WHEN COURTS DO RELIGION

THE DISAMBIGUATION OF RELIGION AND STATE

Isaac Christopher Lubogo

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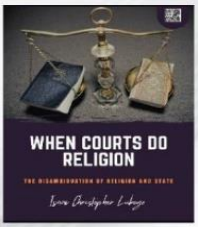

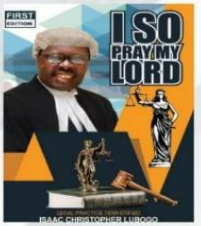

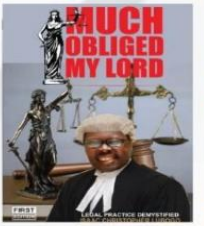

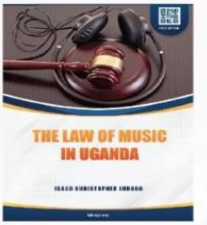

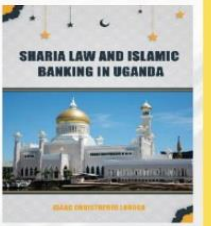

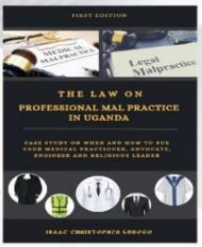

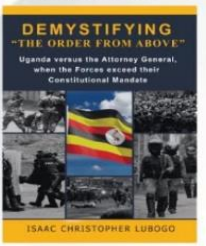

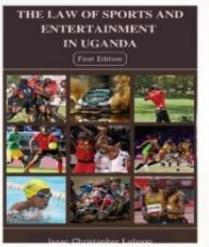

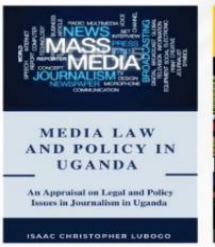

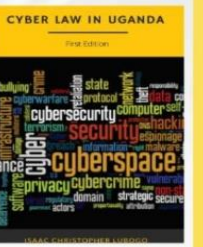

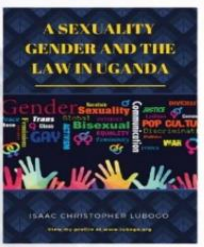

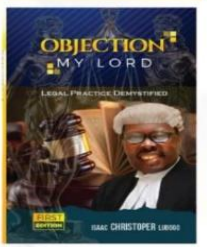

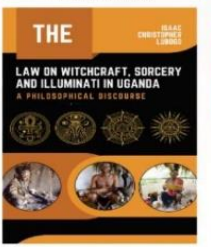

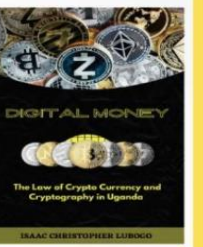

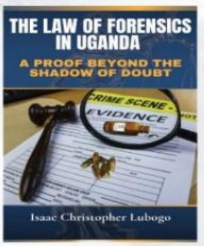

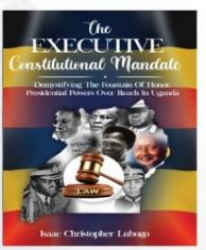

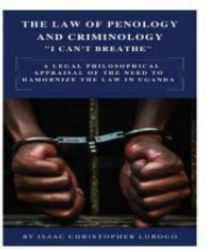

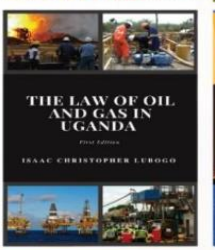

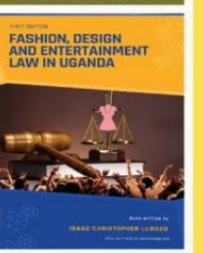

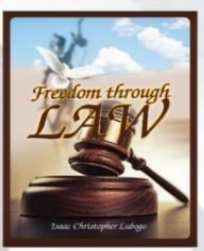

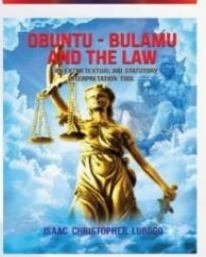

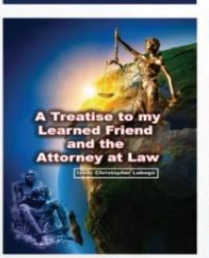

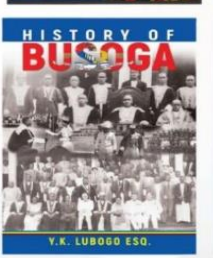

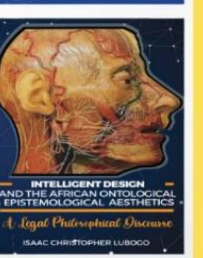

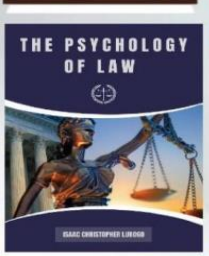

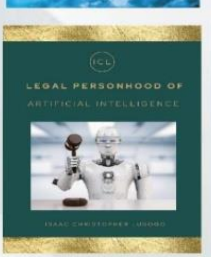

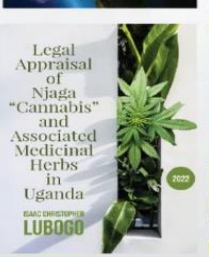

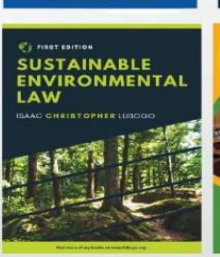

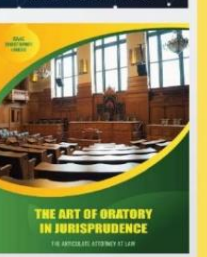

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Dedication

Oh God, Even my God my High Tower, my refuge, my Redemeer, my only source of hope. This and many more is for you Oh God of the mighty universe.

Introduction

Religion and the law adjudicated by courts have a great bond that even before the coming of philosophical doctrines of democracy people adhered to the law of religion which also developed as their customs. In Uganda, there several religious faiths which include Christianity, Islam and African Tradition Religion as the common known religions. But several religions have emerged by the introduction of the freedom of worship. In reference to the late Kenyan theologian John S. Mbiti, he observed extensively in that Africans are notoriously religious, in his book African Religions and Philosophy (1969) which he wrote while still a lecturer at Makerere University, he was against the western civilization tenets that African Tradition religion was demoniac in nature and barbaric. he further noted that traditional African religions deserve the same respect as other religions across the world. He referred to the Bible, God is the creator of all things, therefore meaning that God has revealed himself to all things. The civil courts have without hesitation exercised their jurisdiction to protect the temporalities of religious bodies and religion in general.

Under Article 7[1] it provides for non-adoption of a state religion. This in my view is the rationale enshrined in Uganda's Preamble that provides that "we the people of Uganda: recalling our history which has been characterised by

[1] 1995 Constitution of Uganda as amended

political and constitutional instability; recognising our struggles against the forces of tyranny, oppression and exploitation; committed to building a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress...."

This was a lesson of the scars brought about by religion in different political waves following the Wafaransa-Wangereza wars during the colonial days. The impact of the Uganda martyrs who had a strong ardor towards the religion is still being felt today and a day of 3rd June celebrated across the country and the entire world at large. We see the different customs of the African Tradition Religion evolving from religion on what was right and wrong. It carried a wide understanding of morality to fully capture religion. You will agree with me that morality developed from religion and this explains why something being morally wrong may not be a criminal offence. This is in line with the principle of legality (nullum crimen, nulla poena sine lege). The same can be seen in our Constitution 1995 as amended Under Article 28 (7). It is virtually axiomatic today that judges should not advert to religious values when deciding cases[2]. The book covers arguments of different judicial officers, Profound Counsel, theorists, Law Dons and the authors's critical

[2] kent greenawalt, religious convictions and political choice 239 (1988); stephen l. carter, the religiously devout judge, 64

analysis towards the idea of Courts doing religion which i believe will shape your understanding of religion in court rooms.

The book tends to capture most of the cases as a whole in order to bring to you a clear picture of the gist of religion in Court. The maxim of law is clear to this effect that "**Nemo aliquam partem recte intelligere potest antequam totum perlegit**", which lierally means that no one can properly understand a part until he has read the whole.

The concept of religion and the law

The concept of religion and the law has always been a major subject of deliberation for centuries as many philosophers have made it a point not only to analyze but also to draw a distinction between the two concepts whereas others have made it a point that the two are inseparable in so far as the modern day span of civilization, societal transformation and development. I somewhat subscribe to the latter school of thought basing on the origin of the law and the fact that the first lawyers were actually from the clergy.

Suffice to it as it may, the law, clergy and medicine have for long been referred to as professional courses simply because of the high level of discipline, long time spent in training, not forgetting the fact that both professions are accountable to a specific body that regulates and governs there conduct. For instance, in Uganda, the Advocates are accountable to the Uganda Law Society and the Law Council.

Nevertheless, the concept of law is also linked to religion because of the utmost and likened severity and fear of punishment. It is also a well-established principle of law that wherever there is a command, there is a punishment for failure to obey that command. A principle that can also be linkened to **Ubi Jus Ibi remedium** which means that where there is a wrong, there is always a remedy. Like the law as established in statutes like the Constitution and acts of Parliament. Religion also has books that do establish the law, for instance, in Christianity, the bible is the Grundnorm i.e. it is the Alpha and Omega of spiritualism in a life of a Christian. Similarly, failure to adhere to the standards and commands of God leads to severe and serious punishment just like the Penal code of Uganda which establishes a command and prohibition and further goes ahead to provide a punishment for the violation of the command. In Christianity, the punishment is hell.

Similarly, like the law, Christianity is also prevalent in our daily lives and it is no secret that laws are often based explicitly on religion and made by religious people. By nature, laws are made in such a way that they promote tolerance which tolerance is also exhibited and encouraged by religion through preaching love and unity. This largely explains the formulation of canon law and the linear propensity of religious elements in law and in the world's constitutions. It is therefore not surprising that religion has been held to be the primary or sole source of morality and the law. The same can be deduced from the ancient Greek and Roman societies which based there custom upon

pleasing the various gods they worshipped. It also has to be noted that the Ancient Judeo-Christian societies established laws based on their canonical texts such as the Torah or Bible. This was also evident in the Medieval Europe, where the Catholic Church was heavily intertwined with the government.

The Influence of religion on the law

Have you ever imagined how the world would be if there was no religion? How would people be able to control their emotions and co-exist in a just society without much conflict? It would certainly be a very difficult task to imagine. Basing on the fact that even with the existence of a dual system of control i.e. both legally and religiously, many societal evils have withered death for instance: land grabbing, adultery which is a civil wrong in Uganda, murder among others. But more certainly not it is true that society would be extremely worse had it not been the religious indoctrination that is prevalent in the community both in the schools and in our homesteads including the churches.

It suffices for me to mention that examining the relationship between religion and the Law is similar to analyzing the relationship between life and breathing. In other words, the two concepts have often influenced one another henceforth religion can correctly be said to be a cornerstone to the development of legal jurisprudence all over the world. This is undisputedly

true as many laws have been influenced by the Holy Scriptures and the writings of the holy men. This doesn't mean that we do not have laws that are contrary to the spiritual books and that explains the whole controversy and relationship between the law and religion. Take an example of the homosexuality laws. The fact that some countries do recognize and respect the rights of Trans genders and the fact that other societies, do condemn and have zero tolerance to gay rights activist simply shows and exposes the invisible line between the law and religion that cannot fully separate the two.

Furthermore, other schools of thought condemn the parochial line of inclination between the school of thought that condemns polygamy and supports same sex marriages. This literally shows and escalates the utmost vitality, role and influence that religion plays in societal development and transformation.

It is therefore not surprising that over a dozen years ago, many scholarly organizations and committees focusing on law and religion were in place and by 1983, we had a scholarly quarterly called the *Journal of Law and Religion*which was first published that year. Later on we also had the *Ecclesiastical Law Journal* which began publication in 1987 not forgetting *the Rutgers Journal of Law and Religion* which was founded in 1999, The *Oxford Journal of Law and Religion* which was founded in England in 2012 among others.

Similarly, many departments and centers for the subject have been created around the world during the last decades. For example, the Brigham Young University law school which created the International Center for Law and Religion Studies in 2000.

The Church Vis avis the State

The question as to the separation of church and state has raised enormous confabulations all over the world with many leaders cautioning the moral authority that religious leaders have to question political - leadership misnomers in the government. One of the religious leaders in Africa commented on a warning made by his leader against church leaders who speak up against government actions and inactions by requesting the government to produce a list of things that they consider political and a list of things they consider religious and to date the list has never been produced. This rather leads me to the fact that the question of the religion and the state is a philosophical and jurisprudential one.

Needless to add is that Thomas Jefferson was lucid on the question of separation of the church and the state and issued his "wall of separation between church and state.

Thomas Jefferson expressed his understanding of the intent and function of the Establishment Clause and Free Exercise Clause of the First Amendment to the United States Constitution which reads: that "Congress shall make no

law respecting an establishment of religion, or prohibiting the free exercise thereof..."

The principle is paraphrased from Thomas Jefferson's "separation between Church & State. And It is generally traced to a January 1, 1802, letter by Jefferson, addressed to the Danbury Baptist Association in Connecticut, and published in a Massachusetts newspaper.

Jefferson wrote,

Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

Jefferson also reflects on other thinkers, including Roger Williams, a BaptistDissenter and founder of Providence, Rhode Island when he wrote that

“When they [the Church] have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the Candlestick, etc., and made His Garden a wilderness as it is this day. And that therefore if He will ever please to restore his garden and paradise again, it must of necessity be walled in peculiarly unto Himself from the world, and all that be saved out of the world are to be transplanted out of the wilderness of the World. Furthermore, in keeping with the lack of an established state religion in the United States, unlike in many European nations at the time, Article Six of the United States Constitution specifies that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

It is also important to note that Jefferson's metaphor of a wall of separation has been cited repeatedly by the U.S. Supreme Court as seen In *Reynolds v. United States* (1879, where the Court wrote that Jefferson's comments "may be accepted almost as an authoritative declaration of the scope and effect of the [First] Amendment." Similarly, In *Everson v. Board of Education* (1947), Justice Hugo Black wrote: "In the words of Thomas Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and state."

Needless to add is the fact that the Supreme Court in *Zorach v. Clauson* (1952) upheld accommodations, holding that the nation's "institutions

presuppose a Supreme Being" and that government recognition of God does not constitute the establishment of a state church as the Constitution's authors intended to prohibit. .

It must also be noted that the distinction and separation between the church and the state differs from society to society and it can be total separation as derived from a country's constitution impliedly or directly as is in the constitution of India and Singapore. It can also be seen as hollow separation and in most cases, there is only a thin line of distinction between the two and that is why we have country's that do have a state religion. In Uganda, particularly under Idi Amin Dada, Uganda had become an Islamic state and Uganda had become a factionalized state both in culture and religion which saw to it divided along political-religious lines It is therefore noteworthy that the degree of political separation between the church and the civil state is determined by the legal structures which often define the proper relationship between organized religion and the state.

In Uganda the above separation concept has also found resonance in cases where, Doctrines of 'church autonomy' and 'ministerial exception' are affirmed in Uganda: *Rev.Charles Oode Okunya v The Registered Trustees of the Church of Uganda,* HCCS No. 305/2020 where it was held that **Religious disputes**—that are purely ecclesiastical or doctrinal such as the appointment of ministers—are not within the jurisdiction of civil courts.

However, an exception may be made where the dispute is either civil or involves property.

In light of the above deliberations, it is quite elucid that the extent of separation between government and the church / religion all over the world continues to be a major subject of debate.

The influence of religion on the emergence of the law

The expression “formation of law” is used to denote the law emergence process as one of the most important social phenomena. However, we have to appreciate the fact that the law itself is a phenomenon that is inseparable from modern society. In this regard, law emergence and formation is impossible without specific social processes and conditions and some of these processes are influenced by thoughts largely influenced by religion. Just like the law, societies are also run on norms and religious inclinations which are key in the preservation and promotion of societal order.

Cicero also noted this in his famous writings when he wrote about the "***Ubi societas, ibi jus***" i.e. wherever there is society, there is law. It should be noted that in addition to law, religion plays a particularly significant role in social processes. It has also been overly stated that if the law regulates socially significant relations, then religion permeates almost every area of human life including the sphere of morality and governance.

It is therefore imperative that we can authoritatively analyze thelaw and religion with the aim of ascertaining the existence and extent of any relationship or intersection between the two in modern States and its important to appreciate the great deal of influence that religion has on the society in terms of promoting peace and social existence. When we appreciate the role of religion in the law, we can be able to contribute to the current search on the way to utilize law and in resolving the lingering problem of abuse of freedom of religion and religious extremism.

It is generally taken for granted that there exists a parallel line or a sort of face-off between the secular and the spiritual, between empiricism and dogmatism, between superstitions and science, and between the State and religion. Accordingly, there is the tendency on the part of the learned and the unlearned to hold the opinion that law and religion have no business with each other. However, diligent studies of societies from the ancient time to the modern time disclose that there has always been a point of convergence between law and religion.[3]

In the same premise, the law governs religion be it a state decree or an amendment of an existing act of parliament which gains binding effect and influence on the practice of religion. Needless to add is that laws are made by

[3] 1 Morden, J. W., 1984, An essay on the connection between law and religion. Retrieved July 8, 2020,

religious people. Even when they are not religious, they are made to govern religious people and for a society that is largely / predominantly religious in nature and scope.

The rise of religious diversity and extremism

The practice of religion by individuals and groups, the rise of religious diversity, and the fear of religious extremism, raise profound questions for the interaction between law and religion in society. The regulatory systems involved, the religion laws of secular governments both in the national and international context not forgetting the religious laws of faith communities which have turned out to be extremely valuable tools for our understanding of the dynamics of mutual accommodation and the analysis and resolution of issues. It must be noted that areas such as religious freedom; discrimination and the autonomy of religious organizations not forgetting the concept and doctrines relating to worship and religious symbols; the property and finances of religion among others have had a great influence on the livelihood of people and development of societies. It is therefore not surprising that many scholars at the forefront of law and religion have tried to digest and elucidate on the relationship between the two. Some of these scholars notably being lawyers, religious leaders, and others with an interest in this rapidly developing discipline of religion and the law

In other words, Religion has also imposed a serious influence on modern liberal democratic states all over the world. Religion also imposes requirements and standards that often pose a threat and problem to key people in politics, considering the fact that politics is a source of conflicting interests and conflicting loyalties. The claim of religious citizens that they should not be forced to choose between spiritual and civil obedience poses a particular problem where this takes the form of requests for special accommodation or exemption from requirements and rules that are generally binding on all[4] in Uganda, religion has been used to preach against societal evils like land grabbing, adultery, murder among others. Even in times of epidemics like Covid 19, religious leaders were engaged by the government to help create awareness about the disease and impending

Religion as a right

The right to religion, literally protects the right to thought, conscience, and action. Citizens under the various constitutions have the right to believe in any religion that they choose, as well as the right to exercise this right through religious organization, assembly, and expression, provided that all of this is done without violating the laws of the country or jeopardizing the rights of other citizens of the country. It must also be noted that the protection of inherent rights has been one of the main concerns of the modern

[4] Michael Sandel, Liberalism and the Limits of Justice (Cambridge University Press 1982) xiii

governments all over the world and the same has been overly addressed by the key civil rights issues addressed under constitutions around the world which explicitly affirm to the vitality of the protection of religious rights. Some of the key note areas include how religion is exercised, whether it is taught in schools, and its usage as a discriminatory factor not forgetting how religion can be used as concept of mutual existence and understanding. This is practically inculcated through an education system that speaks and depicts values of tolerance among students right from their early childhood for instance: In Uganda, the Social studies paper for primary pupils has both the Christian religious education section and the Islamic section. More often than not, children in different sects learn and appreciate the values of the two religions and they often answer either of them.

However, by examining how religious freedoms are treated in various constitutions around the world, we can compare and contrast the influence of religion on the different international governments. These observations can be used to see how the protection of religious freedoms is correlated to the social, religious, and economic development of these countries.

