

**SHINING A LIGHT ON DIWALI: AN ASSESSMENT FOR RECOGNIZING IT AS A  
PUBLIC HOLIDAY IN KENYA ACCORDING TO ARTICLE 32 OF THE KENYAN  
CONSTITUTION 2010.**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,  
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**Declaration**

I, PRINITA RAVJI MEGHANI, solemnly affirm that this research is the result of my own original efforts. To the fullest extent of my awareness and belief, this study, neither in whole nor in part, has been presented for a degree or diploma at any other institution. I have duly recognized and credited all other works and sources referenced or cited within this research.

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This dissertation has been submitted for examination with my approval as University Supervisor.

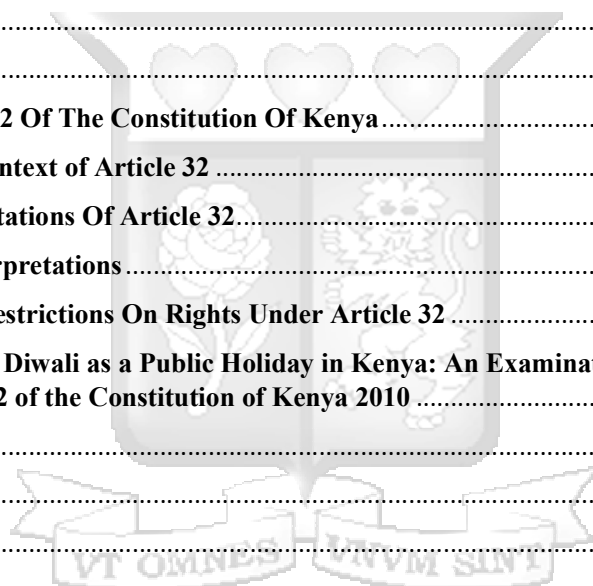
Signed:  .....

Dr Lynette Osiemo

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## ABSTRACT

This comprehensive research endeavours to illuminate the legal, cultural, and social dimensions surrounding the potential recognition of Diwali as a public holiday in Kenya, in alignment with the constitutional provisions enshrined in Article 32 of the Kenyan Constitution (2010). The study takes a holistic approach to investigate the constitutional guarantee of freedom of religion and its implications for recognizing Diwali as a public holiday, emphasizing the importance of cultural inclusivity and respect for diverse religious practices.

The research delves into the historical and cultural significance of Diwali within the Kenyan context, exploring the traditions, rituals, and communal celebrations associated with this Hindu festival. It critically analyses the existing legal framework governing public holidays in Kenya, assessing the feasibility and legal implications of formally acknowledging Diwali as a public holiday.

Through an examination of relevant case law, statutory provisions, and scholarly literature, the research aims to contribute to the broader discourse on constitutional rights, cultural diversity, and the evolving nature of legal frameworks. The findings seek to offer nuanced recommendations for legal and policy considerations, addressing the dynamic intersection of law, culture, and religion in the Kenyan constitutional context.

Ultimately, "Shining a Light on Diwali" aspires to be a valuable resource for legal scholars, practitioners, and policymakers, providing a nuanced understanding of the complexities surrounding the recognition of Diwali as a public holiday and advocating for a legal framework that reflects the principles of inclusivity and cultural sensitivity within the Kenyan legal system.

## **LIST OF CASES**

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

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

JWM v Board of Management O Primary School & 2 others [2019] eKLR.

Seventh Day Adventist Church (EA) Limited v Minister of Education & 3 others [2014]  
eKLR

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

## **LIST OF LEGAL INSTRUMENTS**

The Constitution of Kenya, 2010

The Public Holidays Act, Kenya

The Marriage Act, Kenya

The Education Act, Kenya

## **LIST OF INTERNATIONAL INSTRUMENTS**

The Universal Declaration of Human Rights (UDHR)

The International Covenant on Civil and Political Rights (ICCPR)

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

## CHAPTER 1

### INTRODUCTION TO THE STUDY

#### 1.0 Background Information

In Kenya, religious freedom is founded and governed by two key articles in the Constitution. The first is chapter 2, Article 8, which establishes the relationship between religion and the state by stating unequivocally that "*there shall be no state religion*".<sup>1</sup> Kenya, according to this article, is a secular state. Despite the lack of a state religion, many Kenyans observe religious holidays that are periodically gazetted by the government<sup>2</sup>.

Article 32, "*Freedom of conscience, religion, belief, and opinion*,"<sup>3</sup> is the second and most important article on freedom in Chapter 4 of the Bill of Rights. It is extremely important in terms of religious freedom because it stipulates that; first, the freedom of conscience, religion, thought, belief, and opinion belongs to every person. Second, everyone has the freedom to express any religion or belief by worship, practise, teaching, or observance, including the observance of a day of worship, whether alone or in the community with others, in public or in private.

The Constitution also guarantees the right to practise one's religion freely in a number of ways, including the Marriage Act's<sup>4</sup> recognition of Christian, Muslim, Hindu, and cultural unions. By permitting religious organisations to sponsor schools and support the teaching of religious subjects that are taught and examined in primary schools, secondary schools, and universities up to the undergraduate level, the Education Act<sup>5</sup> promotes the teaching of religions. Christian, Islamic, and Hindu religious education are among the topics covered, as are Gujarati, Greek, Hebrew, and Arabic languages.

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<sup>1</sup> Article 8, Constitution of Kenya, (2010)

<sup>2</sup> *Easter* and *Christmas* are among these festivals for Christians, along with *Eid ul-Fitr* and *Eid ul-Adha* for Muslims and *Diwali* for Hindus. Indeed, the national anthem is a prayer (petition) to God, and prayers offered by Christians, Muslims, and followers of African religions are an integral part of the President's official opening of Parliament as well as during the observance of national holidays like *Madaraka* and *Jamhuri*, which commemorate the days on which Kenya attained self-government and republic status, respectively.

<sup>3</sup> Article 32, Constitution of Kenya, (2010)

<sup>4</sup> The Marriage Act of Kenya, 2014

<sup>5</sup> The Education Act of Kenya, 2012

Hinduism is a major world religion that originated in ancient India and has evolved over thousands of years. It is a complex, diverse, and multi-faceted religion that encompasses a wide range of beliefs, practices, and cultural traditions. The term Hindu is defined under the Marriage Act 2014, it means “a person who is a Hindu by religion in any form (including a Virashaiva, a Lingayat and a follower of the Brahmo, Prarthana or Arya Samaj); a Buddhist of Indian origin; or a Jain or a Sikh by religion”.<sup>6</sup>

The word **Diwali** means the “*Festival of Lights*”. It is a festival that is celebrated by Hindus in the months of October or November according to the Hindu calendar.<sup>7</sup> It is a Hindu festival that is widely celebrated in Indian religions. Diwali symbolises the spiritual "victory of light over darkness, good over evil, and knowledge over ignorance".<sup>8</sup> In different parts of India, Diwali has different connotations and significance, but the two most popular myths linked with the holiday are the tale of Lord Rama's triumph over the demon king Ravana and the celebration of the goddess Lakshmi (goddess of prosperity) and Ganesha, (god of wisdom and the remover of obstacles). People also exchange gifts, decorate their homes, and cook special dishes during the celebration.<sup>9</sup>

Each day of the celebration begins with a traditional oil bath for Hindus in particular. Diwali is also celebrated with pyrotechnics, the decorating of floors with *rangoli*<sup>10</sup> patterns, and the lighting of lamps in various areas of the home. During the Diwali festival, families come together to revel in sumptuous feasts and exchange *mithai*<sup>11</sup>, making food a central and delightful aspect of the celebration.

Public holidays in Kenya are declared by the government through the Ministry of Interior and Coordination of National Government, in accordance with the Public Holidays Act. The Minister has discretionary powers to declare any day as a public holiday according to the Public

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<sup>6</sup> Section 2, The Marriage Act, 2014, Kenya

<sup>7</sup> The New Oxford Dictionary, 1998

<sup>8</sup> Vasudha Narayanan; Deborah Heiligman; “*Celebrate Diwali*” (2008)

<sup>9</sup> Vasudha Narayanan; Deborah Heiligman; “*Celebrate Diwali*” (2008)

<sup>10</sup> Sarah Cobb Spradlin; “*Rangoli – making Art for purpose*” - **Rangoli** is an art form used by Hindus. It is a type of decoration drawn on the ground or sidewalk in front of a house. Rangoli has a purpose; it is used to “enlighten” or to welcome Hindu gods to the household. Mothers in India do this activity every morning and teach rangoli to their daughters.

<sup>11</sup> Macmillan Dictionary – **Mithai** a word meaning **sweets and sweet dishes**, used in India and elsewhere.

Holidays Act<sup>12</sup>. The Minister of Interior publishes a notice in the Kenya Gazette, which is the official government publication, indicating the date on which the public holiday will be observed. The notice is usually published a few weeks or months in advance to give people ample time to prepare. Once a public holiday has been declared, it is observed throughout the country, and employers are required by law to give their employees a day off on that day or pay them double for working on that day.

In Kenya, where Diwali is a recognised public holiday (for Hindus), lights are lit to celebrate all the different connotations and significance of the occasions, and homes, community centres, and temples are all aglow.<sup>13</sup> Kenya's population of Indian descent is only around one per cent, but nonetheless, the Hindu festival of Diwali is a public holiday here.<sup>14</sup>

In 2019, the Ministry was also forced to clarify that Diwali, which fell on Monday, October 28, was not a holiday<sup>15</sup>. *"Kindly ignore a gazette notice circulating on social media claiming Monday 28th October 2019 to be a public holiday. Monday 28th remains a **normal working day**,"* a statement from the Ministry read at the time<sup>16</sup>. In 2022, the Ministry of Interior says Monday, October 24, will not be a public holiday amid speculation online that the government could declare the day a holiday to celebrate Diwali<sup>17</sup>. He added in that, it could be an occasion celebrated by Hindus in Kenya and other parts of the world, but as per the government's holidays calendar, it won't be celebrated by all Kenyans countrywide<sup>18</sup>.

Kenya has 12 public holidays annually, excluding special occasion holidays gazetted on a regular basis by the government.<sup>19</sup> Public holidays are crucial parts of the cultures of many different countries. People take a day off from work to remember the origins of holidays.

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<sup>12</sup> Section 3, The Public Holidays Act, (2012)

<sup>13</sup> Section 2(3), The Public Holidays Act, (2012)

<sup>14</sup> Statista, population on Kenya in 2019, by religion. <https://www.statista.com/statistics/1304207/population-of-kenya-by-religion/>

<sup>15</sup> Mwangi Denis, "Diwali 2022, "Is Monday a Public Holiday in Kenya?", October 19, 2022.

<sup>16</sup> Mwangi Denis, "Diwali 2022, "Is Monday a Public Holiday in Kenya?", October 19, 2022.

<sup>17</sup> Brian Okoth, "Diwali, Monday not a Public holiday", October 2022.

<https://www.standardmedia.co.ke/article/2001458784/diwali-monday-not-a-public-holiday>

<sup>18</sup> Brian Okoth, "Diwali, Monday not a Public holiday", October 2022.

<https://www.standardmedia.co.ke/article/2001458784/diwali-monday-not-a-public-holiday>

<sup>19</sup> Cyprine Apindi; Jackiline Wangare, "Gazetted Public Holidays In Kenya – The Complete List In 2023",

Tuesday, February 14, 2023 Read more: <https://www.tuko.co.ke/261515-gazetted-public-holidays-kenya.html>

Amongst the 12 public holidays, the country celebrates *Eid al Fitr* (marks the end of Ramadhan and the start of Shawwal) and *Eid Ul Adha* (feast of sacrifice). However, the occasions celebrated by Muslims in Kenya are celebrated by all non-Muslims in Kenya countrywide<sup>20</sup>. Non-Muslim Kenyans take time off work and school to recognise their Muslim counterparts who celebrate the day by attending communal prayers, feasting, and handing charity to the less privileged.<sup>21</sup>

This contradicts the provisions of Article 32 of the Kenyan Constitution, which grants all individuals in the country the right to express their religion through practice or observance. This is due to the fact that on the day of Diwali and the subsequent day, which marks New Year's Eve for Hindus, they are unable to observe the occasion by attending communal prayers, visiting temples, and participating in feasts.

### **1.2 Statement of Problem**

Recognizing Diwali as a public holiday in Kenya could enhance intercultural understanding and cooperation across different ethnic and religious groups. This step would not only uphold the religious freedom rights outlined in Article 32 of the Kenyan Constitution but also promote social cohesion by bridging diverse communities. It is expected that this recognition would eliminate the need for Hindu employees to negotiate time off, potentially increasing workplace productivity and morale. Furthermore, such an acknowledgment would signal Kenya's commitment to inclusivity and respect for cultural diversity, contributing to a more harmonious society. This hypothesis suggests significant societal benefits from aligning national holidays with the cultural and religious landmarks of all community segments.

### **1.3 Research Objectives**

1. To examine the historical and cultural significance of Diwali in Kenya and the Hindu community's celebration of the festival.
2. To investigate the potential risks of granting discretionary powers to government officials in deciding public holidays in Kenya.

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<sup>20</sup> Brian Okoth, "Diwali, Monday not a Public holiday", October 2022.

<https://www.standardmedia.co.ke/article/2001458784/diwali-monday-not-a-public-holiday>

<sup>21</sup> Cyprine Apindi; Jackiline Wangare, "Gazetted Public Holidays In Kenya – The Complete List In 2023",

Tuesday, February 14, 2023 Read more: <https://www.tuko.co.ke/261515-gazetted-public-holidays-kenya.html>

3. To analyse the interpretation of Article 32 of the Kenyan Constitution, which guarantees freedom of religion and conscience.
4. To evaluate the extent to which the recognition of Diwali as a public holiday in Kenya aligns with the constitutional rights enshrined in Article 32 of the Constitution of Kenya 2010.

#### **1.4 Research Questions**

1. What is the historical and cultural significance of Diwali, and how has it been celebrated by the Hindu community in Kenya?
2. What are the potential risks associated with granting discretionary powers to government officials in deciding public holidays in Kenya?
3. What is the interpretation of Article 32 of the Kenyan Constitution, which guarantees freedom of religion and conscience?
4. To what extent does the recognition of Diwali as a public holiday in Kenya align with the constitutional right enshrined in Article 32 of the Constitution of Kenya 2010?

#### **1.5 Hypothesis**

Given the widespread observance of Diwali and its cultural significance, it is important to recognize it as a public holiday in Kenya. By declaring Diwali as a public holiday in Kenya, the government can demonstrate its respect and recognition of the religious and cultural diversity of its citizens. Taking into consideration that Kenya is a secular state under Article 8 of the Kenyan constitution of Kenya, 2010.<sup>22</sup> It would also allow people to celebrate the festival without worrying about work or other obligations. In addition, Article 32 grants the citizens religious freedom, to celebrate and express their religious events.<sup>23</sup> Moreover, recognizing Diwali as a public holiday can help promote social cohesion and inclusivity by allowing people of all backgrounds to learn about and appreciate the customs and traditions of their fellow citizens.

