

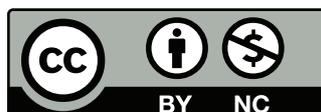
# The Contribution of Notions of Religion in Drafting Some of the Provisions in the 1995 Constitution of Uganda

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## ABSTRACT

After the 1986 guerrilla war, Ugandans embarked on the process of making a new constitution. The Constitutional Commission visited different parts of Uganda to gather peoples' views on what issues should be addressed in the new constitution. The Constitutional Commission report shows that religious leaders and groups made submissions to it on various issues. The recommendations in the Constitutional Commission report were debated by the Constituent Assembly which drafted and later adopted the new constitution. In this article, I rely on the report of the Constitutional Commission and the Proceedings of the Constituent Assembly to show the contribution of the notions of religion or religious beliefs in drafting the constitutional provisions: children's right to education and healthcare; right to life of an unborn child; and state religion. I argue that the Constituent Assembly delegates were not consistent in the way they invoked the notions of religion or religious beliefs during the debates on the constitutional provisions discussed in this article.

**Keywords:** religion, religious beliefs, constitution, Uganda, human rights, drafting



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## INTRODUCTION

The making of the constitution of Uganda and in particular the Bill of Rights, was influenced by factors such as Uganda's poor human rights record and international law, especially international and regional and human rights instruments (Report of the Uganda Constitutional Commission 1992: 131–194).<sup>1</sup> That explains why the Bill of Rights includes many rights that are recognised in international human rights instruments. What is less evident is the influence of religion or religious beliefs in drafting some human rights provisions in the Ugandan constitution. This should be viewed against the background that religions such as Islam, Christianity, Hinduism, and African traditional religions have been part of Ugandan history for more than a century and the colonists did not separate religion from the state. The colonists' approach of entwining religion with the state could explain why the political parties that were formed in Uganda at the end of colonialism were formed on the basis of religion. As the discussion below shows, one of the results of not separating religion from the state was that post-colonial Uganda saw politicians favouring some religious groups over others, and in some cases there were persecutions on the basis of religion against those people who were or were perceived to be opposed to the new government which aligned itself with another religion. It is against that background that later on, after realising the dangers associated with entwining religion with the state, Ugandans sought to separate religion from politics, leading to prohibiting the formation of political parties on the basis of religion. Notwithstanding the fact that religious groups were not represented in the Constituent Assembly, religious beliefs played a role in the making of some of the provisions of the Ugandan constitution. The purpose of

this article is to show the contribution of religion or religious beliefs in drafting the following constitutional provisions: children's right to education and healthcare; right to life of an unborn child; and state religion. Although religion was also mentioned in debating other constitutional rights, such as the right to form and join political parties,<sup>2</sup> the right to marry and found a family,<sup>3</sup> the right to vote,<sup>4</sup> the right to freedom of religion or worship and the right not to be discriminated against on the ground of religion,<sup>5</sup> the contribution of religious beliefs is more evident in the three provisions that are the focus of this article and that is why the discussion of those other rights fall outside the scope of this article. The research is based substantially on the verbatim proceedings of the Ugandan Constituent Assembly (1994), the Uganda Constitutional Commission Report (1992), case law from Ugandan courts, the relevant journal articles, as well as chapters in books. It is important at the outset to briefly mention the process that was followed to adopt the 1995 Ugandan constitution and the role players in this process with a particular focus on the role of religious leaders or organisations.

<sup>1</sup> See generally, The Report of the Uganda Constitutional Commission: Analysis and Recommendations (1992) Chapter 7.

<sup>2</sup> Proceedings of the Constituent Assembly (Official Report): 4795, 1593, 1496, 660, 684, 1550, 1553, 1415, 1413, 1556, 501, 1416, 1504, 1518, 4848, 5354, 5022–5029 and 5049.

<sup>3</sup> Proceedings of the Constituent Assembly (Official Report): 1982, 1986, and 1979.

<sup>4</sup> Proceedings of the Constituent Assembly (Official Report), submissions by Mr Kayongo Israel, 13 February 1995: 3060 - 3061.

<sup>5</sup> Proceedings of the Constituent Assembly (Official Report): 610, 4378, 372, 837, 1626, 693, 1852, 1000, 3063, 3063, 1455, 1638, 1483, 1446, 1556, and 2106.

## THE ROLE PLAYERS IN THE MAKING OF THE 1995 AND IN PARTICULAR THE ROLE OF RELIGIOUS LEADERS OR ORGANISATIONS

When the National Resistance Army/Movement (NRA/M) came to power in 1986, one of the things they did was to suspend the 1967 Constitution. In 1988, the NRA/M embarked on the process of enacting a new constitution. There was a need for the government to ensure that as many Ugandans as possible participated in the constitution-making process. As a result, the government put in place the Uganda Constitutional Commission with the objective of visiting different parts of Uganda to gather peoples' views on issues that should be addressed by the new constitution. The Commission used different methods to gather peoples' review and these included holding seminars and receiving written submissions from the people (Report of the Constitutional Commission 1992: 30–37). The Commission also received submissions from interest groups such as religious bodies, cultural leaders, professional organisations, and women and youth organisations (Report of the Constitutional Commission 1992: 5, 22, 30; Odoki 2014: 148, 153, and 199). In his book on the making of the Ugandan constitution, the chairperson of the Uganda Constitution Commission, Mr Benjamin Odoki, highlighted ways in which religious leaders and organisations made submissions to the Commission. Religion was one of the factors that the government considered in selecting the Commissioners of the Constitutional Commission, and Odoki wrote that “[t]he Commissioners represented various socio-political forces and interest groups in society, as well as the different regions and religions of Uganda” (Odoki 2014, 9). Odoki wrote that in their submissions to the Commission, “[r]eligious groups underscored non-adoption of state religion and freedom of religion and conscience” (Odoki 2014, 147). He added that “[a]ll major religious organ-

isations presented their views” to the Commission (Odoki 2014, 153). He wrote that the Commission recommended that different groups should be represented in the Constituent Assembly, and specifically that ten people should represent “[r]eligious bodies (Catholic Church, Church of Uganda, Orthodox Church, Born Again Churches and Islamic Faith)” (Odoki 269).<sup>6</sup> The rationale behind recommending the inclusion of religious bodies in the Constituent Assembly was because “[r]eligious bodies play an important role in several sectors of society” (Odoki 269). The Constitutional Commission’s Report and Odoki’s book are silent on the role played by each religious group and the specific submissions they made.