However, through a close analysis of the issues pertinent to religion, I have come to realize that the protection of religious rights is very closely tied to the flourishing of human rights and the societies of the various countries today. Religious freedom has therefore been a perpetual political issue throughout our history and in the present day world. It must also be noted that an

openess to many religions has been a major factor that has spurred commerce in places as diverse as the Netherlands in the 1500s, Pennsylvanian colonies in the early 1700s, and Argentina in the 1800s.

Today, it is no secret that religious minorities in the Middle East and in Africa experience persecution at the hands of majorities. Hitherto, many conflicts have arisen throughout history in part because of religious differences and the desire of one religious group to assert its beliefs against another. Some of these conflicts even influenced political leadership and in Uganda, a non-Catholic had no audacity to lead the Democratic Party.

Protection of religious minorities

Over the past several centuries, various forms of religious freedom have emerged as a way of managing increasingly diverse populations. While cultural attitudes are also predominantly an important part of tolerance across religious groups. More often than not the protection of religious minorities is embedded in the laws of a nation and specifically, foundational protections, societies usually write constitutions that spell out the fundamental laws of a country. Despite the fact that most national constitutions have some set of provisions that govern religious beliefs and practices, there is often much variation across those countries in what religious rights exist. Henceforth, many philosophers and writers have tried

to examine the extent to which government intervention in the realm of religion affects the degree upon which people practice religion. Take an example of the implied Islamic declaration of a state religion under General Idi Amin Dada in Uganda.

The concept of religious acceptance

It must be noted that the concept of religious acceptance and tolerance via the various religious practices within various countries dates back into antiquity. The first instance of nationwide religious freedom was in the kingdom of Persia under Cyrus the Great, who granted a degree of religious freedom and allowed enslaved religious groups to re-establish their places of worship. As seen and derived from Cyrus's treatment of the enslaved Jewish people in his kingdom, the Old Testament in the bible further demonstrates his tolerance of foreign religions. In particular, Chronicles 36:22-23 says, "Now in the first year of Cyrus king of Persia, that the word of the Lord by the mouth of Jeremiah might be fulfilled, the Lord stirred up the spirit of Cyrus king of Persia, so that he made a proclamation throughout all his kingdom and also put it in writing: "Thus says Cyrus king of Persia, 'The Lord, the God of heaven, has given me all the kingdoms of the earth, and he has charged me to build him a house. This passage shows Cyrus's toleration of other religions and his willingness to live peacefully with those with other religious beliefs. Cyrus's empire-wide implementation of religious freedom and toleration was unparalleled and for the most part unmatched until the

Roman emperor Constantine enacted the Edict of Milan in 313 A.D. I can therefore conclude that this edict alleviated the heavy persecution endured by Christians in the Roman Empire and attempted to institute religious freedom and equality in the largest empire in history. In this same vein, the Pact of Umar established an apocryphal treaty between the Muslims and Christians of Syria that later gained a canonical status in Islamic jurisprudence[5] The vast majority of constitutions contain a provision which in one way or another includes the freedoms of both conscience and expression with no explicit limitations. Freedom of conscience can be deduced to mean the right of citizens to believe whatever they choose to believe, a freedom that is purely cerebral. Wherefore, the freedom of expression covers all actions that are a result of the beliefs of the free conscience, including worship, writing, speaking, assembling, and many other forms of religious action whereas Free exercise is the combination of both a free conscience and free expression: the right to both think and act upon one's religious convictions.

It has often been argued that free exercise provisions protect religious practices in their fullest form, so that the only constraint on the exercise of one's religion is that the forms of expression cannot infringe on the rights of another citizen. As discussed below, some countries make this constraint

[5] Abu-Munshar (2007) for a discussion of this treaty

explicit through a specific provision stating that free exercise does not excuse illegal activity in the name of religious practice. Nicaragua's constitution contains a provision that provides full free exercise but follows it with a restriction against illegal activity under the guise of religious expression. Article 69 of Nicaragua's constitution begins with a standard free exercise clause that states, "All persons, either individually or in a group, have the right to manifest their religious beliefs in public or private, through worship, practices and teachings" (Nicaragua, Article 69). The article goes on to state that, "No one may evade obedience to the law or impede others from exercising their rights and fulfilling their duties by invoking religious beliefs or dispositions."

Another example of this kind of provision can be found in the constitution of Iceland. Article 63 states, "All persons have the right to form religious associations and to practice their religion in conformity with their individual convictions. Nothing may however be preached or practiced which is prejudicial to good morals or public order" (Iceland, Article 63).

In a very similar vein, the Latvian constitution establishes free exercise in Article 99, which states, "Everyone has the right to freedom of thought, conscience and religion" (Latvia, Article 99). Later on in Article 116, which is dedicated to restrictions on certain articles of the constitution, it states, "The Constitution may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic

structure of the State, and public safety, welfare and morals. On the basis of the conditions set forth in this Article, restrictions may also be imposed on the expression of religious beliefs." (Latvia, Article 116).

Wherefore, I will note that many constitutional frameworks actually value the right to free exercise not forgetting the fact that many laws of the various countries are set up to make most expression legal, thus avoiding undue constriction of free exercise. However, I identified seven countries in the sample with a free exercise clause combined with a legal system that constricts religious freedom by making many forms of expression illegal. I refer to this form of free exercise as "limited free exercise" to reflect constitutions that include a free exercise clause yet constrict free exercise through the wording of the clause or through manipulation of the legal system within which the free exercise clause exists. Afghanistan's constitution has an example of one of the more extreme versions of limited free exercise.

Afghanistan is a self-declared Islamic state (Afghanistan, Article 2, Section 1) that only provides religious freedom and protection to followers of Islam (Afghanistan, Article 2, Section 2). Further, the constitution of Afghanistan states that no law can be created that is contrary to the religion of Islam, at least potentially excluding the legal exercise of any religion other than Islam within the country.

Article 36 of China's constitution states that its citizens have the right to free exercise. The article includes an addition that is uncommon in most constitutions: China's free exercise clause is limited to only protect "normal religious activities." This limitation is highly subjective, and leaves the Chinese government with the ability to determine what "normal" activities entails. This free exercise clause, while seeming to protect religious expression, in actuality allows for extreme limitations upon certain religions if they are determined to be abnormal.

Prohibition of Religious Propaganda Propaganda is defined as "ideas or statements that are often false or exaggerated and that are spread in order to help a cause, a political leader, a 17 government, etc."

Essentially, propaganda can be any communication that is not impartial and used primarily to influence an audience and further an agenda. Many countries do not specifically detail their treatment of religious speech but will specifically prohibit the use of hateful or even simply religiously biased propaganda. Chad's constitution says, "All propaganda of an ethnic, tribalist, regionalist or religious nature, tending to affect the national unity or the secularity of the state, is forbidden" (Chad, Article

Similarly, the constitution of Senegal states, "Any act of racial, ethnic or religious discrimination as well as any regionalist propaganda capable of

interfering with the internal security of the state or the territorial integrity of the Republic, shall be punished by law" (Senegal, Article 5).

Actually, almost all the ancient kingdoms and emirates operated theocracies, thereby making no distinction between crimes and sins.[6]

In ancient Egypt, there was the stolistes, which was a priestly order.3 Theocracies also existed in Israel, Babylon, Persia, Greece, Rome, India, China, the papacy, Ottoman Empire, Islamic caliphates and in African kingdoms and communities. In those days, the people were ruled by kings, who were also the ultimate law-makers and the spiritual heads, supported by priests, whose codes of worship from the gods must be followed by the people. The Code of Hammurabi, which regulated a lot of activities in the Babylonian Empire, had religious contents.4 And among the Greeks could be found a dialectical relationship between the laws (nomos) of the Greek city-states and what Sophocles in Antigone called the "unwritten and unfailing statutes of heaven" (logos).[7]

State Vis Avis Religion

[6] Oyebode, Akin, Law and Nation-building in Nigeria: Selected Essays, Lagos: Centre for Political Administrative Research, 2005, p. 23.
[7] Oyebode, Akin, Law and Nation-building in Nigeria: Selected Essays, Lagos: Centre for Political Administrative Research, 2005, p. 25.

There was also a close interplay between law and religion in the Roman Empire, which became the dominant empire in Europe, Middle East and North Africa after the fall of Greece. People were made to worship the gods of the emperor, who was himself regarded as a demigod

The tablets containing the Ten Commandments, which were the core of the laws for the governance of the theocratic Hebrew kingdom of Israel, were believed to have been directly handed over to Moses, their leader, by God on Mount Sinai.8 Judaism, the religion of the Jews that took off then, has till date shaped Western thought about law. Many of the laws that have been made in the Western world were expected to be based on the morals embedded in the Mosaic Law.[8] It must also be noted that the pictorial nature of the handing over of the law to Moses is actually reflected in the present day making of the law and enactment of statutes which the state envisages will be used and obeyed by the people. Moses signifies a leader and as thus a leader who is similar to the governments of the world today which are meant to protect their people as well as enforce the law among all as a prelude to maintaining peace and prosperity. Also vital to note is the fact that the inextricable intersection between law and religion was even more pronounced in the ancient Islamic caliphates and emirates. This was the reality in the time of Mohammed, the founder of Islam, and the subsequent

[8] Akhere, Jim I. and Okhiria, Regina J., The role of legal and judicial reform in development

caliphates and emirates, including the ones that emerged in Northern Nigeria from 1804. Sharia, the Islamic law, was strictly used to govern them all.[9] This is because Islam makes no distinction between religious injunctions and lifestyle[10] To put it more clearly, politics, adjudication, penal code, tort, contract, commerce, dressing and even diet all have clear prescriptions and punitive measures for the violations of those prescriptions under sharia, which was believed to have been Allah's inspired instructions to Mohammed[11]

It also suffices to mention that Law and religion were in close intersection in the African traditional societies as there was no separation between the State and the shrine of the hundreds of gods, spirits and ancestors worshipped then. The kings of the then African animist communities exercised both spiritual and secular authority[12]

In other words, the secular leadership in the traditional African communities was closely identified with the deityn a nut shell, the gods that were worshipped by religionists in the ancient societies were believed to have given the laws that governed the secular societies. Thus, Karibi-Whyte, a justice of

[9] Orire, AbdulKadir, Shari'ah: The Misunderstood Legal System, Al-Maslaha Journal of Law and Religion, Vol. 3, 2004-2006, p. 131

[10]Anon, International Conference on Law and Religion, Ibadan: University of Ibadan Faculty of Law, 2017, p. 30

[11] 2 Quran 45: 18; Quran 5: 44-45; Quran 5: 47; Quran 4: 65; Quran 16: 89

[12] Oyebode, Akin, Law and Nation-building in Nigeria: Selected Essays, Lagos: Centre for Political Administrative Research, 2005, p. 30.

the Supreme Court of Nigeria then, was right when he remarked as follows at a Judges' Conference: The claim of the Holy Quran to divine revelation is not peculiar to it. The Holy Bible, which appears to contain the fundamental basis of the common law, claims to have been derived partly from the Ten Commandments God gave to Moses on the Mountain. The several books of the Holy Bible are said to have been written on inspiration. The Roman Twelve Tables, the laws of the Greeks and the laws operating in many civilized countries are founded on divine revelations[13]

Influence of Religion on Law Today

Similar to what obtained in the ancient societies, religion has to some extent continued to influence the law of the modern States. In other words, there is still much intersection between law and religion in our time. Despite the effects of modernization, multiculturalism and globalization, the English common law has never extricated itself from its Christian roots. In fact, England is still, at least officially or nominally a Christian State, with Protestant Anglican Christianity as its State religion. Though the archbishop of Canterbury is its Spiritual Head, the monarch of England is "the Imperial Defender of the Faith and Supreme Governor of the Church of England.[14]

[13] Orire, AbdulKadir, Shari'ah: The Misunderstood Legal System. Al-Maslaha Journal of Law and Religion, Vol. 3, 2004-2006, p. 134.

[14] Anon, 2020, The Queen, the Church and other faiths. Retrieved July 10, 2020, from https://www.royal.uk

In all the common law countries, whether Christian, Muslim, Hindu or Buddhist, the English common law, which has a lot of derivatives from the Bible, has, along with the indigenous customary law and religious laws of those countries, continued to have influence on the legal systems of those countries. In other words, the legal systems of such countries as Nigeria, United States, Canada, Australia, India and South Africa colonized by England have all been influenced to some extent by the English common law, which had some Christian roots. In a nutshell, hundreds of the injunctions in the Bible have had enduring influence on the English common law and also on the continental Europe's civil law.

The United States of America is often cited as a classic example of a country whose Constitution provides for a strict separation between the Church and the State. Article vi (3) thereof provides that "no religious test shall ever be required as a qualification to any office or public trust under the United States."[15]It similarly provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[16] While interpreting this provision in Everson v. Board of Education, 19 Black, J., of the Supreme Court of the United States made the following landmark pronouncement: The establishment of religion clause of the First Amendment means at least this: Neither a State nor the Federal Government

[15] Article vi (3), Constitution of the United States 1787.
[16] First Amendment 1791

can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief, for church attendance or no

Though both judicial decisions and academic works now take it for granted that the United States is a very good example of a separationist State[17] this does not mean that the Government of the United States or of any State therein sees or treats the country as not recognizing any religion. In fact, the US Constitution does recognize the taking of oath of office[18] which presupposes the recognition of religion. Indeed, "In God We Trust" remains the inscription on the US dollar bill.

has been argued that aggressive separationism could engender official exhibition of hostility towards religion. Insistence on separation between religion and the State may move government towards inadvertent insensitivity and eventual intentional persecution.22 Even if faith-based organizations do not have an official or endorsed role to play in the State

[17] Everson v Board of Education (1947) 330 US 1.
[18] Article vi (3), Constitution of the United States 1787.

sphere, they would still have a significant role to play in the public sphere because the public sphere is larger than the State sphere[19]

In a nutshell, the laws of many modern countries remain substantially influenced by religion. 53 countries in the world currently have State or established religions.[20] Four of them are officially theocratic States. Some countries also have "endorsed" religions. Endorsementism is currently the concept in many predominantly Roman Catholic countries. Examples of endorsementist States are Italy having the Roman Catholic.

England Anglican Christianity the Monarch of the country is the Imperial Defender of the Faith and Supreme Governor of the Church of England

Iran Shi'a Islam by the 1989 amendment to the 1979 Iranian Constitution, the choice of the Assembly of Experts as the Supreme Leader of Iran must be a cleric

Vatican City Roman Catholicism the Pope (supreme Bishop) of the Roman Catholic Church is its Head of State

Afghanistan and Algeria have Sunni Islam as the state religion

Religious persuasion and inclination

[19] Anon, International Conference on Law and Religion. Ibadan: University of Ibadan Faculty of Law, 2017, p. 120

[20] ee International Freedom Report 2016, Bureau of Democracy, US Department of State.

There is no doubt that the law has been pampered by a lot of religious affiliation and beliefs which have largely shaped precedent and law making. Neverthless, it is also noteworthy that the application of religion in legal affairs has been a very contentious affair that has largely been defined by judges' opinion and also pursuant to the prevailing facts, case and circumstances. In the case of David Nsiyona v Scandi Trading Limited [2021] UG Comm C32 (30 April 2021, the court held that Religion is deemed by our culture to be a matter of persuasion. The law cannot compel a citizen's adherence to a religious belief and must always protect the privilege of infidelity. Furthermore it was noted that Countless are the times when courts have said that religious disputes are not within the jurisdiction of civil suits and that this sweeping statement gets limited to read that a 'purely' ecclesiastical or doctrinal issue is outside the scope of civil jurisdiction, thereby enabling them to assume decision-making function over factions whose property squabbles are inextricably interwoven with doctrinal undertones. Or to put it the other way, a judge may say that religious disputes which involve property or civil dispute are within the scope of court. This decision therefore is a perfect acknowledgement of the unwavering importance and influence of religion on the law.

It also suffices to mention that in the case of United States v Ballard 322 U.S 78 (1944) the court noted that; "Judicial intervention into religious questions is similar to the doctrine of a political question, wherein, it can be understood

that just like it is expected that political branches are more opposite to decide the political question, religious bodies are suitable to decide questions about religion." It was further noted that the court is basically ignorant of the historical beliefs and the reasoning behind religious notions; hence they apply the judicial mind to check the veracity of faiths and beliefs because of which their interpretation is different from the beliefs of devotees. It was also noted that the court has to understand that it is ill-equipped to deal with religious beliefs and practices because of remoteness and lack of familiarity hence should only interfere when any practices seriously damage the constitutional fabric which averment clearly recognizes the influence of religious fabric on religion and vice versa. It is also similar to the repugnancy clause that is prevalent in many of the world's constitutions today including that of Uganda which emphasizes the notion of constitutional supremacy.

In one way or another, the above decision in the United States somewhat prohibited courts from litigating religion because they lacked the ability to address religious questions which concept has regularly been referred to as 'limited jurisprudential competence' to decide religious matters. This explains why courts all over the world have generally extracted the prohibition against litigating religion from the 'church autonomy doctrine' which requires judicial deference to religious institutions "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided.

In the Ugandan case of Rev Father Cyril Adiga Nakari vs Right Reverend Ocan Odoki and Registered Trustees of Arua Diocese HCCS No. 002/2017, Justice Stephen Mubiru in High Court Arua had this to say on Church/religious disputes -

"This is a suit in which deference to organs of governance with the religious community of the Church ought to be observed. This Court should use restraint and be slow to intervene in internal affairs of the Church whenever it is still possible for the Church to correct its errors within its own institutional means."

He went on further -

"On the other hand, the determination of who is morally and religiously fit to conduct pastoral duties or who should be excluded for non-conformity within the dictates of the religion falls within the core of religious functions. Civil Courts will defer to a religious organisation good faith understanding of who qualifies as its Minister where resolution of the dispute cannot be made without extensive inquiry by the Civil Court into religious law and polity, the court will not intervene.

The mere adjudication of such questions would pose grave problems for religious autonomy. This kind of second guessing of ecclesiastical decisions would constitute a clear affront to rights of religious autonomy. The Church must be free to choose who will guide it on its way."

Similarly, the other reason to prohibit courts from this decision making stems not from skepticism regarding judicial ability to resolve religious questions, but rather from concerns that judicial resolutions of such questions will be interpreted as an endorsement of one religious view over another or importing practices not conforming to spiritual and religious teachings.

However, it must be noted that the non-justiciability of some issues would mean that one cannot seek remedy elsewhere and thus leaving them without any options to vindicate their rights. Henceforth in such circumstances, the court should be open to address the issue before hand. In otherwords, where there is a wrong, the law should always provide a remedy. However, where the religious institutions have a dispute resolution mechanism, it must be upheld. In the same premise, as a matter of constitutional law and sound policy, courts should wade in the waters of disputes turning on religious doctrine or practice so as to afford parties access to an adjudicative forum to provide redress for legal wrongs. it must also be noted that whenever the questions of discipline, of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the courts tend to accept such decisions as final, and as binding in their application to the case before them. This is premised on the view that courts lack capacity to litigate religion and it stems in large part from worry that religious claims lack objectivity and empirical bases. Thus, "In contrast to ordinary questions of fact, religious questions are understood to

lie beyond judicial competence because they do not depend on the logic of law. Instead, religious questions may be answered on the basis of faith, mystical experiences, miracles, or other non-rational sources."

Furthermore, In the case of Ballard v United States (supra) The Supreme Court noted; "Men may believe what they cannot prove-They may not be able to put the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law....when triers of fact undertake that task, they enter a forbidden domain."

It was also stated that the selection of a Bishop is a religious function and the plaintiff's claims that are under adjudication would invite court to get involved in the resolution of religious question that involves the interpretation of the church constitution and the provincial canons that govern the appointment process. A similar decision was also reached at by the United States Court of Appeals for the Third Circuit in the case of Petruska vs Gannon University noted: "The process of selecting a religious Minister is perse a religious exercise."

Needless to add is that in the case of Petruska vs Gannon University the United States Court of Appeal for the Third circuit had this to say -

“First, like an individual, a Church in its collective capacity must be free to express religious beliefs, profess matters of faith and communicate its religious message, unlike an individual who can speak on her own behalf However, the Church as an institution must retain the collaray right to select its voice. A Minister is not merely an employee of the Church: she is the embodiment of its message. A Minister serves as the Church public representative, its ambassador, its voice to the faithful. Accordingly, the process of selecting a Minister is per se a religious exercise. The Minister is the chief instrument by which the Church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognised as of prime ecclesiastical concern. Consequently, any restriction on the Church's right to choose who will carry its spiritual message necessarily infringes upon its full exercise to profess its beliefs."