#### **1.6 Justification**

This study can provide policymakers with valuable insights into the cultural and social significance of Diwali for the Indian community in Kenya. They can use this information to

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<sup>22</sup> Article 8, Constitution of Kenya, (2010)

<sup>23</sup> Article 32, Constitution of Kenya, (2010)

make informed decisions about whether to declare Diwali as a public holiday, considering the views of different groups within society. It can raise public awareness about Diwali's cultural and religious significance and its potential impact on the wider community. This knowledge can foster greater understanding and respect for different cultures and religions, promoting social cohesion and harmony. The project can empower employees to advocate for their rights and create awareness about the importance of Diwali as a public holiday. Recognizing Diwali as a public holiday is not just about providing a day off; it plays an important role in promoting cultural understanding and inclusivity. By doing so, organizations empower employees to comprehend the legal and social consequences associated with neglecting Diwali's recognition. From a legal standpoint, failure to acknowledge this festival may lead to issues of discrimination and non-compliance with regulations promoting religious freedom. Socially, the absence of Diwali as a recognized public holiday may impede the fostering of a diverse and tolerant workplace culture. This recognition, therefore, serves as a catalyst for legal compliance, cultural awareness, and social cohesion within a community or organization.

### **1.7 Theoretical Framework – The Ritual Theory**

According to Durkheim, religion is a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden- beliefs and practices which unite into one single moral community called a Church, all those who adhere to them.<sup>24</sup> Emile Durkheim, a pioneering French sociologist, introduced the concept of the ritual theory in his seminal work, "*The Elementary Forms of Religious Life*".<sup>25</sup> According to this theory, the primary purpose of religious rituals is to promote social cohesion, which helps members of the society develop a shared identity and sense of purpose. Such rituals, according to Durkheim, are essential for people to interact with society's collective conscience, which he connects to the sacred. Furthermore, he underlined how important these practices are to maintaining the stability of social order by regulating individual behaviour and upholding social standards. Furthermore, Durkheim recognised the profound emotional and symbolic significance that cultural and religious rituals have in a community.

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<sup>24</sup> Alexander J.C., Smith P. "The Cambridge Companion to Durkheim" Cambridge University Press, 2005

<sup>25</sup> Durkheim, E., & Swain, J. W. (2008). "The elementary forms of the religious life", Courier Corporation, 2008.

Durkheim argued that rituals are a way for individuals to express their connection to the larger society and to affirm their shared beliefs and values.<sup>26</sup> In sociology, the ritual idea has had a big influence, particularly when it comes to studying religion and communal cohesion. Durkheim suggested that elements of secular existence could benefit from an application of the ideas that underpinned his theory of religious rituals. Erving Goffman adopted this notion and extended the theory's applicability to the field of secular social relations, over fifty years after Durkheim's publication.<sup>27</sup> Rather than focusing on the formal interactions that we often think of as rituals, Goffman illustrated how all focused interactions, even passing greetings, had the ritual quality that Durkheim described.

In the sense that tribe members congregate as a single group in a single location and the associated rituals are shared by and visible to all, Durkheim assumes that holidays are public events.<sup>28</sup> Parsons argued, paraphrasing Durkheim, that as long as there is a common acknowledgment of devotion to the larger society, holiday celebrations retain their societal binding impact whether they take place in public or private settings, such as homes. This implies that, regardless of where a holiday is celebrated, its unifying purpose is maintained by common societal ideals.<sup>29</sup>

Holidays are defined as days on which custom, or the law dictates a halting of general business activity to commemorate or celebrate a particular event<sup>30</sup>. Durkheim's thesis about communal holiday celebrations promoting social cohesion is supported by historical evidence from preliterate tribes as well as preindustrial Western civilizations. Specifically, Durkheim's position was reinforced by the widespread practice of celebrating holidays in public settings in rural America throughout the 18th century, where communities were smaller and society was more homogeneous.<sup>31</sup>

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<sup>26</sup> Durkheim, E., & Swain, J. W. (2008). "The elementary forms of the religious life", Courier Corporation, 2008.

<sup>27</sup> Birrell, S. (1981). Sport as Ritual: Interpretations from Durkheim to Goffman. *Social Forces*, 60(2), 354–376.

<sup>28</sup> Durkheim, E., & Swain, J. W. (2008). "*The elementary forms of the religious life*", Courier Corporation, 2008

<sup>29</sup> Parsons, Talcott, "*The Structure of Social Action, Glencoe, Illinois*": The Free Press, 1937.

<sup>30</sup> American Heritage Dictionary of the English Language-3rd edition. 1996. Boston: Houghton Mifflin Company.

<sup>31</sup> Amitai Etzioni "Toward a Theory of Public Ritual," *Sociological Theory*, Vol. 18, No. 1 (March 2000), pp. 40-59.

Instead of treating societies and their traditions as the result of conscious societal development, Durkheim frequently considered them as given or as changing under the influence of historical and social circumstances.<sup>32</sup> Contrarily, the ways in which holidays are observed whether they have a nationalist, militaristic, or religious focus, whether they emphasise conspicuous consumption and merchandising or volunteerism, whether they are held in private homes or in public places, etc. provide relatively telescopic and thus economic global indicators.<sup>33</sup>

Diwali is a major festival celebrated worldwide, marked by family gatherings, gift exchanges, and religious ceremonies. From a Durkheimian perspective, Diwali acts as a ritual that enhances social solidarity and community cohesion. It also allows individuals to express their cultural identity and connect with their heritage. Durkheim's theory suggests that rituals like Diwali develop a collective consciousness, fostering shared values that are essential for social order. The absence of such rituals could lead to societal fragmentation and discontent. Therefore, the cultural and social benefits of recognizing Diwali as a public holiday should be carefully weighed against any practical limitations.

### **1.8 Literature Review**

In Kenya, the discussion about declaring Diwali a public holiday, in alignment with Article 32 of the Constitution which safeguards freedom of conscience and religion has gained attention. Although no specific scholars have directly addressed this topic, various entities and individuals have pushed for this recognition. Notably, in 2017, the Kenya Hindu Council petitioned the government to acknowledge Diwali as a public holiday, emphasizing its importance to Kenya's Indian community and advocating for national inclusivity and diversity.<sup>34</sup>

#### **1.8.1 Discussions on Diwali and its Origins.**

Diwali draws back its origins from the Hindu Religion. Hinduism is one of the oldest and most diverse religions in the world. It is a complex religion that encompasses a wide range of beliefs, practices, and traditions. Swami Vivekananda was a prominent Indian philosopher, monk, and

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<sup>32</sup> Durkheim, E., & Swain, J. W. (2008). "*The elementary forms of the religious life*", Courier Corporation, 2008

<sup>33</sup> Amitai Etzioni "Toward a Theory of Public Ritual," *Sociological Theory*, Vol. 18, No. 1 (March 2000), pp. 40-59.

<sup>34</sup> <https://www.the-star.co.ke/news/2022-10-24-we-hope-diwali-will-be-a-public-holiday-in-future-hindu-council/>

teacher who played a key role in the revival of Hinduism in the late 19th century. According to him, Hinduism is a dynamic and inclusive spiritual tradition that embraces a wide range of philosophical, religious, and cultural practices.<sup>35</sup>

According to Campbell the festival of Diwali is one aspect of Hinduism that is shared across the majority of its variants.<sup>36</sup> No matter which branch of Hinduism a person belongs to, this holiday is the most generally recognised and celebrated, even if how it is observed may vary depending on where in India or the world you live.

As Salamone asserts, Diwali is a festival of lights that occurs at the end of the Hindu month of *Ashwayuja* (*the seventh month in the Hindu Calendar*), which would be somewhere between October and November on our calendar.<sup>37</sup> Diwali is observed over the course of five to six days. Oil lamps are lit during the period along the streets, outside of people's places of employment, and in and around their houses. One reason to do this is to invite Lakshmi, the goddess of wealth and prosperity, into their residences and places of work, for example.<sup>38</sup> Salamone, notes this as it grants them good fortune for the year to come.<sup>39</sup>

Campbell identifies various reasons how Diwali is important to the Hindus; he says that the Ramayana epic, which is one of the main legends on which Diwali is based, is another explanation for this. Ramayana is a literature that tells the story of Lord Rama (incarnation of Lord Vishnu) where after spending 14 years in exile, Rama, Sita, Lakshman, and Hanuman returned to Ayodhya (a city in India) on Diwali when Rama's army of good, destroyed Ravana's army of evil. The people lined the streets with oil lamps to welcome them back to the kingdom, and Rama ruled as its monarch for a considerable amount of time. He served as an example of how to walk the Dharma path by living it.<sup>40</sup> The darkness of ignorance is dispelled by this inner light, which also causes a person to become aware of their true essence, which is ultimate

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<sup>35</sup> Swami Vivekananda, "*Essentials of Hinduism*", Advaita Ashrama, India, 1944

<sup>36</sup> Campbell, Mason, "*Diwali and Its Origins*" (2022). Scholars Day Conference. 8

<sup>37</sup> Frank A. Salamone, *Encyclopedia of Religious Rites, Rituals, and Festivals* (Routledge, 2004), 112.

<sup>38</sup> Campbell, Mason, "*Diwali and Its Origins*" (2022). Scholars Day Conference. 8

<sup>39</sup> Frank A. Salamone, *Encyclopedia of Religious Rites, Rituals, and Festivals* (Routledge, 2004), 112.

<sup>40</sup> 4 Subba Rao, *Valmiki's Ramayana* (Amar Chitra Katha, 1975).

reality. This is a fundamental principle of Hinduism, and Diwali draws particular attention to it by emphasising themes like light and darkness, good and evil.<sup>41</sup>

However, according to J.S. Grewal, a scholar of Sikhism and Sikh history, Diwali in the Sikh tradition is older than the sixth Guru Hargobind legend.<sup>42</sup> Sikhs celebrate the Diwali festival as “*Bandi Chhor Divas*” in remembrance of the release of Guru Hargobind from the Gwalior Fort prison by the Mughal emperor, Jahangir, and the day he arrived at the Golden Temple in Amritsar.

Whereas, according to Anne Valley, Mahavira Jayanti and Diwali are joyous occasions that mark the birth and final release of the Jina Mahavira, celebrated with music, dance, and communal eating by the Jain community.<sup>43</sup> Within Jainism, Diwali marks the anniversary of Lord Mahavir achieving *moksha* (signifying liberation from the cycle of reincarnation) in the year 527 B.C.E. (Before the Christian Era) Lord Mahavir, revered as the 24th and final *Thirtankar* (righteous path) of Jainism, played an important role in revitalizing the religion, shaping it into the form we recognize today.<sup>44</sup>

These scholars have different views because the religious significance of Diwali varies regionally, and they have studied the significance of Diwali to a specific faith. Although for each faith it marks different historical events and stories, nonetheless the festival represents the same symbolic victory of light over darkness, knowledge over ignorance, and good over evil.

### **1.8.2 Discussions on Risks of Discretionary Powers**

Effective government requires discretionary power because few things can be accomplished by simply passing Acts of Parliament. There are much too many small-scale issues and things that can't be decided in advance.<sup>45</sup> Some scholars argue that discretionary powers are necessary for effective governance, as they allow officials to make decisions that are tailored to the specific circumstances of each case. This view emphasizes the importance of flexibility and responsiveness in public administration.

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<sup>41</sup> Campbell, Mason, "*Diwali and Its Origins*" (2022). Scholars Day Conference. 8

<sup>42</sup> J.S Grewal, “The Char Bagh-i Panjab: Socio-Cultural Configuration”,

<sup>43</sup> Vallely, A. (2020). Jainism. In: Yaden, D.B., Zhao, Y., Peng, K., Newberg, A.B. (eds) *Rituals and Practices in World Religions. Religion, Spirituality and Health: A Social Scientific Approach*, vol 5. Springer, Cham.

<sup>44</sup> Nikhil Bumb, “A Jain Perspective on Diwali”, 26<sup>th</sup> December 2011

<sup>45</sup> Wade W, Forsyth C. *Administrative law*, 10th edn. Oxford, UK: Oxford University Press, 2014

Galligan contends that discretionary powers are vital in any system of government, that there are sound reasons for having discretion, and that discretionary powers are not always or usually arbitrary and outside the law.<sup>46</sup> According to Galligan, formal rational authority gives way to substantive rational authority, in which individual actions are more closely related to the intended goals, resulting in more discretion.<sup>47</sup> He further says that, in turn, this process weakens the conventional private law paradigm of legal authority, which is founded on a clear separation of powers between the legislature, the administration, and the judiciary.<sup>48</sup> In contrast, the public law model envisions a greater degree of autonomy in the administrative authority to whom discretionary powers are assigned, and the function of the courts in regard to an administrative agency is less well defined.

In the views of Maurer, the issue of ambiguous legal ideas is closely related to the question of administrative discretion.<sup>49</sup> He reasons that this is because, in both situations, the authority assesses the situation (circumstances, facts, etc.) and makes the ultimate judgement. He points out that the difference is that while discretion is on the side of the rule's legal consequences "discretion on legal consequences", "discretion on action", and "discretion on the choice of one of the options", vague legal concepts are on the side of legal structure, which necessitates the use of appropriate legal interpretation methods to determine the essence (content) of such concepts.<sup>50</sup>

However, other scholars are more sceptical of discretionary powers, arguing that they can lead to arbitrary or unfair decision-making, especially if officials are not held accountable for their actions. This view emphasizes the importance of transparency, accountability, and procedural safeguards to prevent abuses of discretion. Dworkin claimed that philosophical theories on

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<sup>46</sup> Galligan, D. J., 'Senses of Discretion', *Discretionary Powers: A Legal Study of Official Discretion*, Clarendon Paperbacks (Oxford, 1990; online edn, Oxford Academic, 22 Mar. 2012),

<sup>47</sup>Galligan, D. J., 'Senses of Discretion', *Discretionary Powers: A Legal Study of Official Discretion*, Clarendon Paperbacks (Oxford, 1990; online edn, Oxford Academic, 22 Mar. 2012),

<sup>48</sup> D. J. Galligan, Allan, T. (1987). *Discretionary Powers: A Legal Study of Official Discretion*, Oxford: Clarendon Press. 1986, *The Cambridge Law Journal*, 46(3)

<sup>49</sup> Maurer H. *Allgemeines Verwaltungsrecht*. Verlag C.H. Beck, München, 2011, S. 151.

<sup>50</sup> Maurer H. *Allgemeines Verwaltungsrecht*. Verlag C.H. Beck, München, 2011, S. 151.

discretion of judges were dangerous, not only because they were wrong, but they also undermined the important faith the layman has in the objectivity of judicial reasoning.<sup>51</sup>

Overall, the debate over discretionary powers reflects broader tensions between the need for effective governance and the need to protect individual rights and freedoms. Different scholars may place different weights on these competing values, leading to varying views on the appropriate use and regulation of discretionary powers.