The Constitutional Commission’s report was submitted to the government, which afterwards established a Constituent Assembly (1994–1995) with the mandate to debate the recommendations in the Constitutional Commission’s report and draft a new constitution. There were 284 delegates to the Constituent Assembly and although the majority were elected through universal adult suffrage, a few delegates represented special interests such as the army, women, the youth, and organised labour; some were presidential nominees. However, notwithstanding the fact that the Constitutional Commission recommended that 10 delegates should represent the different religious groups in the Constituent Assembly, no delegate elected or nominated to the Constituent Assembly represented religious groups.<sup>7</sup> This means that all the submissions which were made by the delegates, although they in one way or another dealt with issues of religion, were made in their respective capacities and not as representatives of religious groups. The author will in the next section highlight the relationship between religion and politics in Uganda and the position of religion in the

<sup>6</sup> It is not clear why some religions such as Hinduism were excluded from the recommendation.

<sup>7</sup> Proceedings of the Constituent Assembly (Official Report) (alphabetical list of members of the Constituent Assembly as at 18<sup>th</sup> May, 1994).

Ugandan society. This will enable one to understand the context in which the relevant constitutional provisions were made.

## THE ROLE OF RELIGION IN UGANDAN POLITICS BEFORE THE MAKING OF THE 1995 CONSTITUTION AND AT PRESENT

### THE RELATIONSHIP BETWEEN RELIGION AND THE STATE IN UGANDA

The history of Uganda is partly one of a close relationship between religion and the state. This is not unique to Uganda. The history of some African countries such as South Africa, Rwanda and Nigeria is also one of a close relationship between the state and religion (Quashigah 2014: 78–93). There are also concerns that religion is becoming an important factor in Tanzanian politics (Green 2014: 93–125, 113–115) and that there are tensions between religion and the state in Eritrea (Kidane and Mekonnen 2014: 244–265). Like in other African countries (Quashigah 2014: 85–89), the consequences of intermingling religion and the state have sometimes been bitter in Uganda. It is against that background that the 1995 Constitution had to expressly state that Uganda shall not have a state religion. The introduction of Islam by the Arabs and Christianity by the Christian missionaries was accompanied by serious competition and in some instances rivalry between these two religious groups for political dominance in Uganda (Oded 1974: 267–297). This would later lead to religious wars between different religious groups leading to the loss of lives and displacement of people. As one Constituent Assembly delegate put it:

[I]n the past we have fought wars based on religion. When our nation started, we fought wars which involved Chris-

tians fighting against Moslems and Moslems fighting against Christians, Catholics fighting with Protestants and Protestants fighting against Catholics. All these squabbles have gone on based on political ideology, religious ideology and also ethnicity has been also a factor in our political systems.<sup>8</sup>

Religion was an important factor in Ugandan politics during colonialism and after independence. For example, the British colonists ensured that for one to become the Kabaka (King) of the most influential kingdom in Uganda, the Buganda Kingdom, he had to be a Protestant (Ande 2010: 62–63). As one scholar put it, because of the fact that the Kabaka was a pillar of both political and religious systems, “it was not enough that there was a Christian King on the throne of Buganda, he must also be a Protestant King” (Ande 2010: 63). This would have created the “impression that Protestantism was the established religion of Buganda” (Ande 2010: 63). There was therefore a close link between the Protestant denomination and state Buganda kingdom to the extent the church was involved in public events and state functions (Hansen 1992: 115–116). Mudoola (1978) has also demonstrated the role of religion in chief-making in the early days of the Busoga Kingdom. He demonstrates that the British ensured that the majority of the chiefs in this area were Protestants and that they attended missionary schools built by Protestants which ensured that very few Catholics, Muslims and ‘Pagans’ had the requisite skills to be chiefs. Before and after independence, political parties were also formed on the basis of religion. As one Constituent Assembly delegate submitted “...the development of multi-party system as independence approached, was based on antagonism created during colonial days along religious [lines]...The Democratic

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<sup>8</sup> *Proceedings of the Constituent Assembly (Official Report)*, submissions by Prof Senteza Kajubi, 19 June 1995: 4795.

Party...was founded because of the grievances held by Catholics in Buganda. The Progressive People's Party was for the protestants [sic] in Buganda."<sup>9</sup> Therefore "[i]t is just a fact that the majority of DP are catholic [sic], and the majority of protestants [sic] are UPC."<sup>10</sup> Another delegate argued that "the [political] parties are constituted on the basis of religious and ethnic calculations."<sup>11</sup> Despite the general view that political parties in Uganda were formed on religious grounds, it was submitted that in Ugandan history "the first true political party known as the Uganda National Congress, UNC" was formed based on political other than religious ideology.<sup>12</sup> It was submitted during the Constituent Assembly that "Religion...had been entrenched into the political system in this country characteristic of the colonial legacy of divide and rule."<sup>13</sup> One of the reasons why the 1961 pre-independence elections were 'extremely controversial' was because "the lines of combat were more sharply drawn along sectarian (mainly religious and ethnic) grounds" (Report of the Uganda Constitutional Commission 1992: 256). Concern was expressed about political parties that had been in place for years but had "never advanced beyond their essentially...religious

