

There have been cases filed in court involving this fundamental right. For instance *The Administrative Law Chamber of the Supreme Court Case No.3-3-1-39-07*, 17 October 2017³³⁷ and *The Tartu DC Case No.3-07-701*, 2 May 2007.³³⁸

Article 40 of The Constitution of The Republic of Estonia is complementary to Article 45 concerning freedom of opinion and belief, Article 47 concerning freedom of assembly and Article 48 concerning freedom of association. The courts have established freedom of assembly is not absolute and restrictions can be placed on grounds of public order. This was demonstrated in *The Harju County Case No.4-05-936/1*, 25 October 2006 in which a group of believers gathered around a railway station and proceeded to sing using microphones and loudspeakers. The Organisers had neither notified the local authorities nor obtained a permit to carry out their activity. They were asked to stop as it not only led to obstruction of traffic but also caused noise pollution. They disobeyed the directives leading to the arrest of six organisers. In court, they argued that they were within their constitutional right as provided in Articles 40 and 47 of the Constitution. Court held that their activities were in contravention of the Public Meetings Act as they were obstructing traffic and violating public order. It further held that Article 47 could be restricted in order to

³³⁷ A religious association known as *Taara and Native Religions* alleged that the local government had infringed on its freedom of religion by its decision to have wind turbines built on a sacred land of believers of Estonian indigenous religion. The land belonged to the local government; however, it had been listed in the National Register of cultural Monuments as a cultural and ancient sacred place. The local government's argument was that the community did not actively conduct religious activities on the land. Court held that the local government's argument was irrelevant and further it did not substantiate why it needed to limit freedom of religion as stipulated in Article 40 of the Constitution.

³³⁸ Prison authorities confiscated candles from a prisoner on grounds of prison security. The prisoner asserted that the act was in contravention of his Buddhist religious belief as it required use of incense candles. He claimed his right under Article 40 of the Constitution had been infringed. The District Court, on recognising that although candles were a necessity in Buddhist rituals, held that Buddhism does not require a prisoner to burn candles in his cell. Court held that no unreasonable damage was caused to the prisoner. The reasoning for this restriction was not discussed.

ensure national security, public order, traffic safety and the safety of participants of such meetings.

Merilin Kiviorg is quick to point out that there is limited case law regarding religion and on the provisions of the Statutes governing the Church.³³⁹ In her view, the lack of cases indicates that there are not yet many problems with freedom of religion. Furthermore, the Estonian Institute of Human Rights conducted interviews in 2013 with experts in the field of religion as well as members of the public on the issue of freedom of religion in Estonia.³⁴⁰ What came out of it is that not only is freedom of religion well-guaranteed in Estonia but also that there are limited issues on legislation regulating religious societies. These issues have been discussed under section 4.2.1. My view is that this could be the case due to the fact Estonia is considered highly secularized as mentioned earlier.

4.2.1 Legal Authority and regulation of Churches

The sources of religion in Estonia are the Constitution, the Churches and Congregations Act 2002(CCA), the Non-profit Associations Act 1996 and the provisions of international law.³⁴¹ With respect to churches, the Constitution of Estonia specifically provides that there is no State Church.³⁴² The Churches and Congregation Act governs regulation of churches. This Act was adopted in 1993. Prior to the Act, the government of Estonia interfered with the internal affairs of the

³³⁹ Above n321 at 61.

³⁴⁰ Available at <<http://www.humanrightsestonia.ee/wp/wp-content/uploads/2014/03/toimENG-TeineUsuvabaduseUuringEksperdid.pdf>> accessed 19 October 2016.

³⁴¹ Lars Friedner(ed), *Churches and Other Religious Organizations as Legal Persons* (Peeters 2007) at 70.

³⁴² See Article 40 of the Constitution of the Republic of Estonia.

Church and could see to the suspension of a bishop.³⁴³ Under the CCA 1993, religious associations were registered by the Ministry of Internal Affairs.³⁴⁴ This Act was thereafter entirely replaced by the Churches and Congregations Act in 2002.³⁴⁵ Thus the current law regulating the Church in Estonia is the CCA 2002.³⁴⁶ Under the CCA 2002, it is the registration departments of city and county courts that registers churches.³⁴⁷ The purpose of this Act is to ‘provide the procedure for membership of churches, congregations, associations of congregations, monasteries and religious societies and the regulation of their activities in order for freedom of religion as ensured for everyone by the Constitution to be exercised.’³⁴⁸ This means that the CCA recognizes five different types of religious organizations namely: i) churches, ii) congregations, iii) associations of congregations, iv) monasteries and v) religious societies. The Act differentiates religious associations from religious societies thus the first four are known as religious associations and are regulated by the CCA.³⁴⁹ They are considered to be legal persons in private law.³⁵⁰ The Church thus has the capacity to own property in its name. In Kenya, registration of a Church under the Societies Act does not grant the Church legal personality. The CCA defines each of these religious associations.³⁵¹ Religious societies on the other hand are regulated by

³⁴³ Above n320 at 8.

³⁴⁴ Above n318 at 266.

³⁴⁵ Ibid.

³⁴⁶ Ibid.

³⁴⁷ Above n62.

³⁴⁸ section 1 CCA.

³⁴⁹ Section 2(1) CCA 2002 which reads: *Religious associations are churches, congregations, associations of congregations and monasteries as well as institutions of a church operating on the basis of an international agreement.*

³⁵⁰ Section 5(1) CCA 2002 reads: *religious association is a legal person in private law with regard to whom the Non-profit Associations Act applies in so far as this Act does not provide otherwise.*

³⁵¹ Particularly section 2(2) defines the Church as: For the purposes of this Act, a church is an association of at least three voluntarily joined congregations which has an episcopal structure and is

the Non-profit Associations Act and must be registered by a court in the register of non-profit organizations and foundations.³⁵²

The main activities of religious associations are defined in section 3(1) CCA as including ‘...professing and practising their faith, primarily in the form of religious services, meetings and rites, and confessional or ecumenical activities relating to morals, ethics, education, culture, and confessional or ecumenical diaconial and social rehabilitation activities and other activities outside the traditional religious rites and services of the churches or congregations.’ However, the CCA gives significant room for religious associations to organize themselves in accordance with their own teachings and structure.³⁵³ Religious associations are automatically exempt from income tax as is captured under Article 11(2) of the Income Tax.³⁵⁴ This is not the case in Kenya as tax exemption is not automatic. Furthermore, land under places of worship of churches and congregations are exempt from property tax.³⁵⁵ The law neither prohibits nor regulates the activity of religious organizations which are not registered.³⁵⁶ The downside of these entities is that they can neither present

doctrinally related to three ecumenical creeds or is divided into at least three congregations, which operates on the basis of its statutes, is managed by an elected or appointed management board and is entered in the register in the cases and pursuant to the procedure prescribed by this Act.