On a similar note, in Hossana Tabor Evangelical Lutheran Church and School vs Equal Opportunities Commission, the Supreme Court of the United States had this to say on the matter -

“A religious organisation right to choose Ministers would be hollow, however if secular courts would second guess the organisations sincere determination that a given employee is a 'Minister' under the organisations theological tenets."

It went further to state -

“When it comes to the expression and inculcation of religious doctrine there can be no doubt that the messenger matters. Religious teachings cover the gamut from moral conduct to metaphysical truth and both the content and credibility of a religious message depend vitally on the conduct and character of its teachers. A religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religion percepts that he / she espouses. For this reason, a religious body's right to self-governance must include the ability to select and to be selective about those who will serve as the very embodiment of its message and its voice to the faithful."

These cases though decided by the Supreme Court of the United States of America are relevant because they discuss constitutional provisions which are similar to these in the Ugandan Constitution. The First Amendment in the US Constitution provides that Congress shall make no law respecting an establishment of religion. This is at times referred to as the Establishment Clause. This is similar to Article 7 of the Uganda Constitution which states "Uganda shall not adopt a state religion."

The Free Exercise clause in the American Constitution protects the right of citizens to freely exercise their religious rights and beliefs and is similar to Article 29 (1) (c) of the Ugandan Constitution which provides:

"Every person shall have the right to freedom to practice any religion, and manifest such practice which shall include the right to belong to and participate in the practice of any religious body or organisation in a manner consistent with the Constitution."

Justice Steven Mubiru in Rev. Fr. Cyril Adiga Nakari vs 1. Rt. Rev. Sabino Ocan Odoki and 2. The Registered Trustees of Arua Diocese - Civil Suit No. 0002 of 2017 (supra) made reference to the American case of Petruska vs Gannon University and went on to say:

"That statement underscores the fact that a religious organization's fate is inextricably bound up with those whom it entrust with the responsibilities of preaching its word and ministering to its adherents. These are difficulties in separating the message from the messenger. I am persuaded by the interpretation and application given to the First Amendment by the Courts in the United States to hold that Articles 7 and 29(l)(c) of the Constitution of the Republic of Uganda 1995 protect the roles of religious leadership worship ritual and expression.

The freedom of religious groups to engage in certain key religious activities (including the conducting of worship services and other religious ceremonies and rituals as well as the critical process of communicating the faith.

He went on further:

Religious autonomy means that religious authorities must be free to determine who qualifies to serve in positions of substantial religious importance. Accordingly, religious groups must be free to choose the personnel who are essential to the performance of these functions. If a Church believes that the ability of a priest to conduct worship services or important religious ceremonies or rituals, or to serve as a messenger or teacher of its faith or perform such other key functions has been compromised, then the constitutional guarantee of religious freedom protects the Church's right to remove the priest from his position. The Constitution creates a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs, "forcing a group to accept certain members may impair its ability to express those views, and only those views, that it intends to express" (Boy Scouts of America v. Dale, 530 U. S. 640, 648 (2000). The Constitution leaves it to the collective conscience of each religious group to determine for itself who is qualified to serve as a teacher or messenger of its faith. In the result, all church offices ought to be filled by the exclusive decision of the church concerned. No state body (including the courts) is entitled to rule over the canonical aspects of church offices.

The same position was adopted by the Supreme Court of the United States which held in the case of Serbian Eastern Orthodox Diocese for The United States of America and Canada et al vs. Milivojevich as follows:

“whenever the questions of discipline or of faith or ecclesiastical rule custom or law have been decided by the highest of the Church adjudications to which the matter has been carried the legal tribunals must accept such decision as final and as binding".

and went on further to say;

"Religious freedoms encompass the power of religious bodies to decide for themselves free from State interference matters of Church Government as well as those of faith and doctrine".

It must also be noted that in the case of Watson v. Jones (1871). The Court held that in forming churches people had the right to establish ecclesiastical tribunals. Tribunals would be meaningless, however, if church members could review ecclesiastical decisions.

However, it must also be noted that there is a school of thought that dissents from the above assertions and thus states that courts should be able to hear cases involving religious disputes so long as it does “not displace the free religious choices of its citizens by placing its weight behind a particular religious belief, tenet or sect.”

It further avers that Religion is the very basis of human life which is not just following a belief but it is also a the way of living because the followers of a

particular religion follows a definite kind of livelihood and with this moral duty of following certain rules the religion enters the boundary of law whereby a person is compelled to follow or not to break the rules decided by a state (i.e. any country). Hence it is very evident that the law and religion are dependent on each other because before the concept of state or democracy, people were bound to follow the religious duties and can claim religious rights. Thus in this way religion was playing a very vital role of maintaining law and order in ancient societies at different parts of the world.

Meaning of Religion

Religion is one of the most sensitive autonomies in our society. It is one's desire and mindset that whatever he does he will be accountable for it by a supreme being. It is the only theory that does not need written sanctions against abuse since it is built on the idea of faith and a person is able to evaluate himself individually, albeit different writers have come up with different definitions on its meaning. All of them arrive at the same conclusion regardless of their backgrounds, origin and general understanding of the modern changing society. Whatever defined is a penny of thoughts from different scholars and thus shouldn't be too authoritative but persuasive in nature. Religion is the belief which binds spiritual nature of men to super-natural being'. It includes worship, belief, faith, devotion etc. and extends to rituals. Religious right is the right of a person believing in a particular faith to practice it, preach it and profess it. It is civil in nature. The dispute about the religious office is a civil dispute as it involves disputes relating to rights which may be religious in nature but are civil in consequence. Civil wrong is explained by Salmond as a private wrong[21]. Blackstone who has described private wrongs as, 'infringement or privation of the private or civil rights

[21]Most. Rev. P.M.A. Metropolitan & Ors Vs. Moran Mar Marthoma & Anor 1995 SCC Supl. (4) 286

belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries'. Any infringement with a right as a member of any religious order is violative of civil wrong. According to Emile Durkheim, religion is the product of human activity, not divine intervention. He thus treats religion as a sui generis social fact and analyzes it sociologically. In his words Karl Marx defines religion that 'Religion is the sigh of the oppressed creature, the sentiment of a heartless world and the soul of soulless conditions. It is the opium of the people[22]. We should note that this came to be called the famous "**Opium theory**" of religion. According to Marx, one of the main functions of religion is to prevent people making demands for social change by dulling pain of oppression, as follows: The promise of afterlife gives people something to look forwards to. It is easier to put up with misery now if you believe you have a life of 'eternal bliss' to look forward to after death.

a) Religion makes a virtue out of suffering – making it appear as if the poor are more 'Godly' than the rich. One of the best illustrations of this is the line in the bible: 'It is easier for a camel to pass through the eye of a needle than for a rich man to enter the Kingdom of heaven.

[22] Karl marx –Marx on religion book collections on project muse

b) Religion can offer hope of supernatural intervention to solve problems on earth: this makes it pointless for humans to try to do anything significant to help improve their current conditions.

c) Religion can justify the social order and people's position within that order, as in the line in the Victorian hymn All Things Bright and Beautiful:

Away from Marx, in my opinion, religion is a way of worshipping and believing in a supreme being, a supernatural being.

There are more than ten religions in Uganda and more than 100 in the world which proclaims to the fact that at least a vast percentage of the people in the society fall under any category of religious belief.

Religion is as old as the human race and this can be traced in the concept of creation stories from different faith. Under the Christian faith

Genesis Chapter 1 of the bible provides [1] In the beginning God created the heaven and the earth.[2] And the earth was without form, and void; and darkness was upon the face of the deep. And the Spirit of God moved upon the face of the waters.[3] And God said, Let there be light: and there was light. The bible provides that And God said; Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every

creeping thing that creepeth upon the earth[23]. and the Lord God formed man of the dust of the ground, and breathed into his nostrils the breath of life; and man became a living soul[24].

Verse 8 provides that- and the LORD God planted a garden eastward in Eden; and there he put the man whom he had formed.

The Islamic faith also provides for the Big Bang Theory. Therefore, these are most of the common known theories of evolution and we shall discuss more of them in the nearby chapters on how courts have adopted them, for example the principle of oneness, fair hearing or natural justice has administered in courts of Law are all premised on the basis of religion.

Separation of State and Religion

It takes a verbose explanation for one to separate the state from religion, different philosophers came up with different theories on this catastrophy. Stretching from the French Revolotion of 1789 which marked the stapping down of the religious monarchy of the Bourbons. Among the causes of this revolution as condemned by Voltaire and other philosophers included but not the leastthe gap between rich and poor in France was vast. The social

[23]**Genesis Chapter 1 verse 26**
[24]**Genesis 2 Verse 7**

inequalities of different classes of people in France were a major cause of the French Revolution.

Religious leaders in france took over the first class estates as the clergy who exploited the second and third classes of people. The Privileged Estates Two of the estates had privileges, including access to high offices and exemptions from paying taxes, that were not granted to the members of the third. The Roman Catholic Church, whose clergy formed the First Estate, owned 10 percent of the land in France. It provided education and relief services to the poor and contributed about 2 percent of its income to the government. These were the high-ranking members of the church and with great previledge. The Second Estate was made up of rich nobles. Although they accounted for just 2 percent of the population, the nobles owned 20 percent of the land and paid almost no taxes. The majority of the clergy and the nobility scorned Enlightenment ideas as radical notions that threatened their status and power as privileged persons. The third estate was the peasants who paid taxes on which the first class estate previledged lived. One philosopher was quoted to say that the Third Estate is the People and the People is the foundation of the State; it is in fact the State itself; the.... People is everything. Everything should be subordinated to it. . . . It is in the People that all national power resides and for the People that all states exist[25]. The extravagant spending of Louis

[25] COMTE D'ANTRAIGUES, quoted in Citizens: A Chronicle of the French Revolution

XVI, who claimed to be a divine king with authority from God and his queen, Marie Antoinette without claim of right thre France into debts. With claim to have been appointed by God, he claimed he was the state and the state was him. It is therefore important to note that the monarchy ruled by a divine right, Monarch ruled by divine right that God put the world in motion and God put some people in positions of power this Power is given by God, therefore No one can question God No one can question someone put in power by God. Questioning the monarchy was blasphemy because it meant questioning God.

However, on the new age of reason there came the era of philosophers who used critical thinking. Philosophes were secular in thinking they used reason and logic, rather than faith, religion, and superstition, to answer important questions. For them they questioned the divine being of the king. Among such philosophers include François-Marie Arouet, known by his literary pseudonym "Voltaire" he was a French Enlightenment writer, historian, and philosopher, who attacked the Catholic Church and advocated freedom of religion, freedom of expression, and separation of church and state. He potrayed that the church as a static and oppressive force. His works, especially private letters, frequently contain the word "l'infâme" and the expression "écrasez l'infâme," or "crush the infamous." The phrase refers to abuses of

the people by royalty and the clergy that Voltaire saw around him, and the superstition and intolerance that the clergy bred within the people. Voltaire's first major philosophical work in his battle against "l'infâme" was The Treatise on Tolerance (1763), in which he calls for tolerance between religions and targets religious fanaticism, especially that of the Jesuits, indicting all superstitions surrounding religions. The book was quickly banned. Only a year later, he published The Philosophical Dictionary, this was an encyclopedic dictionary with alphabetically arranged articles that criticize the Roman Catholic Church and other institutions. In it, Voltaire is concerned with the injustices of the Catholic Church. He sought to opt for a state that was separated from religion.

Thomas Jeffersons' Theory

If one is asked about the profound scholars about writings between the state and religuion, Thomas Jeffersons's writings have to be on a frontier. Several rebviews have benn made out of his writings, juges have based his writings in Judgements to do with the relation of the church and the state. Countries that are secular have also drawn a comparison of how far court should engage into religious issues. On July 4, 1776 representatives of thirteen British colonies in North America published the Declaration of Independence, an open letter to the world stating their reasons for breaking the American ties of allegiance to King George V. Its opening paragraphs, written primarily by

Thomas Jefferson, contain the stirring language that has inspired oppressed peoples for more than two centuries: We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States... And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

From the above declaration you'll note the Jefferson tended to show that Human beings have their Creator who is God with "inalienable" rights. and humans in this form represent the state which makes its own laws made but deriving its originality from the will of God, however those declarations may

not fully point to the visibility of a relationship between the church and the state. Jefferson and Madison were the primary authors of the Declaration of Independence and the Constitution of U.S, Their arguments cannot be underrated and such contributions drawing a wall between the state and the Religion a concept this book is tendinmg to address, niot particularly in Uganda but also other jurisdiction.

Secular States and Religious States

There can be no freedom ofreligion if the citizen is not free not to belong to any religion,[26] it was further observed by JusticeSussman in a classic case of israel[27] A secular state is basically a state that doesn't succumb to any religious faith, such states tend to potray that they provide equality of freedom of worship and these are very many across the country. It is however important to note that the mere fact that the state is secular doesn't mean that it is completely ignoring to associate itself with any religion, it is always a res ipsa loquitor comparision. The mere fact that the most population of the country attribute to a certain religion is enough proof of a certain religion the country may be syubjected to despite the provisions of the law. Uganda is one of the secularStates as envisaged in our constitution 1995 as amended under Article 7 which is to effect that Uganda shall niot adopt any state reluiguion, our

[26]Segev v. Rabbinical Court, P.D. 21(2) 505.
[27]H.C. 130/66

brothers inKenya under Article 8 of the Kenyan Constitution as Amended also provides for the same.

Even countries that previously hadn't subscribed to secularism went ahead to amend their constitutions to properly express themselves as secular states, a case in point is the State of India which made her constitution in 1950 and only amended in 1976 under the 42 Amendment Act to include the word "Secular". This is all done in a view to disassociate themselves from religious affiliations which has beenm a great cause of conflicts around the Globe.

These states following secularism can be traced from the Movements for "laïcité" in France and separation of church and state in the United States. The most important finding of these states is that they have a very big number of religions. These states however may have a mixture of public holidays to capture several religious festivals whiuch leaves a question on whether they are secular states or religious states. Countries such as France originaly known as a christain state among others official holidays for the public administration tend always to be Christian celebrations.

Some of the states that confuse to that extent include Israel which is proclaimedas a secular state whereas others proclaim it as a religious state "Jewish state"."A Jewish State": theterm Jewish means pertaining to Jews. According to Haim Cohn, Human Rights in Jewish Law[28]The State of Israel

[28](New York: Ktav, 1984), 17

is a secular State. Its Parliament, Knesset, makes its laws.When the idea of modern political Zionism was introduced by Theodor Herzl, his idea was that Israel would be a secular state which would not be influenced at all by religion. When David Ben-Gurion founded the state of Israel, he put religious parties in government next to secular Jews in the same governing coalition. Many secular Israelis feel constrained by the religious sanctions imposed on them. Many businesses close on Shabbat, including many forms of public transportation, restaurants, and Israeli airline El Al. In order for a Jewish couple to be formally married in Israel, a couple has to be married by a rabbi. Jewish married couples can only be divorced by a rabbinical council. Many secular Israelis may go abroad to be married, often in Cyprus. Marriages officiated abroad are recognized as official marriages in Israel. Also, all food at army bases and in cafeterias of government buildings has to be kosher. Many religious symbols have found their way into Israeli national symbols. For example, the flag of the country is similar to a tallit, or prayer shawl, with its blue stripes. The national coat of arms also displays the menorah. However, some viewpoints argue that these symbols can be interpreted as ethnic/cultural symbols too, and point out that many secular European nations (Sweden, Norway and Georgia) have religious symbols on their flags.

"Not every Jew, in Israel or elsewhere, is a religious individual. It is in collective terms that religion has been an essential ingredient in the self-definition and behavior of the Jews, believers or not, observant or not. For

that reason, it was aptly stated that Judaism conceived of itself not as a denomination but as the religious dimension of the life of a people. Hence peoplehood is a religious fact in the Jewish universe of discourse. In its traditional self-understanding, Israel is related not to other denominations but to the 'nations of the world' ... Israel's ... body is the body politic of a nation. A denomination but as the religious dimension of the life of a people.

Hence peoplehood is a religious fact in the Jewish universe of discourse. In its traditional self-understanding, Israel is related not to other denominations but to the 'nations of the world' ... Israel's ... body is the body politic of a nation". Page 423: "It seems reasonable to accept that the reference to Israel as a 'Jewish State' is equivalent to stating that in historical, political, and legal terms, it is the state of the Jewish people". Page 424: "all refer to a Jewish state, and Jewish means, in all of them, pertaining to Jews, namely the individuals seeing themselves as composing the Jewish people, or nation, or community. It clearly does not mean the body of religious precepts, commands or convictions regulated by the Halakha, the Jewish religious law developed over centuries."[29].

The State and Religious Autonomy

They refer to the effort by secular law to make sense of religious self-governance, particularly institutional or communal self-governance. Public

[29] Religion and the state in Israel, Natan Lerner- page 421-422

authorities do not intervene in the life or organization of religiouscommunities and the law does not restrict the autonomy of the religious communities togovern themselves. They also include more recently developing questions over the extent to which regulatory regimes such as labor law,2 civil rights law[30],

The Courts and The Religion

This book tends to analyze extensively the relationship between religion, law, and morality to reveal theoretical approaches basing on case law discussing how courts do religion. In this book which is the locus classicus as far as discussing how courts have done religion, I bring to you the reasoning of various court decisions and in order not to do disadvantage to the readers, cases which have rich information to the readers are brought up in full document. This is because I want the readers to appreciate the full concept on when courts do religion, to think like me, throw away the box and have the reasoning sail flamboyantly at a glance of the entire concept. Tell me and I forget, teach me and I remember, involve me and I learn. Words of the U.S. statesman Benjamin Franklin and the Chinese philosopher Confucius.

[30] Equal Employment Opportunity Commission and Elizabeth McDonough v. Catholic University of America, 83 F.3d 455 (D.C. Cir. 1996) (enforcing "ministerial exception" to employment discrimination law); Young v. Northern Illinois Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994)

We should note that the foundations of the law are rooted from religion basing on physical circumstances we see entailing the sitting of court is the same as that of the Christians, the language of court more so how to address Judges that is Your Worship, the court etiquettes among others all have a history to connect to the religion.

We should note that the contradiction of the law with religion is majorly that the law is based on facts and evidence whereas the religion is based on belief and faith. That human conduct themselves in the way of fearing the Supreme Being above everything and who is omnipotence.

In a popular Ugandan example in the news, the Baganda clan known as Lugave clan members disagreed with UNRA for cutting down the tree claiming it is sacred. The tree by its name was being worshipped under the African Tradition Religion. They demanded for Shs500m as compensation for allowing the Shs300 billion Busega-Mpigi Expressway to pass through their piece of land that houses the tree.

General Katumba Wamala told Parliament that government through UNRA was trying to negotiate with the Lugave clan in order to compensate them for the destruction of the tree they were worshipping, in his words he said: “We don’t take land without compensation an example is a tree along Mpigi-Kampala Expressway where one clan says all their spirits are in that one tree.

They are asking for Shs500m and we can't move. They have been offered Shs150m and they say it can't appease the spirits," Katumba told Parliament.

The lugave clan members led by Hussein Katamba ran to Mpigi High court to demand for the compensation of 500M from Government for compulsory acquiring their worshipping land that included the "Nabukalu tree" tree which is commonly known as a muwafu tree.

The Mpigi High Court Judge Anthony Oyuko Ojok granted permission to the Uganda National Roads Authority-UNRA, to remove the spiritual tree at Mabuye-Katende in Mpigi district, which had become an obstacle in the processes of opening route for Kibuye-Busega-Mpigi 23.7 kilometers expressway. The indigenous African "bush candle" tree, commonly known as Muwafu in Luganda, Katamba had sued UNRA demanding for 500 Uganda million shillings to enable him to relocate the religious ancestral cultural site to another location after the authority declined his plea to redesign the road's plan to avoid the site.

In his ruling the learned Judge Anthony Oyuko Ojok, the presiding judge set aside Hussein Katamba's prayers of 500 million Uganda shillings and granted UNRA permission to go ahead and remove the claimed tree, after upholding the shillings 4.6 million compensation fees that were earlier allocated to him by the Chief Government Valuer.

The judgement has been perceived as controversial by conservationists and African Traditional Religion believers who termed it as a blow for court not to do religion.