### **1.8.3 Discussions On The Right To Freedom Of Religion, Conscience And Belief as a Human Right.**

The sanctity with which religion or belief is held is a big part of why "freedom of religion" is recognised as a legal right. Philosopher Martha Nussbaum describes it as "To be able to search for an understanding of the ultimate meaning of existence in one's own manner is among the most fundamental features of really human life."<sup>52</sup> One of the most common ways this has been done historically is through religious belief and practise; burdening these activities so inhibits many people's pursuit for the ultimate good".<sup>53</sup>

The 2010 Constitution protects people's freedom of religion, conscience, and belief<sup>54</sup>. Every person is entitled to the freedom of conscience, religion, thinking, belief, and opinion, as well as the freedom to "manifest any religion or belief by worship, practise, teaching or observance," according to Article 32.<sup>55</sup> Every person is likewise protected by Article 32 from being denied entry to a facility, employment, or institution on the grounds of belief or religion. This has led to discussions around the provision and the interpretation of the Article.

Eisgruber and Sager's approach might be a suitable beginning point for the much-needed conversation about how to ensure that each individual's freedom of religion or belief is safeguarded in the long run, as well as how to build new indexes to assess limitations.<sup>56</sup> According to them, freedom of religion would have emphasized the importance of being aware

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<sup>51</sup> Dworkin, R. (1963). Judicial Discretion. *The Journal of Philosophy*, 60(21), 624–638.

<sup>52</sup> Nussbaum, Martha C. 2001. *Women and Human Development: The Capabilities Approach*. 1st ed. New York: Cambridge University Press.

<sup>53</sup> Nussbaum, Martha C. 2001. *Women and Human Development: The Capabilities Approach*. 1st ed. New York: Cambridge University Press.

<sup>54</sup> Article 32, Constitution of Kenya (2010)

<sup>55</sup> Article 32, Constitution of Kenya (2010)

<sup>56</sup> See Eisgruber/Sager, *Religious Freedom and the Constitution*, p. 104.

that religious as well as non-religious commitments can be compelling in a way that people would rather die than compromise them.

According to Alvin Attalo, Article 32(4) of the Kenyan Constitution stipulates that one cannot be compelled to act against their personal belief or religion.<sup>57</sup> The Constitution acknowledges that personal thoughts and feelings are private and cannot be violated by external forces. He further argues that Article 2(6) of the Kenyan Constitution recognises Kenya's obligations under international law with regard to treaties.<sup>58</sup>

Many researchers and activists believe that without respecting religious or philosophical freedoms, the concept of human rights remains an illusion. Manfred Nowak's view that freedom of religion or belief is a "particularly contentious right" highlights the complexity of this issue.<sup>59</sup> This right is often obscured by identity politics and political partisanship, especially within groups defending specific religious interests. This partisanship can even affect international organizations tasked with protecting human rights, leading to debates and decisions that may compromise the ethical principles intended to universally promote religious freedom.

Moreover, according to Heiner Bielefeldt, official policies that prioritise interreligious concord may jeopardise the rights of dissenters, converts, critics, or those who are thought to be disrupting a state-imposed communal harmony.<sup>60</sup> Furthermore, although some international organisations undertake long-term policies to preserve faiths' reputations from "blasphemous" criticism, certain advocates of anti-religious worldviews would prefer to purge the public realm of all visible religious symbols. In this environment, the relationship between religious freedom and political secularism continues to elicit fierce debate.

In conclusion, discussions around the right to freedom of religion are important to promote understanding, tolerance, and respect for different religious beliefs and practices. It is a fundamental human right that should be protected and upheld in all societies.

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<sup>57</sup> Alvin Attalo "The Devil's in the dictum: the Kenyan Court of Appeal wishes away inviolability of the right to hold a religious belief" (OxHRH Blog, 5 July 2017)

<sup>58</sup> Article 2(6), Constitution of Kenya (2010)

<sup>59</sup> See Manfred Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary 408, (2<sup>nd</sup> ed. 2005)

<sup>60</sup> Bielefeldt, Heiner. "Misperceptions of Freedom of Religion or Belief." 2013

## **Contribution**

The study on recognizing Diwali as a public holiday in Kenya investigates the relationship between Article 32 of the Kenyan Constitution, which ensures religious freedom, and the discretionary powers of public officials. It builds upon previous research highlighting how these powers can impact fundamental rights, emphasizing the need for transparency to avoid constitutional violations. The case of Diwali serves as a focused example, offering insights into the broader practices of governance and legal interpretation in Kenya, particularly in the context of religious holidays.

The research also explores the interpretation of Article 32, detailing its role in supporting or limiting religious freedom alongside other constitutional rights like equality and non-discrimination. This helps define the interactions between various constitutional rights, enriching the understanding of religious freedom within Kenya's legal structure.

Overall, this examination into the potential declaration of Diwali as a public holiday is crucial for enhancing discussions on constitutional interpretation and the use of discretionary powers in Kenya. It provides key case studies that illustrate the effects of such decisions on religious freedom, fundamental rights, and social cohesion, contributing to the development of a more inclusive and equitable society.

## **1.9 Methodology**

To assess the recognition of Diwali as a public holiday in Kenya, a doctrinal methodology will be applied, examining Article 32 of the Kenyan Constitution which safeguards the freedom of religion. This approach will involve a detailed review of the legal provisions of Article 32, comparison with the criteria for other religious holidays in Kenya, and the analysis of how courts have interpreted these rights.

This study conducts a thorough review of literature regarding the recognition of religious holidays and freedom of religion in Kenya, focusing on Article 32 of the Kenyan Constitution. It includes a legal analysis to understand the scope and limitations of recognizing religious holidays like Diwali, comparing it with already recognized holidays such as Christmas and Easter. The study also examines the demographics of the Kenyan Hindu community, the economic and social benefits of recognizing Diwali, and promotes cultural diversity and religious tolerance. Based on these findings, it offers policy recommendations to lawmakers for the inclusion of Diwali as a public holiday.

However, the study faces challenges due to the scarcity of local legal cases specific to Diwali and potential biases in traditional legal interpretations. Improvements could include incorporating empirical data on public opinion and engaging with a diverse range of stakeholders. Staying updated with recent legal developments is also advised to ensure the study's relevance and accuracy. This approach aims to create a well-supported case for Diwali's recognition, aligning with Kenya's legal and cultural framework.

### **1.10 Chapter Breakdown**

Chapter one forms the foundation of this study. It details, among others, the research objectives, conceptual framework, and the justification of the study and thus sets the foundation for the subsequent chapters.

Chapter two examines the historical and cultural significance of Diwali; it delves into the religious significance of Diwali, including its roots in Hindu mythology and its relevance to contemporary Hindu beliefs and practices. It also explores how other religions and faiths in Kenya perceive Diwali and how they relate to it.

Chapter three examines the risks associated with the discretionary powers of public officials, which, while essential for flexible governance, also present potential issues such as arbitrariness, bias, and abuse of power. The chapter explores these inherent risks and discusses strategies to mitigate them, emphasizing the importance of effective oversight, accountability mechanisms, and clear legal standards and procedures to ensure fair and effective use of discretionary powers.

Chapter four delves into the interpretation of Article 32 of the Kenyan Constitution, which guarantees freedoms related to conscience, religion, thought, belief, and opinion. The chapter discusses the varying interpretations and debates among legal scholars and practitioners regarding this article's scope and its impact on fundamental rights in Kenya. It assesses how limitations and judicial roles affect the enforcement of these rights and specifically explores whether recognizing Diwali as a public holiday aligns with the protections offered by Article 32.

Chapter five offers recommendations on how Article 32 of the constitution of Kenya can be interpreted and how the proper use of discretionary powers could pave the way for Diwali to become a public holiday, giving the Hindus of Kenya the opportunity to celebrate the important festival.

## CHAPTER 2

### UNVEILING THE HISTORICAL AND CULTURAL SIGNIFICANCE OF DIWALI

#### 2.1 Introduction

This section explores the origins and essence of Diwali, highlighting it as a significant cultural and historical celebration. It reviews the evolving traditions and practices that make Diwali unique. This discussion emphasizes Diwali's importance and supports its recognition as a public holiday in Kenya, aligning with Article 32 of the Constitution, which promotes diversity and unity.

#### 2.2. Historical Evolution Of Diwali

Diwali, also known as Deepavali, is a festival with deep historical roots that extend into ancient cultural contexts. Its origins can be traced back to various mythological and historical narratives embedded in Hindu traditions. One of the earliest references to Diwali can be found in the ancient Sanskrit epic, the Ramayana.<sup>61</sup> The narrative of Lord Rama's return to Ayodhya after defeating the demon king Ravana is often cited as the historical basis for the celebration of Diwali.<sup>62</sup> The lighting of lamps or *divas* during Diwali symbolizes the triumph of light over darkness, reflecting the joyous return of Lord Rama.

Over the course of time, Diwali, the festival of lights, has experienced significant transformations in its observance. While the fundamental essence of the celebration remains unaltered, the customs and traditions associated with Diwali have evolved, reflecting the dynamism of cultural practices.

In its early origins, Diwali was predominantly a religious festival observed within the sanctity of homes and temples. The rituals included fervent prayers, intricate ceremonies, and the illumination of oil lamps, symbolizing the victory of light over darkness.<sup>63</sup> The atmosphere was imbued with a sense of spiritual reflection, emphasizing the divine significance of the festival.

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<sup>61</sup> *The Ramayana*, *The Ramayana is an all-popular epic in South and Southeast Asia. It is the story of King Rama who must save his kidnapped wife, Sita. Ascribed to the sage Valmiki, this Sanskrit masterpiece, dating back to around 200 B.C.E., imparts valuable Hindu life lessons throughout Rama's journey*, adapted from “*Ramayana: an Introduction to the Great Indian Epic*” <https://asiasociety.org/education/ramayana> 3/12/2023

<sup>62</sup> Vasudha Narayanan; Deborah Heiligman; “*Celebrate Diwali*” (2008)

<sup>63</sup> Vasudha Narayanan; Deborah Heiligman; “*Celebrate Diwali*” (2008)

Over the centuries, Diwali underwent a process of evolution that mirrored the changing socio-cultural dynamics of the Indian subcontinent. Initially, Diwali was primarily a Hindu festival, but its celebration expanded beyond religious boundaries. The festival became a unifying force, fostering a sense of community and shared joy among people of various backgrounds. The exchange of sweets, lighting of fireworks, and the decoration of homes with vibrant colours became integral components of Diwali celebrations, transcending religious affiliations.

The advent of the Mughal era (1526 – 1761)<sup>64</sup> and later colonial influences further influenced the evolution of Diwali. During the Mughal period, Diwali gained additional elements of grandeur and festivity, with elaborate decorations, processions, and cultural performances.<sup>65</sup> In the colonial era, Diwali transformed into a more public and communal celebration, with people from diverse communities participating in the festivities. The secularization of Diwali allowed it to become a pan-Indian festival, celebrated by people of various faiths and cultural backgrounds.<sup>66</sup>

Illustratively, Sikhs commemorate the liberation of the 6th *Guru*<sup>67</sup>, Guru Hargobind, from imprisonment in 1619. Jains observe Diwali as the day when Lord Mahavira attained Nirvana, while Buddhists recognize it as the moment when the Hindu emperor Ashoka converted to Buddhism.<sup>68</sup> In Kenya, under the Hindu Marriage Act, Sikhs and Jains are identified as Hindus under the definition of Hindu.<sup>69</sup>

Muslims in South Asia have a centuries-old tradition of celebrating Diwali, dating back to the era of the Mughal ruler Akbar the Great (1556-1605).<sup>70</sup> Over time, Diwali evolved into a grand public festival, with iconic mosques such as the *Haji Ali Dargah* in Mumbai and the grand

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<sup>64</sup> <https://www.britannica.com/place/India/The-Mughal-Empire-1526-1761> accessed on January 10, 2024

<sup>65</sup> Scott McLaughlan, "What Is the History and Significance of Diwali?", November 11, 2023

<sup>66</sup> Scott McLaughlan, "What Is the History and Significance of Diwali?", November 11, 2023

<sup>67</sup> **Guru** - in Sikhism, any of the first 10 leaders of the Sikh religion of northern India. The Punjabi word *sikh* ("learner") is related to the Sanskrit *shishya* ("disciple"), and all Sikhs are disciples of the Guru (spiritual guide, or teacher). Britannica, The Editors of Encyclopaedia. "Guru". *Encyclopedia Britannica*, 19 Dec. 2023, <https://www.britannica.com/topic/Guru-Sikhism>. Accessed 1 January 2024.

<sup>68</sup> Scott McLaughlan, *What Is the History and Significance of Diwali?*, November 11, 2023

<sup>69</sup> Section 2, The Hindu Marriage and Divorce Act, 2012, Laws of Kenya

<sup>70</sup> Scott McLaughlan, *What Is the History and Significance of Diwali?*, November 11, 2023

*Hazrat Nizammudin Dargah* (Mosque) in New Delhi illuminating in celebration of Diwali today.

In summary, the evolution of Diwali is a fascinating journey that spans millennia, intertwining religious, cultural, and historical dimensions. The festival's ability to adapt and incorporate diverse elements has contributed to its enduring significance and widespread celebration across different communities and regions.

### 2.2.1 Ancient roots and Vedic Origins

Diwali, with its roots deeply embedded in ancient Indian traditions, began as a harvest festival, marking the culmination of the agricultural season. The harvest season was celebrated by farmers as Diwali years ago between the months of October and November.<sup>71</sup> The festival's association with light, symbolizing the victory of good over evil, can be traced back to Vedic texts, where it was linked to the worship of various deities.

Diwali's association with the epic Ramayana is one of the most prominent aspects of its mythological connection.<sup>72</sup> The central narrative involves Lord Rama, an incarnation of the divine, returning to his kingdom of Ayodhya after defeating the demon king Ravana. The people of Ayodhya, overjoyed by Rama's return, celebrated by lighting rows of lamps or *divas*<sup>73</sup> to welcome him. This symbolic triumph of light over darkness is the essence of Diwali, emphasizing the victory of righteousness over evil. The Ramayana, therefore, serves as a foundational text that not only narrates the historical context of Diwali but also establishes its deep spiritual and moral underpinnings.<sup>74</sup>

Another significant mythological narrative associated with Diwali is found in the *Bhagavata Purana*<sup>75</sup>, a revered Hindu scripture. This narrative revolves around Lord Krishna's defeat of

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<sup>71</sup> <https://www.diwalifestival.org/diwali-as-harvest-festival.html>

<sup>72</sup> 4 Subba Rao, Valmiki's Ramayana (Amar Chitra Katha, 1975).

<sup>73</sup> *Diya* - is an oil lamp made from clay or mud with a cotton wick dipped in oil or ghee. These lamps are commonly used in the Indian subcontinent and they hold sacred prominence in Hindu, Sikh, Buddhist, and Jain prayers as well as religious rituals, ceremonies and festivals including Diwali.

[https://en.wikipedia.org/wiki/Diya\\_\(lamp\)](https://en.wikipedia.org/wiki/Diya_(lamp)) Accessed 1 January 2024

<sup>74</sup> Subba Rao, "Valmiki's Ramayana" (Amar Chitra Katha, 1975).