³⁵²Section 4(2) CCA 2002 states: *A religious society shall be entered in the non-profit associations and foundations register pursuant to the procedure prescribed by the Non-profit Associations Act. In order to determine compliance of the statutes of a religious society with the requirements provided by law, the county court which maintains the register may suspend proceedings for entry in the register for two months and request the opinion of the ministry whose area of government includes management of issues relating to religious associations or request an expert opinion of a competent authority.*

³⁵³ This is covered in section 5(2) CCA which reads: The statutes of a religious association may prescribe differences from the provisions of the Non-profit Associations Act concerning membership and management if such differences arise from the historical teaching and structure of the religious association.

³⁵⁴ Above n341 at 74.

³⁵⁵ Ibid.

³⁵⁶ Ibid.

themselves as legal persons and nor get tax-exempt status.³⁵⁷ Such organizations cannot exercise their rights or seek protections accorded to a religious organization that is registered. Nonetheless, they are free to worship as a religious group since freedom of religion is guaranteed in the Constitution.

In order to register a Church, the founders are required to enter into a memorandum of association which sets out: “1) the name, registered office, address and objectives of the activities of the Church, congregation, association of congregations being founded or monastery which does not belong to a Church and which is being founded; 2) the names and residences or registered offices, and the personal identification codes or registry codes of the founders; 3) the obligations of the founders; 4) the names, personal identification codes and residences of the members of the management board.”³⁵⁸ The statute of the Church is annexed to this memorandum of association. It is this statute that governs the operations of the Church thereby ensuring transparency and accountability are observed by religious leaders as well as congregants. Section 12 of the CCA sets out what information the statute shall contain as:

- 1) the name and registered office;
- 2) the objective and doctrinal bases of the activities;
- 3) obligatory religious rites;
- 4) the structure of management bodies and supervisory bodies and the procedure for the foundation, competence and terms of authority thereof;

³⁵⁷Merilin Kiviorg, ‘Church Autonomy in Estonia’ Available at <http://www.strasbourgconsortium.org/content/blurb/files/Chapter%2012.%20Kiviorg.pdf> accessed 22 November 2014.

³⁵⁸ Section 11(2) CCA.

- 5) the procedure for the election or appointment of members of the management board and restrictions on the right of representation;
- 6) the status, hierarchy, service relationships and professional attire of the ministers of religion;
- 7) the procedure for the formation, use and disposal of assets;
- 8) the bases and procedure for the adoption and amendment of the statutes;
- 9) the bases and procedure for termination of activities;
- 10) the conditions and procedure for membership in the religious association and for leaving and exclusion from the religious association;
- 11) the rights and obligations of members or the procedure for the establishment of obligations for members.”

As mentioned earlier, since a registered Church is deemed to be a legal person and can acquire property in its own name, the statute of the Church will outline the procedure for the acquisition, use and disposal of that property. Any assets to be acquired or even transferred can only be done with the permission of the management board and in accordance with the procedure prescribed by the statutes.³⁵⁹ An audit or review may be carried out as this is recommended in the statute of the Church. Where a body calls for an audit or review, the management board allows the auditors access to all the necessary documents. The auditors thereafter make a report and present it to the relevant body.³⁶⁰ The constitution/rules of a Church in Kenya also capture this. Additionally, section 31(1) (e) of the Societies Act empower the Registrar to call for

³⁵⁹ Section 25 CCA.

³⁶⁰ Section 26 CCA.

audited accounts of a Church whenever he has reasonable cause to do so.³⁶¹ It is the management board that determines the remunerations of the religious leaders such that these priests do not have labour contracts.³⁶²

There have been successes as well as challenges encountered in application of the statutes governing the Church in Estonia. As mentioned earlier, the Estonian Institute of Human Rights conducted interviews in 2013 with experts in the field of religion on the issue of freedom of religion in Estonia.³⁶³ The major successes highlighted are that the requirement for registration of a Church in Estonia are minimal as it calls for twelve people to establish a Church unlike some European countries, such as Croatia, Armenia, Austria, Belgium and Hungary³⁶⁴, that require one hundred or more. Estonians view the fact that the courts and not the Ministry of Internal Affairs being responsible for the registration of the Church and other religious societies as a sign of a democratic society.³⁶⁵ The challenges on the other hand include: The CCA 2002 gives the term 'church' and 'congregation' definitions which are not considered appropriate by the native religionists since other religious traditions are not taken into account by those definitions.³⁶⁶ Secondly, churches and congregations are classified as non-profit associations and are supposed to be given special status but this is disregarded as they are treated in the same manner as other associations thus

³⁶¹ Above n232.

³⁶² Above n341 at 76. The author gives Evangelical Lutheran Church as one of the churches when making this point

³⁶³ Above n340.

³⁶⁴ See Sergej Flere 'Registration of Religious Communities in European Countries' (2010) IV Politics and Religion 99.

³⁶⁵ Above n340 at 12.

³⁶⁶ Ibid at 7,16.

threatening the freedom of religion.³⁶⁷ In addition, lack of this crucial differentiation brings about confusion especially when disputes on taxation arise.³⁶⁸ Thirdly, the Ministry of Interior and its religious affairs which handle draft laws and amendments pertaining to the Church and other religious societies fail to keep stakeholders up to date. Moreover, legal decisions pertaining to the Church are not received in a timely manner.³⁶⁹

Nevertheless, what makes Estonia exceptional is that it has Statutes that specifically govern registration and regulation of religious organizations. The CCA specifically makes provision to ensure that a registered Church is considered a legal person. Consequently, the Church avoids the process of appointing trustees. This is one of the practices that Kenya can adopt. Much as this Statute defines the activities of religious associations, it is still flexible as the association can organize itself to conform with its teachings and structure thereby ensuring freedom of religion is still maintained. The statute of the Church, which governs the operations of the Church, is the equivalent of the constitution/rules of the society that an applicant in Kenya attaches to his application form. What makes this statute unique is that it gives the doctrinal bases of the activities as well as obligatory religious rites. In addition, the memorandum of association to which the statute is attached, outlines the personal identification and residences of the founders and the management board. The management board also determines the stipends of the religious leaders. The law does not bar unregistered Churches from carrying on with worship as is guaranteed in the Constitution.

³⁶⁷ Ibid.

³⁶⁸ Ibid at 14.

³⁶⁹ Ibid at 15.