The court dismissed their claim of 500M, on the basis that the significant cultural value given that it was not in gazette as a protected object under the Historical Monuments Act,1967 and as a result court failed to find viable justifications for granting the 500M. the learned judge further ruled that the court cannot hear from spirits as it only bases on viable evidence adduced before he was unable to find the claim for 500,000,000 million shillings justifiable, he further observed that the plaintiff failed to prove to the court the existence of a cultural site for the Lugave clan on the suit land for which he sought this enormous compensation. The court rather found it gluttonous of the plaintiff to want to reap from what he did not sow," the judgement reads in part[31]. The court in its view you will concur with me it failed to appreciate the fact that Nabukalu tree was a spirit tree, religiously a worshipping place for the said one of the old clans in Buganda.

[31] Monitor newspaper Friday, March 11, 2022

In looking at the surface of this case, the learned Judge being not associated with the kiganda Religious worship he couldn't take a judicial notice to that.

Nabukalu, the spiritual tree belonging to Lugave. Internet photo

The above photo was taken after the court ruling to remove the Nabukalu tree. The case is attached

Islam In Courts

It is prudent to note that Article 129 (1) (d) of the 1995 Constitution as amended provides for establishment of Qadhis courts for matters of marriage, divorce, inheritance and custody for persons professing the Mohammedan faith. Under Article 129(1), it provides that the judicial power of Uganda shall be exercised by the Courts of Judicature which shall consist of

a. the Supreme Court of Uganda;

b. the Court of Appeal of Uganda;

c. the High Court of Uganda; and

d. such subordinate courts as Parliament may by law establish, including Qadhis' courts for marriage, divorce, inheritance of property and guardianship, as may be prescribed by Parliament.

It is also important to note that there is no specific law operationalizing Qadhis courts, whatever we have is just a theoretical approach but not yet operationalized in practice though different efforts have been made by the Government to establish Sharia courts atleast to every District in the country.

Be that as it may, the Law is clear that such courts have to be established by an Act of Parliament[32] but it is sad to say that Parliament has not yet made a law to establish those courts, however courts have gone ahead to appreciate the existence of Sharia Courts. Section 2[33] provides that Muslims may handle their marriage and divorce matters in accordance with their customs (Sharia). Section 18[34] empowers Courts to handle divorce matters under the Act, but the law applicable in such cases must be Mohammedans law in a right interpretation of the section. It is surprising how courts have applied the sharia religion even in the absence of an Act of Parliament establishing them.

In the case of Sumaya Nabawanuka v Med Makumbi[35] is an example of such instances where court applied religion in the absence of the Law to establish these courts. The facts of the case where that On 16th January 2012, the Respondent filed his reply refuting the allegations in the Petition and by way of a preliminary objection applying that the Petition be dismissed because it is re-judicata since the matter before Court had been finally determined by the Sharia Court of the Muslim Supreme Council in Divorce Cause No. SC/MDO 65/10/2011.

[32] Article 129 (1) (d) of the 1995 Constitution as amended
[33] Marriage and Divorce of Muhammedans Act Cap 252
[34]Ibid 8
[35]Divorce Cause 39 of 2011) [2013] UGHCFD 3 (13 February 2013);

At the commencement of the hearing, indeed Counsel for the Respondent-John Mike Musisi raised a preliminary objection to the effect that the matter before Court is res-judicata. In his submission he relied on Section 7 of the Civil Procedure Act Cap 71 which is to the effect that a matter is res-judicata if the issue before Court is directly and substantially the same as an issue between the same parties which has already been determined by a Court with competent jurisdiction to try the suit. Mr. Musisi went on to urge that a Sharia Court is a court of competent jurisdiction as provided for Under Article 129 (1) (d) of the Constitution 1995. He further contended that the Sharia Court of the Muslim Supreme Council is such Court that is envisaged under the Marriage and Divorce of Mohammedans Act Cap 252 Law of Uganda. Mr. Musisi further urged that the Petition was incompetent in as far as it sought reliefs under the Divorce Act Cap 249 even though the marriage between the parties was celebrated under Mohammedan law. He relied on Section 18 of the Marriage and Divorce of Mohammedan Act Cap 252 which specifically excludes the application of the Divorce Act in granting reliefs under that Act where the marriage between the parties has been declared valid under the Marriage and Divorce of Mohammedans Act. In her reply, Ms Harriet Nabankema Learned Counsel for the Petitioner refuted the assertion that the Sharia Court of the Muslim Supreme Council is a Court of competent jurisdiction as envisaged under Article 129 (1) (d) of the Constitution. She urged that Parliament has not yet operationalised it basing

her argument on Art. 129 (1) (d) of the Constitution which requires Parliament to establish Qadhi's courts and that if there are such Courts in operation they are operating outside the dictates of Art.129 and are consequently incompetent. Counsel further urged that in absence of a forum for dissolving Mohammedan Marriages, recourse should be by invoking the provisions of Section 8 of Civil Procedure Act[36] which gives Court inherent powers to give remedies to all aggrieved parties before it.

On the question of whether the suit is barred by res-judicata, Counsel urged that the Petition before Court has not been adjudicated upon by a Court of competent jurisdiction since the Sharia Court of the Muslim Supreme Council has no jurisdiction to act as such. As to whether the Petition is incompetent as it seeks relief under the Divorce Act, Ms. Nabankema urged that in as much as the marriage between the parties was celebrated under Mohammedan Law, the Marriage and Divorce of Mohammedan Act[37] gives the High Court power to dissolve such marriages. She referred Court to Section 18 of the Act which read together with Sections 14 and 33 of the Judicature Act would have the effect of giving the High Court powers to grant the reliefs sought. She called upon Court to dismiss the PO.

[36] Cap 71
[37] Cap 252

In his Judgement, after considering the submissions of counsel, Justice Kainomura B observed and heldthat the matter was heard and determined by a competent Court and an attempt to resurrect the matter in his Court would surely run foul of Section 7 of CPA. Accordingly, he further observed that this matter was *res-judicata*.

On the offset of this decision, it is barely true on the surface that the trial judge gave this matter life to term a decision of a sharia court to be binding as that of a competent court yet the law has not yet operatuionalised the existence of these courts. The learned Judge did religion in this matter.

Religions in Uganda

Stretching from the history of our country, religion has been very paramount and this after the coming of missionaries both the catholic missionaries and Anglican missionaries. Christianity is `a religion that traces its origins to Jesus of Nazareth, whom it affirms to be the chosen one (Christ) of God[38]. Christianity is embodied both in its principles and precepts in the Scriptures of the Old and New Testaments, which all denominations of Christians believe to be a Divine revelation, and the only rule of faith and obedience[39]. It is `a historical religion. It locates within the events of human history both

[38][Encyclopedia Britannica, Volume 5, Page 693]
[39][Faiths of the World by James Gardner, Volume 1, P. 516]

the redemption it promises, and the revelation to which it lays claim[40]"In its origin Christianity is Eastern rather than Western. Jesus was a Palestinian Jew, and during the early centuries of the church's life the Greek and Syriac East was both numerically stronger and intellectually more creative than the Latin West. Christ preached the gospel to both the Jews and Gentiles. He is always proclaimed as a son of God who came to save mankind.

Religious affiliation in Uganda[3]

Affiliation	**1991 census**	**2002 census**	**2014 census**[1]
Christian	85.4%	85.2%	84.5%
Roman Catholic	44.5%	41.9%	39.3%
Church of Uganda (Anglican)	39.2%	35.9%	32.0%
Pentecostal	-[note 1]	4.6%	11.1%
Seventh-day Adventist	1.1%	1.5%	1.7%
Baptist	-[note 2]	-[note 2]	0.3%
Eastern Orthodox Christian	<0.1%	0.1%	0.15%
Other Christian	0.6%	1.2%[note 3]	-[note 2]
Muslim	10.5%	12.1%	13.7%
Traditional	-	1.0%	0.1%
Bahái Faith	-[note 1]	0.1%	-[note 2]
None	-[note 1]	0.9%	0.2%
Other non-Christian	4.0%	0.7%[note 4]	-[note 2]

[40][The Encyclopedia of Religion, Volume 3, p. 348].

Others	_[note 2]	_[note 2]	1.4%

Notes

^ Jump up to:[a b c] The 1991 census did not have separate categories for "None" and "Pentecostal" so the 1991 category of "Other Christian" includes "Pentecostal" and the 1991 category "Other non-Christian" includes "Bahá'í Faith" and "None".

^ Jump up to:[a b c d e f g] The 1991 and 2002 censuses did not have separate categories for "Baptist" and also had separate categories for "Other Christian" and "Other non-Christian" and "Bahá'í Faith" so the 2014 category of "Other" includes those (minus the Baptists). The census states that "Others" includes those religions with less than .1% of the population and specifically mentions Salvation Army, Bahá'í, Jehovah's Witnesses, Presbyterian, Hindus, Mammon, Jews and Buddhists.

^ If Pentecostals are merged in to allow better comparison with the 1991 figure for "Other Christians", it is 5.8%.

^ If Bahá'í and None are merged in to allow better comparison with the 1991 figure for "Other non-Christians", it is 1.7%

Religious affiliation in Uganda by region[4]

Affiliation	Central Region	Eastern Region	Northern Region	Western Region
Roman Catholic	41.2%	29.6%	59.2%	40.6%
Anglican/Protestant	30.1%	43.0%	25.3%	45.2%
Pentecostal	5.9%	6.1%	3.1%	3.4%
Seventh-day Adventist	1.9%	1.0%	0.5%	2.6%
Eastern Orthodox Christian	0.2%	0.1%	0.1%	0.2%
Other Christian	0.8%	2.1%	0.5%	1.1%
Muslim	18.4%	17.0%	8.5%	4.5%
Traditional	0.1%	0.1%	1.6%	0.1%
Other	0.6%	1.0%		

Source:https://en.wikipedia.org/wiki/Religion_in_Uganda#Government_policy

The above tables show the composition of Uganda in different religions which have significance role to play in determining the majority of people that go to court basing on the population as of 2014 population census.

It follows that the obvious concern is that a judge's use of religious values might violate the Establishment of a particular law as it will be discussed below in the subsequent chapters including land mark cases such Hope Rwabisomwes' case in the judgement of Learned Justice Twinomujuni, J.A

Courts have on the other side followed religion, the laws in Uganda which are built on religious institutions such as Marriage laws are in conformity with the religious requirements and where such impediments aren't complied with it leads to treatment of such marriage as void. Reference on section 21 of the Marriage Act Chapter 251.

Religion in Equity

Equity is defined as the body of laws that were applied by the court of chancery before the Judicature Act of 1873. Equitydeveloped from the courts of chancery by the principles applied by Lord Chancellor who was then a clergy, the aggrieved and dissatisfied litigants petitioned the king who was then a fountain of honor to find for them appropriate remedies in a way that at common law there was only damages available to the successful litigant which in many cases were not adequate. The clergy who by then was the Lord

Chancellor used the principles of equity to administer justice. Lord Nottingham is one the most appreciated chancellors who saw that equity developed even after the merging of the common law courts with equity courts in 1873 and 1875. But the multitude of suits generated common principles, many of which were elucidated by Lord Nottingham. Therefore, you'll will note that courts in England had from way back did religion hence it is not a new concept today. In discussing how courts do religion, equity will also be put in paramount.

But extent to which people petitioned him led to delegation of responsibility to the Lord Chancellor who was a cleric (churchman), and considered to be 'keeper of the king's conscience'. Extent of petitioning led to creation of Separate court Court of Chancery, staffed by clerks of Chancellor – independent court in 1474[41].

Theories of Law

There are different theories of law which include the natural theory, Austin's command theory, Karl Marx, Kelsen, John Locke, Thomas Jefferson theories among others but I will base my arguments in line with religion on Thomas Aquinas and the Natural theory. Thomas Jefferson and Madison also made contributial arguments in line with religion and the state. However, Thomas Jefferson echoed Locke's argument that the right to free conscience was

[41] Key facts Equity and Trusts, 3rd edition Chris Turner page 3

rooted in thefutility of coercing human opinion, and that the protection of conscience was essential for maintaining civil peace.

Therefore, it is also important to analyse the writings of James Madison also show the influence of Enlightenment thought. His Memorial and Remonstrance against Religious Assessments, written in 1785, famously defended separation of church and state. Madison began by describing the right of conscience in words that resonate with Locke: "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." In contrast to Europe, where "torrents of blood have been spilt . . . by vain attempts of the secular arm, to extinguish religious discord, by proscribing all difference in religious opinion," American civil society enjoys moderation and harmony because the care of the soul is treated as a private matter. Religion also benefits from church-state separation, for history shows that "ecclesiastical establishments, instead of maintaining the purity and efficacy of religion, have had a contrary operation," causing "pride and indolence in the clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution."

Thomas Aquinas and Natural Law Theory

This is one of the most popular theories of law that have been interpreted by different scholars, Aquinas summarized it in four types of law which were

eternal law, divine law, natural law, and man-made law. He observed that the eternal law reflected God's grand design. The Divine law on the other side was that set of principles revealed by Scripture, and natural law was eternal law as it applied to human conduct. He asserted that Man-made law was constructed by human beings to fit the requirements of natural law in a way that the changing society had to benefit from it entirely. Aquinas, the fundamental precepts of natural law was not only mere mortals who looked as ascertained but self-evident, and the important reason was that they required no proof. They were, in Aquinas' own terms he used, per se nota, known through them. Like his predecessor, Aristotle, Aquinas distinguished two kinds of reasoning: theoretical and practical. Human beings were capable of both sorts of reasoning. The principle of non-contradiction was as self-evident as the first and most fundamental principle of natural law which we can literally here term as “Good is to be done and evil is to be avoided". Like the principle of non-contradiction, the precepts of natural law were, according to Aquinas, general and unchanging thereby applied the same everywhere.

The Legal System in Uganda

The legal system of Uganda covers a wide range of sources which include The 1995 constitution as amended being a Grand norm, Precedents and

Common Law as applied, the doctrines of equity under section 15[42], Statutes, the customary law that is applied depending on the customs of existing Societies however subjected to the repugnancy clause of the 1995 Uganda Constitution as amended.

Hierachy of Ugandan Courts

It is prudent to know the meaning of courts and their hierarchy to draw a proper nexus of how religion is done inside the walls of a court room. A court is an organ of the government, belonging to the judicial department, whose function is the application of the laws to controversies brought before it and the public administration of justice. This definition differs from the definition of Court in the Blacks' law dictionary which is a space which is uncovered, but which may be partly or wholly inclosed by buildings or walls.[43]. there are majorly two judicature types of courts that is to say Courts of record and courts not of record. The former being those whose acts and judicial proceedings are enrolled, or recorded, and testimony, and which have power to fine or imprison for contempt. Error lies to their judgments, and they generally possess a seal. Courts not of record are those of inferior dignity, which have no power to fine or imprison, and in which the proceedings are not enroll. In Uganda the highest court of record is the supreme court

[42] The Judicature Act Cap 15
[43]Smith v. Martin, 95 Okl. 271, 219 P. 312, 313

provided under article 131[44]. The Composition of the Supreme Court is that it consists of an uneven number not being less than five members of the Court. However, when hearing appeals from decisions of the Court of Appeal sitting as a Constitutional Court, the Supreme Court consists of a full bench of all Uganda 1995[45]. The Chief Justice presides at each sitting of the Supreme Court and in the absence of the Chief Justice, the most senior member of the Court as constituted presides over.

The jurisdiction of Supreme Court is that[46] it is the final court of appeal. therefore, any party aggrieved by a decision of the Court of Appeal sitting as a Constitutional Court is entitled to appeal to the Supreme Court against the decision; issue orders and directions to the courts necessary for the proper and efficient. The Court of Appeal of Uganda is provided for under Article 134[47]. Court of Appeal of Uganda consists of the Deputy Chief Justice and a number of Justices of Appeal not being less than seven. Therefore, an appeal lies to the Court of Appeal from such decisions of the High Court as may be prescribed by law. The Composition of the Court of Appeal is duly constituted at any sitting if it consists of an uneven number not being less than three members of the Court. It is presided over by the Deputy Chief

[44] 1995 constitution as amended
[45](rev. 2005)
[46] Article 132 of ibid 7
[47] Ibid 7

Justice. The Constitutional Court is provided under Article 137[48]. It hears Questions as to interpretation of the Constitution, therefore any question as to the interpretation of this Constitution is determined by the Court of Appeal sitting as the Constitutional Court. The Court of Appeal consists of a bench of five members of that Court. The High Court of Uganda is the another court of record with unlimited original jurisdiction in all matters. It is headed by the Principle Judge and the composition of one judge. It hears appeals from lower courts known as the Magistrates courts.

The Magistrates courts are not Courts of record in our jurisdiction. The high court also exercises its inherent powers to hear and determine whether administrative bodies operate and function in accordance with the law. This is also known as Judicial Review enshrined under section 36 of the Judicature Act[49]. Judicial review is defined under Rule 3 of the Judicature[50] as the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of subordinate courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties.

[48] Ibid 7
[49] Cap 13

[50]Judicial Review Rules 2019

The magistrate courts are also provided under the Magistrates Court Act[51] under Section 3 which provides for the establishment and existence of the magistrates courts in different magisterial areas. Following section 4(2) of the Magistrates Court Act provides for chief magistrate, magistrate grade 1, magistrate grade 2. Under section 5, a magistrate's court is deemed to be duly constituted when presided over by one magistrate lawfully empowered to adjudicate in the court. In application of Civil customary law under section 10 of the Act[52] it allows a magistrate a right to observe and to enforce the observance of any civil customary law which may be applicable trhat is not repugnant to justice.

Is Customary Law Applied By Courts A Form Of Religion?

The definition of civil customary law is that these are rules of conduct which govern legal relationships as established by custom and usage and not forming part of the common law nor formally enacted by parliament[53]. In the outset of the definition you will concur with me that customary law is literally repeated ways of life, the conduct of which people in a given society subscribe to. It's a trite fact that customary law evolved from religious belief, this is so because once people believe something, it becomes part of their customs. A case in point is that when Africans believe that when they pour the first drop of beer onto the ground appeases their gods, it becomes a custom when they do it repeatedly. Therefore, applying customary law by courts of law is one

[51] Cap 16
[52] Magistrates Court Act Cap 16
[53] Section 1 (1),(a) of the Magistrates Courts Act Cap 16

way or the other applying religion. In the History of Buganda, different Clans started as small families who expanded and migrated to different places and this explains why different clan members are scattered far away from there so called “embuga”. However they remained with that bond of brotherhood and it was prohibited from any member of the same clkan to marry the other. This in the modern cponcept is termed as “incest” which under our laws is provided for under SSection 149 of the Penal Code Act Cap 120 Laws of Uganda, also prohibits incest and any person who commits it is liable to imprisonment for seven years or, if that other person is under the age of eighteen years of age, to imprisonment for life.

In the case of Bruno Kiwuuwa V Namazzi Juliet[54] where it was held by Judge Remmy Kasule that the marriage between MsJuliet Namazzi and Bruno Sserunkuuma who intended to marry a man from the same Ndiga clan (sheep) was void as contradicting with the kiganda customs.

In the case of Luseleka and Others v Namalwa[55] the deceased had relocated to Switzerland at the beginning of October 2021. the deceased fell sick while in Switzerland. Hc was subsequently hospitalized and sadly passed away on 7th October 2021. His remains were repatriated to Uganda by the respondent and were at the moment being kept at A Plus Funeral Home. Upon arrival of the deceased's remains, there arose a dispute as to where the remains of the deceased should be laid to rest between the applicants (half-brothers and half-sisters of the deceased) on the one hand and the respondent on the other. They claimed that he was not a member of the “ndiga” clan.The applicants contended that the deceased belonged to the *"Ndiga"* clan of the Baganda and espoused that the cultural norms and traditions which dictate that he should be buried at Kakoola village, Sekamuli Parish, Bamunanika Sub-County

[54] HCCS 52 of 2006

[55](Miscellaneous Application 167 of 2021) [2021] UGHCFD 3 (23 November 2021);

Luwero District, at the ancestral grounds/burial grounds where his deceased father is buried. The issues to be determined included Whether the deceased was to be buried at the ancestral home in Kakoola Village, Luweero or at his home in Mukono and also Who has the right to determine where the deceased should be buried?