<sup>75</sup> *Bhagavat Purana* - Sanskrit: "Ancient Stories of God [Vishnu]" the most-celebrated text of a variety of Hindu sacred literature in Sanskrit is known as the Purana and the specific text that is held sacred by

the demon *Narakasura*<sup>76</sup>, who had unleashed tyranny and darkness upon the world.<sup>77</sup> Krishna's victory is celebrated with immense joy with people lighting lamps to dispel the darkness and usher in a new era of light and righteousness. The connection between Diwali and the triumph of good over evil is once again emphasized in this mythological context.<sup>78</sup>

The significance of these mythological narratives extends beyond mere storytelling; they serve as moral and spiritual guides for millions of Hindus worldwide. Diwali becomes a time for reflection on the values of righteousness, compassion, and the eternal battle between light and darkness. The symbolism embedded in these stories transforms Diwali into a deeply meaningful and spiritually charged festival for those who observe it. The narratives not only recount historical events but also convey timeless lessons that continue to resonate with individuals celebrating Diwali, fostering a sense of cultural identity and a commitment to virtuous living.

### 2.3 The Religious Essence Of Diwali

The religious essence of Diwali is deeply ingrained in a myriad of rituals and traditions that are passed down through generations, creating a cultural and spiritual multitude that defines the celebration. An in-depth analysis of traditional Diwali customs and practices unveils a fascinating array of rituals, each laden with symbolic significance and religious connotations.

#### 2.3.1 Rituals and Traditions

At the heart of Diwali celebrations is the tradition of cleaning and decorating homes. The meticulous cleaning symbolizes the removal of impurities, both physical and spiritual, preparing the space for the arrival of divine blessings. Homes are adorned with vibrant *rangoli*<sup>79</sup> (decorative patterns made with coloured powders), *diyas* (oil lamps), and bright

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the Bhagavata sect. *Encyclopedia Britannica*, 19 Oct. 2023, <https://www.britannica.com/topic/Bhagavata-purana>. Accessed 1 January 2024.

<sup>76</sup> *Narakasura* – a demonic being, adapted from: Scott McLaughlan, *What Is the History and Significance of Diwali?*, November 11, 2023

<sup>77</sup> Veda Vyasa composes the Bhagavata Purana, in eighteen thousand *slokas* (verses) and twelve *kandas* (books). He teaches it to his illumined son Suka, who narrates the Secret Purana to Yudhishtira's heir, King Parikshit, on the banks of the Ganga. *Britannica*, The Editors of Encyclopaedia. "Bhagavata-purana". *Encyclopedia Britannica*, 19 Oct. 2023, <https://www.britannica.com/topic/Bhagavata-purana>. Accessed 1 January 2024.

<sup>78</sup> Scott McLaughlan, *What Is the History and Significance of Diwali?*, November 11, 2023

<sup>79</sup> Sarah Cobb Spradlin; "Rangoli – making Art for purpose" - *Rangoli* is an art form used by Hindus. It is a type of decoration drawn on the ground or sidewalk in front of a house. Rangoli has a purpose; it is used to

decorations, transforming the surroundings into a visual spectacle. This ritual signifies the invitation of prosperity and light into one's life.

The lighting of *diyas* is a central and symbolic ritual during Diwali. Beyond its aesthetic appeal, the lighting represents the victory of light over darkness, goodness over evil. Devotees believe that the illuminated lamps attract positive energy and divine blessings. Temples, homes, and public spaces are illuminated with an array of lights, creating a collective effulgence that mirrors the spiritual illumination sought during the festival.

Religious rituals observed during Diwali extend beyond lighting lamps. Puja<sup>80</sup>, or worship, plays an important role. Devotees gather to offer prayers to specific deities, with Lord Ganesha and Goddess Lakshmi being central figures. The worship of Lord Ganesha precedes all Diwali festivities, symbolizing the removal of obstacles and the beginning of new ventures. Goddess Lakshmi, the goddess of wealth and prosperity, is revered through elaborate ceremonies, seeking her blessings for abundance and well-being.

Furthermore, the exchange of sweets and gifts among family and friends is not just a social custom but holds religious significance. It symbolizes the sharing of joy and prosperity and fosters a sense of unity and goodwill within the community. An in-depth analysis of traditional Diwali customs and practices reveals that the festival extends beyond a single day, unfolding over a five-day period with each day holding profound significance and religious connotations.

The festivities commence with *Dhanteras*<sup>81</sup>, the first day of Diwali. This day is dedicated to the worship of Lord Dhanvantari, the god of health, and marks the beginning of wealth-related activities. It is common for people to purchase gold, silver, and utensils on this day, symbolizing the ushering in of prosperity and well-being.

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“enlighten” or to welcome Hindu gods to the household. Mothers in India do this activity every morning and teach rangoli to their daughters.

<sup>80</sup> Puja - in Hinduism, ceremonial worship, ranging from brief daily rites in the home to elaborate temple rituals. Britannica, The Editors of Encyclopaedia. "puja". Encyclopedia Britannica, 27 Oct. 2023, <https://www.britannica.com/topic/puja>. Accessed 2 January 2024.

<sup>81</sup> *Dhanteras* - The term "Dhan" signifies wealth, and "Teras" denotes the thirteenth day. In summary, Dhanteras is recognized as the day falling on the thirteenth lunar day of the Dark Fortnight in the Vikram Samvat Hindu Calendar month of Ashwin, specifically associated with the celebration of wealth, Adapted from “All About Dhanteras” <https://www.fnp.com/article/dhanteras> accessed on 3 January, 2023

The second day, *Naraka Chaturdashi*, *Kaali Chaudas* or *Choti Diwali*, commemorates the defeat of the demon Narakasura by Lord Krishna. The second day of Diwali is known as *Naraka Chaturdashi*, during which it is believed that Lord Krishna triumphed over the demon *Narakasura*.<sup>82</sup> Legend has it that *Narakasura*, a powerful and ambitious human, aimed to dominate the entire world, successfully overpowering numerous earthly realms. His strength was so overwhelming that even gods retreated from his advance.

Lord Krishna, along with his wife Satyabhama, confronted *Narakasura*. Despite *Narakasura's* efforts to overwhelm Krishna with his forces, they were all vanquished. In the end, Satyabhama dispatched *Narakasura* with an arrow, securing victory for Lord Krishna. The celebration of *Krishna's* return was marked by jubilation, and to purify themselves from the battle's residue, both *Krishna* and *Satyabhama* partook in an oil bath. This act founded the tradition of taking an oil bath on the second day of Diwali.<sup>83</sup>

On *Naraka Chaturdashi*, it is thought that undergoing an oil bath before sunrise (while the stars are still visible) holds the same sacred significance as bathing in the Ganges River.<sup>84</sup> The oil bath, deeply significant in their cultural reverence for the Ganges, is a paramount tradition of Diwali on this day. Furthermore, *Naraka Chaturdashi* is marked by a special puja, where offerings are made to Lord Krishna or Lord Vishnu, symbolizing the celebration of Krishna's victory over *Narakasura*.<sup>85</sup>

The third day is the main Diwali celebration, also known as *Deepavali* or *Lakshmi Puja*. This day is dedicated to the worship of Goddess Lakshmi, the goddess of wealth and prosperity. Elaborate rituals, including the *Lakshmi Puja*, are conducted, and homes are adorned with lamps and rangoli to welcome the goddess. The exchange of gifts and sweets further enhances the festive spirit.

When the lamps are kindled on this occasion, it is a gesture to invite prosperity and well-being into the homes of Lord Lakshmi's worshippers. As narrated in one of the earlier Vedics,

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<sup>82</sup> Campbell, Mason, "*Diwali and Its Origins*" (2022). Scholars Day Conference. 8

<sup>83</sup> Reeja Radhakrishnan, "Narakasura Diwali Story", New Indian Express.

<sup>84</sup> Hindu Holy Days: Diwali, Holi, Vijayadashami, Maha Shivaratri, Lakshmi Puja, Ayya Vaikunda Avataram, Krishna Janmashtami, Akshaya Tritiya. Books LLC, 2010.

<sup>85</sup> Hindu Holy Days: Diwali, Holi, Vijayadashami, Maha Shivaratri, Lakshmi Puja, Ayya Vaikunda Avataram, Krishna Janmashtami, Akshaya Tritiya. Books LLC, 2010.

Lakshmi emerged from the churning of the ocean and was revered as a beautiful goddess bestowing blessings upon all she encounters. Although Lakshmi remains a central figure throughout Diwali, she is accorded special significance on this particular day.<sup>86</sup> Another customary practice observed on this occasion involves the percussion of drums and the ignition of firecrackers to generate a cacophony. This uproar is intended to ward off Alakshmi, the counterpart of Lakshmi.<sup>87</sup> The reason for this is that *Alakshmi*, often considered the goddess of misfortune and poverty, is believed to be repelled by noise and chaos. Therefore, the recognition of Diwali as a public holiday suggests an appreciation and respect for cultural customs. It shall signifies an acknowledgment of its meaningful traditions, emphasizing that they are an integral part of the cultural identity. By taking this step, it ensures that everyone in Kenya has the opportunity to enjoy and understand the unique traditions that contribute to the diversity and richness of the country.

The manner in which the fourth day of Diwali is celebrated, varies based on the region in India. In the northern states, it is observed as ***Govardhan Puja***, marking the day when Krishna triumphed over Lord *Indra* (the God of rain and storms in Hinduism) by lifting the *Govardhana* hill. Meanwhile, in southern India, this day is known as *Bali Pratipada*, commemorating the victory of Vamana over the demon king Bali. To attain a thorough understanding of the importance of this day, we shall delve into the narratives of both the northern and southern Indian traditions.

Following tradition, Krishna convinced cowherds to honour the mountain over Lord *Indra*, angering *Indra* and prompting him to unleash a fierce storm to flood their lands. Lord Krishna countered this by lifting Mount *Govardhana* with one finger to shield the cowherds and their cattle, eventually causing *Indra* to stop the storm.<sup>88</sup> Grateful, the people began worshipping Krishna on Diwali's fourth day, symbolizing his protection with a mound of food representing the mountain and a grass rope ritual for safe future journeys. Additionally, people fashion a

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<sup>86</sup> Jones, Constance A., and James D. Ryan. "Diwali." Encyclopedia of World Religions: Encyclopedia of Hinduism. Facts On File, 2nd edition, 2016.

<sup>87</sup> Hindu Holy Days: Diwali, Holi, Vijayadashami, Maha Shivaratri, Lakshmi Puja, Ayya Vaikunda Avataram, Krishna Janmashtami, Akshaya Tritiya. Books LLC, 2010.

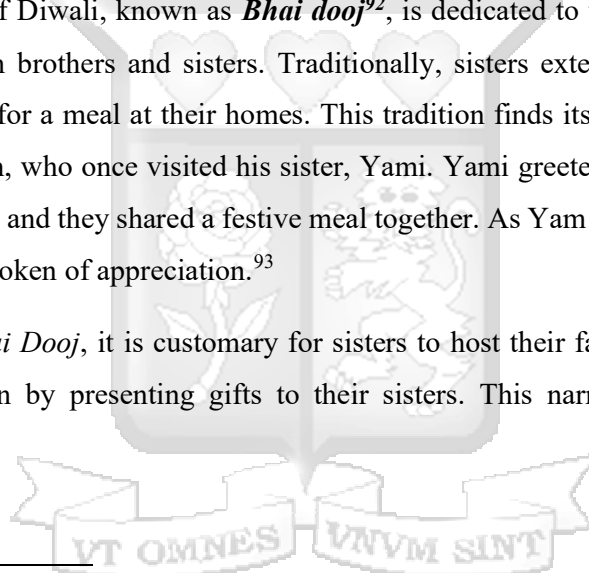
<sup>88</sup> Dimmitt, Cornelia and J.A.B. van Buitenen, "Classical Hindu Mythology", Temple University Press, 1978.

grass rope attached to a tree and a pole, passing underneath it as a ritual to ensure safe journeys in the coming year.<sup>89</sup>

In the western states of India for instance Gujarat, this day is observed as *Annakut*<sup>90</sup> and the new year's eve. It is the first day of the month of *Kartik*<sup>91</sup> and the start of the new year in the Vikrama (Hindu) calendar. In Gujarat, the commencement of the new year aligns with the day following Diwali. According to the Hindu Calendar, this occasion occurs on *Shukla Paksha Pratipada* [The difference of the Moon from the Sun is zero to twelve degrees] in the month of *Kartik*. In the Indian Calendar, which follows the Lunar Cycle, *Kartik* marks the initiation of the year, and in Gujarat, the New Year is celebrated on the first illuminated day of *Kartik*, known as *Ekam* [first date of the Hindu Calendar].

The concluding day of Diwali, known as *Bhai dooj*<sup>92</sup>, is dedicated to the celebration of love and affection between brothers and sisters. Traditionally, sisters extend invitations to their brothers to join them for a meal at their homes. This tradition finds its roots in the legend of Yam, the god of death, who once visited his sister, Yami. Yami greeted him with an Aarti, a ritual of offering light, and they shared a festive meal together. As Yam departed, he presented Yami with a gift as a token of appreciation.<sup>93</sup>

Consequently, on *Bhai Dooj*, it is customary for sisters to host their families, while brothers express their affection by presenting gifts to their sisters. This narrative underscores the



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<sup>89</sup> Jones, Constance A., and James D. Ryan. "Divali." Encyclopedia of World Religions: Encyclopedia of Hinduism. Facts On File, 2nd edition, 2016.

<sup>90</sup> *Annakut* - hundreds of foods, organised in tiers is placed in front of the Lord as an offering. <https://swaminarayan.info/library/festivals/33-annakut#:~:text=The%20significance%20is%20that%20traditionally,the%20Lord%20as%20an%20offering.>

<sup>91</sup> *Kartika* - is the eighth month of the year of the Hindu Calendar <https://isha.sadhguru.org/en/wisdom/article/kartik-month-significance>

<sup>92</sup> Bhai Dooj - Bhaiya Dooj stands out as a significant event that symbolizes the enduring bond between siblings, specifically brothers and sisters. This joyous festival holds great importance as sisters devoutly pray to God for the enduring health, happiness, and prosperity of their beloved brothers. Notably, this occasion follows the two days of the Diwali festival. Adopted from "About Bhai Dooj" <https://www.fnp.com/article/bhai-dooj> accessed on 4 January 2024

<sup>93</sup> Dimmitt, Cornelia and J.A.B, van Buitenen, "Classical Hindu Mythology", Temple University Press, 1978.

significance of familial bonds, emphasizing how Diwali serves as an important time for strengthening both familial and social relationships.<sup>94</sup>

Examining the religious rituals observed during Diwali reveals a deep connection to these five days of celebration. The meticulousness of cleaning and decorating homes, the lighting of *diyas*, the offerings made to deities, and the communal celebrations all contribute to a spiritual ambiance that transcends the material aspects of the festival. Diwali, in its entirety, becomes a holistic journey of purification, devotion, and celebration, reflecting the multifaceted religious essence that defines this auspicious occasion.

### **2.3.2 Diwali's role in modern Hinduism - Adaptations and changes in religious practices over time**

Hinduism, one of the world's oldest religions, demonstrates remarkable adaptability, encompassing a diverse range of traditions, rituals, and philosophies that have evolved over millennia. This pluralistic nature allows for a variety of beliefs and practices under its broad spectrum. Similarly, Diwali celebrations have evolved, adapting to new social norms and contemporary cultures while retaining core elements. This evolution highlights Diwali's ability to seamlessly integrate with the dynamic aspects of modern life, reflecting both the constancy and change inherent in Hindu culture.