However, to enjoy the benefits that come with registration, a Church must be recognized in law. This is an indirect form of ensuring religious organizations register. There is interaction between the Church and the State in the sense that the State ensures religious affairs is well-regulated. The highlighted practices in Estonia, if adopted in Kenya, would bring about accountability which is currently missing in Kenya's system.

4.3 THE UNITED KINGDOM

The United Kingdom, just like Kenya, is a multi-cultural society and is seen as a largely Christian nation.³⁷⁰ Unlike many other nations, it has no single core constitutional document; rather has an uncodified and an unwritten constitution.³⁷¹

Freedom of religion in the UK is governed by European legislation as well International law and treaties that form part of its legislation.³⁷² The UK is a signatory to the European Convention on Human Rights.³⁷³ This Convention was given effect in the domestic law by the passing of the Human Rights Act 1998.³⁷⁴ In addition, the basis for religious freedom in the UK is found in a number of precedents established by courts.³⁷⁵ Some notable cases include; *Re South Place Ethical Society (1980)* *IWLR* where the court in arriving at a decision whether the society's objects were for

³⁷⁰ Keith Ward, 'Is a Christian State a Contradiction?' in Dan Cohn-Sherbok and David McLellan (eds) *Religion in Public Life* (Palgrave Macmillan 1992).

³⁷¹ Av.Ahmet Emrah Gecer, 'The Principle of Parliamentary Supremacy in the UK Constitutional Law and Its Limitations' (2013) 1 Ankara Bar Review 157.

³⁷² Above n314; McClean David, 'State and Church in the UK' in G.Robbers (eds), *State and Church in the European Union* (Nomos Verlagsgesellschaft 2005) 553-575.

³⁷³ This Convention was drafted in the 1940s and has its own court. The recent withdrawal of the UK from the EU does not include an automatic withdrawal from this Convention. Plans are underway by the UK government to modify this. (See *generally*, Philip R.Wood, 'A lawyer's view on Brexit' Allen & Overy Intelligence Unit. Available at www.allenoverly.com/Brexit-Law?Pages/default.aspx accessed 18 July 2016.

³⁷⁴ Above n314.

³⁷⁵ *Ibid.*

the advancement of religion and whether the trust could be considered charitable, had to consider the meaning and nature of religion. It held that the society's objects while possessing elements of benefit to the public were for the advancement of education and not religion; *Williamson.v.the UK No.2700/95 Decision of the Commission of 17 May 1995*³⁷⁶; *R (Williamson & Others).v.Secretary of State for Education and Employment and Others (2005) UKHL 15* on religious conviction³⁷⁷; *Eweida and Others.v.UK (2013) ECHR 37*³⁷⁸ and the *R (on the application of Hodkin and another).v.Registrar General of Births, Deaths and Marriages [2013] UKSC 77*.³⁷⁹

The precedents as well as the Statutes guarantee freedom of religion in the UK.

The law governing regulation of the Church in the UK comprises of Statutes and case laws.³⁸⁰ This shall be discussed in detail in the next sub-heading.

4.3.1 Legal Authority and regulation of Churches

There has always been a close link between Church and State as far back as the sixteenth century.³⁸¹ This flowed from the English and Scottish Reformations.³⁸² The

³⁷⁶ The applicant, a male priest in the Church of England, considered the ordination of women as priests upon enactment of 1993 Ordination of Women Measure, as against his conscience and belief since he was forced to accept women priests in the Church. He argued that his freedom of conscience and belief as captured in Article 9 of the European Convention on Human Rights had been infringed. Court in dismissing his application held that one of the reasons of the Church of England in allowing the ordination of women was to ensure equality between men and women in the hierarchy of the Church.

³⁷⁷ The appellants who were teachers in Christian schools and believed in corporal punishment argued that the ban on corporal punishment under section 548 of the Education Act 1996 infringed on their freedom of religion and conscience under Article 9 of the European Convention of Human Rights. It was held that the manifestation of belief relied on must be linked to the belief concerned.

³⁷⁸ The applicants stated that they had suffered discrimination in the hands of their respective employers on grounds of their religious beliefs. They also argued that the State had failed to take action to protect their rights to manifest their religious beliefs under Articles 9 and 14 of the European Convention on Human Rights.

³⁷⁹ The UK Supreme Court confirmed Scientology as a religion and held that its services are an act of worship.

³⁸⁰ Above n314.

extent to which the State interferes with the affairs of the Church is minimal.³⁸³ However, the State has in the past attempted to interfere with the freedom of worship.³⁸⁴ In the sixteenth century, King Henry VIII dominated the Church and even assumed to appoint bishops and to interfere with doctrinal issues.³⁸⁵ Once again in the nineteenth century, the State introduced the Public Worship Regulation Act 1874 that was aimed at suppressing what was perceived as growing ritualism in churches.³⁸⁶ Before the Act, the Court of Aches was supervising the Church of England.³⁸⁷ The Act however established a secular court and this was viewed by many as interference with worship.³⁸⁸ The imprisonment of four priests for disobedience between 1877 and 1882 discredited the Act.³⁸⁹ It was later repealed in 1963.³⁹⁰

In the UK, there are churches with special status. These include the Church of England, Church of Scotland and the Anglican Church in Wales.³⁹¹ The Church of England and the Church of Scotland are established churches; while the Anglican

³⁸¹ Clive D.Field, 'Religious Statistics in Great Britain: An Historical Introduction' Available at <http://www.brin.ac.uk/commentary/drs/> accessed on 5 December 2015.

³⁸² Back in the sixteenth century, there were attempts to reform the Catholic church .This led to the development of protestant churches in Western Europe, with Martin Luther being the pioneer of this reformation.(See http://www.bbc.co.uk/bitesize/ks3/history/uk_through_time/religion_through_time/revision/5/-)

³⁸³ McClean David, 'State and Church in the UK' in G.Robbers (eds), *State and Church in the European Union* (Nomos Verlagsgesellschaft 2005) 553-575.

³⁸⁴ Frank Cranmer, John Lucas and Bob Morris, *Church and State: A mapping exercise* (The Constitution Unit, UCL 2006).

³⁸⁵ The Concise Oxford Dictionary of the Christian Church (3rd ed). Available at www.oxfordreference.com/view/10.1093/oi/authority.20110803100353716 accessed on 5 February 2016.

³⁸⁶ Above n384 at 41-2.

³⁸⁷ Ibid.

³⁸⁸ Above n385.

³⁸⁹ Ibid.

³⁹⁰ Ibid.

³⁹¹ Above n384 at 9-10.