constituencies."<sup>14</sup>

The changes in governments have also sometimes been accompanied by the harassment and murder of people because they used their religion or were perceived to have used their religion to benefit politically or economically from previous regimes (Report of the Uganda Constitutional Commission 1992: 89–98). Constituency Assembly delegates submitted that although they were of different religious backgrounds,<sup>15</sup> the people they represented had instructed them to ensure that the political parties established in terms of the new constitution should "be nationalistic in outlook and will not divide us on religious..." lines.<sup>16</sup> This is so because political parties formed on religious lines had resulted into "a very bitter experience in the past" as people "could hardly eat with each other because of fear of being poisoned because of belonging to different religion and different political parties."<sup>17</sup> For multi-party democracy to take root in Uganda, the issue of religion had to be solved.<sup>18</sup> One delegate argued that "politics and religion are like a plus and a minus, negative therefore and positive."<sup>19</sup> It is against that background that

<sup>9</sup> Ibid submissions by Mr Chango Machyo, 5 August 1994, page 1593. See also ibid submissions by Mr Pulkol, 3 August 1994: 1496.

<sup>10</sup> Ibid submissions by Mr Mulongo, 7 July 1994: 660. See also submissions by Mrs Bagarukayo, 8 July 1994: 684 where it is submitted that the old political parties that were formed on the basis religion, the DP and UPC, should not be revived by the new constitution as this will divide people on religious lines.

<sup>11</sup> Ibid submissions by Lt Gumisiriza 4 August 1994: 1550.

<sup>12</sup> Ibid submissions by Mr Adoko Nyekon, 4 August 1994: 1553.

<sup>13</sup> Ibid submissions by Maj Gen Tinyefuza, 1 August 1994: 1406. See also ibid submissions by Dr Ruhakana Rugunda, 1 August 1994: 1415 (where it is submitted that colonialism divided people along religious lines).

<sup>14</sup> *Proceedings of the Constituent Assembly (Official Report)*, submissions by Mrs Rwabyomere, 1 August 1994: 1413. See also Lt Gumisiriza 4 August 1994: 1549 (where its argued that although the Democratic Party and the Uganda Peoples' Congress had been in place for over thirty years, 'have never advanced essentially beyond their...religious constituencies...'). In determining whether a political party is closely associated with a particular religious group, it is not enough to look at the leadership of that political party. See *Proceedings of the Constituent Assembly (Official Report)*, submissions by Mr Adoko Nyekon, 4 August 1994: 1556.

<sup>15</sup> *Proceedings of the Constituent Assembly (Official Report)*, submissions by Mrs Rwabyomere, 1 August 1994: 1412.

<sup>16</sup> Ibid submissions by Mr Basaliza, 1 July 1994: 501.

<sup>17</sup> Ibid submissions by Mrs Rwabyomere, 1 August 1994: 1416.

<sup>18</sup> Ibid submissions by Dr Ssemogerere, 3 August 1994: 1504.

<sup>19</sup> Ibid submissions by Mr Kimera 4 August 1994: 1518.

when the Constitution of Uganda was adopted in 1995, it expressly prohibited (Article 71(b)) the formation of political parties based on religious grounds.<sup>20</sup> Article 71(b) of the Constitution has been reproduced in section 51(1) (a) of the Political Parties and Organisations Act<sup>21</sup> which provides that “[a] person shall not form a Political Party or Organisation – (a) the membership of which is based on sex, race, colour or ethnic origin, tribe, birth creed or religion, or other similar divisions.” Another important provision is Article 71(f) which relates to someone’s right to join or not to join a particular party by virtue of belonging to a particular organisation or interest group. The rationale behind that provision was captured by one delegate in the following terms:

In 1962, I saw some people who were being forced to be baptised to any of the two religions, Catholic or Protestant and if you are baptised as a Catholic you must vote DP, if you are baptised as a Protestant you must vote UPC... So, this clause is trying to cure that very disease of a certain organisation being compelled to belong to a party, not on individual wish but simply because you belong to that organisation. I think this clause is very important...<sup>22</sup>

The above discussion shows that religion and in particular the history of religion in Ugandan politics was invoked to include a provision in the Constitution which stipulates that no membership of a political party will be based on religion. However, in Uganda, as in other African countries (Quashigah 2014: 82), the absolute separation of the church and the state is impossible. The result is that al-

though politicians have emphasised the fact that religious leaders should not make political statements, religious leaders continue to make political statements or statements with political implications, which sometimes annoy politicians.<sup>23</sup> There are also allegations of “politics of religion.”<sup>24</sup> A study by Alava and Ssentongo shows that during the 2016 presidential and parliamentary elections in Uganda (Alava & Ssentongo 2016), religious leaders were involved in one way or another in the electoral process. Some supported the ruling party either expressly or implicitly, some supported the opposition whereas others appeared to be neutral although their statements or conduct could easily be interpreted as either supportive of the government or the opposition. This study also shows that most new religious movement churches (born-again Christians) supported the government. The authors also demonstrate that the Ugandan government gives money or gifts to religious leaders or causes as one of the ways to ensure that religious leaders do not oppose the government. Because of the close and problematic relationship between religion and the state during colonialism and in the immediate aftermath of colonialism, it is imperative to illustrate that notions of religion and religious beliefs were invoked and relied upon in the submissions during the constitutional drafting process. This shades light on the relationship between religion relation and the state in lawmaking in contemporary Uganda.