#### **Transitioning from Earthen *Diyas* to electric lights**

Diwali, the festival of lights, is celebrated with the lighting of earthen *diyas*, small clay oil lamps that hold deep symbolic meaning. Lighting these *diyas* represents the expulsion of negative forces and the welcoming of positivity. Arranged along windowsills, doors, and rooftops, the flickering flames of the *diyas* spread warmth and happiness, enhancing the beauty of the surroundings and bringing brightness to life by dispelling darkness and negativity. As the gentle flames flicker in unison, they symbolize not only the triumph of light over darkness but also the unity of people in celebrating the values of hope, positivity, and shared joy during the auspicious festival of Diwali.<sup>95</sup>

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<sup>94</sup> Dimmitt, Cornelia and J.A.B, van Buitenen, “Classical Hindu Mythology”, Temple University Press, 1978.

<sup>95</sup> Pujanpujari, “How Diwali Has Evolved Over Time”, November 10, 2023

<https://medium.com/@spuvisubramani/how-has-diwali-evolved-over-time-62ff33db4682#:~:text=Diwali%2C%20the%20festival%20of%20lights%2C%20has%20evolved%20over%20time%2C.and%20the%20renewal%20of%20hope>. Accessed on January 3, 2024.

Diwali celebrations today blend modern and traditional lighting elements, reflecting the festival's adaptability. While electric and LED lights offer ease and safety, adding a vibrant atmosphere, many still cherish the traditional earthen diyas for their cultural significance and warm glow. This mix of old and new highlights Diwali's enduring spirit of light, happiness, and community unity, showcasing its capacity to embrace change while preserving traditions.

### **From use of crackers to promoting environmental consciousness**

For numerous years, the tradition of igniting firecrackers has been closely tied to the jubilant spirit of Diwali, infusing the celebrations with enthusiasm and liveliness. Nonetheless, the increasing awareness of environmental issues and the adverse effects of firecrackers on air quality have prompted a change in people's perspectives.

In the present era, there is a noticeable surge in the adoption of eco-friendly practices during Diwali festivities. Many individuals are now choosing alternatives like sparklers or appreciating the professionally orchestrated brilliance of fireworks displays. This evolving trend underscores a growing collective consciousness regarding environmental responsibility.<sup>96</sup> It reflects a shared aspiration to celebrate the festival in a more sustainable manner, acknowledging the need to mitigate the environmental impact associated with traditional practices.<sup>97</sup>

### **2.4 Conclusion**

The analysis underscores Diwali's cultural significance and its celebration of light over darkness, with its recognition as a public holiday in Kenya reflecting the nation's commitment to diversity and unity under Article 32 of the Constitution. This fosters social cohesion and strengthens Kenya's pluralistic society. The subsequent chapter shifts focus to the discretionary powers of public officials, examining the need for balance between flexibility in governance and the risks of abuse and bias. It explores strategies to ensure accountability, transparency, and fairness in governance, aiming to mitigate risks and enhance public administration.

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<sup>96</sup> Pujanpujari, "How Diwali Has Evolved Over Time", November 10, 2023

<https://medium.com/@spuvisubramani/how-has-diwali-evolved-over-time-62ff33db4682#:~:text=Diwali%2C%20the%20festival%20of%20lights%2C%20has%20evolved%20over%20time%2C,and%20the%20renewal%20of%20hope>. Accessed on January 3, 2024.

<sup>97</sup> Abhijit Vishwajit Nimbalkar, Jayashree Sachin Gothankar, Reshma Sachin Patil, Harshal Tukaram Pandve "Promotion of eco-friendly Diwali: A students' perspective" September 29, 2022

## CHAPTER 3

### EVALUATING THE PERILS OF DISCRETIONARY AUTHORITY IN PUBLIC ADMINISTRATION

#### 3.1 Introduction

Chapter three examines the risks associated with the discretionary powers of public officials. These powers allow officials to make decisions based on their judgment and knowledge, providing flexibility in government operations. However, there is a risk that these powers could be used unfairly, with bias, or abusively. The chapter details these risks thoroughly.

#### 3.2 The Nexus Between Discretionary Powers And Effective Governance

Discretionary powers grant public officials the flexibility to make decisions based on their judgment, playing a crucial role in effective governance. This relationship ensures decisions are precise, fair, and aligned with the common good, by allowing officials to navigate complex situations without being strictly confined to rigid rules.<sup>98</sup> However, this dynamic between discretionary powers and governance is complex, highlighting the importance of balancing discretion with the principles of effective administration.

##### 3.2.1 The importance of discretionary powers

Discretionary powers, as discussed by D. J. Galligan, refers to the legal authority granted to individuals or bodies, allowing them to make decisions within a range of possible responses in various situations.<sup>99</sup> These powers are essential for responsive and adaptive governance, as they permit decision-makers to tailor their actions to the specific needs of a situation.

Administrative law helps make the exercise of power more democratic by ensuring government actions do not overstep their boundaries, acting as a bridge between the vast powers granted by constitutional law and the practical need to prevent misuse. It's key to maintaining a government that respects legal limits and upholds the principle of rule of law, safeguarding

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<sup>98</sup> Galligan, D. J., "Senses of Discretion", *Discretionary Powers: A Legal Study of Official Discretion*, Clarendon Paperbacks (Oxford, 1990; online edn, Oxford Academic, 22 Mar. 2012),

<sup>99</sup> Galligan, D. J., 'Senses of Discretion', *Discretionary Powers: A Legal Study of Official Discretion*, Clarendon Paperbacks (Oxford, 1990; online edn, Oxford Academic, 22 Mar. 2012),

against the potential abuse of discretionary powers granted to public bodies and officials.<sup>100</sup> In the Kenyan context, the Public Holidays Act empowers the Minister with discretionary authority to declare public holidays as deemed appropriate.<sup>101</sup> This power allows for timely and context-specific decision-making, enabling the government to respond to unique circumstances, such as national events, cultural celebrations, or emergencies, reflecting the need for adaptability in governance.

Scenarios where this discretion could be beneficial include situations where quick action is needed, such as declaring a holiday for an unforeseen national event for example public health events or recognising a significant cultural or historical moment specific to Kenya.<sup>102</sup> This flexibility is crucial for governance that is attuned to the country's dynamic socio-cultural landscape. However, it's important to note that the use of discretionary powers also comes with the need for accountability and transparency to prevent misuse or arbitrary decision-making. Balancing authority with responsibility is a key theme in discussions about discretionary powers in governance.<sup>103</sup>

### 3.3 Inherent Risks Of Discretionary Powers

The use of discretionary powers in public affairs has sparked considerable debate, largely due to the personal judgment it involves, which opens the door to potential misuse. Critics, such as Dicey, have long warned that discretion can easily slip into arbitrariness, where decisions are made without clear justification, sometimes based on irrelevant factors.<sup>104</sup> K.C. Davis echoed

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<sup>100</sup> Akech, Migai. "Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?" *Indiana Journal of Global Legal Studies*, JSTOR, <https://doi.org/10.2979/indjglolegstu.18.1.341>. > January 3, 2024.

<sup>101</sup> Section 3, The Public Holidays Act, 2012

<sup>102</sup> Galligan, D. J., 'Senses of Discretion', *Discretionary Powers: A Legal Study of Official Discretion*, Clarendon Paperbacks (Oxford, 1990; online edn, Oxford Academic, 22 Mar. 2012),

<sup>103</sup> Galligan, D. J., 'Senses of Discretion', *Discretionary Powers: A Legal Study of Official Discretion*, Clarendon Paperbacks (Oxford, 1990; online edn, Oxford Academic, 22 Mar. 2012),

<sup>104</sup> A.V. Dicey, *The Law of the Constitution*, London, 1961 edn. p. 188. See also Lord Hewart, *The New Despotism*, London, 1929, ch. iv.

this concern, highlighting how such decisions could lack objective grounding, leading to arbitrary outcomes.<sup>105</sup>

Fairness in decision-making can be understood in three interconnected ways: substantive fairness, which ensures equitable distribution of society's benefits and burdens; procedural fairness, which assesses the fairness of the decision-making processes impacting both private and public interests; and formal fairness, which stresses the importance of consistent treatment in similar cases.<sup>106</sup> Additionally, the concept of guidance is crucial in discussions about discretion. A stable and predictable relationship between the state and its citizens is maintained through clear rules that guide behavior, allowing individuals to anticipate expectations and plan their lives effectively.

Discretion in governance can undermine rule-based stability, leading to unpredictability and risks such as potential abuse, lack of transparency, inconsistency, reduced accountability, and diminished public trust.<sup>107</sup> If not managed well, this flexibility can result in corruption and erode the legitimacy of public administration. Addressing these challenges involves setting clear guidelines, enhancing transparency and accountability, and ensuring consistency in governance to maintain integrity and preserve public trust.<sup>108</sup>

Law drafting often lacks detail, granting broad discretionary powers to officials through terms like "deems fit," "public interest," or "reasonable".<sup>109</sup> This flexibility aids in adapting to various situations but can lead to concerns over fairness, consistency, and misuse. Effective oversight and guidelines are crucial to mitigate these issues. For example, Kenya's Public Holidays Act

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<sup>105</sup> K.C. Davis, "Discretionary Justice", Louisiana, 1969.

See also J.L. Jowell, "The Legal Control of Administrative Discretion", 1973 and D.J. Galligan, "Arbitrariness and Formal Justice in Discretionary Decisions", in: D.J. Galligan (ed.), *Essays in Legal Theory*, Melbourne UP, 1984.

<sup>106</sup> Galligan, D. J., 'Senses of Discretion', *Discretionary Powers: A Legal Study of Official Discretion*, Clarendon Paperbacks (Oxford, 1990; online edn, Oxford Academic, 22 Mar. 2012),

<sup>107</sup> Galligan, D. J., 'Senses of Discretion', *Discretionary Powers: A Legal Study of Official Discretion*, Clarendon Paperbacks (Oxford, 1990; online edn, Oxford Academic, 22 Mar. 2012),

<sup>108</sup> Akech, Migai. "Abuse of Power and Corruption in Kenya: the New Constitution Enhance Government Accountability?" *Indiana Journal of Global Legal Studies, JSTOR*, <https://doi.org/10.2979/indjglolegstu.18.1.341> > January 3, 2024.

<sup>109</sup> Munir, B., Khan, A. N., & Ahmad, N. "Necessity of Discretionary Powers: A Critical Appreciation as a Necessary Evil" *Global Regional Review*, [https://doi.org/10.31703/grr.2020\(V-III\).19](https://doi.org/10.31703/grr.2020(V-III).19) > January 3, 2024.

permits the Cabinet Secretary to declare public holidays as seen fit, demanding transparent criteria to avoid arbitrary decisions and ensure equitable recognition of diverse events.

### 3.3.1 Potential for Arbitrariness and Bias in Decision-Making

Arbitrariness essentially means acting without reason. When government agencies make decisions that defy logic, it is considered wrong.<sup>110</sup> The Public Holidays Act of Kenya embodies a provision granting the Cabinet Secretary discretionary powers<sup>111</sup> This legislative feature is designed to allow the government the flexibility necessary to acknowledge and honour significant national or cultural occasions as they arise. However, this discretionary power, while beneficial in theory, presents complex issues of arbitrariness and bias, especially when it comes to recognising religious holidays.<sup>112</sup> For example, not recognizing Diwali as a public holiday in religiously diverse Kenya highlights this issue, risking the alienation of communities and undermining democratic principles of equality and inclusiveness.

The differential treatment of religious observances under this Act raises important questions about equality and fairness in national recognition. A case in point is the recognition of religious holidays in Kenya, which underscores the concerns surrounding the discretionary power vested in the Cabinet Secretary. For instance, Diwali, a major Hindu festival celebrated by a significant portion of Kenya's population, has not been accorded the status of a public holiday. The declaration of *Idd-ul-Adha*<sup>113</sup> (*Eid al-Adha*) as a public holiday by a Cabinet Secretary exemplifies a positive use of discretionary powers, showcasing how such decisions can foster inclusivity and respect for diversity when conducted under principles of good governance. However, the Cabinet Secretary fails to give a similar treatment to the festival of Diwali for Hindus.

This omission stands in stark contrast to the treatment of *Idd-ul-Adha*, a Muslim festival, which is provided for under Section 2(2) of the Public Holidays Act, was declared a public holiday

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<sup>110</sup> Munir, B., Khan, A. N., & Ahmad, N. "Necessity of Discretionary Powers: A Critical Appreciation as a Necessary Evil." *Global Regional Review*, [https://doi.org/10.31703/grr.2020\(V-III\).19](https://doi.org/10.31703/grr.2020(V-III).19) > January 3, 2024.

<sup>111</sup> Section 3, The Public Holidays Act, 2012, Kenya

<sup>112</sup> Munir, B., Khan, A. N., & Ahmad, N. "Necessity of Discretionary Powers: A Critical Appreciation as a Necessary Evil." *Global Regional Review*. [https://doi.org/10.31703/grr.2020\(V-III\).19](https://doi.org/10.31703/grr.2020(V-III).19) > January 3, 2024.

<sup>113</sup> *Eid al-Adha* marks the [culmination](#) of the [hajj](#) (pilgrimage) rites at Minā, [Saudi Arabia](#), near [Mecca](#), but is celebrated by Muslims throughout the world.

for all Kenyans under Section 2(1).<sup>114</sup> Initially this holiday is classified under Section 2(2) of the Act, which states that “*The days specified in Part II of the Schedule shall, in addition to the days specified in Part I thereof, in every year be public holidays for all persons belonging to the Islamic faith.*”<sup>115</sup> However, due to the discretionary powers of the Minister, he started declaring this holiday as a public holiday for all Kenyans under Section 2 (1) of the Act, which states that “*The days specified in Part I of the Schedule shall in every year be kept as public holidays.*”<sup>116</sup>

Since 2016, the Cabinet Secretary for the Interior and Coordination of National Government has begun to officially recognize and gazette a holiday as a public holiday under Section 2 (1) of the Public Holidays Act in Kenya.<sup>117</sup> The official gazette notice by the Cabinet Secretary for the Interior and Coordination of National Government, utilizing the authority granted by section 3 of the Public Holidays Act, declared Monday, September 12, 2016, as a public holiday in celebration of Idd-ul-Adha, 2016.<sup>118</sup> This variation in acknowledgment not only underscores the possibility of partiality but also underscores the significance of such discretionary powers on the inclusivity of the nation’s religious and cultural practices.