Church in Wales, Northern Ireland and Scotland is de-established.³⁹² All other churches in the UK are non-established.³⁹³ Established Churches enjoy less autonomy in regulating their inner affairs than the non-established ones.³⁹⁴ This paper will focus on the regulation of the non-established churches. The non-established churches enjoy the status of a private organization and are regarded in law as unincorporated voluntary associations.³⁹⁵ Being an unincorporated voluntary association means that they have no separate legal identity, are not treated as juridical persons and have no restrictions imposed by Statutes on their self-regulation.³⁹⁶ Just like Kenya, the Church cannot hold property; however, institutions within the Church may be legal owners of property as they enjoy the status of corporations.³⁹⁷ Furthermore, the internal rules formulated by churches are viewed as contracts which can be enforced by the secular courts; however courts do not interfere with the internal management and administration of such churches.³⁹⁸ Being an unincorporated association qualifies it as a charity thus in investing charitable funds, the Church is regulated by the

³⁹² Ibid. The authors explain that there are laws which apply to established churches and not to the other churches. They explain that the State distinguished them from other churches and granted them a privileged position in society. They also point out that the established churches have never been established by an Act of Parliament but have grown from the era when the Church and the Nation were deemed partners in governance of the Nation. This was around the sixteenth century up to the seventeenth century. The authors also explain that in the 1800s, the State began to take initiative in Church affairs.

³⁹³ Above n383 at 555.

³⁹⁴ Above n384 at 11; David Rutledge, 'Caesar's Coin: How should Church and State interact?' Available at <<http://www.abc.net.au/radionational/programs/encounter/caesars-coin-how-should-church-and-state-interact/3225878#transcript>> accessed on 10 November 2015.

³⁹⁵ Above n314.

³⁹⁶ Ibid.

³⁹⁷ Ibid.

³⁹⁸ See the case of *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth ex parte Wachmann* (1992) 1 WLR 1036 in which Brown J at page 932G-H stated: "... the court is hardly in a position to regulate what is essentially a religious function – the determination whether someone is morally and religiously fit to carry out the spiritual and pastoral duties of his office. The court must inevitably be wary of entering so self-evidently sensitive an area, straying across the well-recognised divide between church and state."

Charities Act.³⁹⁹ As earlier mentioned, such churches are categorised as charities since the advancement of religion is considered to be a charitable purpose.⁴⁰⁰ The Church will have to demonstrate to the Charity Commission that it provides benefit to the public else it will not be recognised as a charity.⁴⁰¹ It is the Charity Commission that registers and regulates charities.⁴⁰²

The Charity Commission which is governed by a board, reports directly to the UK Parliament as it is the Public Administration Select Committee which oversees its work.⁴⁰³ This Commission was first established by the Charitable Trust Act 1853.⁴⁰⁴ Prior to this Act, there was a body of Commissioners established with the *Statute of Charitable Uses 1601* so as to ensure charitable gifts were used for their intended purpose.⁴⁰⁵ However, this proved ineffective due to expensive legal remedies.⁴⁰⁶

³⁹⁹ Above n314.

⁴⁰⁰ Above n65.

⁴⁰¹ This was demonstrated in The Decision of Charity Commissioners of 17 December 1999 on the Church of Scientology (England and Wales). On September 1996, the Church of Scientology, an International organisation registered in the USA and with its headquarters there, applied to the Charity Commission for registration as a charity. It argued that it was a body established for charitable purpose which is the advancement of religion. The Charity Commission decided it was neither established for charitable purposes nor for the benefit of the public and as such could not be registered as a charity under section 3(2) of Charities Act 1993. (Available at <https://www.gov.uk/government/publications/church-of-scientology-england-and-wales> accessed 11 October 2016). However, in 2013, The UK Supreme Court in *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages [2013] UKSC 77* confirmed Scientology as a religion and held that its services are an act of worship. The Registrar General was ordered to record the Church as a place of worship under the Places of Worship Registration Act 1855. Despite this ruling, the Church has not appealed against the 1999 Decision of Charity Commissioners refusal to register it as a charity.

See also *Gilmour.v.Coats (1949) AC 426* in which a trust was to apply the income of a fund for Catholic nuns who lived in seclusion and held prayers. It was held that the prayers lacked evidence of public benefit hence could not be considered as a charity.

⁴⁰² Part 2 Charities Act 2011(Chapter 25).

⁴⁰³ Our governance: The non-executive board of the Charity Commission. Available at <https://www.gov.uk/government/organisations/charity-commission/about/our-governance> accessed 19 October 2016.

⁴⁰⁴ Peter R.Elson, 'The Origin of the Species: Why Charity Regulations in Canada and England Continue to Reflect Their Origins' (2010)12(3) The International Journal of Not-for-Profit Law 75.

⁴⁰⁵ Ibid at 83.

⁴⁰⁶ Ibid.

During the Industrial revolution in the nineteenth century, Lord Brougham led an inquiry which led to prosecution of about four hundred charities.⁴⁰⁷ At that time, there had been a proposal to inquire into charities the engaged in fraudulent activities and misappropriated funds but this was rejected by the powerful institutions such as churches and Universities as they did not want their internal affairs under scrutiny.⁴⁰⁸ Nevertheless, in 1819, the Inquiry into Charitable Endowments which was conducted by trained lawyers got underway.⁴⁰⁹

One of the key roles of the Charity Commission is to ensure compliance and accountability by charities.⁴¹⁰ Registered charities are exempt from income tax on grants, donations and similar sources of income.⁴¹¹ The Charity Commission, being an independent regulator, protects the public interest by ensuring the charities are carried out for the benefit of the public.⁴¹² To ensure the funds received are accounted for, the Charity Commission requires that accounting records be kept and the same to reflect the true financial position of the Charity.⁴¹³ The record should be preserved for

⁴⁰⁷ Ibid.

⁴⁰⁸ Ibid at 84.

⁴⁰⁹ Ibid.

⁴¹⁰Section 14 Charities Act 2011 states:

The Commission has the following objectives—

1. The public confidence objective

The public confidence objective is to increase public trust and confidence in charities.

2. The public benefit objective

The public benefit objective is to promote awareness and understanding of the operation of the public benefit requirement.

3. The compliance objective

The compliance objective is to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.

4. The charitable resources objective

The charitable resources objective is to promote the effective use of charitable resources.

5. The accountability objective

The accountability objective is to enhance the accountability of charities to donors, beneficiaries.

⁴¹¹ This is captured in Part 10 of The Income Tax Act 2007(Chapter 3), specifically sections 521-536.

⁴¹² Above n410.