In courts' holding, it observed In Uganda, there is no express law that determines burial grounds for a person who dies intestate. Any person that wishes to be buried in a particular place must state that wish either in a will or some other document that can be used to ascertain his/her wishes easily and clearly.

However, laws have been put in place to help courts on how to resolve such matters when they arise such as; the Constitution of the Republic of Uganda, 1995 (as amended), the Succession Act, Cap. 162, The Administrator General's Act Cap 157, the Judicature Act, Cap. 13, Civil Procedure Act, to mention but a few.

Section 14 (1) and (2) of the Judicature Act empower the High Court with unlimited jurisdiction over all matters that are in conformity with; written law, common law and the doctrines of equity.

Section 14 (2) (c) in particular provides that subject to the Constitution and this Act, the jurisdiction of the High court shall be exercised- where no express law or rule is applicable to any matter in issue before the High Court, in conformity with principles of justice, equity and good conscience.

Section 98 of the Civil Procedure Act provides that nothing in this Act shall bejoined to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of process of the court. Thus, in absence of a specific law, the court committed itself to exercise its powers in determining the issues before it while applying the principles of natural justice, equity and good conscience.

Now the question of the dat was that Who had priority rights over burial of a person who dies intestate?

Court had to argue this basiong on the current laws in support of this issue, it observed that the wishes of the deceased are found in the WILL of a deceased person. Those wishes are in most cases executed by the executors always appointed by the deceased and named in the WILL. The executors should therefore enforce the wishes and or the rights of the deceased person.

In conclusion, the learned judge observed that the fact that Uganda is a secular nation and does not have a state religion but I am also alive to the fact that Christianity as one of the recognized religions in Uganda has the Bible as the major source of guiding principles, norms, values and standards. In the instant case, the respondent and the deceased both practiced the Christian religion and chose to get married at Namirembe Cathedral which is the Anglican church/ Church of Uganda. My considered view is that by doing this, they chose to be bound by the biblical principles which are taught in church. He therefore did not find it out of order to cite the Bible.

Note;

Looking at this case, the court declined to do religion based on the provision that Uganda is a secular state he therefore inclined to quote the bible.

In the case of Nice Bitarabeho Kasango Versus Rose Kahise Eseza[56] which dealt with a dispute between the widow of the late Bob Kasango and the mother as to where the late Kasango should be buried. the learned trial judge held inter alia, on page 10 paragraph 37; that It therefore does not matter that one loves their ancestry or not, is ashamed of it or not, knows or speaks their ancestral language or not, practices theirancestral culture or not.We are born

[56]Miscellaneous Cause No. 17 of 2021

into our ancestry.Wedo not choose it. It is imparted by birth and it is a matter outside our discretion. Court observed in line with culture.

Looking at it in line with religion, you will agree just like culture that is to say born into our ancestry, it is also a religious formant that once a child is borm, automatically acquires the religion of its parents without consenting or deciding whether to fall.

One Proffesor asked me a Question whether I was a baptized Christian? I answered him with a poker face that it was alleged that I was baptized and seemed not to understand the scope of it. In Christianity, more so the mother religions, one is baptized without using his actual words to accept Jesus Christ just as it applies to culture that you do not choose where to fall.

Courts and The Witchcraft

Witchcraft literally understood as the practice of magic, especially for evil purposes; the use of spells, is literally religion on the other hand. You can disagree with me or not that some people regard the so called "magic" as a form of worship. Therefore, in a modern context it is a religious practice involving magic. It is so important to note that various cases have come up to address witchcraft as barbalic, satanic form of worship and the law doesn't associate itself with it. Other Courts have declined to accept the fact that witchcraft exists. However, some scholars and books have analysed witchcraft in a broader perspective. Dr. Lubogo Christopher in his book the Law of Witchcraft fully appreciated the concept of it in the eyeas of the law, the only difference is that we are looking at it here in a court setting. In the case of Attorney General v Salvatory Abuki[57]The facts of this case were that the first

[57] (Constitutional Appeal 1 of 1998) [1999] UGSC 7 (25 May 1999);

respondent, Salvatori Abuki, and one Richard Obuga petitioned the Constitutional Court challenging their convictions under the Witchcraft Act (Cap. 108). They were separately tried in the Magistrate grade II Court of Aduku in Lira District. Richard Obuga died in prison and although the petition was joint the offences were different and to that extent Obuga's petition abated.

Salavatori Abuli was charged in one count with practising witchcraft on three different people, Agol, Alisandoro and Ogola contrary to section 3 (3) of the Act. He pleaded guilty, was convicted and sentenced to 22 months' imprisonment and was in addition banished from "that home" for ten years after serving the sentence of imprisonment.

Therefore, this was an appeal by the Attorney general against a decision of the Court of Appeal sitting as the Constitutional Court granting the following declarations that the sections interpreting witchcraft, Sections 2 and 3 of the Witchcraft Act are void for being vague and ambiguous and do not meet the requirements of Article 28 (12) of the Constitution.As a result of 1 above the petitioner was not offered a fair trial as the offence was not known. Articles 28(12) and 44(c) of the Constitution were contravened. It was observed that Section 2 of the witchcraft Act, which is the interpretation section, does not help much to give proper effect to witchcraft. It says: - 'Witchcraft does not include bona fide spirit worship or bona fide manufacture, supply or sale of native medicine'

During the Constitutional Court determining this case Mr Tumwesigye submitted on this thatthere are many different English dictionaries that may give varying meanings. He further noted that. Article ***28(12)*** is very clear. It requires that offence must be defined. That definition in his view must be

clear enough to enable a citizen to distinguish between the prohibited conduct and the permissible one. Any vague interpretation will not satisfy the requirement of Article 28(12). He observed thatSection ***3 (3)*** of the Witchcraft Act does not specify what conduct constitutes witchcraft. therefore, he alluded to that extent it does not afford sufficient guidance for legal debate. The ingredients of the offence cannot be properly determined because the conduct constituting witchcraft is not known. Without knowing the ingredients of an offence, one cannot meaningfully prepare his defence" and the other three judges agreed with the learned Judge.

To analyse this case you will find out that the court declined to affirm that witchcraft in its ordinay meaning was an offence under our laws.

In a case of Uganda V Mawa Bosco and 3 Ors[58] where Court observed that the question that needs to be answered is whether in fact the deceased bewitched Mawa's son and if so, if this amounts to a defense of provocation in law. The court further noted that Section 2 of the Witchcraft Act[59]creates offences to do with witchcraft.Any person whodirectly or indirectlythreatens another with death by witchcraft, or to cause harm or diseaseto another or to livestock or property by witchcraft or other supernatural meansor practices witchcraft commits offences punishable by imprisonment.

However, in that case (supra) an issue arises when court noted that It is obvious that practicing witchcraft involves abnormal or unnatural behavior, on the part of an individual, or a suspect, intended for bad motives or aimed at satisfying supernatural beliefs or wickedness. Court further held thatthe alleged practice of witchcraft by Aromarach was not proved and nor is a beliefshe bewitched Mawa's son justification for taking away her life, the four accused person were guilty of murder.

[58](Criminal Session 161 of 2014) [2018] UGHCCRD 189 (02 November 2018);

[59]Cap 124

You'll note that court disassociated itself from the religious beliefs by quoting "supernatural" as a form pof wickwedness.

The court further in an "Obiter dictum" condemned in the strongest terms the habit of Local council chairpersons calling meetings to discuss alleged breaches of the Witchcraft Act when Local councils do not have powers to investigate crime let alone jurisdiction to hear offences related to witchcraft. All this explains how court had proceeded to argue witchcraft a supernatural belief in court.

In the case of Ugandavs Fenekasi Oyuko[60]an accused was charged with being in possession of articles used in witchcraft this court held that the articles used should have been set out and that the omission to do so left the charge vague. Therefore, it couldnot amount to witchcraft in that reasoning.

Disciplining Clergies

It is important to note that courts have done religion in situations where a clergy has requested for a judicial review by the High court for the decision of a selective religious committee. We shall see cases of this nature below whereby courts proceeded to use the canon law provisions of the church. The rules and procedures of the Christian Churches are set out in its Constitution and Canons. Justice Stephen Mubiruin the case of **Rev. Fr. Cyril Adiga Nakari V Registered Trustees of Arua Diocese and Anor**,[61] held that In the final result, the preliminary objection was sustained and he found out that suit is incompetent and it was struck out on grounds that the dispute between the parties being steeped in matters of church doctrine and administration, which may have to be resolved internally within the Church.

[60]Criminal Revision No. 407 of 1972 reported in [1973] 1 ULR 35.

[61]Civil Suit No. 0002 of 2017

The details of that case however will be discussed in our next chapters, it therefore follows that courts will intervene in matters related to the church if at all it requires the interpretation of the Law as it was put out in the case of Rev Oode's case (infra).

Litigating Religion

It is always said that courts should do away with Church business and treat them as Functus officio, as earlier stated a country like Uganda whose laws are steamed on religion, courts are reluctant in most cases in put their nose in the church issues unless such issues arise questions of national importance. courts dismiss the plaintiff's claims because adjudicating the case would entail constitutionally impermissible judicial involvement in the resolution of religious questions[62]. But just because courts refuse to adjudicate such claims does not mean that these disputes disappear. Instead, dismissing such claims from civil courts is one way of compelling them into alternative dispute resolution forums capable of addressing religious claims as ordered by Justice Stephen Mubiru in the case of **Rev. Fr. Cyril Adiga Nakari v Registered Trustees of Arua Diocese and Anor (supra).**

In the case of the **Queen Vs Big M. Drug Marrt Ltd[63],** the respondent had been charged with unlawfully carrying on the sale of goods on a Sunday, contrary to the Lord's Day Act, 1970 and acquitted by the trial court.The court of Appeal dismissed the appeal. Further appeal to the Supreme Court of Canada, the main question was whether the Act especially section 4 which prohibited any one to sell any thing or offer for sale or purchase any goods, chattels or to carry on any business of his ordinary calling ... on that day,

[62] Redhead v. Conference of Seventh-Day Adventists, 440 F. Supp. 2d 211, 220 (E.D.N.Y. 2006) ("[T]he ministerial exception guards against excessive entanglement and is a tool for analyzing the nature of the alleged burden on religious exercise."); Klagsbrun, 53 F. Supp. 2d at 737

[63](1986) LRC 332

infringed the right of freedom of conscience and religion guaranteed by section 2 of the Canadian Charter of Rights and Freedom. The Supreme Court, stated:

"Both purpose and effect are relevant in determining constitutionality, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively in the sense of the legislation's object and its ultimate impact are linked, if not indivisible Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus the validity."

The respondent, Big M Drug Mart Ltd was charged with unlawfully carrying on the sale of goods on a Sunday contrary to the *Lord's Day Act*. Respondent was acquitted at trial. The Court of Appeal dismissed the appeal. The constitutional questions before the Court were whether the Lord's *Day Act*, and especially s. 4, (i) infringed the right to freedom of conscience and religion.

The court made the following observations about the Lawyers' day,

One, it was observed that the Lord's Day Act cannot be found to have a secular purpose on the basis of changed social conditions. Legislative purpose is the function of the intent of those who draft and then enact the legislation at the time and not of any shifting variable.

Since the acknowledged purpose of the Lord's DayAct, on long-standing and consistently maintained authority, is the compulsion of religious observance, that Act offends freedom of religion and it is unnecessary to consider the actual impact of Sunday closing upon religious freedom. Legislation whose purpose is found to violate the Charter cannot be saved even if its effects were found to be inoffensive. Robertson and Rosetanni, which considered freedom of religion

under s. 1 of the CanadianBill ofRights, is of no assistance since the application and not the constitutionality of the legislation was in issue.

The court further Observed that the Lord's Day Act to the extent that it binds all to a sectarian Christian ideal, works a form of coercion inimical to the spirit of the Charter. The Act gives the appearance of discrimination against non-Christian Canadians. Religious values rooted in Christian morality are translated into a positive law binding on believers and non-believers alike. Non-Christians are prohibited for religious reasons from carrying out otherwise lawful, moral and normal activities. Any law, purely religious in purpose, which denies non-Christians the right to work on Sunday denies them the right to practise their religion and infringes their religious freedom. The protection of one religion and the concomitant non-protection of others imports a disparate impact destructive of the religious freedom of society.

It was further held that the power to compel, on religious grounds, the universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multi-cultural heritage of Canadians recognized in s. 27 of the Charter. The appellant did not establish that the Lord's DayAct constituted a reasonable limit, demonstrably justifiable in a free and democratic society and therefore it cannot be saved pursuant to s. 1 of the Charter.

The Lord's Day Act is enacted pursuant to the criminal law power under s. 91(27) of the Constitution Act,1867. It compels the observance of a religious duty by means of prohibitions and penalties, and is therefore directed towards the maintenance of public order and the safeguarding of public morality.

In another case of Re Legislation Respecting Abstention from Labour on Sunday[64] this was a case where court under issue 1 arose a question as to differentiate the bill and N Act that was enacted by the Provincial Legislation. The format of the bill is attached below followed by the decision and reason of court.

Interpretation

"1. In this Act unless the context otherwise requires

"(a) The expression 'day' means and includes the period of twenty-four hours from midnight to midnight;

"(b) The expression 'person' means and includes any body, corporate and politic, company, society or person;

"(c) The expression 'vessel,' includes any ship, vessel, boat, raft or other craft, or any contrivance made use of for the conveyance of passengers or freight by water;

"(d) The expression 'railway' includes steam railway, electric railway, street railway and tramway;

"(e) The expression 'performance' includes any game, match, sport, contest, exhibition or entertainment; [Page 584]

"(*f*) The expression 'employer' includes every person to whose orders or directions any one is by his employment bound to conform.

[64](1905), 35 S.C.R. 581

Application.

"2. Nothing in this Act contained shall be deemed to apply to or affect or prevent the operation of or the performance of any work or labour the regulation or prohibition of which is within the exclusive authority of the Parliament of Canada upon or with respect to:

"(a) Lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting, this province with any other or others of the provinces or extending beyond the limits of this province;

"(b) Lines of steamships between this province and any British or Foreign country;

"(c) Such works as although wholly situated within this province are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces: or

"(d) Any work or service within the exclusive authority of the Parliament of Canada

"3. Nothing in this Act contained shall be construed to repeal or in anywise affect the provisions of any Act respecting the Lord's Day in force in this province on the 1st day of July, 1867.

Weekly Day of Rest

"4. The first day of each week commonly called Sunday shall be observed as a day of rest and abstention from labour, and it shall not be lawful for any person on any such day:

"(a) To do any work or perform any labour or transact any business or to sell or offer for sale or purchase any chattels or other personal property, or any

real [Page 585] estate, or to employ or be employed by any other person to do any work, business or labour;

"(b) To engage in any game or contest for gain or for any *prize* or reward or to be present thereat, or to provide, engage in or be present at any performance at which any fee is charged directly or indirectly either for admission to such performance or for any service or privilege thereat;

"(c) To run, conduct or convey by any mode of conveyance any excursion on which passengers are conveyed for hire and having for its principal or only object the carriage on that day of such persons for amusement or pleasure;

"(d) To open to the public any park or pleasure ground or other place maintained for gain or to which an admission fee is charged directly or indirectly or within which a fee is charged for any service or privlege;

"(e) To shoot at any target, mark or other object or to use any gun, rifle or other engine for that purpose

"(2) When any performance (at which an admission fee or any other fee is so charged) is provided in any building or place to which persons are conveyed for hire the charge for such conveyance shall be deemed an indirect payment of such admission fee within the meaning of this section.

"5. It shall not be lawful for any person to advertise in any manner whatsoever any performance or other thing prohibited by this Act.

"(2) It shall not be lawful for any person to advertise in this province in any manner whatsoever any performance or other thing which if given or done in this province would be a violation of this Act.

"Notwithstanding anything in this Act contained any person may on the first day of any week do any work of necessity or mercy[65].

PENALTIES

"7. Every constable or other peace officer who suspects that a violation of this Act is being committed in or upon any premises shall, within the limits for which he is such constable or peace officer, have the right at any time to enter into or upon and to search such premises for the purpose of ascertaining whether such offence is being committed.

"(2) Every one who obstructs such constable or peace officer acting under the authority of this section shall be guilty of a violation of this Act.

"8. Every one who violates any of the provisions of this Act shall for each offence be liable to a penalty of not less than one dollar and not exceeding forty dollars together with the costs of prosecution.

"9. Every one who as employer authorizes or directs anything to be done in violation of any of the provisions of this Act shall for each offence be liable to a penalty of not less than ten dollars and not exceeding one hundred dollars together with the costs of prosecution in addition to any other penalty prescribed by law for the same offence.

"10. Every company or corporation which authorises, directs or permits its employees to carry on any part of the business of such company or corporation in violation of any of the provisions of this Act shall for the first offence incur a penalty of two hundred and fifty dollars and for each subsequent offence a penalty of five hundred dollars together with the costs

[65][Page 586]

of prosecution in addition to any other penalty prescribed by law for the same offence.

"11. Every person who owns or controls wholly or partly any vessel or railway or any building or any park, pleasure ground or other place which is used for the doing of anything which violates any of the provisions[66]

of this Act shall for each offence forfeit and pay the sum of not less than two hundred and fifty dollars and not exceeding five hundred dollars together with the costs of prosecution in addition to any other penalty prescribed by law for the same offence.

In the holding of Court, the majority of the Justices were unable to distinguish the draft bill submitted for our opinion from the Act pronounced by the Judicial Committee in the case before referred to as ultra vires of the Provincial Legislature and think, for the reasons given in that case by the Lord Chancellor, that this draft bill as a whole is also ultra vires of the Provincial Legislature. This answer covers also questions (2) and (3). With regard to the other questions (4) to (7) inclusive, it appears to us that the day, commonly called Sunday, or the Sabbath, or the Lord's Day, is recognised in all Christian countries as an existing institution, and that legislation having for its object the compulsory observance of such day or the fixing of rules of conduct (with the usual sanctions) to be followed on that day, is legislation properly falling within the views expressed by the Judicial Committee in the Hamilton Street Railway reference before referred to and is within the jurisdiction of the Dominion Parliament.

In the dissenting Judgement of, SEDGEWICK J, held that in differing from my learned brothers, as indicated in the foregoing, it is necessary for me, under the statute, to give my reasons.

[66][Page 587]

Among which included the Second reason, he held that I do not think this is a case in which the doctrine of ejusdem generisapplies, but, even if that principle does apply, then this is a case falling within it. In my view, to submit a question asking this court to determine whether a proposed Act (giving us the draft of it) is within the competency of a provincial legislature is a similar or like question to, or ejusdem generiswith, a question asking us to pass upon the constitutionality of a provincial Act. If we decide[67] that neither the Act itself nor the proposed Act is within such competency, then they fall within the same category, and therefore the doctrine referred to applies.

I feel it to be my duty to answer, not only the questions already answered by my brother judges and myself, but also the rest of them, and my answer is in the negative, basing my opinion upon the Privy Council case above referred to and the fact that all the matters dealt with in the particular statutes mentioned fall within the ambit of the criminal law of Canada.

Attorney General for Ontario V. Hamilton Street Railway Co[68]This was case whereLegislation to prohibit on Sunday the performance of work and labour, transaction of business, engaging in sport for gain or keeping open places of entertainment is within the jurisdiction of the Parliament of Canada.

The Sunday Observance Laws

The first modern English Act dealing with Sunday observance was passed in 1625[69]. This Act declared that the "keeping of the Lord's Day is a principal part
of the true service of God" and it prohibited "meetings, assemblies or concourse

[67] [Page 594]
[68]([1903] A. C. 524)
[69] An Act for Punishing Divers Abuses Committed on the Lord's Day Called Sunday, 1 Car. 1, c. 1

of people out of their owne Parishes on the Lord's Day, within this realme of England, or any the Dominions thereof, for any sports or pastimes whatsoever".
In 1627[70]

Power for Court to Execute Search Warranty on Sunday

Under section the Magistrate Court Act[71] Where it is proved on oath to a magistrate's court that in fact or according to reasonable suspicion anything upon, by or in respect of which an offence has been committed or anything which is necessary to the conduct of an investigation into any offence is in any building, vessel, carriage, box, receptacle or place, the court may by warrant (called a search warrant) authorise the person to whom the warrant is directed to search the building, vessel, carriage, box, receptacle or place (which shall be named or described in the warrant) for any such thing and, if anything searched for is found, to seize it and carry it before the court issuing the warrant or some other court to be dealt with according to law[72].
Under section 71 of the Magistrates' Court Act cap 16, it provides that Every search warrant may be issued and executed on a Sunday, and shall be executed between the hours of sunrise and sunset; but the court may, by the warrant, in its discretion, authorise the police officer or other person to whom it is addressed to execute it at any hour.