<sup>23</sup> ‘Bishops condemn poll violence, call for peace’ 27 December 2015, Daily Monitor, at <http://www.monitor.co.ug/News/National/Bishops-condemn-poll-violence-call-for-peace/-/688334/3010704/-/jbm77/-/index.html> ; Ephraim Kasozi, ‘Religious leaders condemn counter-campaign rallies’ 16 December 2015, available at <http://www.monitor.co.ug/SpecialReports/Elections/Religious-leaders-condemn-counter-campaign-rallies/-/859108/2998552/-/p8errq/-/index.html>  
<sup>24</sup> Kinene, E, ‘Minister warns on politics of religion’ 3 December 2015, Daily Monitor, available at <http://www.monitor.co.ug/News/National/Minister-warns-on-politics-of-religion/-/688334/2982350/-/qant0jz/-/index.html>

<sup>20</sup> Ibid submissions by Dr Kanyeihamba, 20 June 1995: 4848; Mr Sabiiti, 3 August 1995: 5354

<sup>21</sup> See section 5(1)(a) of the Political Parties Organisations Act, 2002.

<sup>22</sup> *Proceedings of the Constituent Assembly (Official Report)*, submissions by Mr Malilo, 28 June 1995: 5049.

## THE LACK OF DEFINITION FOR 'RELIGION'

Before the author deals with the relationship between religion and politics in Uganda, it is important to deal with the question of the meaning of 'religion' in Ugandan legislation. I am not aware of any law or document which defines 'religion' in Uganda. The Interpretation Act<sup>25</sup> does not define religion either. There have also been cases where courts have dealt with the right to freedom of religion without defining the meaning of 'religion'.<sup>26</sup> Despite this, religion and religious beliefs are at times at the center of legal matters, as the following examples illustrate.<sup>27</sup> Some regulations, for example, the Prison Regulations,<sup>28</sup> require prison authorities to respect the religious practices of prisoners.<sup>29</sup> For example, Regulation 34(4) provides that "[t]he hair of a prisoner who follows a religion that prohibits the cutting of hair shall not be cut without an order in writing from the officer-in-charge, made on the ground of necessity certified by a medical

officer." The Penal Code Act<sup>30</sup> under section 118 creates the offence of insult to religion by providing that:

Any person who destroys, damages or defiles any place of worship or any object which is held sacred by any class of persons, with the intention of thereby insulting the religion of any class of persons, or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to its religion, commits a misdemeanour.

This is the case although the Act does not define 'religion.' The Anti-Corruption Act<sup>31</sup> makes it an offence for a public official "to act in connection with the office for the purpose of doing a favour or offering undue advantage to any person on the basis of that person's religion." Ugandan courts have also recognised the role of religious courts (sharia courts) in presiding over personal affairs of Muslims.<sup>32</sup> Courts have held that the constitution recognises one's right to practice a religion of his choice,<sup>33</sup> and that a political party may not be formed on the basis of religion.<sup>34</sup> When people go to court, for example, in divorce matters, they would state their religion for the court to determine which law governs the marriage in question.<sup>35</sup> An accused's religion must be mentioned in the trial court records.<sup>36</sup> In

<sup>25</sup> Interpretation Act 1976.

<sup>26</sup> See for example, *Sharon and Others v Makerere University* (Constitutional Appeal No. 2 of 2004) [2006] UGSC 10 (1 August 2006) (where the court dealt with the relationship between the right to freedom of religion and the right to education); *Law & Advocacy for Women in Uganda v Attorney General* (Constitutional Petition No. 8 of 2007) [2010] UGCC 4 (28 July 2010) (whether female genital mutilation may be justified on religious grounds); *Ajanta Kethan Thakkar v Kethan Thakkar* (Divorce Cause No.3 Of 2002. ) [2003] UGHC 45 (26 June 2003) (divorce granted because the respondent changed his religion from Hinduism to Christianity (Pentecostal).

<sup>27</sup> See for example, section 10 of the Prohibition of Female Genital Mutilation Act, 2010 provides that 'Any culture, custom, ritual, tradition, religion or any other non-therapeutic reason shall not be a defence under this Act.' Marriage and Divorce of Mohammedans Act 1906; Domestic Violence Act, 2010 (section 6); Prevention of Trafficking in Persons Act, 2009 (section 11(1)); Land (Amendment) Act, 2004 (section 38A(4) (d)); Anti-Corruption Act, 2009 (section 12).

<sup>28</sup> Prisons Regulations 2012 (25 October 2012).

<sup>29</sup> See Regulations 36, 66(2), 91(1)(a), 108(1)(d) and 109(1)(c).

<sup>30</sup> Penal Code Act 1950.

<sup>31</sup> Anti-Corruption Act, 2009.

<sup>32</sup> *Nabawanuka v Makumbi* (Divorce Cause No. 39 of 2011) [2013] UGHCFD 3 (13 February 2013).

<sup>33</sup> *Butime Tom v Muhumuza David & Anor* (Election Petition Appeal No.11 of 2011 ) [2012] UGCA 12 (21 May 2012)

<sup>34</sup> *Paul Kafeero and Another v Electrol Commission and Attorney General* (Constitutional Petition No. 22 of 2006) [2008] UGCC 3 (30 April 2008).