⁴¹³ Section 130 Charities Act 2011 reads:

a period of six years from end of year it was prepared.⁴¹⁴ It is mandatory for the trustees to prepare annual reports and submit it to the Commission as provided in sections 162 and 164 of the Charities Act. The annual report must have attached to it a copy of the statement of account and the relevant auditor's or examiner's report. Section 165 of the Charities Act states that this report is open for public inspection for the period it is kept at the Commission. Therefore, a Charity is required to send the audited financial report to the Commission and where it fails to do so or where the report is not clear, the Commission has the power under section 146 to order an audit. This ensures that the funds collected or received are accounted for. The Act gives the Commission the power under section 46 to institute inquiries either generally or for a particular purpose.⁴¹⁵ The Commission does the inquiry itself or it appoints a person

(1) The charity trustees of a charity must ensure that accounting records are kept in respect of the charity which are sufficient to show and explain all the charity's transactions, and which are such as to—

(a) disclose at any time, with reasonable accuracy, the financial position of the charity at that time, and

(b) enable the trustees to ensure that, where any statements of accounts are prepared by them under section 132(1), those statements of accounts comply with the requirements of regulations under section 132(1).

(2) The accounting records must in particular contain—

(a) entries showing from day to day all sums of money received and expended by the charity, and the matters in respect of which the receipt and expenditure takes place, and

(b) a record of the assets and liabilities of the charity.

⁴¹⁴ Section 131(1) Charities Act 2011 reads: *The charity trustees of a charity must preserve any accounting records made for the purposes of section 130 in respect of the charity for at least 6 years from the end of the financial year of the charity in which they are made.*

⁴¹⁵ The Reports on the inquiry are published and open for public view. They are available on <https://www.gov.uk/government/collections/inquiry-reports-charity-commission> Some instances include:

- i. Inquiry Report on Coptic Orthodox Church Foundation Manchester, Registered charity Number 519300 which was published on 4th March 2016. This particular Church had failed to submit its annual returns to the Charity commission for two years. The Commission used its power gathering information under section 52 Charities Act 2011 to obtain the bank records and information of the Church relating to the accounts.
- ii. Inquiry Report on Truro Methodist Church, Registered charity Number 1131902 which was published on 27th May 2015. The Church failed to file annual returns for a period of two years. The Charity Commission ensured the Church complied with its legal obligation to submit their annual accounting information.

to conduct the inquiry and make a report to the Commission.⁴¹⁶ The Commission may proceed to suspend or remove a trustee, officer, agent or employee of a charity who has been responsible for or privy to a misconduct or mismanagement.⁴¹⁷

The Charity Commission faces a number of challenges despite the existence of the comprehensive Charities Act. A report by the National Audit Office released (NAO) in 2014 found that the Commission is not regulating charities effectively and makes little use of its enforcement powers thus raising concerns that certain issues go undetected.⁴¹⁸ NAO also reported that the Commission examines trustees rather than the charity itself and relies more on information by trustees on compliance rather than getting into investigations as it is empowered by the Charities Act. Additionally, the Public Administration Select Committee has questioned the activities of the Charity Commission in certain instances. In 2012, a few Members of Parliament appeared before the Public Administration Select Committee to argue that refusal by the

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- iii. Cathedral of Revival Assembly of God, Registered charity Number 1123909 which was published on 6th October 2014. It had failed to file its annual returns as is required. The Commission concluded that the trustees were in default of their legal obligation thus misconduct in the administration of the charity. Nevertheless, they were deemed to have complied upon submission of the annual returns.

⁴¹⁶ See <<http://www.secularism.org.uk/news/2014/11/four-churches-and-christian-charities-face-charity-commission-investigation>> Religious charities with financial irregularities and who have failed to comply with the regulations of the Charity Commission are placed under investigations by the Commission. In 2014, a Nigerian preacher David Oyedepo of the Winners Chapel International was placed under investigations as he was accused of misapplying Church funds.

Other Churches under investigation include the Rhema Church London (see <https://www.gov.uk/government/news/new-charity-investigation-rhema-church-london>) and The Christ Apostolic Church World Soul Winning and Evangelistic Ministry (see <https://www.gov.uk/government/news/new-charity-investigation-christ-apostolic-church-world-soul-winning-and-evangelistic-ministry>).

⁴¹⁷ Sections 76(3), 79 Charities Act 2011.

⁴¹⁸ Report of the National Audit Office, The regulatory effectiveness of the Charity Commission, December 2013.

Charity Commission to grant *Plymouth Brethren* charitable status amounted to suppression of religion.⁴¹⁹

There are other Acts of Parliament that regulate churches, albeit indirectly. For instance, the Places of Worship Registration Act 1855 which governs the registration and legal recognition of places of worship.⁴²⁰ This Act enables a place of meeting for purposes of worship to be recorded by the Registrar General. A Church which is not recorded under this Act can still be used by congregants to worship but it cannot be used as a venue to solemnize a marriage.⁴²¹

As shown above, save for the established churches, the law does not provide for systematic and strict regulation of churches. There is no single body of laws applicable to Church autonomy.

Kenya does not have a specific legislation on charities.⁴²² Any donations made to the Church are held in trust for the benefit of the Church. The Trustee Act ensures that incorporation of trusts is not utilized for personal gain. For instance, as mentioned

⁴¹⁹ Available at <http://www.parliament.uk/search/results/?q=October+2012+hearing+on+the+Charity+Commission+refusal+to+grant+Plymouth+Brethren+charitable+status&page=0> accessed 19 October 2016.

⁴²⁰ Above n314; This Act however does not govern the Church of England or the Church in Wales.

⁴²¹ See *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77 which was an appeal on whether the Church of Scientology can be recorded as a place of worship under section 2 of the Places of Worship Registration Act 1855. The effect of such a registration is that solemnisation of marriage can take place in such a building. Court held that since the Church of Scientology held religious services, then the Church is a place of meeting for religious worship. The Registrar General was ordered to record it as such as provided under the Places of Worship Registration Act 1855.

⁴²² The NGO Act may have been construed to govern charities based on provision of section 2 which states “*Non-Governmental Organization*” means a private voluntary grouping of individuals or associations, not operated for profit or for other commercial purposes but which have organized themselves nationally or internationally for the promotion of social welfare, development, charity or research through mobilization of resources.” However, this Act has been repealed and in its place is the PBO Act which expressly excludes any religious organization devoted to religious teaching or worship as shown in Chapter One of this study.

earlier in Chapter Two of this study, acquisition and disposal of land is done with the consent of the Cabinet Secretary for Lands. Thus accountability is limited to land as financial account by the Church falls in the docket of the Registrar of Societies. The Lands Office in Kenya does not deal solely with trusts since that is not its main mandate. In UK on the other hand there is a Charity Commission which is an independent regulator for charities.