Swearing In And Affirmation In Courts

[70]An Act for the Further Reformation of Sunday Abuses Committed on the Lord's Day Commonly Called Sunday, 3 Car. 1, c. 2.
[71] Cap 16
[72] Section 70 of the Act, ibid 50

During court procedures, witnesses are sworn in to give eveidence depending on the religion each of them falls under, if one is a Christian then this means he will need the biblwe to swear in, proclaiming words that I swear in the name of God that whatever I am going to sday is the truth, the absolute truth, so help me God.

For Muslims, they end by saying so help me Allah: however, the Muslim process of making such declarations is not termed as swearing rather affirmation. A Muslim affirms but does not swear.In the case of Samwiri Massa vs. Achen[73], it was held that; "Where certain facts are sworn to in an affidavit, the burden to deny them is on the other party and if he does not, they are presumed to have been accepted."

However, there has always been a big debate whether such swearing and affirmation should continue in court proceedings. Some legal Dons claim that countries that do not subscribe to any religion as the country's' religion their courts shouldn't do religion in away pf forcing witnesses to swear or affirm while giving their testimony. Such people include the atheists which are majorly professors. Its prudent to note that most of the African countries do not subscribe to a particular religion therefore one would say they are "secular countries" This can be clearly evidenced in their constitutions disclaiming to fall under any religion. A country like Uganda under its constitution Article 7[74] prohibits Uganda from adopting a religion.

In Kenya, its constitution under Article 8 also hinders the state from adopting a religion. The best example to this is a recent decision in Kenyan courts where atheist professor refused to swear in the **name of God to give testimony.** A university lecturer caused drama in a Nairobi court on Friday after he refused to invoke God's name while taking an oath.

[73][1978] HCB 297

[74] 1995 constitution as amended

Karega Munene, a professor of history and a confessed atheist, was required to swear in God's name before testifying before the court but the university don, who is the claimant in a dispute with United States International University (USIU) Africa, insisted he would not do it.

The attorney representing the university insisted that Prof. Munene must invoke God's name, arguing that the preamble to the Constitution and the National Anthem, by mentioning God, acknowledges the supremacy of the Almighty. He also argued that courts had forms of oaths and all citizens must abide by the set standards.

But Prof. Munene's advocate objected, saying his client cannot be forced to mention God's name as he is an atheist.

Employment and Labor Relations Court judge James Rika ruled in favor of Prof. Munene, saying he cannot compeled to swear in God's name. The judge also urged Kenyans to rethink the usefulness of oaths and affirmations in judicial proceedings and public service with a view to discarding them.

"The Constitution and the Oaths and Statutory Declarations Act do not compel anyone to swear by God," said the judge as quoted by Nation. "Does the invocation of the name of God in oaths put the fear of God in witnesses and compel them to tell the truth?" posed the judge.

The judge further said that although reference to God in the Preamble and in the National Anthem appears on the face of it, Article 8 affirmed that there is no state religion and Kenya is, therefore, a secular state.

"Our legal system is secular, and the name of God is not a legal concept. Secular means not connected with religious or spiritual matters," he said.

The judge noted that most of the practices and laws that define the legal profession and judicial proceedings were archaic and based on misty Judeo-Christian and Roman traditions and should be discarded.

"Swearing a witness by God, by body organs, or by slaughtering a male goat does not assist the course of truth and the administration of justice," he added.

He explained that presidents and other senior state officers are sworn in the name of God to uphold and protect the Constitution but "spend their entire tenure of office, mutilating and ravaging the Constitution".

"The invocation of the name of God does not instill fear as intended for the state officers or witnesses in judicial proceedings to speak and act truthfully," he said.[75] Looking at the surface of this drama you'll find out that the trial judge concurred with the professor not to do religion however it was a trite fact in procedure for one to swear in civil matters unlike the criminal matters were an accused may not give evidence on oath.

The Allocutus based on Religion

Allocutus is the court's question of a prisoner after verdict of guilty as to any statement he may desire to make before sentence is passed[76]. In criminal procedure, when a prisoner Is convicted on a trial for treason or felony, the court is bound to demand of him what he has to sgy as to why the court should not proceed to judgment against him; this demand Is called the "allocutus," or "allocution," and ls entered on the record[77].

Just like bail, during the allocutus the accused tend to show remoursefulness and religion closeness inorder to mitigate the sentence to be given. It is prudent to note that in most cases they show their reformatory nature while

[75]**Drama in Court After Kenyan Professor Refuses to Swear in God's Name articlebyJohn Wanjohi, Mwakilishi.com.**
[76]Ballentine's Law Dictionary, See 27 Mo. 324
[77]Black's Law Dictionary: 2nd Edition, Archb. Crim. PI. 173; State v. Ball, 27 Mo. 324

on remand. During the accused 's last words, apart from thwe common phenomenom of being a bread winner, some of the accused always come to claim that they have even pronounced Jesus Christ as the sentence has been moving.

Cases Based on Religion Discrimination in Uganda

Equal opportunities.

In the case of Bwengye v Bishop Stuart University[78] This decision arose from complaint Ref: EOC/CR/020/2018 brought under Section 23 of the Equal Opportunities Commission Act, 2007 for orders that: -

1. The impugned provisions of Bishop Stuart University's Guild Constitution are discriminatoiy and /or amount to impairment of equal opportunities.
2. The discrimination or impairment of equal opportunities complained of is unjustifiable and also sought for remedies.

The facts of the case were that the Complainant was a law student at the Respondent University. The Respondent is a private university established by Ankole Diocese of the province of the Anglican Church of Uganda. The Complainant's case was that some provisions of the Respondent University's

[78](EOC/CR 20 of 2018) [2018] UGEOC 1 (18 July 2018)

Guild Constitution are discriminatory because they ring-fence certain positions on the Guild Executive exclusively for students who belong to the Anglican faith.

These positions included; -

a. Chairperson and Vice Chairperson of the Electoral Commission under Article 6 (i), (vii) a), b) of the Guild Constitution
b. Guild President under Article 6 (3) (1) (i), vii), xiii), xv) of the Guild Constitution
c. Guild Vice President under Article 6 (4) (v) of the Guild Constitution
d. Guild Speaker and Deputy Guild Speaker under Article 6 (3) (a) (b) of the Guild Constitution.
e. Minister of Religious Affairs under Article 6 (3) (v) of the Guild Constitution.
f. Minister of Justice and Constitutional Affairs under Article 6 (3) (v) of the Guild Constitution.

The Complainant's case was that for a student to contest for any of the posts stated above, he or she must belong to the Anglican faith; and for the positions of Chairperson and Vice Chairperson of the Electoral Commission of the Guild, as well as the Guild Speaker and Deputy Guild Speaker, the prospective candidates are required to seek clearance from the University

Chaplain as well as their home Parish. Contestants for the office of Guild President are additionally required to include baptism cards and marriage certificates on their applications for nominations.

The complainant therefore contended that the provisions and requirements referred to herein are discriminatory and amount to nullification of equal opportunities as they seek to exclude students who do not belong to or profess the Anglican faith from contesting for the listed Guild positions. The Complainant consequently prays that the Commission declares the impugned provisions discriminatory and accordingly nullifies them.

On the other hand, the Respondent's case was that the restrictions embedded within the impugned provisions are for good reason and intended to preserve the Christian identity of the University in line with the philosophy of the Anglican Church of Uganda as captured in Part 2 (11) of the University Charter.

The Respondent's argument was that all students admitted to the University must comply with its Instruments of Identity. It was also the Respondent's contention that the exclusion of other students from assuming certain offices of the University Guild administration is allowed by the limitations contained in the Constitution of Uganda. The Respondent further argued in this case that the exclusion is intended to ensure that the values and morals of

the Anglican faith are advanced at the University through the Students' Guild. The Respondent therefore submitted that the impugned provisions are an example of positive discrimination.

Although Commission Counsel had prayed to halt the Guild Election slated for 28th April 2018, this Tribunal declined to grant the application on grounds that preparations for the Guild elections were long underway and a lot of resources had been committed to this cause and that proceeding with the scheduled election would not cause any prejudice to the Complainant.

At the beginning of the trial both parties agreed to file written submissions instead of proceeding by way of oral evidence.

Among the issues to be determined by Court included Whether the impugned provisions of the Respondent's Guild Constitution are discriminatory and/or amount to impairment of equal opportunities.

Court observed that Article 21 of the Constitution of the Republic of Uganda, 1995, guarantees equality of all persons before and under the law, and prohibits discrimination of any person on the basis of ethnicity, tribe, creed or religion, social or economic standing, political opinion or disability. Article 2(1) of the International Convention on Civil and Political Rights to which Uganda is a state party also recognizes the right to all persons to enjoy the rights recognized in the Covenant without distinction of any kind, such

as race, colour, sex or religion. Article 26 of the Covenant provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

Discrimination under Article 21(3) of the Ugandan Constitution means to give different treatment to different persons attributable only or mainly to their respective description by sex, race, color, ethnic, origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

Similarly, the Court further submitted that Section 1 of the Equal Opportunities Act 2007, defines discrimination to mean;

"any act, omission, policy, rule, law, practice, ... exclusion or preference which directly or indirectly has effect of nullifying or impairing equal opportunities or resulting in unequal treatment of persons in the enjoyment of rights and freedom on the basis of sex, age, religion among others."

The Equal Opportunities Commission is enjoined by Article 32 (3) and (4) of the Constitution of the Republic of Uganda as well as the Equal Opportunities Commission Act, 2007, to give effect to the State's constitutional mandate to eliminate discrimination and inequalities against any individual or group of persons on the grounds of creed or religion, among others. Court observed that the purpose of the Guild as stated in Article 1 (3) of the Guild Constitution, **is to seek, promote and protect the interests**

and rights of all its members. Under Article 1(4) (ix) of the Constitution, one of the Aims and Objectives of the students' Guild is **to create equal opportunities for leadership development.**

It was further observed that under Article 3 (1) (a) of the same Constitution **that all students are equal before and under the Guild laws in all spheres of academic, political, economic and social life and every other respect and shall enjoy equal protection of the Guild law.**

However, in sharp contrast to the above provisions, the same Constitution provides in Article 6 that the Chairperson and Vice Chairperson of the Guild Electoral Commission shall be a member of the Anglican Communion and shall be nominated after getting clearance from the University Chaplain and home Parish. Similarly, contestants for the office of Guild President, Vice Guild President, Guild Speaker, Deputy Guild Speaker, Minister for Justice and Constitutional Affairs, and the Minister for Religious Affairs must mandatorily be members of the Anglican Communion, and must equally be cleared by the University authorities and their home parishes. The court strongly agreed with the submission of Commission Counsel that the impugned provisions are discriminatoiy within the meaning of Article 21 of the Constitution of the Republic of Uganda, Sections 1 and 14 of the EOC Act 2007, Article 2 of the Universal Declarations of Human Rights, Article 2(1) of the International Covenant on Civil and Political Rights 1966;

Articles 2 and 3 of the African Charter on Human and Peoples Rights, and the Declaration on the Elimination of all forms of Intolerance and of Discrimination Based on Religion or Belief (UNGA Resolution 36/55 of 25^ November 1981.) Article 2 of the Declaration provides that;

"No one shall be subject to discrimination by any state, institution, group of persons or person on the ground of religion or belief."

Looking at the above provision, the Court noted that by giving unequal treatment to its students on the basis of religion, the Respondent did not only offend Uganda's Constitution and the other laws (including international and regional Instruments) listed above, but contradicted its own Constitution whose provisions on equal opportunities for all students were clear cut. Reading the provisions of the Guild Constitution together, it is clear that the impugned provisions are out of sync with the overall purpose of that document and the students' Guild generally which seeks to allow all students to showcase their leadership abilities and competences.

In courts' view of the fact that students are admitted from all walks of life and no reference is made to religion as a mandatory requirement for admission to the Respondent University. It is discriminatory for students who profess the Anglican faith to be given preferential treatment, especially with regards to offering themselves to contest for leadership positions.

The Court noted that the unconstitutional practice of ring fencing and allowing only students who belong to the Anglican faith to contest and occupy key offices of the Guild administration to the exclusion of others has the adverse effect of killing natural endowments of leadership skills of the non-Anglican students, who are rudely denied the opportunity to harness their skills so as to develop into future leaders.

The court took notice of the fact that student leadership plays an important role towards the fulfillment of all the above stated objects. Sadly, however, the impugned provisions discriminately apply these objects to students who belong to the Anglican Communion, to the detriment of others who then cannot access the benefit and experience of harmonious and holistic development.

In understanding this case, it is also prudent to look at the Submission of Counsel for the respondent on the purpose of the University.

Counsel for the Respondent passionately submited at page 3 of his submissions that;

"The purpose of the University therefore among others is to advance and promote Anglican ethos and values. To this extent, the university enjoys the fundamental right to hold to this Anglican faith and the right to manifest this belief which entails that those holding ring

fenced positions live up to the Anglican ethos and values and practice the same. It would be a negation of these rights if for instance the position of Guild President was held by an atheist. What message would this convey? It would run counter to the very objective and purpose of setting up an Anglican based University."

The court observed that the above was an expression of discrimination in as far as the Guild Constitution purports to allow only students of the Anglican faith to contest for the most important offices in the Guild administration, while relegating non-Anglican students to the less privileged and insignificant positions in the Guild administration and it entirely agreed with Commission Counsel that the measures taken by the Respondent to ring fence certain positions in the Guild administration are indeed unfair, irrational and unreasonable.

It was submitted by the Commision Lawyer that the respondent had alternative ways of promoting values of the Anglican faith and other desirable elements of Christian philosophy without discriminating against sections of its students. It would be understandable if only the Guild Minister for Religious Affairs was mandatorily required to belong to the Anglican faith because looking at Article 5(3) (h) of the Guild Constitution, the incumbent's roles are purely religious in nature. Other positions that are secular in nature and the holders' efficiency and competence ought to be

measured by practical leadership talents and not their respective religious affiliations. Such leadership talents are not only found in students of the Anglican denomination but are available to atheists and persons of other denominations alike.

The impugned provisions are therefore segregative and do not promote diversity, tolerance and respect for students' respective beliefs and orientations.

The first issue is therefore answered in the affirmative, with the finding that the impugned provisions of the Respondent's Guild Constitution are discriminatory and amount to impairment of equal opportunities contrary to Article 21 of the Constitution of Uganda, Sections 1 and 14 (1) and 23 of the Equal Opportunities Act, 2007; Articles 2 and 3 of the African Charter on Human and Peoples Rights, Articles 2(1) and 26 of the International Covenant on Civil and Political Rights, 1966, and Article 2 of the Declaration on the Elimination of all Forms of Discrimination Based on Religion or Belief, 1981.

Another issue that was to be determined by Court included Whether the discrimination or impairment of equal opportunities complained of is justifiable.

The court observed that It is important to note that the limitations that are permissible in the enjoyment of the right to equality and non-discrimination are expressly provided under Article 21 (4) and (5) and Article 43 of Uganda's Constitution of 1995.

i) Article 21 (4) and (5) deals with matters which are within the realm of the legislative arm as well as permissible discriminatory actions which are specifically provided by the Constitution. These two provisions are not applicable to this complaint.

ii) Article 43 (1) provides that "In the enjoyment of the rights and freedom prescribed in this chapter, no person shall prejudice the fundamental or other human rights and freedom of others or the public interest." Article 43 (2) (c) provides that public interest shall not permit any limitation of the rights under Chapter IV beyond what is acceptable and demonstrably justifiable in a free and democratic society or what is provided in the Constitution.

In its view, the impugned provisions, however, fall short of this criteria and are a clear unjustified breach of the right to equality and non-discrimination. Looking at the Respondents' Charter, the core object of the Respondent is to offer education, foster research, as well as provide holistic training to students, including providing them with leadership opportunities and professional training in various areas that are relevant to social growth and

development. Restricting non-Anglican students from rising to the most important positions in the Guild for the sole reason that the office holders advance the Anglican philosophy of the Respondent is a misnomer.

We should also note that the State is enjoined by Objectives II (i) and (ii) of the National Objectives and Directive Principles of State Policy to promote democratic principles which empower and encourage active participation of all citizens at all levels in their own governance; and to ensure that all the people of Uganda shall have access to leadership positions at all levels, subject to the Constitution. Objectives III (ii) and (iii) make it equally mandatory to integrate all the peoples of Uganda while recognizing the existence of their ethnic, religious, ideological, political and cultural diversity; and to promote a culture of cooperation, understanding, appreciation, tolerance and respect for each other's customs, tradition and beliefs.

The impugned provisions do not guarantee access to leadership for all; they are segregative and intended to impair equal opportunities for a section of the students' community. Instead of promoting unity in diversity, tolerance and respect for each other's religions or other beliefs, they are an undesirable creation of intolerance and division among students who would otherwise live in harmony and enjoy equal treatment especially in offering leadership.

On its part, Objective XVIII provides that religious bodies shall be free to found and operate educational institutions if they comply with the general

educational policy and to maintain national standards. The general educational policy of Uganda does not condone discrimination. I agree with Commission Counsel that even if it did, this Tribunal would be required by Section 14(1) of the EOC Act, 2007 to streamline it and ensure that it complies with equal opportunities. The Respondent, like any other private University must therefore comply with the general education policy and maintain national standards which are not unjustifiably discriminatory.

Thus, the impugned provisions glaringly offend the spirit and letter of these Objectives and Principles in as far as they exclude and deny participation of non-Anglican students in the key areas of the Guild leadership.

It should be recalled that Article 2 of the Constitution of Uganda is crystal clear on the supremacy of the Constitution and provides that the Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda; and that if any other law or any custom is inconsistent with any of the provisions of the Constitution, the constitution shall prevail, and that other law or custom shall, to the extent of its inconsistency be void.

Consequently, in as far as the impugned provisions of the Respondents' Guild Constitution did not in that case conform to the National Objectives and Directive Principles of the State Policy (which are by virtue of Article

8(A) part of the Constitution), and Article 21 of the Constitution of the Republic of Uganda cited herein above, they are void and of no legal effect.

In the Courts' view of the above, I am persuaded by Commission Counsel that the discrimination complained about is unjustified, wrongful and simply premised on prejudice against the non-Anglican students. This Tribunal is not satisfied that there is any other justification for discriminating against them. In addition, Counsel for the Respondents does not indicate that the discrimination complained of is intended to benefit the Anglican students perhaps because they have previously faced discrimination in accessing the Guild leadership, or even suffered any other disadvantage in the past, hence validating the positive discrimination argument. The learned counsel does not indicate how belonging to the Anglican faith as opposed to other qualities and attributes of leadership are relevant and necessary for office bearers to perform the functions of the ring-fenced positions of the Guild administration.

For all intents and purposes therefore, the court found no good will in the impugned provisions and accordingly held that the discrimination and impairment of equal opportunities complained of were unjustified.

With the greatest respect to counsel, to argue that the Complainant chose to go to an Anglican based university, submitted himself to observe and abide by those impugned provisions of the Guild Constitution and therefore

cannot turn around and challenge them is to seek to hold him as a slave of his own conscience contrary to Article 29 (1) (b) of the Constitution of the Republic of Uganda. The purported taking of an oath by the Complainant to abide by the Rules and Regulations of the Respondent is thereby rendered nugatory in the context of this case, by the very illegality in which the impugned provisions are rooted.

This Tribunal is therefore enjoined by law to nullify the impugned provisions. It cannot be seen to condone baseless discrimination as this would be an undesirable betrayal of its core function under Section 14 of the Equal Opportunities Act, 2007 to ensure that laws and practices of organs of state and private entities at all levels are compliant with equal opportunities.

The court in light with the above held that the discrimination or impairment of equal opportunities complained of is unjustifiable, illegal and against the Constitution of Uganda.

Fundamental and other Human Rights and freedoms are generally protected and promoted under Chapter 4 of the Constitution of the Republic of Uganda. The same Constitution provides for the right to remedy in case of violations of guaranteed rights. That is the same spirit in which this Commission was set up.