<sup>35</sup> *Peter Ddungu Matovu v Dorothy Ddungu Matovu* (Case No 0037 of 2003) ((Case No 0037 of 2003)) [2004] UGHC 19 (28 June 2004) (catholic religion)

<sup>36</sup> *Charles Rwamunda v Uganda* ((Cr.Appeal No.6 Of 1993)) [1994] UGSC 10 (2 June 1994).

adoption proceedings, a court may also order that the adoptive parents may not change the child's religion. For example, *In The Matter of Rwothmio Damian (Infant)*<sup>37</sup> in which Austrian citizens adopted a Ugandan child, one of the conditions imposed by the high court was that "[u]nder no circumstances shall the legal guardians allow, convert, influence or do anything to change the child's religion from the Christian faith in which it has been baptized and born in before this child attains the age of 18 years of age." Courts have also examined the role of religion in the lives of the prospective adoptive parents.<sup>38</sup>

The Constitutional Court held that if a person alleges that he was discriminated against because of his religion, he must prove that fact.<sup>39</sup> The Constitutional Court has used the words 'religion' and 'faith' interchangeably.<sup>40</sup> The Supreme Court has observed that "there are different Christian denominations in Uganda" and that each denomination has its own practices.<sup>41</sup>

The above examples show that religion is not defined in any piece of legislation and in most court cases. There is, however, one case in which a Ugandan court defined or described religion. In *Adiga v Sabino and Another*, the High Court held that "[r]eligion is the belief which binds the spiritual nature of humans to a super-natural being. It includes worship, belief, faith, devotion etc. and extends to rituals."<sup>42</sup> It is clear that legislators and most

of the judges have not found it necessary to define religion. However, religion appears to be widely understood by the judges and legislators. Scholars have also disagreed on the meaning or description of religion (Segal 1999: 139–163, 141–144; Godlove: 2014). It is beyond the scope of this article for the author to define or describe religion or religious belief. However, one of the lessons to learn from the Ugandan experience is that the lack of a legal definition of a word such as religion does not bar legislators and judges from invoking it.

## THE ROLE OF RELIGION IN LAWMAKING

Related to the above is the role of religion in Ugandan law. As indicated above, many pieces of legislation refer to religion although they do not define it. Mwamba has demonstrated that "[l]aw and religion are two sides of social relations and human nature" (Mwamba 2014: 71). Thus a legislator's religious belief or background may influence the way he or she thinks about law. Law absorbs the environment surrounding it. This could be a religious or economic environment (Mwamba 2014: 72–73). The fact that "Africans are naturally spiritual people", means, inter alia, that they may not enact laws that contradict their religious beliefs (Mwamba 2014: 76). Tamale argued that "[e]ven where it is not explicitly stated that religion has the force of law, many religious principles find expression in the legal codes of most jurisdictions and are often used to justify and legitimise culture and law" (Tamale 2014: 154). It has been argued that in many African societies there has always been an interaction between law and religion and that "[i]n some of its earliest forms in many African societies, law was difficult to distinguish from religion – the two were intertwined often to the point of being identical" (Kirkham and Durham Jr 2014: 62).<sup>43</sup>

<sup>43</sup> In South Africa although religion is recognised

<sup>37</sup> *In The Matter of Rwothmio Damian (Infant)* (HCT – O8 – CV – FC – 0002 OF 2015) [2015] UGHCFD 41 (10 December 2015).

<sup>38</sup> *In Re Namubi and Juma (infants)* (Family Cause No. 020 of 2013 and Family Cause No. 023 of 2013) [2014] UGHCFD 12 (21 February 2014).

<sup>39</sup> *Kamba Saleh v Attorney General* (Constitutional Petition No. 38 of 2012) [2015] UGCC 3 (25 May 2015).

<sup>40</sup> *Kamba Saleh v Attorney General* (Constitutional Petition No. 38 of 2012) [2015] UGCC 3 (25 May 2015).

<sup>41</sup> *Mifumi (U) Ltd & Anor Vs Attorney General & Anor* (Constitutional Appeal No. 02 of 2014) [2015] UGSC 13 (6 August 2015).

<sup>42</sup> *Adiga v Sabino & Anor* (CIVIL SUIT No. 0002 OF 2017) [2018] UGHCCD 4 (11 January 2018), p. 3 – 4.

Although since 1995 political parties based on religious beliefs have been abolished in Uganda, religion still has a role to play in law making. There are numerous examples to support this statement. First of all, when the Constitutional Court held that a section of the Penal Code Act which criminalised adultery was unconstitutional for violating the right to equality, some religious leaders criticised the court for promoting immorality and called upon the legislature to immediately enact a law that would protect the institution of marriage based on the teachings of religious scriptures, and the politicians promised to come up with a tougher law (Mujuzi 2010: 477–492). Two, one of the reasons why the Constitution was amended to expressly prohibit same-sex marriages was because some members of Parliament argued that same-sex marriages were prohibited in the Bible (Mujuzi 2009: 277–288). Three, one of the reasons why homosexuality is still prohibited in Uganda is because religious leaders have called upon the government to punish homosexuals seriously. Religious leaders were one of the groups which supported the anti-homosexual legislation.<sup>44</sup> Lastly, as demonstrated above, there are many laws in Uganda which in one way or another deal with the issue of religion. Against that background, it is apposite to examine the contribution made by some religious beliefs in the making of some of the provisions of the constitution of Uganda. In this discussion, I rely on the Constitutional Commission Report (1992) and the Proceedings of the Constituent Assembly (1994–1995). However, it is important to repeat here that although the Consti-

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in the Constitution, the contribution of religion or religious beliefs to the making of the constitution is not clear (Coertzen 2014: 126–141). In Nigeria there is evidence that religious beliefs have been invoked to enact legislation (Tamale 2014: 162) and that there is religious influence on public policy (Oloyede 2014: 190–191).

<sup>44</sup> See ‘Ugandan President Yoweri Museveni signs anti-gay bill’ 24 February 2014, BBC news, at <http://www.bbc.com/news/world-africa-26320102>

tutional Commission recommended that ten representatives of both mainstream and new religious movements should be appointed as Constituent Assembly delegates, no religious group or body was represented in the Constituent Assembly and therefore the arguments below reflect those of the relevant delegates in their individual capacities as opposed to being representatives of religious bodies. This means that although religious bodies/leaders made submissions to the Constitutional Commission and they have been influential in law making (as discussed above), they did not make any submissions during the debates in the Constituent Assembly.