The decision to declare a public holiday in favour of one religious group over another can inadvertently signal a preference or bias, whether intended or not, which may foster feelings of exclusion or marginalization among those whose celebrations are not similarly recognized. The principle of fairness dictates that the process of recognizing public holidays should be transparent and inclusive, reflecting the country's diverse cultural and religious varieties.<sup>119</sup>

The current approach to recognizing public holidays in Kenya, such as the differing treatment between Diwali and *Idd-ul-Adha*, highlights a lack of equitable recognition for all cultural and religious groups. The discretionary powers given to the Minister, without clear guidelines, can lead to inconsistency and unequal treatment, questioning the fairness of the system. This

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<sup>114</sup> Section 2, The Public Holidays Act, 2012, Kenya

<sup>115</sup> Section 2 (2), The Public Holidays Act, 2012, Kenya

<sup>116</sup> Section 2 (1), The Public Holidays Act, 2012, Kenya

<sup>117</sup> The Kenya Gazette, *Declaration of Public Holidays*, September 9<sup>th</sup>, 2016, No.7135

<sup>118</sup> The Kenya Gazette, *Declaration of Public Holidays*, September 9<sup>th</sup>, 2016, No.7135

<sup>119</sup> Adapted from Munir, B., Khan, A. N., & Ahmad, N. (2020). Necessity of Discretionary Powers: A Critical Appreciation as a Necessary Evil. *Global Regional Review*, V(III), 183-191.

[https://doi.org/10.31703/grr.2020\(V-III\).19](https://doi.org/10.31703/grr.2020(V-III).19) > January 3, 2024.

disparity can deepen divisions within Kenya's diverse society, hindering social cohesion and unity. The case of Diwali versus *Idd-ul-Adha* illustrates the potential for bias and arbitrariness, emphasizing the need for a transparent, fair, and inclusive method of recognizing public holidays that respects Kenya's diversity and ensures equality.

### 3.3.2 Abuse of power in the context of non-recognition of Diwali

The non-recognition of Diwali in some political contexts can be seen as a failure to respect cultural and religious diversity, potentially reflecting an abuse of political power. This omission may contradict community expectations about the responsibilities of political authorities to acknowledge and respect the practices of all community sections. Such an omission indicates a lack of inclusivity and sensitivity towards the cultural and religious identities of minority groups within a society. It demonstrates how political power can be misused, not only through the commission of acts deemed inappropriate but also through the failure to act in a manner that is socially prescribed and expected by the community.<sup>120</sup> In this context, the abuse of power manifests as a neglect of the political authority's duty to promote and protect the cultural and religious rights of all individuals, thereby undermining the principle of equality and fairness that should underpin governance.<sup>121</sup>

In the absence of effective regulation, law can inadvertently become a tool that aids in the abuse of power and corruption, especially when it provides discretionary powers to individuals without sufficient oversight or transparency.<sup>122</sup> This can be exemplified by examining the scenario of a Cabinet Secretary in Kenya exercising his discretionary powers under the Public Holidays Act to declare public holidays.

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<sup>120</sup> Beattie, J. H. M. "Checks on the Abuse of Political Power in Some African States: A Preliminary Framework for Analysis." *JSTOR*, <http://www.jstor.org/stable/43643975>. Accessed 5 Feb. 2024.

<sup>121</sup> Akech, Migai. "Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?" *Indiana Journal of Global Legal Studies*, *JSTOR*, <https://doi.org/10.2979/indjglolegstu.18.1.341>. Accessed 5 Feb. 2024.

<sup>122</sup> Akech, Migai. "Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?" *Indiana Journal of Global Legal Studies*, *JSTOR*, <https://doi.org/10.2979/indjglolegstu.18.1.341>. Accessed 5 Feb. 2024.

The belief that lawmakers are as corrupt as the executive officials they're supposed to oversee severely weakens the credibility and effectiveness of governance systems.<sup>123</sup> This perception is further compounded by the reality that some key legislative committees, tasked with oversight functions, are led by individuals who themselves have been implicated in corruption scandals. This situation creates a conflict of interest, where those expected to regulate and oversee the government's actions are themselves part of the corruption problem.<sup>124</sup>

If Diwali is not recognized as a public holiday despite public support and the expectations of the celebrating communities, it could be perceived as an abuse of political power, demonstrating a failure to respect cultural and religious diversity. Such non-recognition underscores the need for inclusive governance. Conversely, the decision to declare *Idd-ul-Adha* a public holiday exemplifies the constructive use of discretionary powers, promoting inclusivity, integrity, and freedom of expression. This approach not only enhances the legitimacy of public service but also strengthens democracy by ensuring governance reflects the diverse composition of society.

### **3.4 Mitigating Risks Through Effective Oversight And Accountability**

Effective oversight and accountability in the public sector are crucial to ensure that discretionary powers, such as declaring public holidays, are exercised responsibly and in the public interest. Implementing mechanisms for transparency and fairness in these decisions promotes inclusivity and respects diversity, as demonstrated by the declaration of *Idd-ul-Adha* as a public holiday. This showcases the positive outcomes when discretionary powers are guided by good governance principles.

Effective oversight involves monitoring and reviewing the actions and decisions of public officials to ensure they align with legal frameworks, ethical standards, and public

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<sup>123</sup> Akech, Migai. "Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?" *Indiana Journal of Global Legal Studies*, JSTOR, <https://doi.org/10.2979/indjglolegstu.18.1.341>. Accessed 5 Feb. 2024.

<sup>124</sup> Akech, Migai. "Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?" *Indiana Journal of Global Legal Studies*, JSTOR, <https://doi.org/10.2979/indjglolegstu.18.1.341>. Accessed 5 Feb. 2024.

expectations.<sup>125</sup> Oversight can be conducted by various bodies, including legislative committees, independent regulatory agencies, and civil society organizations. These bodies scrutinize the exercise of discretionary powers to prevent misuse, such as discrimination, corruption, or abuse of power.

Firstly, in the case of recognizing *Idd-ul-Adha* as a public holiday, oversight ensures that the decision was made based on a fair assessment of the significance of the holiday to a substantial portion of the population and that it aligns with the country's commitment to cultural and religious inclusivity. Oversight bodies may review the decision-making process for transparency, the rationale provided for the recognition, and its impact on promoting national unity and respect for diversity.<sup>126</sup>

Secondly, accountability measures, in this context involves a complex interplay of educational, supportive, motivational, and deliberative measures, each addressing different aspects of decision-making and behaviour of public officials.<sup>127</sup> The declaration of Idd-ul-Azha as a public holiday by a Cabinet Secretary can serve as a pertinent example to illustrate how these accountability measures can be effectively implemented. The following measures can be adopted.

Firstly, formative measures, particularly through formalized educational programs, play a critical role in shaping the knowledge, values, and norms of individuals with discretionary powers.<sup>128</sup> By equipping them with a common foundation of knowledge and ethical standards, it is expected that such individuals will make more informed, uniform, and consistent decisions.<sup>129</sup> In the case of the Cabinet Secretary, a solid educational background in public

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<sup>125</sup> De Londras, Fiona, and Fergal F. Davis. "Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms" *JSTOR*, <http://www.jstor.org/stable/40660429>. > 6 February 2024.

<sup>126</sup> De Londras, Fiona, and Fergal F. Davis. "Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms." *JSTOR*, <http://www.jstor.org/stable/40660429>. > 6 February 2024.

<sup>127</sup> Molander, Anders, "Professional Discretion and Accountability in the Welfare State." *Journal JSTOR*, <http://www.jstor.org/stable/24356114>. > 8 February 2024.

<sup>128</sup> Molander, Anders, "Professional Discretion and Accountability in the Welfare State." *Journal JSTOR*, <http://www.jstor.org/stable/24356114>. > 8 February 2024.

<sup>129</sup> Molander, Anders, "Professional Discretion and Accountability in the Welfare State." *Journal JSTOR*, <http://www.jstor.org/stable/24356114>. > 8 February 2024.

administration, law, and ethics, supplemented with specific training on cultural sensitivity and religious diversity, would ensure that the decision to recognize a public holiday not only respects legal standards but also reflects societal values and norms.

Secondly, supportive measures, such as evidence-based professional practice, provide decision-makers with reliable knowledge and tools to make judicious decisions.<sup>130</sup> For the Cabinet Secretary, utilizing evidence-based frameworks could involve assessing the social, economic, and cultural impacts of declaring a public holiday, drawing on studies, expert opinions, and community consultations. This approach ensures that the decision is grounded in the best available evidence, enhancing the quality and consistency of discretionary reasoning.

Thirdly, motivational measures in governance involve aligning individual motivations with the principles of good governance by creating incentives that reward transparency, inclusivity, and ethical decision-making.<sup>131</sup> For example, publicly acknowledging and rewarding the Cabinet Secretary for inclusive and impactful decisions can encourage other officials to prioritize these values in their discretionary choices.

Lastly, deliberative measures improve the quality of discretionary decision-making by encouraging critical discussion and reflection.<sup>132</sup> For instance, forums for reviewing decisions, such as public holiday declarations, prompt officials like the Cabinet Secretary to consider public scrutiny, leading to more thoughtful and defensible choices. This approach, along with educational, supportive, and motivational measures, helps mitigate risks in discretionary decision-making. For example, contrasting the declaration of *Idd-ul-Adha* with the non-declaration of Diwali highlights the need for informed and ethical decisions that reflect societal values. These measures enhance accountability, build public trust, promote inclusivity, and contribute positively to society.

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<sup>130</sup> Molander, Anders, "Professional Discretion and Accountability in the Welfare State." *Journal, JSTOR*, <http://www.jstor.org/stable/24356114>. > 8 February 2024.

<sup>131</sup> Molander, Anders, "Professional Discretion and Accountability in the Welfare State." *Journal JSTOR*, <http://www.jstor.org/stable/24356114>. > 8 February 2024.

<sup>132</sup> Molander, Anders, "Professional Discretion and Accountability in the Welfare State." *Journal JSTOR*, <http://www.jstor.org/stable/24356114>. > 8 February 2024.

### 3.5 Aligning Diwali Recognition With The Constitutional Freedoms

Establishing clear legal standards and procedures for recognizing Diwali as a public holiday requires a comprehensive approach that includes legislative action, inclusive policymaking, and criteria that respect diversity while ensuring transparency, equity, and justification. This framework should involve detailed components, supported by relevant citations and resources, to guide and inform the process effectively.

First and foremost, in the draft legislative proposal or bill that would give legal recognition to Diwali as a public holiday in Kenya is.<sup>133</sup> The draft legislative proposal to recognize Diwali as a public holiday in Kenya could be initiated by an MP acknowledging its cultural importance to the Hindu community, or by the Cabinet Secretary in charge of the interior using executive authority to support the cause. The proposal must be comprehensive and consider the social, cultural, and economic impacts of recognizing Diwali as a public holiday.

The principle of public participation is central in Kenya's legislative process and enshrined under Article 118 (1)(b) of the Constitution of Kenya (2010).<sup>134</sup> The proposal to make Diwali a public holiday in Kenya must undergo a comprehensive public participation phase, gathering feedback from diverse groups such as the Hindu community, civil society, business leaders, and the general public. This step is vital to gain support, address potential concerns, and ensure the decision reflects the will of the Kenyan people, embodying democratic principles and inclusive policymaking where public input and consent are key.<sup>135</sup>

After the public participation period, the bill is presented to the National Assembly for its first reading, which is primarily procedural to introduce the bill.<sup>136</sup> The critical discussions occur during the second reading, where MPs engage in detailed debates about the bill's benefits, focusing on its potential impacts on national unity, societal harmony, and economic growth. They also assess the bill's compatibility with the principles and objectives of Kenyan society to ensure that its implementation would positively contribute to the country's overall well-being.

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<sup>133</sup> Adapted from: The National Assembly, "The Legislative Process", Factsheet No. 2, August 2022

<sup>134</sup> Article 118 (1) (b), The Constitution of Kenya, 2010

<sup>135</sup> Adapted from: The National Assembly "Public Participation in the Legislative Process", Factsheet No. 14, August 2022

<sup>136</sup> Adapted from: The National Assembly, "The Legislative Process", Factsheet No. 2, August 2022

After passing the second reading, the bill is sent to a relevant parliamentary committee for detailed review.<sup>137</sup> The committee consults further, possibly holding additional public hearings, to refine the bill and avoid unintended consequences. It then reports any suggestions, including potential amendments, back to the assembly for evaluation during the third reading. Approval at this stage signifies the assembly's consensus on the bill's importance and readiness to become law.<sup>138</sup>

The last step in the legislative process involves the bill's approval by the Senate, especially when it has implications for county governments. After the Senate gives its nod, the bill is then forwarded to the President for his signature.<sup>139</sup> The President's signing of the bill and its publication in the Kenya Gazette officially make Diwali a public holiday in Kenya, reflecting the nation's democratic values and commitment to cultural diversity. To ensure fairness in recognizing public holidays, it's essential to have clear legal standards that outline the criteria, processes, and authorities involved, including public consultation steps. The legal framework should also be regularly reviewed and adjusted to match societal changes. Recognizing Diwali not only celebrates cultural diversity but also underscores Kenya's dedication to inclusivity, transparency, and democratic unity through a process that involves public participation, legislative oversight, and presidential endorsement.

### **3.5 Conclusion**

Chapter three discussed the balance between discretionary powers and governance, highlighting how these powers allow officials to make decisions tailored to specific contexts. It also covers the risks of unchecked discretion, such as arbitrary decisions, biases, and potential misuse for personal gains, which can undermine public trust and governance quality. The chapter recommends strict oversight and clear legal guidelines to ensure transparency, accountability, and fairness in the use of these powers. The next chapter focuses on Article 32 of the Kenyan Constitution, examining the right to freedom of religion and its relationship with individual liberties and governance, ensuring the protection of individual rights within Kenya's governance framework.

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<sup>137</sup> Adapted from: The National Assembly, “The Legislative Process”, Factsheet No. 2, August 2022

<sup>138</sup> Adapted from: The National Assembly, “The Legislative Process”, Factsheet No. 2, August 2022

<sup>139</sup> Adapted from: The National Assembly, “The Legislative Process”, Factsheet No. 2, August 2022

## CHAPTER 4

### EXAMINING THE INTERPRETATION OF ARTICLE 32 OF THE CONSTITUTION OF KENYA

#### 4.1 Introduction

Article 32 of the Kenyan Constitution 2010 serves as a cornerstone for protecting the right to freedom of conscience, religion, thought, belief, and opinion.<sup>140</sup> However, the interpretation of this essential article has generated significant discussion among Kenya's legal scholars and practitioners. This section aims to examine the diverse interpretations of Article 32 and their consequences for the protection of basic rights and freedoms within Kenya.

#### 4.2 Exploring Article 32 Of The Constitution Of Kenya

##### 4.2.1 Historical context of Article 32

The incorporation of article 32 of the Constitution of Kenya can be traced back to the incorporation of the bill of rights in the Constitution of Kenya. According to M.L. Dudziak, Thurgood Marshall was instrumental in shaping the Kenyan Bill of Rights for the Independence Constitution, marking his significant contribution to American civil rights law.<sup>141</sup> Marshall, drawing upon ideals enshrined in the Universal Declaration of Human Rights and incorporating elements from the constitutions of Nigeria and Malaysia, infused the document for the constitution with a distinctly American perspective on enforcement and equality.<sup>142</sup> His vision was particularly forward-looking, addressing the critical issue of minority rights in a country with significant white and Asian populations.