Thus, this Tribunal is empowered by Sections 14 and 23 of the Equal Opportunities Commission Act to inquire into and hear complaints of discrimination, marginalization or impairment of equal opportunities and make decisions or awards in accordance with Regulation 22 of the Equal Opportunities Regulations, 2014.

In the conclusion of Court, Court held that the impugned provisions of the Respondent's Guild Constitution are discriminatory and amount to impairment of equal opportunities contrary to Article 21 of the Constitution of Uganda, Sections 1 and 14 (1) and 23 of the Equal Opportunities Act, 2007; Articles 2 and 3 of the African Charter on Human and Peoples Rights, Articles 2 (1) and 26 of the International Covenant on Civil and Political Rights, 1966, and Article 2 of the Declaration on the Elimination of all Forms of Discrimination Based on Religion or Belief, 1981.

Rationale for Swearing and Affirmation in Line with Religion

The religion being a basis of faith whereby people are believed to have fear in the almighty is a basis of making them swear or Affirm because Court believes one would not want to lie in the name of his creator. The bible teaches Christians to always tell the truth thy the truth will set them free.

Under the teachings of Christianity, the ten commandments prohibit one from telling lies in two commandments this clearly shows you how the religion is based on telling the truth. Commandment two provides that"You shall not misuse the name of the LORD your God, for the LORD will not hold anyone guiltless who misuses his name[79].

When one holds the bible to swear in court, if he/she tells lies after swearing it is clear evidence that he or she has used Gods' name for evil purposes or he has misused it.

But also under the ten commandments, the very similar commandment is commandment 9 which provides that "You shall not give false testimony against your neighbor.[80]

In the African Tradition religion, they also had a similar aspect. In Buganda one would swear in the name of their gods such as "Jjaaja Ddungu", "Kiwanuka" among others to show that he/she was telling the truth. Basing also on their belief that the dead weren't dead, they could also swear in the name of their dead ancestors. In Acholi, while a village court meeting, they had the tall ok where one held a stick klnown as "tal" and proclaimed to say the truth.

[79] Exodus 20 verse 7
[80] Exodus 20 verse 16

With the above examples you'll agree with me that Courts do religion regardless of whether they come out to agree or not.

The intention behind the swearing and affirmation is clear, there is a latin maxim to the feect that "Animus hominis est

anima scripti" which means that, "the intention is the soul of an instrument" therefore by applying such procedures, the court is doing religion.

Voire Dire in Testimony of Minors Based on Religion

Voire dire examination is a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror[81]. With specific regard to the testimony of children, voir dire examination is essential to enable the court satisfy itself that the child is conscious of the truth. the court will conduct a hearing to determine if the child is competent to give sworn testimony. The court will make this determination sui generis and will seek to determine if the child understands the consequences of lying and telling the truth as a general concept of what an oath is. The purpose of voire dire was explained by the court in Johnson Muiruri vs Republic[82] as follows:

1. "Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on

[81]Duhaime, Lloyd. "Voir Dire definition" Duhaime's Legal Dictionary
[82] [1983] KLR 445

a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

> 5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

In regard to whether a child understands the essence of telling the truth, Courts are forced to do religion. Sometimes Court will ask the following questions to the child: "Do you know God or believe in him?" If the child answers "Yes" then court may proceed and ask the child "what does God do to those who tell lies? If the child says in its answer that God burns up those who tell lies with unstoppable fire, then court will in this way be satisfied that the child knows what it is talking about. Therefore,it bears repeating that the purpose of *voir dire* is to ensure that the minor understands the solemnity of oath and if not, at the very least, the importance of telling the truth. It's a trite fact that court here is seen to do religion. People v. Nisoff[83], The court noted that there is no set requirement that will absolutely make a child witness eligible versus disqualification. The trial court has a "degree of latitude" in making this determination and a court will not normally discount a trial courts determination of competence. Id. The Court of Appeals ruled that the trial judge did not abuse its discretion in allowing the 10-year-old to give sworn testimony or letting the 8-year-old give unsworn testimony. This is because for the most part, the voir dire process is subject to the discretion of

[83]36 N.Y.2d 560 (N.Y. 1975).

the trial judge, who controls both the manner and scope of the examination and the trial judge will apply his intelligence quotient mostly to do religion to know the child will tell the truth.

This is clear evidence that the trial judge will base religion on the notion whether a child knows that telling the truth is so important. There's quit a big difference between morality and religion, but the fact remains that morality is based on religion. A child brought up in a Godly family will be fearful to do immoral acts unlike the colleague who grew up from streets, God will definitely be in intent but not details and it will show this plainly to the trial judge.

PRINCIPLES OF NATURAL JUSTICE AS USED BY COURTS HAS ITS ORIGIN FROM RELIGION

The principles of natural justice are the rock of justice in all courts and it's the basis of adjudication and litigation to have the end result of natural justice. The principles of natural justice originate from the concept of religion. In the start of creation as per the Christendom meaning, God gave a fair hearing to Adam and Eve after their sinning although he knew what they had done. He asked them why they were in hiding? Overwhelmed with shame after disobeying God, by eating from the Tree of the Knowledge of Good and Evil,

Adam and Eve attempted to hide from God[84]Therefore, this continues to affirm to you that the principle of natural justice as applied by Court is a doctrine of religion.

In Uganda, the rules of natural justice are embedded in the Constitution under Articles, 28, 42 and 44[85] which guarantee every person a right to a fair hearing before an administrative body. In the case of **Ojangole Patricia & 4 Others vs. Attorney General[86],** the rules of natural justice were also applied by the court. Citing **Halsbury's Laws of England 5th Edition 2010 Vol. 61 para 639**, it is stated that;

"The rule that no person shall be condemned unless that person has been given prior notice of the allegations against him/her and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adopted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract, to conduct themselves in a manner analogous to courts."

[84] Genesis 3 Verse 11
[85] 1995 Constitution of Uganda as amended
[86]H.C.M.C No. 303 of 2013

In a nutshell, by courts applying the doctrines of natural justice that is to say fair hearing though it may not be practically an evident way of manifesting religion but in the great sense they're doing religion.

Presumption of Oneness in Court Based on Religion

You will concur with me as already discussed that the presumption of oneness brought about by Christianity under the institution of marriage is to effect that a husband and a wife are one in the eyes of the law, therefore one spouse cannot be compelled to give evidence in civil matters against the other spouses**.** It is clear that this presumption is a based religious phenomenon that once you get married you become one.

Evidence of Spouses in Criminal Proceedings

The law courts follow to determine whether a spouse should testify against her husband is clear in criminal proceedings.[87]

In criminal proceedings, the following provisions shall have effect—
(a) the wife or husband of the accused person shall be a competent (but not compellable) witness for the prosecution without the consent of the accused person;

[87] Section 120 of the Evidence Act, cap 6

And (b) the wife or husband of the accused person shall be a competent and compellable witness for the defence whether the accused person is charged alone or jointly with another person.

(2) In this section, and in section 121, "husband" and "wife" mean respectively the husband and wife of a subsisting marriage recognised as such under any written or customary law.

However, under Section 121 of the Evidence Act Cap 6, In all civil proceedings, the parties to the suit, and the husband and wife of any party to the suit, shall be competent and compellable witnesses.

Religious Associations in Courts

However, courts have ruled in favor of religious Associations in matters regarding the interpretation of the law. This was properly brought out in the case of **International Bible Students Association v Uganda Revenue Authority**[88] The plaintiff is an International Bible Students Association, a religious association incorporated as a company limited by guarantee and registered as a charity in the United Kingdom. It is also registered in Uganda under Part X of the Companies Act. The Plaintiff is a legal entity used by Jehovah's Witnesses to accomplish its religious activities in Uganda and is the legal structure for Jehovah's Witnesses in Uganda. The structure of the Plaintiff is premised on spiritual direction being provided by an ecclesiastical Governing Body, the Worldwide Order of Special Full time Servants of Jehovah's Witnesses, hereinafter referred to as 'the Order', an unincorporated international association of religious ministers who have made a vow of obedience and poverty, and a commitment to serve in a special full time

[88](HCT-00-CV-CS-0209 OF 2008) ((HCT-00-CV-CS-0209 OF 2008)) [2009] UGHC 142 (29 June 2009);

capacity. The Order routinely provides the Plaintiff with members of the Order to assist the Plaintiff in accomplishing the religious activities of the Jehovah's Witnesses in Uganda. These members receive food, shelter, and modest support from the plaintiff to cater for personal necessities in the course of carrying out the plaintiff's charitable and religious activities in Uganda. The support provided to each of these members is USh. 170,000= per month and USh. 576,000= per year.

The Defendant is the Uganda Revenue Authority, a statutory body established under the Uganda Revenue Authority Act, Cap 196. It is principally charged with the collection of taxes in Uganda. In January 2008, the Defendant made an internal ruling that the monetary support given to members of the Order in Uganda for personal expenses is taxable as employment income, specifically under Pay As You Earn (PAYE) income tax, because it believes that members of the Order are "employees" within the meaning of the Income Tax Act. The plaintiff was dissatisfied with the above internal ruling, and the parties agreed to refer the matter to court for a declaration. Hence the present suit.

The Plaintiff seeks a declaration that members of the Order who serve in Uganda are not employees of the Plaintiff for purposes of the Income Tax Act, Cap 340, and therefore, are not liable to pay PAYE income tax, and that, consequently, the Plaintiff is not under obligation to deduct any such tax from the support provided to the said members of the Order. The most important issue to be determined was Whetherthe Plaintiff is obliged to compute and deduct income tax and specifically Pay as You Earn from the support it gives to the members of the Worldwide Order of Special Fulltime Servants of Jehovah's Witness**.**

Judge Elizabeth Musoke held that Income tax deductions, specifically PAYE, can only be deducted from taxable income. Because of the court's finding that the relationship between the plaintiff and the members of the

Order is not an employment relationship and that the support provided is not taxable income, it is unnecessary to address the issue of whether the Plaintiff must deduct PAYE.

Therefore, this clearly shows that religious Associations bring up matters of civil nature and Courts decide them on the basis of the law not religion, such matters involving the critical interpretation of the law but not religion.

Another important case to consider was the case of **Open Bible Standard Churches of Uganda V Samuel Egessa**[89]Plaintiff sought a permanent injunction restraining the defendant from conducting activities in the plaintiff's churches and projects, vacant possession of a grinding mill machine and the land on which it is situate, return of several other land titles and other properties belonging to the plaintiff including but not limited to motor vehicles, a trimmer machine for cutting paper, and graduation gowns. The plaintiff claims that on the 18/10/2007, the plaintiff's National Executive Board of Trustees (hereinafter referred to as the Board) through a special resolution, relieved the defendant of his duties as the general overseer of the Open Bible Church in Uganda. That the defendant was requested to hand over all the plaintiff's property in his possession and to stop managing any projects, Churches or conducting any service or ministry within the plaintiff's churches or projects. That he handed over some but not all the plaintiff's property. In particular he declined to hand over the grinding mill and its land, motor vehicle **Reg NO.UAE 743F,** a motorcycle **Yahama registration NO. UAC 505D, a** trimmer machine, graduation gowns, and several land titles of the Churches at Bugiri, Namala, Makoma, Bumooli, Nakabaale, Mulwande,Lugaga Bukimo, Bumeru Nambengere, Buwemba

[89]**(Civil Suit No. 004 of 2010) [2019] UGHC 7 (12 July 2019);**

and Otabongo, some of which he has continued to wrongfully manage. In response, the defendant claimed that he was unlawfully relieved of his duties. He contended that he handed over all churches and property belonging to the plaintiff including the grinding mill and all documents relating to the land on which it is situate, a trimmer machine, graduation gowns and 46 land titles. That the two motor vehicles were given to him by Vince Marcarty the Executive Director of International Ministries of the Open Bible Churches with Karl Francis as a token of appreciation for his dedicated service to the Church. He denied having control over any of the plaintiff's Churches, any misappropriation of Church funds, and contended that he had infact expended his own money towards the plaintiff's projects.

The defendant raised a counter claim for the recovery of **UGX 261, 500,000/=** spent by him on construction of the plaintiffs churches and buying church land. In his submissions, counsel for the defendant raised a preliminary point of law with respect to the counterclaim.

In the holding of court, it was observed that it was enough for the defendant to hand over the title and it was then incumbent of the plaintiff to make a request for a formal hand over of the mill or through her agents' attempt to gain access and possession of the mill and failing to do so, ask the defendant for assistance.

In conclusion judgment was entered for the Plaintiff against the Defendant for:

An order that the plaintiff is entitled to vacant possession of the grinding mill in Bugiri, which is their property.

An order that the defendant returns to the plaintiff a trimmer machine for cutting paper.

An order that the defendant returns to the plaintiff motor vehicle registration **No.UAE 743F**, and motor cycle Yahama registration **NO. UAC 505D** and all their official documentation in particular the log/registration books.

An order that the defendant pays to the plaintiff Shs. **UGX3, 315,849** for the outstanding electricity bill in respect of the grinding mill in Bugiri.

Religion During Granting of Bail

Bail is one of the major concerns in criminal Law and it takes a verbose explanation for one to convince the judge to grant it, the applicant in most cases finds himself in a dilemma of proving unusual and exceptional circumstances in order to persuade a Judge grant him Bail.

Questions of this nature have been arising whether Bail is a right? Or even it falls under the discretion of Court to grant it. Courts have taken into account the religion and reformatory natureofan accused to grant bail. this was clearly illustrated in the case of Jemba Steven V Uganda[90], Before Honorable Justice Remy Kasule Sitting at a single Judge. This was an application seeking release on a bail by the applicant pending the disposing of the Criminal No. 094 of 2015 against charges of Aggravated robbery. The application was supported by an affidavit of the applicant which interalia included that he had undertaken reformatory courses during service of his imprisonment, Bible way correspondence school (Basic Bible teachings) and a now responsible

[90]Miscellaneous Application No. 78 of 2019

Christian Course completed in twelve Studies with examination memorized 12 verses.

Now a Question arises whether one being too religious should be considered as exceptional circumstances of Granting Bail or Courts should only take it into account as a mitigating factor, in that case (supra) Court declined to grant the applicant bail claiming that circumstances brought up couldn't satisfy court to the maximum in relation to the offence committed.

Religion and Academic Qualifications in Court

In most cases court is approached by cases which require a convertor of religious college qualifications whether they are equivalent to the required academic qualifications. And also issues requiring to summon religious leaders, head of religious institutions to court. This was seen in the case of Opio v Okabe & 2 Ors[91]The petitioner and 1st respondent contested for Parliamentary seat for Serere County, Serere District together with 5 other candidates. The elections were held on the 18th day of February 2016 and these were the results;

Makhalu Richard Okodel who got 564 votes

Ochola Stephen who got 18,091 votes

[91](Election petition No. 003 of 2016) [2016] UGHCEP 29 (30 august 2016);

Odongo Francis who got 948 votes

Okabe Patrick who got 23,,949 votes

Opolot Daniel who got 564 votes

Opio Joseph Linos who got 0 votes.

The petitioner being dissatisfied with the declaration of the 1st respondent as the winner by the 2nd respondent filed this Petition.

In the Petition the petitioner prays for a declaration that; a) the 1st respondent's Certificate of completion of formal education equivalent to a Diploma verified by the 3rd Respondent is a nullity b) the 1st Respondent's diploma alleging he sat and passed a Diploma majoring in Bible and Theology issued on 7th August 2015 from the Pentecostal Theological College, Mbale be declared fake, unauthentic and a nullity, c) the National Council of Higher Education failed in their duty to effectively verify the academic documents, d) the 1st Respondent at the time of election was not qualified to be elected as a Member of Parliament, e) the elections were conducted in non-compliance with the provisions of the law for which they should be set aside , f) the elections of the Member of Parliament of Serere County, Serere District 2016 be directed to denovo and the petitioner be awarded costs.

The issues to be determined included Whether the 1st respondent was qualified to be nominated and elected for the Parliamentary elections. The petitioner alleged that the 1st respondent was not qualified for nomination as Member of Parliament since he did not have the minimum qualification of formal education prescribed by the law. **Section 4(1) (c) PEA** provides that for one to be qualified to be a Member of Parliament, that person should have completed a minimum formal education of Advanced Level standard or its equivalent. The 1st respondent relied on the following academic qualification to be nominated: -

Ordinary level certificate of education from Ayer College obtained in 1976.

Certificate in Church Ministries obtained from Pentecostal Theological College (PTC) obtained in 2013.

Diploma in Bible and Theology obtained from PTC obtained in 2014.

The court invited imede Ketty the Academic Registrar of PTC and Amos Isale the Academic Dean of PTC to testify to the fact that the 1st respondent held the necessary qualifications when he was admitted to the Certificate Course in Church Ministries and that upon completing the Certificate Course he was admitted to undertake a Diploma Course.

Judge B. Kainamura looking at all evidence present he thereby declaredthe nomination and subsequent election of the 1st respondent as Member of Parliament for Serere County is hereby nullified and the seat of the 1st respondent is declared

How Courts Do Religion

Having understood the concept of religion, theories of law, procedures of court among others. It is very important to now discuss practically how courts have gone ahead to apply religion in the walls of the court room**.**

In **Long vs.Bishop of Capetown**[92], where the Bishop held an ecclesiastical court for proceeding against the appellant who was authorised to perform ecclesiastical duties in a Parish was held as "coram non judice" as he had no authority to hold an ecclesiastical court. The court held that where no Church was established by law it was in the same situation as any religious

[92]1863 (1) Moore PCC NS 411

body, therefore, if any tribunal was constituted by such body which was not court then its decision would be binding only if it was exercised within the scope of the authority.

Therefore, it follows that in Longs's case(supra) a decision based on religion had to be done in accordance with the provisions of the law in order to be valid. Anything outside the rhealms of the Law is wrong abinitio.

In **Dame Henriette Brown vs. Les Cure Et Marguilliers De L'Oeuvre Et Fabrique De Notre Dame De Motreal**[93], the Privy Council while following the decision in Long (supra) held that where a Church was merely a private and voluntary religious society resting only upon a consensual basis courts of justice were still bound when due complaint was made that a member of the society was injured in any manner of a mixed spiritual and temporal character to inquire into the laws and rules of the tribunal or authority which inflicted the alleged injury and ascertain whether the act complained of was law and discipline of the Church and whether the sentence was justifiably pronounced by a competent authority.

We should consider some of the prudent cases were religion and Court were at a test as was a point in the case of **Dimanche Sharon and Ors V Makerere University**[94]in this case the plaintiffs were seventh day Adventists Christians

[93]1874-75 (6) PC 157
[94]Constitutional cause 1 of 2003

and students at Makerere University a public institution. Makerere University had scheduled the taking of mandatory examinations for the subject of introduction to law and others on Saturday of 25th January 2003 which was a Sabbath Day for the petitioners. On the basis of their faith and beliefs, it was a cardinal tenet of the seventh Day Adventist Christian Faith that believers cannot engage in any form of work on the Sabbath Day which is blessed and sacred day. The Makerere University policies and regulations made under the authority of the University and Other Tertiary Institutions Act (Act 7 of 2001), which policies and regulations require students to attend classes, and take mandatory tests and examinations on any day of the week (including the Sabbath Day in the case of your Petitioners who practice the Seventh Day Adventist Christian faith), irrespective of the students' religious affiliations is inconsistent with and in contravention of Articles: 20, 29 (1) (c), 30 and 37 of the Constitution of Uganda. They further contended that Makerere University is a Public Institution, and is obliged under Article 20 of the Constitution of Uganda to respect and uphold the inherent and fundamental rights and freedoms (which include the religious freedoms) of the Petitioners as established under the Constitution.

It was further noted in their affidavits that according to the seventh day Adventists Christians, the Sabbath is one of the Ten Commandments. This was supported by the book of exodus chapter 20 verses 8-11 of the bible

(N.I.V) where it was stated that the petitioners are to remember the Sabbath by keeping it holy.

For the meaning of "Freedom of religion" the court took into consideration counsels' submissions that "declare those beliefs openly and without fear or hindrance or reprisal and the right to manifest religious beliefs of worship and practice or by teaching or dissemination. But the concept means more than that"0

It is prudent to note that Dimanches' case(supra) was greatly welcomed by the public to see how courts were to interpret the law viz-a-viz the provisions of religion. There wasn't any locus clasccuss case to deal with this situation and whatever the arguments among religion and the Law were only in myth.