## STATE RELIGION

As indicated above, religion has been closely associated with the state in Uganda leading to, amongst other things, the formation of political parties on religious lines and the murder of people on the basis of their religion. In order to make sure that there was separation between state and religion, the Constituent Assembly delegates agreed that the constitution should not provide for a state religion. They had different views on how that should be phrased. The drafting committee suggested that the relevant provision in the constitution should read “*Uganda shall not adopt a state religion.*”<sup>45</sup> One delegate suggested that the constitution should provide that “*Uganda shall be a secular state.*”<sup>46</sup> The delegates

[W]ere of the view that we should be specific and that no religion shall be declared a state religion. In other words, some people were saying that if we say *Uganda shall be a secular state*, we are saying Uganda shall rec-

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<sup>45</sup> *Proceedings of the Constituent Assembly (Official Report)*, submissions by Prof Kanyeihamba, 22 August 1995: 5771. Emphasis in original.

<sup>46</sup> *Ibid* submissions by Lt Col. Sserwanga Lwanga, 22 August 1995: 5771.

ognise religions and so, we were saying yes, we recognise religions but let none of them be a state religion.<sup>47</sup>

The idea that Uganda should not have a state religion was supported by people professing different religions and for different reasons. It was submitted, for example, that “[t]he Moslem community subscribe to Uganda being a secular state for this would guarantee them an equal right and opportunity to worship a religion of their own faith and to have Friday as a day of worship acknowledged and respected.”<sup>48</sup> It was argued that having no state religion will ensure that religion and the state are separated. One delegate submitted that he supported the “non-adoption of any state religion [because religion] must be completely barred from meddling into politics” because “[r]eligion has served as an alternative to political extremism” and he further submitted that experience had shown that “the highly religious are likely to be among the most politically intolerant.”<sup>49</sup> Although it was very important that Uganda shall not adopt a state religion, some Ugandans “were confused; they thought that what is being suggested by this Article is that Uganda does not care about religion” and therefore “some ways should be found to include the fact that Uganda is a God fearing country.”<sup>50</sup> One delegate suggested that the provision which states that Uganda shall not adopt a state religion should be included in the constitution and “respected religiously” because “[t]here have been some interferences in some religions in this country by

the past Governments. Some politicians have used some religions in Uganda to achieve their political objectives.”<sup>51</sup> The result of the above submissions was Article 7 of the Constitution which is to the effect that “Uganda shall not adopt a state religion.” The above submissions indicate that the reasoning behind it was that since different Ugandans belong to different religious groups, the adoption of a state religion would have been seen as discriminatory against members of those religious groups that have not been included in the constitution. Of equal importance is also that some delegates argued strongly that the adoption of state religion will make the church part of the state and hence allow religious leaders to ‘meddle’ in politics or allow politicians to use religion to gain or retain power. In order to avoid such a situation, it was critical for the constitution to make it expressly clear that Uganda shall not adopt a state religion.<sup>52</sup>

## CHILDREN’S RIGHT TO EDUCATION AND HEALTHCARE

The Constitutional Commission recommended that the new constitution should include a provision or provisions on the rights of children to medical care and education (Report of the Uganda Constitutional Commission 1992: 175). The report is silent on the relationship between those rights and religion. During the Constituent Assembly the issue of the relationship between religion, especially a parent’s religious beliefs, and a child’s rights to education and healthcare was debated. It was submitted that religion should not be invoked to deny children medical treatment.<sup>53</sup> The

<sup>47</sup> Ibid submissions by Chairman, Mr Kule, 20 June 1994: 378. See Deputy Chairman of Junior Constituency Assembly, 17 June 1994: 209 where it is submitted that Uganda should not adopt a state religion.

<sup>48</sup> Ibid submissions by Mrs Anifa Kawooya, 7 July 1994: 669. Some people were ‘happy’ that Uganda will not adopt a state religion, see submissions by Mr Mululi Mukasa, 26 July 1994: 1241.

<sup>49</sup> Ibid submissions by Mr Wambede, 11 July 1994: 719.

<sup>50</sup> Ibid submissions by Mr Ssekandi Edward, 12 July 1994: 779.

<sup>51</sup> Ibid submissions by Mr Lubega Waggwa, 15 July 1994: 909.

<sup>52</sup> It should be recalled that the issue of whether or not a state religion should be adopted is not unique to Uganda. It is also evident in some other African countries (Quashigah 2014: 84–85).

<sup>53</sup> *Proceedings of the Constituent Assembly (Official Report)*, submissions by Mr Masika and Lt Mayombo,

draft constitutional provision (the one included as a recommendation by the Constitutional Commission for the Constituent Assembly to debate) provided that “*No child shall be deprived by any person of medical treatment, education, or any other source of economic benefit by reason of religious or other beliefs*”.<sup>54</sup> One delegate submitted that “[t]he provision is very, very specific trying to address a problem in our society which seems to be growing where you have sects which believe that to go to school is against God. That to go to a Doctor is not necessarily that you will be cured...”<sup>55</sup> On the issue of invoking religion to deny people medical treatment, one delegate argued that:

[T]he formulation here is to enable a person to receive treatment even if that religious community...does not believe in that kind of treatment. If it is thought it is necessary for that person to have that treatment. Hon. Colleagues, you will recall that sometime back there was trouble, I do not know whether it was in Zambia or in South Africa where I think it was in Jehovah’s Witnesses, who were refusing I think blood transfusion, and the state had to come in forcefully to allow those who wanted members of those [religious groups] who were involved in an accident to receive blood transfusion by their religious beliefs were not allowed. So lives were unnecessarily being lost. I think this is what this formulation here seeks to achieve, it enables the medical authorities to do that which is necessary to save that life irrespective of the beliefs of the person concerned...I think it is a very impor-

tant provision to have in the law...<sup>56</sup>

Another delegate expressed concern that the proposed provision was broad enough to cover parents who did not have financial means to pay for their children’s medical bills or to take such children to school and argued that it was “very unwise for us to provide that a parent who fails through his own economic inability to pay school fees for a child or to take him to hospital, that, that person should be held for having breached a constitutional right of the child” and added that “[b]ut if some person has the capacity, has the money to take the child to school but because of a religious belief he...refuses, there ...[is] sufficient ground for the state to say that, that kind of parent or person must take the child to school irrespective of his faith or other beliefs.”<sup>57</sup> The issue of the parent’s inability to take the said child to hospital or to take him or her to school was clarified in the following terms:

The intention of the provision is not to punish parents who do not have the money or resources to pay for their children’s medical care or education. But rather to deal with those who despite of the fact that they have resources refuse to take children to hospital or to school because of religious beliefs.<sup>58</sup>

As it was captured clearly, the provision was aimed at that person who “because of religious beliefs you do not want to take certain treatment for a child...*(Applause)*”<sup>59</sup> and that the intention of the provision “is simply trying to protect children from religious or other beliefs that may prejudice their education, medical

12 September 1994: 2039.

<sup>54</sup> Ibid submissions by Mr Obiga Kania Mario, 12 September 1994: 2040.

<sup>55</sup> Ibid submissions by Prof Kabwegyere 12 September 1994: 2040.

<sup>56</sup> Ibid submissions by Mr Malinga, 12 September 1994: 2040.

<sup>57</sup> Ibid submissions by Mr Kutesa, 12 September 1994: 2041.

<sup>58</sup> Ibid submissions by Mr Kweronda Ruhemba, 12 September 1994: 2042.

<sup>59</sup> Ibid submissions by Chairman, 12 September 1994: 2043.

treatment and so on. (*Applause*).”<sup>60</sup> Against that background, Article 34(3) of the Constitution was enacted which provides that “[n]o child shall be deprived by any person of medical treatment, education or any other social or economic benefit by reason of religious or other beliefs.” It was also submitted that religion should not be invoked to deny people the right to education, healthcare or telling people not to pay tax.<sup>61</sup> However, those submissions did not receive express constitutional recognition although nobody can successfully argue that the constitution allows them to practice their religion in a manner that prevents them from paying taxes. The constitution is also very clear that the right to practice one’s religion is not absolute and therefore such a right should not be exercised in a manner that violates other peoples’ rights, for example the right to medical care and to education. In this case, it is clear that religion was used to recommend that the inclusion of a provision in the Constitution which is aimed at protecting the rights of children to medical care and to education. Put differently, the drafters of the Constitution wanted to ensure that religion is not invoked to deny children healthcare and education.

## RIGHT TO LIFE OF AN UNBORN CHILD

The Constitutional Commission report indicates that some people supported and others opposed abortion.<sup>62</sup> However, the report is

silent on the reasons for the different views on this issue. Another provision in which religion featured during its drafting stage was the one on the right to life and especially on the question of abortion. There are those who supported abortion and those who did not support it. The Proceedings of the Constituent Assembly show that no candidate unreservedly supported women’s right to abort. Even those who supported abortion argued that as a general rule it should be prohibited and only be permitted in three exceptional circumstances: first, if the continued pregnancy put the mother’s life at risk; second, if the foetus had severe abnormalities; and third, if the pregnancy was a result of a criminal act such as rape or defilement.<sup>63</sup> However, the majority of the delegates opposed abortion. In opposing abortion, one delegate submitted that “most religious denominations still do not approve of abortion like – the Roman Catholic. They compare abortion to murder, and it is a sin.”<sup>64</sup> Another delegate submitted that:

[T]here are many reasons why abortion should not be encouraged and among these are religious grounds. I am sure each of us has a belief, one or another, and to go against this belief is to go against one’s conscience and also to oppose the Act of God, whereby he puts up life from the time of conception. Apart from the religious grounds, there are the moral grounds on which we should be very strong if we have to protect this nation.<sup>65</sup>

The reasons why abortion was opposed were

<sup>60</sup> Ibid submissions by The Chairman, 12 September 1994: 2044.

<sup>61</sup> Ibid submissions by Dr Mugenyi, 7 September 1994: 1971.

<sup>62</sup> See The Report of the Uganda Constitutional Commission: Analysis and Recommendations (1992) paragraph para 7.142(c) where it is stated that ‘[m] any views strongly condemned abortion and wanted it severely punished by law. Other views, especially from women, wanted the issue to be nationally debated in order to reach a consensus decision on the issue.’

<sup>63</sup> *Proceedings of the Constituent Assembly (Official Report)*, 19 September 1994: 2032–2038.

<sup>64</sup> Ibid submissions by Mrs Ziwa, 19 September 1994: 2216.

<sup>65</sup> Ibid submissions by Dr Miyingo, 12 September 1994: 2030.

not only religious but also moral.<sup>66</sup> One delegate submitted that “culturally most societies in Uganda... do not approve of abortion. Because of its consequences and religiously.”<sup>67</sup> It was also argued that international human rights law did not sanction abortion as a method of family planning.<sup>68</sup> Another delegate argued that the reason why abortion should be opposed is because God grants everyone his or her rights even before birth.<sup>69</sup> Against that background Article 22(2) was included in the Constitution and it provides that “[n]o person has the right to terminate the life of an unborn child except as may be authorised by law.”<sup>70</sup>

CA delegates agreed that by including the above provision in the constitution, they had “killed two birds with one stone” because “[w]e shall have not given permission to anybody to carry abortion and at the same time we shall have left the responsibility to Parliament to authorize any other lawful abortion.”<sup>71</sup> The view that the provision catered for the interests of religious bodies and the rights of women was highlighted by one delegate who submitted that “[i]n the Catholic faith, the catholics [sic] do not agree with abortions or contraceptives, but we have passed a provision saying that nobody should terminate the life of an unborn child unless as authorised by law.”<sup>72</sup> Another delegate had a feeling that the Catholic