In the years following Kenya's independence, the initial promise of the Bill of Rights was eroded by numerous amendments that sought to centralize power and marginalize extensive portions of the country. This period also saw global shifts, including new human rights treaties

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<sup>140</sup> Article 32, The Constitution of Kenya, 2010

<sup>141</sup> Dudziak M.L.,'' Exporting American Dreams: Thurgood Marshall's African Journey'' (Oxford University Press) 2008

<sup>142</sup> Dudziak M. L.,'' Exporting American Dreams: Thurgood Marshall's African Journey'' (Oxford University Press) 2008

and challenges like environmental degradation, which underscored the need for constitutional reform.<sup>143</sup>

The 1990s marked a turning point with significant movements towards reinstating the rule of law, notably the repeal of Section 2A in 1991, which transitioned Kenya from a one-party state to a more democratic state, and the subsequent Inter Parties Parliamentary Group (IPPG) reforms. The Constitution of Kenya Review Commission (CKRC) and the National Constitutional Conference, culminating in the Bomas of Kenya Process, were critical steps in this journey. Although a proposed constitution was rejected in a 2005 referendum, the process set the stage for further reforms.<sup>144</sup>

A new phase began in 2008, aimed at addressing contentious issues through a comprehensive review process. This led to the establishment of key bodies, including the Committee of Experts (CoE) and the Parliamentary Select Committee (PSC), culminating in a referendum on August 4, 2010. The approval of the new Constitution by 67% of voters marked a significant milestone in Kenya's political evolution, ushering in a new era characterized by enhanced protections for basic rights, a check on executive power, and a move towards devolution with the establishment of forty-seven county governments. This new Constitution is hailed as the most consequential political development since Kenya's independence from Great Britain in 1963. The new constitution of Kenya promulgated on August 27, 2010, that included the Bill of Rights.<sup>145</sup>

The 2010 Constitution positions Kenya as a secular nation. This status implies a commitment to religious neutrality. Despite not endorsing any religion officially, the 2010 Constitution's Preamble has sparked debate due to its invocation of "God".<sup>146</sup> It states:

*'PREAMBLE*

*We, the people of Kenya:*

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<sup>143</sup> Adapted from Mukami Wangai, "Religious pluralism and liberal constitutionalism: secularity and secularism in Kenya's religious freedom jurisprudence",

<sup>144</sup> Dudziak M. L., 'Exporting American Dreams: Thurgood Marshall's African Journey' (Oxford University Press) 2008

<sup>145</sup> Dudziak M. L., 'Exporting American Dreams: Thurgood Marshall's African Journey' (Oxford University Press) 2008

<sup>146</sup> Preamble, The Constitution of Kenya, 2010

***ACKNOWLEDGING the supremacy of the Almighty God of all creation:***

Such explicit mentions of "God" suggest an acknowledgment and deep respect for a singular, supreme deity by the Kenyan populace. This God is portrayed as the ultimate creator and as having the authority to bestow blessings upon the nation. This shows that Kenya promotes passive secularism through recognizing God being as a supreme being and not having a specific state religion.<sup>147</sup>

### **4.3 Divergent Interpretations Of Article 32**

#### **4.3.1 Liberal Interpretations**

Since the adoption of the 2010 Constitution, Kenya has embarked on a progressive journey toward enhancing its legal framework, particularly in relation to fundamental rights and freedoms, including the right to freedom of religion or belief. The constitution, characterized as autochthonous, reflects the aspirations and historical experiences of the Kenyan people, making it contextually relevant and attuned to the realities of its populace. This homegrown constitution marks a departure from the independence constitution, which was significantly influenced by English laws, providing a robust foundation for good governance, democracy, and the rule of law.

A notable feature of the 2010 Constitution is the expanded and protected role of the judiciary in interpreting the constitution, a role that is fundamentally derived from the people.<sup>148</sup> Article 160(1) underscores the judiciary's independence, asserting that it is subject only to the Constitution and the law.<sup>149</sup> This independence is further reinforced through new procedures for appointing the Chief Justice, Deputy Chief Justice, and other judges, alongside a clearly defined role for the courts in applying the Bill of Rights. Specifically, Article 20(3) mandates courts to develop the law where it falls short of enforcing rights or freedoms and to favor interpretations that promote the enforcement of these rights.<sup>150</sup> Furthermore, Article 20(4)

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<sup>147</sup> Article 8, The Constitution of Kenya, 2010

<sup>148</sup> Mbondenyei MK and Ambani JO, "The new constitutional law of Kenya: principles, government & human rights", 2012, Clarion Ltd, Nairobi.

<sup>149</sup> Article 160, The Constitution of Kenya, 2010

<sup>150</sup> Article 20 (3), The Constitution of Kenya, 2010

encourages interpretations that advance the values of a democratic society based on dignity, equality, equity, and freedom.<sup>151</sup>

The judiciary's elevated role is pivotal in democratizing the constitution of Kenya, particularly in addressing the challenges inherent in a pluralistic society. The 2010 Constitution acknowledges Kenya's ethnic, cultural, and religious diversity in its Preamble, emphasizing the nation's commitment to living in peace and unity.<sup>152</sup> This recognition of diversity and the inclusion of provisions such as Kadhis' courts illustrate a nuanced approach to secularism, accommodating religious beliefs and practices to foster societal cohesiveness.<sup>153</sup>

Judicial interpretations of the right to freedom of religion or belief since 2010 have been dynamic, navigating between secularism and secularity. Secular refers to attitudes, activities, or other things that have no religious or spiritual basis.<sup>154</sup> It is related to worldly rather than religious affairs. Secularism, on the other hand, is the principle of separation between governmental institutions and the persons mandated to represent the state from religious institutions and religious dignitaries. In essence, secularism involves two key concepts: the separation of religion from state affairs and the consideration of all individuals within a state as equal regardless of their religious beliefs or non-belief.<sup>155</sup>

Recent jurisprudence, especially concerning religious observance and dress in schools, highlights the judiciary's role in mediating between individual religious freedoms and the secular nature of state institutions.<sup>156</sup> These cases often involve conflicts between students'

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<sup>151</sup> Article 20 (4), The Constitution of Kenya, 2010

<sup>152</sup> S. Macedo, "Transformative constitutionalism and the case of religion: defending the moderate hegemony of liberalism," 1, Feb 1998, 56–80.

<sup>153</sup> Adapted from Mukami Wangai, "Religious pluralism and liberal constitutionalism: secularity and secularism in Kenya's religious freedom jurisprudence",

<sup>154</sup> Casanova, J. (2009). The Secular and Secularisms. *Social Research*, 76(4), 1049–1066.

<http://www.jstor.org/stable/40972201>

<sup>155</sup> Casanova, J. (2009). The Secular and Secularisms. *Social Research*, 76(4), 1049–1066.

<http://www.jstor.org/stable/40972201>

<sup>156</sup> Adapted from Mukami Wangai, "Religious pluralism and liberal constitutionalism: secularity and secularism in Kenya's religious freedom jurisprudence",

religious practices and school regulations, prompting the courts to balance the need for religious accommodation with the principles of a secular educational environment.

Three notable cases concerning religious attire stand out: *Republic v The Head Teacher Kenya High School & another ex parte SMY*,<sup>157</sup> *Methodist Church in Kenya v Mohamed Fugicha & 3 others*,<sup>158</sup> and *JWM v Board of Management O Primary School & 2 others*.<sup>159</sup> These instances collectively highlight the ongoing discussion around the right to religious expression in Kenya. An important starting point is the *Kenya High Case*, initiated in 2009 before the adoption of the 2010 constitution.<sup>160</sup> This case stemmed from objections to school uniform policies that were brought to the attention of a body within the Parliament. The complaints were lodged by four organizations: the National Muslim Leaders Forum, the Kenya Council of Imams and Ulamaa, the Young Muslim Association, and the Family Resource Centre at the Jamia Mosque.<sup>161</sup> They expressed concerns over several schools' policies that did not permit Muslim students to incorporate elements of their religious dress into their school uniforms, leading to these issues being taken up with the Ministry of Education.<sup>162</sup>

In response, the Permanent Secretary for Education issued a directive on 14 July 2009 to all Provincial Directors of Education, District Officers, Municipal Education Offices, and school heads. This directive emphasized that "*no child should be denied the right to education on religious grounds, a right protected by the Constitution.*"<sup>163</sup> It also instructed principals who had expelled students for wearing the *hijab* to readmit them immediately.

Following the rejection by the head teacher and Board of Governors of Kenya High School to comply with the ministerial directive, a legal application for judicial review was initiated in court. The minor, identified as SMY, through her mother and 'next friend' A B, contested the decision. The claim was that the letter from the Permanent Secretary had created a reasonable expectation for SMY to be permitted to wear the *hijab*<sup>164</sup>, which was unmet by the school.

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<sup>157</sup> *Republic v The Head Teacher Kenya High School & another ex parte SMY* [2012] eKLR.

<sup>158</sup> *Methodist Church in Kenya v Mohamed Fugicha & 3 others* [2019] eKLR.

<sup>159</sup> *JWM (alias P) v Board of Management O Primary School & 2 others* [2019] eKLR.

<sup>160</sup> *Kenya High Case*, [2012] eKLR

<sup>161</sup> *Kenya High Case*, [2012] eKLR

<sup>162</sup> *Kenya High Case*, [2012] eKLR

<sup>163</sup> *Kenya High Case*, [2012] eKLR

<sup>164</sup> '*Hijab*' for female schoolgirls wearing of a head scarf and a pair of trousers or long skirts up to the ankles.

Supporting evidence from Sheikh Ahmed M. Athman, an Imam at Jamia Landhies Mosques, was presented, highlighting the Islamic mandate for women to wear the hijab, covering all but their hands and face, as per the Quran. This mandate's non-acknowledgment by the school, according to the applicant, amounted to religious discrimination, infringing on her rights under Articles 32 and 27 of the 2010 Constitution.<sup>165</sup>

The school, its Board, and the PTA Chairman defended their position with detailed affidavits, including testimonies from religious scholar Prof Dr. Imam Al-Hajj Ibrahi B. Sayed and educator Dr. Eddah W Gachukia. They highlighted the school's Christian foundation in 1910 and its tradition of inclusivity. The defense argued that a uniform dress policy was essential for equality, order, and discipline, promoting a cohesive academic environment. Despite receiving a letter from the Permanent Secretary, the school contended it wasn't officially communicated before the applicant's notice. The school's Board and PTA meeting decided to keep the existing dress code to maintain discipline and uniformity.<sup>166</sup>

The school contended that no student had been discriminated against or denied education rights. It defended its policy by highlighting accommodations for Muslim students, like Islamic religious education, and argued that the restriction on wearing religious attire was a proportionate measure to achieve educational goals of equality, cohesion, and inclusivity among a diverse student body.<sup>167</sup>

In the end, the judge decided on the procedural validity of the Permanent Secretary's instruction as well as on the allegation of discrimination. The court concurred with the argument put forth by the defence, stating that the instruction did not have legal authority since it was not formally issued pursuant to section 27 of the Education Act, nor was there any official delegation of power to the Permanent Secretary via a gazette notice.<sup>168</sup> Consequently, the school was not obligated to follow the directive, and no legitimate expectation was established for SMY.<sup>169</sup> The court in the same case, found no evidence of any prior commitment by the school to allow religious dress.

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<sup>165</sup> Kenya High Case, [2012] eKLR

<sup>166</sup> Kenya High Case, [2012] eKLR

<sup>167</sup> Kenya High Case, [2012] eKLR

<sup>168</sup> The Education Act, Kenya, 1980

<sup>169</sup> Kenya High Case [2012] eKLR

The court concluded that SMY's rights under Articles 32 and 27 were not infringed, determining that the limitation on her religious expression was justified to promote inclusivity, unity, and balance among the school's diverse religious and cultural groups.<sup>170</sup> The High Court's ruling in the Kenya High case reflected a secularism approach, ensuring an equitable environment. However, subsequent cases on religious dress in schools initially veered towards secularity before swinging back to secularism at the appellate level.

In *Mohamed Fugicha & 3 others v Methodist Church* in Kenya, involving St. Paul's Kiwanjani Day Mixed Secondary School, located in Isiolo County and sponsored by the Methodist Church, the issue of accommodating Muslim religious dress under the school's dress policy was contested.<sup>171</sup> Initially addressed administratively, the matter escalated following a request from the county governor during an event at the school on June 22, 2014, advocating for the allowance of the hijab for Muslim girls. Despite discussions involving various stakeholders, it was decided to maintain the current school uniform policy without accommodations for Islamic religious dress.

The inclusion of Islamic dress at a school, following directives from education authorities and discussions among the school's Board, PTA, and Church, was contested by the school's principal and the Methodist Church. The Church's legal challenge, citing discrimination, was initially supported by the High Court but overruled by the Court of Appeal in 2016. The Appeal Court ruled that banning Islamic dress amounted to indirect discrimination against Muslim students, referencing English law to support religious expression rights. It instructed the school to revise its dress code to include Islamic religious dress, after consulting with stakeholders.<sup>172</sup>

The Court of Appeal's decision in the Fugicha case was initially hailed as a victory for religious freedom in Kenya, moving away from rigid secularism towards a more inclusive interpretation of neutrality that embraces various religions and beliefs, aligning with the 2010 Constitution's principles.<sup>173</sup> This ruling was seen as a step towards unity and allowed Muslims to practice their faith freely, addressing the historical context of religious accommodations in Kenya. The

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<sup>170</sup> Kenya High Case, [2012] eKLR

<sup>171</sup> Mohamed Fugicha & 3 others v Methodist Church in Kenya [2016] eKLR

<sup>172</sup> Mohamed Fugicha & 3 others v Methodist Church in Kenya [2016] eKLR

<sup>173</sup> Mohamed Fugicha & 3 others v Methodist Church in Kenya [2016] eKLR

judges ordered the Cabinet Secretary for Education to draft regulations ensuring the protection of students' rights to religious freedom and equality, as stated in the Constitution.

In January 2019, the Supreme Court reversed its earlier decision following an appeal from the Methodist Church, leveraging its post-2010 Constitution authority to have final say on constitutional issues. The reversal was based on procedural errors involving a 'cross-petition' by Mr. Fugicha, who was only an interested party and not central to the case. The Supreme Court found that this cross-petition did not meet the necessary procedural standards and thus should have been disregarded. As a result, the Court of Appeal's decision was nullified, leading to the reaffirmation of a stricter secular stance on the issue.

The majority acknowledged the case's national importance and suggested its potential review by the High Court. Justice Ojwang, dissenting, stressed the importance of religious freedom and equality, supporting the Court of Appeal's decision to accommodate religious dress for Muslim students as vital for their faith. He advocated for a balanced approach that respects the school's multicultural setting.<sup>174</sup>

As discussions on religious accommodations in Kenyan schools unfolded, another notable case involved a dispute over religious observance rights at Alliance High School. The Seventh Day Adventist Church, representing students from various public high schools, challenged the school's policy that conflicted with their Sabbath observance from Friday sunset to Saturday sunset.<sup>175</sup> Despite losing initially in the High Court, the appeal highlighted the issue of whether denying SDA students their Sabbath observance unjustifiably infringed upon their rights under Articles 24 and 32 of the Constitution.<sup>176</sup>

The Court of Appeal sided with the petitioners, overturning the High Court's decision and identifying direct discrimination against SDA students compared to other Christian students who observe Sabbath on Sundays. Dismissing Alliance High School's arguments on institutional autonomy, the court emphasized the lack of legal backing for restricting students' religious rights and the historical precedence of Sabbath observance in schools prior to the 2009/10 constitutional drafting period.