4.5 CONCLUSION

The jurisdictions discussed above share a number of similarities amongst them: the State does not regulate the affairs of the Church save for the established State churches in the UK. As has been discussed, both jurisdictions interfered with internal affairs of the Church at some point. This is however not the case as that was viewed to restrict the freedom of religion. This chapter has also established that the UK, churches are classified as unincorporated voluntary associations. Such religious associations thus qualify as charities and are regulated by the Charity Commission. Registration with the Commission automatically exempts the Church from tax. Just like Kenya which registers churches as societies, churches in the UK which fall under unincorporated associations have no separate legal identity. Nonetheless, what differentiates this jurisdiction from Kenya is that the Charity Commissions sees to the accountability of funds received by the Church. As for Estonia, there is legislation that deals specifically with religious organizations: the CCA 2002. As mentioned above, this Act outlines the main activities of the Church without interfering with the teachings and structure of the Church. Once a Church registers under the CCA 2002, it is exempt from income tax as well as property tax on land under places of worship.

It is important to point out that there is no perfect model for regulation of the Church in the world. However, there are positive elements to the laws of the jurisdictions picked that have embraced best practices.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 CONCLUSION AND SUMMARY OF FINDINGS

This study sought to determine whether the State should regulate the Church. As has been demonstrated, the State on its own is unlikely to succeed in regulating the Church. From the point of view of the Church, three out five of the participants supported the debate that the State should regulate the Church. They were of the view that the State should regulate the Church; however, the Church as the stakeholders, should be involved in the process. From the State's point of view, there is no question that the situation as is currently churches should be regulated. This will greatly enhance accountability by the religious leaders. The State cannot rely solely on self-regulation to ensure that the Church upholds transparency and ensures accountability. Certain principles ought to be captured in statute to ensure compliance across the board. This will ensure churches that do not comply face the consequences. As the CoK provides for public participation, religious leaders and the State can come together and develop a mechanism where the two cooperate on the operation of a statutory regulation. This is because there is already statutory backing in place and the government is already involved as it carries out registration of the Church.

To arrive at the foregoing conclusion, this study was conducted in five chapters namely:

Chapter one presented the introduction of the study, its objectives and justification, the methodology applied and the theoretical framework. It also delimited the problem investigated. Review of literature did not only act as a guide to facilitating this paper

but also identified gaps intended to be filled in by the study. The limitations encountered were also set out as they contributed to the outcome of the study.

Chapter two looked into the applicable law on the registration of the Church in Kenya. To provide a clear understanding of the operations of the Church, the historical development of the Church in Kenya was considered. The current legal framework governing registration process was examined. In this regard, it sought to establish whether the problem of transparency and accountability begins at the registration level. It was also established that there are both legal and institutional challenges encountered as the Church goes through the registration process.

For its part, Chapter three delved into the rationales for and against State regulation of the Church. It was concluded that involvement of religious leaders in regulation of the Church is key. Participation of the religious leaders who are the stakeholders will assist in coming up with clear guidelines on the law governing the Church. This in the long run ensures compliance and commitment on their part.

Chapter four of this study comprised comparison of Kenya's regulation process on the one hand and that of Estonia and the UK on the other. It emerged that Kenya can borrow in terms of ensuring transparency and accountability by religious leaders.

Chapter five being the final one restates the findings of this study and makes recommendations necessary to ensure that transparency and accountability within the religious sector are observed.

5.2 SUGGESTIONS ON THE WAY FORWARD:

The overall study did establish that the Societies Act as it is is not sufficient to govern Churches.

The State on its own will not manage to regulate the Church unless the various stakeholders are involved in the process. The practice by the jurisdictions studied, together with the data collected makes me to suggest the following recommendations:

5.2.1 Development of policy framework for religious societies

Development of a policy framework should be starting point because it sets the basis for the needed enactment of legislation. There is need to formulate a proper policy framework that will guide in implementation of laws passed. As the law is one of the most important instruments for governance, policies should be developed so as to avoid challenges in implementation.

5.2.2 Enactment of an Act of Parliament to govern religious societies.

Kenya needs to enact legislation that will regulate the Church. It is appreciated that freedom of conscience, religion, belief and opinion is a human right; however it is not absolute when it is exercised through an association which is registered under the law because then the Church must comply with that law. Kenya already provides for registration of the Church and a Church which is not registered is deemed an unlawful society. Thus if an association of ten or more persons gather to worship, they must ensure that they are registered in order to enjoy the freedom as is guaranteed by the CoK. With this argument therefore, I recommend that a Statute be enacted to govern the Church. Some of the issues that need to be brought out include:

- There is need for the law to define what a Church is. The aim will be to narrow down what can be termed a Church. In addition, the definition will

rule out conflict with other Statutes governing organizations registered for charitable purposes.

- Minimum standards or requirements for registration of a Church. In addition to the requirements already in place, they should include: a) a copy of theological certificate for all the Church officials. This will prove that they have undergone theological training and therefore understand the basic Biblical doctrines. Religious leaders will also use the appropriate titles upon receiving the required training. All the interviewees were in concurrence that theological training is essential. b) Personal identification of the Officials, for instance, a copy of their National Identity Card or passport, passport photos, copy of PIN certificate to confirm they are tax compliant. c) Work permit for foreigners who want start a Church in Kenya. A Church that fails to meet these requirements should not be registered.
- Audited accounts of the Church to be filed with the Registrar. The Church should attach its independent audited accounts together with the annual returns. The audited accounts should then be examined by an auditor assigned to the office of the Registrar in order to validate the accounts or reject them if he finds them to be misleading or uncovering acts of financial impropriety. It is only when the accounts are verified and validated by an auditor at the Registrar's office that the Church can proceed to file its annual returns. This report should be accessible to the congregants as well as members of the public since the Church receives support from the public through donations or offerings. In case acts of financial impropriety are disclosed, then heavy fines

imposed on them or the Church should be deregistered where it is determined that the acts of impropriety are too significant to let the Church carry on day to day activities.

- As is the case currently, each Church must submit a copy of its constitution/rules to guide Church administration. One of the matters that need to be covered in the constitution/rules of the Church is the remuneration of the Religious leaders. A religious leader should be deemed to be an employee of the Church and as such should be registered with the Registrar. Once registration is done, the religious leader should declare the amount of salary he receives for purposes of taxation.
- The constitution/rules of the Church should include a clause that a religious leader will uphold integrity. This clause may outline some general principles that are accepted across the board.
- The Church should acquire a legal personality status to allow it to own property in the name of Church and not in the name of appointed trustees as is currently the case. As a body corporate, another regulatory framework, being the law on trusts, need not apply to it.
- Compliant Churches to be published in the Newspaper or the official website of the Office of the Attorney General. Where Churches comply with the standards that are formulated, a list of the compliant churches should be published in a newspaper with wide circulation or the website of the Office of the Attorney General. This will not only encourage churches to comply with

the regulations but also allow congregants to make informed decisions about their Church.