Church was not ‘very happy’ that a provision was included in the constitution which “allowed abortion under certain circumstances.”<sup>73</sup> One delegate argued that ‘perhaps’ the reason why abortion was not legalised in the constitution is because the constitution should not be interpreted as allowing people to do whatever they want with whatever belongs to them – including their bodies.<sup>74</sup> The above submissions show that religious beliefs contributed to the phrasing of Article 22(2) in the manner in which it was phrased. This was meant to cater for the interests of those who opposed to abortion on grounds such as religion and also for the interests of those who supported women’s rights, especially the right to terminate a pregnancy in circumstances allowed by the law, such as to save the life of the mother. A combined analysis of the submissions on children’s right to access health care and education on the one hand and those on issue of abortion shows that with regards to the issue of the right to healthcare and education, the argument was that religion should not be invoked to violate those rights. However, on the issue of abortion, religion itself was invoked to enact a provision which restricted the circumstances in which a woman can terminate a pregnancy. It could be argued that this was an inconsistent approach.

## CONCLUSION

The article has dealt with the contribution of religion in the making of some of the provisions of the Ugandan constitution. Notwithstanding the above observations, it is important to note that although the Uganda Constitutional Commission’s report shows that religious leaders and bodies made submissions to the Constitutional Commission and Odoki argued that religious bodies and leaders “participated ac-

<sup>66</sup> One delegate submitted that abortion should not be legalised in the constitution ‘because the values of our people are that abortion is still abhorrent and the rights of the unborn child should also be protected.’ See submissions by Miss Byanyima 12 September 1994: 2037.

<sup>67</sup> Ibid submissions by Mrs Zziwa, 19 September 1994: 2216.

<sup>68</sup> Ibid submissions by Mrs Zziwa, 19 September 1994: 2215.

<sup>69</sup> Ibid submissions by Mr Omolo, 1 July 1994: 511.

<sup>70</sup> A conscious decision was made by CA delegates not to define ‘unborn child.’ They left it to Parliament. See *ibid*: 3436.

<sup>71</sup> Ibid submissions by Dr Nyeko, 12 September 1994: 2038.

<sup>72</sup> Ibid submissions by Lt Col Sserwanga Lwanga, 21 August 1995: 5732.

<sup>73</sup> Ibid submissions by Mr Sebidata, 16 June 1994: 4739.

<sup>74</sup> Ibid submissions by Mr Sebidata, 16 June 1994: 4738.

tively in the constitution-making process and had a positive role to play in the Constituent Assembly” (Odoki 269), the Constitutional Commission report is silent on the extent to which such submissions directly or indirectly influenced the recommendations in the report. The Report of the Constituent Assembly is also silent on the exact role religious leaders played in the making of the constitutional provisions discussed in this article. My analysis shows that delegates opposed religious practices that they thought would undermine constitutional rights such as the right to education and healthcare. Because the delegates did not represent religious groups, they did not argue that their religious beliefs or groups prevented them from supporting or opposing a given constitutional amendment. However, what they did was to invoke general knowledge, for example, that major religions supported or opposed a given issue such as abortion as one of the reasons why they opposed a constitutional provision. This could be an indication that delegates, in order to get as many colleagues as possible to endorse their submissions, did not want to be perceived as representatives of specific religious groups. However, they were aware that their views were to be supported by other delegates. Another observation to make from the debates of the Constituent Assembly is that some arguments were directly meant to address a practice by a given religious group. In particular, the issue of denying blood transfusion to children was meant to address the Jehovah’s Witnesses’ view that is opposed to blood transfusion. The discussion shows that for religious beliefs to influence the manner in which law is made, it is not necessary for religious bodies to be represented in the law-making body. What matters is the presence of a sufficient number of delegates who share a given view and vote for or against it. The discussion also shows that on issues which all major religious groups are opposed, such as abortion, Constituent Assembly delegates found it very easy to invoke their religious beliefs as one of the reasons to enact a provision

that permitted abortion in very limited circumstances. It also shows that a religion which has very few or no delegate in the lawmaking body will have one of its practices easily abolished by those who are opposed to it. This was the case with regards to the issue of blood transfusion – a practice commonly identified with Jehovah’s Witnesses.<sup>75</sup> Had Jehovah’s Witnesses been represented in the Constituent Assembly, or had there been many delegates who did not find their opposition blood transfusion controversial, the constitutional provision on children’s right to access healthcare would probably have been different.

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<sup>75</sup> The Jehovah’s Witnesses are very active in Uganda. See generally, *International Bible Students Association v Uganda Revenue Authority* (HCT-00-CV-CS-0209 OF 2008) ((HCT-00-CV-CS-0209 OF 2008)) [2009] UGHC 142 (29 June 2009). There are cases in which courts have authorised hospitals to conduct blood transfusion procedures on children to save their lives after their parents, who are Jehovah’s Witnesses, had objected to such a procedure. See for example, *Ex Parte, An order authorising emergency lifesaving medical treatment to a child without parental consent* (CS 130/2007) [2007] SCSC 127 (17 April 2007) (Supreme Court of Seychelles); *Life Healthcare Group (Pty) Ltd and Another v JMS (as parent and guardian of the infant child MT) and Another* (34758/2014) [2014] ZAGPJHC 299 (20 October 2014) (High Court of South Africa). See also *ES v AC* (SA 57/2012) [2015] NASC 11 (24 June 2015) (Supreme Court of Namibia ordered that an adult should have blood transfusion); *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo* (SC 213/1999) [2001] 10 (02 MARCH 2001) (Supreme Court of Nigeria, patient refused blood transfusion and died and the doctor was disciplined for failing to administer blood transfusion without the patient’s consent).

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