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<sup>174</sup> Mohamed Fugicha & 3 others v Methodist Church in Kenya [2016] eKLR

<sup>175</sup> Seventh Day Adventist Church (EA) Limited v Minister of Education & 3 others [2014] eKLR

<sup>176</sup> Article 24 and 32, The Constitution of Kenya, 2010

The Court of Appeal, building on its decision in the Fugicha case, emphasized reasonable accommodation for religious practices in schools and criticized the Education Cabinet Secretary for not implementing religious freedom guidelines.<sup>177</sup> This stance was affirmed in a case at Olympic High School, where the court supported a Rastafarian student's right to wear her hair in '*rastas*', highlighting the precedence of constitutional rights over school regulations. These decisions underscore the judiciary's commitment to expanding rights under the Bill of Rights and fostering an inclusive interpretation of religious freedoms, moving away from a traditional secular order towards embracing secularity and diversity in religious expressions within educational settings.<sup>178</sup>

The fluctuating jurisprudence around religious expressions versus the state's acknowledgment of religious or non-religious identities suggests progress in liberal constitutionalism. The Atheists in Kenya (AIK) case<sup>179</sup>, for instance, highlights the state's formal recognition of non-religious groups, challenging the preference for monotheistic beliefs. Despite avoiding a direct ruling on the right to freedom of religion or non-religion, the court's decision to address AIK's procedural rights underlines an implicit acknowledgment of diverse beliefs within Kenya's constitutional framework.

This evolving legal landscape suggests a strategic shift towards using less coercive means to mediate between religious freedom and secular governance. The judiciary's role has varied, sometimes reinforcing traditional secularism to maintain equality and peace, while at other times promoting inclusivity through secularity.<sup>180</sup> This dual approach reveals a broader constitutional space allowing both religious and non-religious groups to coexist and express their beliefs, marking a significant step in constructing Kenya's new democracy.<sup>181</sup>

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<sup>177</sup> Mohamed Fugicha & 3 others v Methodist Church in Kenya [2016] eKLR

<sup>178</sup> Adapted from Mukami Wangai, "Religious pluralism and liberal constitutionalism: secularity and secularism in Kenya's religious freedom jurisprudence".

<sup>179</sup> Atheists in Kenya and another v The Registrar of Societies and 2 others [2018] eKLR.

<sup>180</sup> Adapted from Mukami Wangai, "Religious pluralism and liberal constitutionalism: secularity and secularism in Kenya's religious freedom jurisprudence".

<sup>181</sup> Adapted from Mukami Wangai, "Religious pluralism and liberal constitutionalism: secularity and secularism in Kenya's religious freedom jurisprudence".

### 4.3 Limitations And Restrictions On Rights Under Article 32

The Constitution of Kenya 2010 establishes from the outset that it does not recognize an official state religion, implying that every Kenyan citizen is free to follow any faith of their choice.<sup>182</sup>

In addition to this foundational principle, Article 32 mandates the State to ensure that all laws and measures do not infringe upon an individual's freedom of conscience, religion, belief, and opinion. However, this freedom, like all fundamental human rights, is not without its limits and can be subject to state-imposed restrictions. Various global and regional frameworks also outline protections for these freedoms, as well as conditions under which they may be limited.

As a member of the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights, Kenya incorporates treaties it ratifies into its national law under Article 2(6) of its Constitution.<sup>183</sup> International agreements protect the right to freedom of thought, conscience, and religion, including the freedom to convert, and express religious beliefs through various practices in both public and private. Consequently, Kenyan laws and policies must uphold these freedoms.

Article 32 of the Kenyan Constitution specifically safeguards the freedom of thought on all matters, personal convictions, and the adherence to religion or belief, whether individually or collectively.<sup>184</sup> These freedoms are protected equally, and no individual is coerced into acting against their religious beliefs or conscience.

However, in the case of *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others*, the court was presented with a challenge that questioned the extent of these freedoms, particularly for students of the Seventh Day Adventist (SDA) faith.<sup>185</sup> The petition highlighted the limitations faced by Adventist students in public schools, who are hindered from observing the Sabbath due to school schedules, sometimes facing suspension for non-participation in activities scheduled during Sabbath hours. Despite previous assurances to the National Assembly regarding the protection of Adventist and Muslim students' rights, the failure to formalize these protections was argued to violate not only the freedom of expression but also the constitutional safeguard against discrimination.

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<sup>182</sup> Article 8, The Constitution of Kenya, 2010

<sup>183</sup> Article 2 (6), The Constitution of Kenya, 2010.

<sup>184</sup> Article 32, The Constitution of Kenya, 2010

<sup>185</sup> *Seventh Day Adventist Church (EA) Limited v Minister of Education & 3 others* [2014] eKLR

The petitioners argued that public schools hinder Adventist students' Sabbath observance, as activities scheduled from Friday to Saturday sunset lead to suspensions for those absent due to religious observance. They highlighted a broken promise to the National Assembly by the Respondents to protect Adventist students' Sabbath rights and Muslim girls' rights to wear the hijab, accusing them of violating freedom of expression and the anti-discrimination Article 27 of the Kenyan Constitution.<sup>186</sup>

The defendants argued that equal rights for all should not allow for special privileges based on faith. They cited Article 24 of the Constitution, stating that limits on religious freedom can be justified in a democratic society that prioritizes human dignity, equality, and freedom. They emphasized that these limits are necessary, especially when considering other important rights like education, which they believe should take precedence.

The court ruled that the educational programs in public schools were uniform for all students and did not discriminate based on religion. It found that minor interferences with Adventist students' rights were counterbalanced by reasonable accommodations made by schools, with no evidence of refusal to adjust. The court concluded that exempting Adventist students would result in impractical accommodations, determining that any infringement on religious rights was justifiable and reasonable under Article 24 of the Constitution.<sup>187</sup>

In the case of *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others*, the court used a proportionality test to weigh the right to education against the freedom of religious practice.<sup>188</sup> Jim Murdoch, on the other hand, suggests that the freedom to choose and practice a religion or belief should face minimal restrictions.<sup>189</sup> However, he also emphasizes that religious beliefs or practices should never serve as a basis for inciting war or spreading hate.<sup>190</sup>

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<sup>186</sup> Article 27, The Constitution of Kenya, 2010

<sup>187</sup> Article 24, The Constitution of Kenya, 2010

<sup>188</sup> *Seventh Day Adventist Church (EA) Limited v Minister of Education & 3 others* [2014] eKLR

<sup>189</sup> Jim Murdoch, "Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights", 2012

<sup>190</sup> Jim Murdoch, "Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights", 2012

The discussion emphasizes the critical need to protect freedom of conscience, religion, belief, and opinion, as outlined in Article 32 of the Kenyan Constitution, relevant case law, and international treaties. It explores the challenges of balancing these freedoms with competing rights and public interest, especially in education and security contexts. The Seventh Day Adventist Church case exemplifies how the judiciary mediates between individual rights and collective interests. The discourse concludes with the importance of balancing religious freedoms with security needs, advocating for a fair approach that avoids discrimination while ensuring public safety and adhering to constitutional and international legal standards.

#### **4.4 The Recognition of Diwali as a Public Holiday in Kenya: An Examination of Constitutional Rights under Article 32 of the Constitution of Kenya 2010**

The proposal to recognize Diwali, a significant festival for Hindus, as a public holiday in Kenya brings forth an important discussion on religious freedom and equality as enshrined in the Constitution of Kenya 2010. Article 32 of the Constitution of Kenya 2010 enshrines a broad spectrum of freedoms, underscoring the country's dedication to protecting individual liberties related to conscience, belief, religion, and opinion. The article 32 provision reads as follows<sup>191</sup>:

*Freedom of conscience, religion, belief and opinion*

- (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.*

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<sup>191</sup> Article 32, The Constitution of Kenya, 2010

Kenya has no state religion according to Article 8 of the Constitution of Kenya.<sup>192</sup> Secularism is thus a democratic principle to safeguard religious freedom. Kenya incorporates general principles of international law, along with any ratified treaties or conventions, into its national law. Being a member of the Universal Declaration of Human Rights (UDHR), the African Charter on Human and Peoples' Rights (ACHPR), and the International Covenant on Civil and Political Rights (ICCPR), Kenya upholds the freedom of thought, conscience, and religion. These international agreements guarantee the right to change one's beliefs and to freely express them, whether alone or with others, through teaching, practice, worship, and observance.<sup>193</sup>

### **A breakdown of the rights under Article 32**

**Freedom of Conscience:** This right is fundamental to individual autonomy, protecting the inner realm of personal belief and ethical discernment. It empowers individuals to adhere to their moral guidance, unfettered by external pressure or interference. This liberty is vital for fostering a society where individuals navigate according to their own ethical and moral compasses.

**Freedom of Religion and Belief:** By recognizing the diversity of the Kenyan society, Article 32 guarantees that every person has the liberty to choose, alter, and openly practice their religion or belief.<sup>194</sup> The constitution of Kenya does not define religion. However, according to the Oxford Dictionary, Religion is the belief in and worship of a supreme human controlling power especially a God or Gods.<sup>195</sup> This encompasses the freedom to engage in worship, observance, teaching, and the performance of rituals and traditions, both publicly and privately. The constitutional safeguarding of this freedom nurtures religious plurality and acceptance, ensuring equitable respect and protection for all faiths and beliefs under the statute.

**Freedom of thought and Opinion:** The prerogative to possess and articulate opinions forms the foundation of democratic communities. Article 32 ensures that individuals have the right to freely ponder and voice their views without the threat of persecution or bias. This liberty is

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<sup>192</sup> Article 8, The Constitution of Kenya, 2010

<sup>193</sup> Article 2 (5) and (6), The Constitution of Kenya, 2010

<sup>194</sup> Article 32, The Constitution of Kenya, 2010

<sup>195</sup> The Oxford Dictionary

critical for the cultivation of dialogue, constructive criticism, and the progressive evolution of society.<sup>196</sup>

Article 32 of the Kenyan Constitution thoughtfully addresses the need for individuals to freely express their beliefs, both in private and in public spheres, underscoring the importance of these practices not just as personal acts but as expressions that enrich community life and public interaction. It allows for the communal celebration and observance of beliefs, highlighting the significance of gathering, worshiping, and sharing in beliefs that tie communities together and celebrate the diversity of religious life.<sup>197</sup>

The celebration of Diwali, as protected under Article 32 (2) of the Kenyan Constitution, exemplifies the essence of this provision by allowing Hindus, both individually and collectively, to manifest their religion through the observance of this significant festival.<sup>198</sup> Diwali, known as the Festival of Lights, holds profound spiritual meaning, symbolizing the victory of light over darkness, knowledge over ignorance, and good over evil. The constitutional safeguard allows for the open and public celebration of Diwali, including the lighting of lamps, fireworks, prayers, and communal gatherings, without fear of discrimination or reprisal.

This right to observe Diwali not only affirms the cultural and religious diversity of Kenya but also promotes a sense of inclusion and respect among different faith communities, ensuring that the Hindu population can fully express and share the joy and teachings of their faith with others, both in private and public spaces. The celebration of Diwali includes performing rituals, which is a practice followed by the Hindu community in Kenya. Durkheim argued that rituals are a way for individuals to express their connection to the larger society and to affirm their shared beliefs and values.<sup>199</sup> Therefore, Article 32 is important in the context of recognizing Diwali as a public holiday in Kenya, allowing the Hindu community in Kenya to be able to perform their rituals.

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<sup>196</sup> Article 32, The Constitution of Kenya, 2010

<sup>197</sup> Article 32 (2), The Constitution of Kenya, 2010

<sup>198</sup> Article 32 (2), The Constitution of Kenya, 2010

<sup>199</sup> Durkheim, E., & Swain, J. W. (2008). "The elementary forms of the religious life", Courier Corporation, 2008.

Furthermore, the rights champion a stand against discrimination, ensuring that every individual has equal access to employment, education, and public services, regardless of their religious beliefs or personal convictions.<sup>200</sup> This commitment to inclusivity is important in building a society where everyone, irrespective of their faith or belief system, is afforded equal opportunities to thrive and contribute.

Article 32 of the Kenyan Constitution safeguards individuals' rights to live according to their beliefs without coercion, protecting both traditional religious views and a range of philosophical, ethical, and moral convictions. This provision emphasizes freedom of conscience, religion, belief, and opinion, highlighting Kenya's dedication to diversity and inclusivity in beliefs. Article 32 acts as a crucial support for a democratic, tolerant, and inclusive society, recognizing both personal and communal expressions of belief.

#### **4.5 Conclusion**

Chapter Four synthesizes interpretations of Article 32 of the Kenyan Constitution, highlighting its role in safeguarding freedoms like conscience, religion, and belief in a democratic society. It discusses the evolving constitutional jurisprudence in Kenya, emphasizing its adaptability to societal changes. The chapter uses the recognition of Diwali as a public holiday as a case study, illustrating Kenya's commitment to multiculturalism and the practical application of its constitutional values. This acknowledgment not only respects religious diversity but also promotes inclusivity, aligning with Article 32's goal of fostering a cohesive national identity.

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<sup>200</sup> Article 32 (3), The Constitution of Kenya, 2010

## **CHAPTER 5**

### **CONCLUSION AND RECCOMENDATIONS**

The dissertation has explored the complexities involved in designating Diwali as a public holiday within Kenya's legal and constitutional framework. It has highlighted the alignment between such recognition and the freedoms guaranteed under Article 32 of the Constitution of Kenya, emphasizing every individual's right to freedom of conscience, religion, thought, belief, and opinion. The research found that recognizing Diwali as a public holiday would not only celebrate Kenya's cultural and religious diversity but also reinforce the nation's commitment to upholding the constitutional rights of all its citizens, promoting a more inclusive society.

Based on the dissertation's findings, several recommendations are proposed to ensure the proper interpretation of Article 32 of the Kenyan Constitution and the appropriate use of discretionary powers for the recognition of Diwali as a public holiday in Kenya. These include advocating for legislative amendments to include provisions for recognizing the religious holidays of significant minority communities, encouraging the development of a policy framework with clear criteria for public holiday designation, and recommending the establishment of a consultative mechanism involving religious and community leaders.

Additionally, it suggests initiating public awareness campaigns about Diwali and other religious festivals to enhance mutual respect among different faiths, creating a multi-faith committee for monitoring and evaluating policies on public holidays, conducting impact assessments to understand the economic implications of new public holidays, and ensuring that the recognition of religious holidays does not infringe upon the rights of individuals from other religious backgrounds.

In conclusion, recognizing Diwali as a public holiday in Kenya would be a meaningful acknowledgment of the country's religious freedoms as outlined in its Constitution. By implementing the recommended strategies, Kenya can further progress towards becoming an inclusive society that values and celebrates its diverse cultural and religious heritage. This effort not only demonstrates Kenya's dedication to upholding constitutional rights but also establishes a precedent for the importance of recognizing all religious celebrations, thereby leading the way to greater inclusivity and unity.

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