- Vetting and Accreditation of Theological Institutions. In order to ensure that the material being taught in theological institutions promote integrity and are in line with Biblical principles and doctrines it is imperative that standard curricula be formulated. The institutions should be vetted and accredited so as to distinguish the ones that comply from the ones that fail to comply. Once this is done, only the certificates from the accredited institutions should be accepted at the Registrar's office when an application for registration of a Church is made. This is one of the critical areas that should be strengthened by legislation.
- There should be a requirement for Church to be registered with an Umbrella Body. This Body will act as the oversight body made up of representatives from the Church. The Umbrella Bodies should then meet regularly to assess status of its members. There should be set the minimum number of members in a Body for accountability and uniformity purposes. The Umbrella Bodies can deal with disputes that require the resolution of religious matters since the government lacks the expertise to handle such matters.

5.2.3 Decentralization of the Registrar of Societies services

The department of the Registrar General within the office of the Attorney General and Department of Justice is established to serve the entire country. Churches are spread throughout Kenya. Therefore, it is expected that the department of the Registrar General be in most if not all the forty seven Counties in Kenya. The

operational capacity of the office of the Attorney General should be strengthened in order to effectively handle the number of applications. It is furthermore important that stakeholders in this sector are aware of the governance structure of the department of the Registrar General. When equipped with such information, the stakeholders are able to recommend ways that can enhance fast delivery of services. This is an upfront to access to services which is one of the Constitutional requirements. The structure of this department must be in such a way that it would improve access to services by all people. It is in this regard that decentralization of its services needs to be given urgent attention.

APPENDICES

APPENDIX 1

(For the Umbrella Bodies)

NAME OF ORGANISATION _____

ADDRESS _____

Dear Sir/Madam,

My name is Brenda Odiemo. I am currently pursuing my Masters Degree in Law at the University of Nairobi. As part of the course complement, I am required to write and present a Project Paper in an area of interest. My topic of study is *“Regulation of Churches in Kenya: The Debate For And Against.”*

As part of this research, I would like to interview one of the officials in the Umbrella Bodies. This research focuses on whether Churches in Kenya should be regulated by the State and if so, to what extent it should be regulated. The study is intended to look at the current legal regime governing registration of Churches as well as the self-regulatory mechanisms put in place by churches. This is in order to determine which mechanism, if adopted, would assist in improving the current challenges the Church in Kenya is facing today especially on the issue of lack transparency and accountability by some religious leaders. The solutions proposed to deal with these challenges will be reviewed with a view to learning from their deficiencies. If you would be willing to be interviewed as part of this research project, it would be much appreciated.

Participants WILL NOT be asked to divulge any information regarding the sensitive/confidential information of the Organization. Rather, this research intends to ascertain the perception of various actors in religious organizations and the public in general as regards whether Churches should self-regulate or be regulated by the State.

If you would be willing to take part in this research project, or require any additional information about the interviews, please contact me on **odiemob@gmail.com** or **0722-975059**. Alternately, if you have any thoughts on my research, or points that you think may be of interest, your input would be much appreciated.

Yours faithfully,

Brenda Odiemo
LL.M Candidate, University of Nairobi

(For the Independent Church)

NAME OF ORGANISATION _____

ADDRESS _____

Dear Sir/Madam,

My name is Brenda Odiemo. I am currently pursuing my Masters Degree in Law at the University of Nairobi. As part of the course complement, I am required to write and present a Project Paper in an area of interest. My topic of study is "*Regulation of Churches in Kenya: The Debate For And Against.*"

As part of this research, I would like to interview one of the officials in the Church. This research focuses on whether Churches in Kenya should be regulated by the State and if so, to what extent it should be regulated. The study is intended to look at the current legal regime governing registration of Churches as well as the self-regulatory mechanisms put in place by churches. This is in order to determine which mechanism, if adopted, would assist in improving the current challenges the Church in Kenya is facing today especially on the issue of lack transparency and accountability by some religious leaders. The solutions proposed to deal with these challenges will be reviewed with a view to learning from their deficiencies. If you would be willing to be interviewed as part of this research project, it would be much appreciated.

Participants WILL NOT be asked to divulge any information regarding the sensitive/confidential information of the Organization. Rather, this research intends to ascertain the perception of various actors in religious organizations and the public in general as regards whether Churches should self-regulate or be regulated by the State.

If you would be willing to take part in this research project, or require any additional information about the interviews, please contact me on **odiemob@gmail.com** or **0722-975059**. Alternately, if you have any thoughts on my research, or points that you think may be of interest, your input would be much appreciated.

Yours faithfully,

Brenda Odiemo
LL.M Candidate, University of Nairobi

(For the Registrar of Societies, Office of the Attorney General and Department of Justice)

NAME OF ORGANISATION _____

ADDRESS _____

Dear Sir/Madam,

My name is Brenda Odiemo. I am currently pursuing my Masters Degree in Law at the University of Nairobi. As part of the course complement, I am required to write and present a Project Paper in an area of interest. My topic of study is *“Regulation of Churches in Kenya: The Debate For And Against.”*

As part of this research, I would like to interview the Registrar of Societies. This research focuses on whether Churches in Kenya should be regulated by the State and if so, to what extent it should be regulated. The study is intended to look at the current legal regime governing registration of Churches as well as the self-regulatory mechanisms put in place by churches. This is in order to determine which mechanism, if adopted, would assist in improving the current challenges the Church in Kenya is facing today especially on the issue of lack transparency and accountability by some religious leaders. The solutions proposed to deal with these challenges will be reviewed with a view to learning from their deficiencies. If you would be willing to be interviewed as part of this research project, it would be much appreciated.

Participants WILL NOT be asked to divulge any information regarding the sensitive/confidential information of the Organization. Rather, this research intends to ascertain the perception of various actors in religious organizations and the public in general as regards whether Churches should self-regulate or be regulated by the State.

If you would be willing to take part in this research project, or require any additional information about the interviews, please contact me on **odiemob@gmail.com** or **0722-975059**. Alternately, if you have any thoughts on my research, or points that you think may be of interest, your input would be much appreciated.

Yours faithfully,

Brenda Odiemo

LL.M Candidate, University of Nairobi

APPENDIX 2

QUESTIONNAIRE BACKGROUND

Study Title: Regulation of Churches in Kenya: The Debate For and Against

Researcher: Brenda Awuor Odiemo, LL.M Candidate, University of Nairobi

Supervisor: Miss Koki Mbulu

Dear Sir/Madam,

I am currently pursuing my Masters Degree in Law at the University of Nairobi. As part of the course complement, I am required to write and present a Project Paper in an area of interest. As indicated above, my topic of study is “*Regulation of Churches in Kenya: The Debate For and Against.*”

This questionnaire is administered as part of a study on whether Churches in Kenya should be regulated by the State and if so, to what extent it should be regulated. The study is intended to look at the current legal regime governing registration of Churches as well as the self-regulatory mechanisms put in place by churches. This is in order to determine which mechanism, if adopted, would assist in improving the current challenges the Church in Kenya is facing especially on the issue of lack transparency and accountability by some religious leaders.

As a participant, please note the following:

- Your participation is entirely voluntary.
- In the event that any question administered is not clear, feel free to ask for clarification;
- Your responses will be recorded on the questionnaire;

Do you agree to participate in this study?

Yes: _____

No: _____

Please sign below confirming your decision:

Signature: _____

(Accept/Decline)

APPENDIX 3

TOPIC:

REGULATION OF CHURCHES IN KENYA: THE DEBATE FOR AND AGAINST

(For Umbrella Bodies)

SECTION 1: BACKGROUND INFORMATION

NAME OF BODY: _____

NAME OF OFFICIAL/INTERVIEWEE: _____

SECTION 2:

1. How many members are currently registered in the Body?
2. Should Churches belong to an Umbrella Body?

YES []

NO []

Please explain why

3. Do all members share the same view on the issue of whether Churches should be regulated?

YES []

NO []

4. The State was in the process of seeing whether Churches should be regulated. Did the Body collect views of the members so as to be presented as one?

YES []

NO []

Please elaborate further

5. To what extent should the State regulate Churches?

- Very great extent [] Great extent [] Moderate extent []
Small extent [] No extent []

Please explain your answer

6. Will regulation of Churches by the State ensure transparency in the Church?

- Very great extent [] Great extent [] Moderate extent []
Small extent [] No extent []

Please explain your answer

7. Will regulation of Churches by the State ensure accountability in the Church?

- Very great extent [] Great extent [] Moderate extent []
Small extent [] No extent []

Please explain your answer

8. Will regulation of churches by the State curb abuse and financial misappropriation by some religious leaders?

- Very great extent [] Great extent [] Moderate extent []

Small extent [] No extent []

Please explain your answer

9. Should religious leaders undergo theological training?

Strongly Agree [] Agree [] Disagree []

Please explain your answer

10. a.)What mechanisms has your Body put in place to ensure that there is transparency and accountability by the members?

b.)How do you ensure that the members abide by these mechanisms?

c.) What are the steps taken in the event that members fail to abide by these mechanisms?

11. Is there anything you would like to add?

Thank you for your participation.

TOPIC:

REGULATION OF CHURCHES IN KENYA: THE DEBATE FOR AND AGAINST

(For the Independent Church)

SECTION 1: BACKGROUND INFORMATION

NAME OF CHURCH: _____

NAME OF OFFICIAL/INTERVIEWEE: _____

SECTION 2:

1. Is your Church a member of any Umbrella Body?

YES []

NO []

2. Should Churches belong to an Umbrella Body?

YES []

NO []

Please explain your answer.

3. To what extent should the State regulate Churches?

Very great extent []

Great extent []

Moderate extent []

Small extent []

No extent []

Please explain your answer

4. Will regulation of Churches by the State ensure transparency in the Church?

Very great extent [] Great extent [] Moderate extent []

Small extent [] No extent []

Please explain your answer

5. Will regulation of Churches by the State ensure accountability in the Church?

Very great extent [] Great extent [] Moderate extent []

Small extent [] No extent []

Please explain you answer

6. Will regulation of churches by the State curb abuse and financial misappropriation by some religious leaders?

Very great extent [] Great extent [] Moderate extent []

Small extent [] No extent []

Please explain your answer

7. Should religious leaders undergo theological training?

Strongly Agree [] Agree [] Disagree []

Please explain your answer

8. a.)What mechanisms has your Church put in place to ensure that there is transparency and accountability by the religious leaders?

- b.)How do you ensure that the other branches abide by these mechanisms?

- c.) What steps are taken in the event that the leaders fail to abide these mechanisms?

9. Is there anything you would like to add?

Thank you for your participation.

TOPIC: REGULATION OF CHURCHES IN KENYA: THE DEBATE FOR AND AGAINST

(For Office of the Attorney General and Department of Justice -Registrar of Societies)

SECTION 1: BACKGROUND INFORMATION

DATE OF INTERVIEW: _____

TIME OF INTERVIEW: START _____ END _____

LANGUAGE OF INTERVIEW _____

SECTION 2: REGISTRATION PROCESS

1. Who can register a church? (Eligibility)
2. What is required when one wants to register a church?
3. Is there a registration fee paid? If so, how much?
4. What are the forms to be filled in? Is the one for tax exemption part of it and is it mandatory that one fills it in?)
5. Once the forms are filled in what is the next step?
6. How long does it take for the entire process to be concluded?
7. In instances where an application is rejected, what are the reasons/grounds for rejecting?
8. Once one is given a certificate, what next?
9. Where and how are the returns filed by a church?
10. What action is taken when a church fails to file returns?
11. How many churches are currently registered in Kenya?
12. How do you keep the database on churches?
13. What about a foreigner who wants to open a church in Kenya? Procedure?
14. What if a church is registered in a foreign country and the officials want to open a branch in Kenya, how do you handle/deal with such?
15. Do you have regional offices or does one have to come to Nairobi if s/he wants to register a church?
16. If no regional offices, are plans underway to open?
17. How many Umbrella Bodies are currently registered in Kenya?

18. *Does multilateral registration apply to Churches? That is, can a Church register under more than one regime for the same purpose?

SECTION 3: REGULATION OF THE CHURCH

1. What in your view is the cause of proliferation of Churches in Kenya?
2. What is the basis of regulation of Churches by the State?
3. What is the role of the State in regulation of Churches?
4. Have there been previous efforts by the State at regulating Churches? Please explain.
5. Are the provisions of The Societies Act sufficient to handle registration of Churches? Please explain.
6. Is the State doing enough when it comes to the registration process to ensure that con persons are picked out at the onset? Please explain.
7. What is your take on self-regulation of Churches in Kenya? Should Churches be allowed to self-regulate? Please explain.
8. Will regulation by the State curb abuse and financial misappropriation by some religious leaders? Please explain.
9. Is there anything else you would like to add?

Thank you for your participation.

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