Mr. Kakembo also submitted there was no justification for sacrificing the rights of the minority 150 seventh Day Adventists to that of the majority population of 31,000 students. The funnier part about this reasoning was that nothing was adduced to court to show that the rest of the students were in support with doing the papers on the Sabbath regardless of their religious affiliation.

And the fact that someone had stood up for her rights why wouldn't court consider that first before it looks at the others who sat on their rights yet it had a vigilant person in court. All this continue to explain that the court wasn't in order to consider religion rather other factors.

Looking at the judgement of the Learned Judge LE.M. Mukasa –kikonyogo DCJ, as then he was, among the issues to be determined included the following.

On the surface of his arguments you can think like me that he went outside the box of religion and analyzed this case on the basis of public opinion and what in his human conscience was right. On a good day for Dimanche and the other petitioners, any justice could have given his stand basing on the articles they cited Articles 20,29(1) (c), 30, and 37

The court in this case took into account **Article 37 of the Constitution** of Uganda which provides as follows**: -**"Every person has a right as applicable, to belong to, to enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others"

In the affidavit of Esther Irakunda She averred that she attended two tutorials in her second year between 1995/96 academic year while in Makerere University that were held on two separate Sundays and she never heard a complaint from other students on the ground that Sundays was a religious prescribed as a rest day. The learned judge based on that averment and did neither take a judicial notice nor reason like any officious by-stander to that effect that it is so important for Christians rest on Sundays, all this proves why the religion in this case wasn't so important.

Regarding his view, there was no evidence to show that the problem of Sabbath was only peculiar to the Seventh Day Adventists students. This is proof on how courts have not upheld prima facie provisions about religion on unclear ratio decidendi.

The court also emphasized that the provisions of **Article 30**[95] notwithstanding, University education is not compulsory and is not obtainable only from the respondent. The petitioners had an option to join other Universities and other tertiary institutions. The court didn't consider the petitioners' religion.

Basing his argument on **Article 43** about limitations of these rights among which the issue of public interest arose but you will accept the fact that no affidavit was attached from a public official to represent that this matter was in public interest. Borrowing the reference of the case of **Andrew Mwenda and Anor V AG**[96], Court failed to accept the respondents' argument that the matter was in favor of public interest when the A.G failed to attach an affidavit from a public leader be it a member of Parliament or mayor. In the case above of Makerere University for the benefit of doubt at least the

[95] 1995 constitution of Uganda as Amended
[96]Numbers 12 of 2005

respondent would have used an affidavit from a Seventh Day Adventist or a Guild President from Makerere University.

It is self-explanatory that the Learned judge in this case failed to base his arguments on religion but his conscience and what the University wanted, he didn't pay attention on the gravity of religion towards its subjects and he concentrated in rem not personam by referring to allegations of those that didn't stand to oppose the University policies. And the maxim of law is clear LEX VIGILANTIBUS, NON DORMIENTIBUS, SUBVENIT, in my view the court must have put it in consideration and do some bit of religion.

In that case the court was under a requirement to do religion but hesitated to do so albeit all odds were that Sharon and her colleagues were on a higher chance to win had court took religion into account. We should also consider the case of **Julius Rwabinumi V Hope Bahimbisomwe**[97]**,** this was the best example of a case where court was prima facie doing religion. The court did not stop on only quoting religious provisions but also it seemed it was preaching the Gospel.

This case that has greatly been criticized by several Legal brains on the basis that Court relied on the religious provisions rather than what the Law provides. It was a case concerning sharing of matrimonial property. The

[97]**Court of Appeal Civil Appeal 30 of 2007**

Learned Judge Twinomujuni, JA, as then he was, Observed desuetude several religious provisions as discussed below. The brief facts of this case are that:

The appellant and the respondent were wedded on 30th August 2003 at Our Lady of Africa Mbuya Catholic Church. Before this wedding, the two had lived together informally and produced a baby boy on 28th March 2003 named Edison Rubarema. However, between the date of the wedding and July 2004, when the parties separated, the marriage was strained and broke down irretrievably. It was the case for the respondent that it was the conduct of the appellant that led to the break down of the marriage. In her divorce petition dated 14th February 2005,

Among other reasons to be determined included The learned judge erred in law and in fact when he ordered that the parties share the various properties when the respondent never proved any contribution towards acquisition of the same. This would be our major focus in line to how courts have used religion. Justice Twinomujuni observed that **Article 31(1)** of the Constitution provides:-

"Men and women of age of eighteen years and above, have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and its dissolution."

He further observed that in this petition, we are dealing with the dissolution of a marriage contracted in Church under the Christian tradition. He Quoted the bible as follows: In Genesis Chapter 2 verses 21-25, we find the following provision:

"The Lord God made the man fall into a deep sleep, and while he was sleeping, he took out one of the man's ribs and closed up the flesh. He formed a woman out of the rib and brought her to him. Then the man said, *"At last, here is one of my own kind – Bone taken from my bone, and flesh from my flesh. 'Woman' is her name because she was taken out of man."* That is why a man leaves his father and mother and is united with his wife, and they become one."

He drew a nexus between the provisions of the constitution 1995 and the provisions of the bible and found out that both provisions pointed at the basis of equality between a man and woman in unity as one.

The learned Judge further observed that parties to this appeal were married in the Christian tradition on 30th August 2003. The ceremony took place in Our Lady of Africa Mbuya Catholic Church. All those who choose to be married in Church must take vows at the precise moment when they become husband and wife. The vows are to the effect that they undertake to live together as husband and wife, in shared companionship in riches or poverty.

He further observed that these vows are usually made in presence of hundreds and sometimes thousands of their parents, relatives and friends. His understanding of the vows is that at the time the bridegroom and the bride become husband and wife, all the property they own become joint property. All the property they acquire during the subsistence of their marriage is theirs to share equally in unity and love. At the time of the vows, it is never envisaged that the spouses would have to split. In fact, he alluded to the fact that they are told this in Church that: **"That which God has put together let no person divide".**

The judge didn't see the reason why the issue of matrimonial property could be in issue in presumption that the two were one as per religious teachings.

In his remarks basing on religion he alluded to the fact that in 1995, for the first time in our history, the Constitution of Uganda clearly put into reality the equality in marriage principle contained in Genesis Chapter 2 verse 24 (supra) and what those who choose to contract marriages under the Marriage Act undertake to practice. And he concluded that matrimonial property is joint property between husband and wife and should be shared equally on divorce, irrespective of who paid for what and how much was paid.

AUTHORS' NOTE ON RWABINUUMIS' CASE(SUPRA);

What the judge did is a rule in common law referred to as LEX SCRIPTA SI CESSET, ID CUSTODIRI OPORTET QUOD MORIBUS ET CONSUETUDINE INDUCTUM EST; ET, SI QUA IN RE HOC DEFECERIT, TUNC ID QUOD PROXIMUM ET CONSEQUENS EI EST; ET, SI ID NON APPAREAT, TUNC JUS QUO URBS ROMANA UTITUR SERVARI OPORTET, this maxim literally was to effect that If the written law be silent, that which is drawn from manners and custom ought to be observed; and, if that is in any manner defective, then that which is next and analogous to it; and, if that does not appear, then the law which Rome uses should be followed.

We should intelligently appreciate the fact that in absence of the legislation to handle matters related to division of matrimonial property, we see the Learned Justice upholding the maxim to give religious provisions life in law.

Overturning Rwabinuumis' Case by The Supreme Court

However, the position of law concerning division of matrimonial property equally based on religious reasoning per The Learned Judge Twinomujuni, JA was never left to stand by the Supreme Court in an appeal case of Rwabinumi v Bahimbisomwe (Civil Appeal 10 of 2009) [2013]in the lead judgement of Justice Esther Kisakye,JSC she observed as follows dissenting to the religious grounds the Learned Justice Twinomujuni based on. In

Consideration of Parties' Submissions on errors of law made by the learned Justices of Appeal were majorly against the religion usage by the Justice of the Court of Appeal.

She started by considering the submissions of counsel for the appellant which relate to the legal effect of marriage vows exchanged during marriage ceremonies celebrated according to religious rites of the parties. The submissions of counsel for the appellant arose from the articulations of the law by Twinomujuni, J.A basing on religion.

Justice Esther Kisakye,JSC observed that the statements of Twinomujuni, J.A., though *obiter dicta,* warrant consideration in order to clarify on the law governing the property owned by married persons acquired either before and/or during the subsistence of a marriage. These statements on the effect of marriage vows and the marriage ceremony on a spouse's individual property rights and the legal conclusions he drew there from have no legal basis and cannot therefore be left to stand.

She further observed that it was not only legally wrong but also very dangerous for the court to hold that proprietary rights can pass from one party to a marriage to another, based purely on religious marriage vows taken in accordance with one's religious beliefs or denomination, in the absence of specific legislation providing that such parties' property rights shall be determined according to their religious beliefs and practices.

We see that in her view she seemed to show that the provisions of the law were at a great privilege than the religious obligations regardless of the bond it has towards the parties.

Another important point to note is that the respondent, who was the petitioner in the High Court, never based her claims to a share of the property registered in the appellant's names on the marital vows they had exchanged at the time of contracting their marriage. As the record of appeal clearly shows, the respondent's claims for a share in the property were purely based on her direct cash contributions and not on the mere fact that she had been married to the appellant and that the appellant had exchanged marriage vows with her, giving her "all his property". Since the issue of whether marital vows can give rise to property rights *per se* was never canvassed by either party at the trial stage or even before the Court of Appeal, I find, with due respect, that it was not necessary for the learned Justices of Appeal to make any pronouncements on it.

I will break the ice with the recent decision of **Joseph Waigo Ambayo** in the court of Appeal that by no means found itself in the newspapers all over the country and social media platforms. The decision of the court in the lead judgment of MUZAMIRU MUTANGULA KIBEEDI. JA, couldn't help to find itself popular after overruling a decision made by the High Court of Uganda at Kampala before Catherine Bamugemereire, J (as she then was)

dated 31st March, 2014 in Divorce Cause No. 10 of 2012). This appeal concerns the handling of matrimonial property by courts of law when a marriage breaks down and the parties are apart.

The rationale for the many discussions were based on religion, the hullabaloo from the public claimed that the two distinctive decisions were biased by each ones' religion, justice Catherine Bamugemereire being a Christian took into upholding the standi that the property should be shared equally. It was then a dissenting judgment by Justice Muzamiru Kibeedi a moslem who overruled the earlier decision that each party gets what he/she contributed. It is bitter truth that this decision was in favor of men rather than women which superiority of one party the religion stems.

Joseph Waigo Ambayo v Jackline Aserua (Civil Appeal 100 of 2015) [2022] the brief facts are that appellant and respondent started cohabiting in 1989when the appellant was aged about 24 years, while the respondent was aged about 19 years. At the time of this judgment the respondent is about 52 years of age, while the appellant is about 57years.As usually happens in matters which have now been baptized "early marriages", the respondent at the time she started cohabiting with the appellant had not completed her formal primary level education. But the appellant supported and financed her return to formal schooling and the respondent make very commendable formal academic gains. She completed Primary Education from Nakasero Primary School,

In the first instance case the trial Judge, Hon. Lady Justice Catherine Bamugemereire, J (as she then was), held that whereas the contract upon which the matrimonial home stands was in the appellant's names alone, the house nonetheless belonged to the couple jointly in equal shares. She ordered that the house should be sold, or it should be valued, and fifty percent of the value granted to the respondent "who worked so hard to acquire if'. The appellant was dissatisfied with the decision of the trial Judge and appealed to this court.

In his lead judgment, Justice Muzamiru Kibeedi observed that it is not very clear as to how the trial Judge computed the respondent's contribution in the suit property and determined it as equal to fifty percent. But what is clear is that this case resurrects the perennial debate about the rights of spouses in matrimonial property upon the breakdown.

He further observed that One of the circumstances under which the appellate court can overturn a finding of fact of the trial court based on demeanour notwithstanding that the appellate court did not have the opportunity to observe the demeanour of the witness, is where it is shown that the trial judge failed to appreciate the weight or bearing of circumstances admitted or proved. He further expounded that ln the instant case, the failure of the trial judge to appreciate the significance of real-life experience and collateral circumstances when accepting the truthfulness of the respondent's evidence

would justify this court not to allow the trial judge's finding that the respondent contributed to the suit property by purchasing building materials and supervising its construction. As regards cooking, it likewise does not conform to real life possibilities. At the material time the respondent was schooling and/or starting to put in practice the practical skills learnt from school. At home, two maids had to be employed to assist her in the execution of the house chores like cooking, washing, and looking after the children. In those circumstances, it beats ordinary logic why the respondent would be deployed by the appellant to cook for the site employees in preference to letting her focus on schooling and acquiring her tailoring skills.

He referred to the case of Gisslng V Gissing [1970] 2 All E.R. 780 (HL) in order to bring out the maxim" equality" is equity" that it doesn't necessary mean 50%.

In the above alternating decisions of Court, the ratio decidendi clearly confronts to the notion that sometimes Courts do Religion either directly or indirectly.

A very interesting case was the judgement of SAHAI, R.M. (J) in the supreme court of india in a case of Most. Rev. P.M.A. Metropolitan & Ors Vs. Moran Mar Marthoma & Anor[98]. It was a case between two rival groups of Jacobite Christian Community of Malabar which was going on for more than

[98]1995 SCC Supl. (4) 286

hundred years apparently for religious and spiritual supremacy over the Church. This was the third round between the parties in court, the two earlier being in 1954 and 1959. While deciding the appeal in 1959 the Court had observed that the dispute had been going on for a considerable length of time which has brought in its train protracted litigation involving ruinous costs.

One of the most interesting thing about this case was the Justices' Openning statements in regard to religion as far as quoting the provisions of the bible. The justice of the supreme court opened up the case with opening statements in line with religion observing that When Lord Jesus Christ was asked by a youngman who was possessed of property what was the road to heaven, the Holy Bible records it in Chapter 19 of the New Testament - the Gospel According to St. Mathew thus. quoting verse 16 upto 22.
Quoting the bible is one of the different ways courts do religion, at a glance of this you find out that such secular countries, Courts ought to quote the Law with a rationale that the country doesn't adopt any religion.

The various legal issues of this case included whether the suit under Section 9 of the Code of Civil Procedure was maintainable, effect of Places of Worship (Special Provisions) Act, 1991 and whether the decision in earlier suit filed by the appelants operated as res judicata can be, better, appreciated if the history how the Malankara Church came to be established, what is its nature and how

the two groups Patriarch of Antioch and Catholicos came to be formed leading to internecine struggle and litigation may be noticed in brief.

The court noted that Religion is founded on faith and belief. Faith emanates from conscience and belief is result of teaching and learning. Christianity is embodied both in its principles and precepts in the Scriptures of the Old and New Testaments, which all denominations of Christians believe to be a Divine revelation, and the only rule of faith and obedience'[99]. Christianity came to India many centuries before it reached Europe as it is believed that St. Thomas, one of the original apostles of Jesus Christ, visited India in 56 A.D. and found the first Christian settlement in the South'[100]. The indian court further observed that in A.D. 37 Apostolic See at Antioch was established by St. Peter to whom the stewardship of Church was entrusted by Lord Jesus Christ. It took root in Kerala within 20 years of the epoch making events in Jerusalem, the crucifixion, resurrection and ascension of the Lord Jesus Christ. St. Thomas, one of the 12 apostles of Jesus Christ visited India in A.D. 51/52 and established 7 Churches in the Malayalam speaking parts of South India. They are known as Malankara Jacobite (or orthodox) Syrian Church, "Malankara" means "Malayalam speaking" `The two Syrian Orthodox Churches in Syria and India, along with the Egyptian (Coptic), Ethiopian, and Armenian Churches, belong to the group of Ancient, or

[99][Faiths of the World by James Gardner, Volume 1, P. 516]
[100][Religion in India by Dr. Karan Singh]

Oriental Orthodox, Churches, wrongly called "monophysite". Their Christology is essentially the same as that of the Eastern Orthodox related to the patriarchate of Constantinople. They affirm the perfect humanity as well as the perfect divinity of Christ, inseparably and unconfusedly united in the divine-human nature of the person of Christ'[101].

The court to define the different sects of the church observed that Jacobite Church is a name which the Syrian Church assumes to itself. It further observed that the Christian religion is one but Christians differ greatly in their beliefs about the nature of the church[102]

it was held that the Catholicate established under Exht. A14 with powers as provided therein was valid and binding on the Malankara Church, that by such establishment Patriarch has not been deprived of his powers to ordain Metropolitans or consecrate Morone or to exercise any other recognised spiritual power, though the power to ordain Metropolitans is subject to acceptance of the Malankara community represented by the Association and that by the establishment of the Catholicate spiritual power of the Patriarch has not been reduced to a vanishing point, though the Patriarch could not be regarded as having active spiritual supremacy.

[101][Encyclopedia of Religion, Volume 14, page 227]
[102][Encyclopedia Britannica, Volume 5, page 739]

, 'canonically' and, 'traditionally' the Patriarch of Antioch is the supreme head of the Holy Universal Syrian Orthodox Church and the Catholicos, is subordinate to the Patriarch of Antioch'. Therefore, the Catholico was validly ex- communicated in accordance with the canon filed as Ex. 18, which is the foundation of the power and jurisdiction of the Patriarch. How far is correct?

In Moran Mar Basselios (supra) it was held that the Catholicos had not committed any act of heresy. Could they be held to have committed act of heresy when, then used the world 'Holiness' and on the 'Throne of St. Thomas'. From the New Testament - The Gospel according to St. Mathew. Chapter 19 it appears there was throne for each apostle:-

"Then answered Peter and said unto him, Behold, we have foresaken all, and followed thee; what shall we have therefore?"

"And Jesus said unto them, verily I say unto you, That ye which have followed me, in the regeneration when the son of, man shall sit in the throne of his glory, ye also shall sit upon twelve thrones, judging the twelve tribes of Israel".

St. Thomas was, 'one of the original apostles of Jesus Christ' [Religions of India by Dr. Karan Singh, P. 15]. In a book written by E.M. Philip, one of the authors on Syrian Church, the effect of the judgment by Royal Court of Appeal is described thus, 'of course. the majority judgment prevailed and Mar

Dionysius was established on the throne of St. Thomas'. The expression 'Melapattakaran of the throne in Malayalam' has been used by Royal Court of Cochin in its judgment thus, "He upheld the contention of Mar Thomas Athanasius, and found that the Syrian Church was independent of the Patriarch of Antioch. Of course, the majority judgment prevailed, and Mar Dionysius V. was established on the throne of St. Thomas".

In Exht. A-4 (Notice for M.D. Seminary Meeting of 1934) issued to Vicars, Priests, Kykars and Parishioners, it was mentioned: -

In the letter dated 8th June, 1959, Ex. A-24, the Catholic in his reply to the Patriarch wrote as under: -

"3. His Holiness: The propriety of using the title 'His Holiness' along with my name is questioned. Now I must bring to your notice that fact that customarily the same ephithets have been attached to the Patriarch and the Catholicos in our church as evinced by our Holy writs and other books. For example, in the diptych (first intercession of the Church, during the Holy Qurbana, the people are asked to pray for our Patriarchs Aboon Mar Ignatius and Aboon Mar Baselios. The very same titles are here seen applied to the Patriarch and the Catholicos, alike, the later himself being called a Patriarch. The inference is that the titles proper to the Patriarch of Antioch are proper also to be Catholicos of the East. We also see that such epithets as Moran,

Aboon, etc. are applied to both the prelates in common. Further this title has been in use here for long time.

4. The Throne of St. Thomas:

Your Holiness says 'It is never heard that St. Thomas established a throne of the Catholicos or the Mapriano, either in India or in my other place'. I must, without presumption, ask your Holiness, whether for that matter, any apostle has established a throne anywhere. Is it not that such honours have been connected, with them in latter times. There is also no special thronal ascension for any dignitary of our church except the installation ceremony(.....) done at the time of the consecration of Bishops and other prelates and at their acceptance by their respective dioceses. Besides, we see that this term 'throne' is added to the Patriarchs, Metropolitans and Bishops alike in the Hudaya Canon and other books (Canon Chap. VII, Section I) and the ceremony of enthronment is done over for Bishops. Your Holiness knows that the very eminent Syrian Historical writer Gregories Bar Heoraous regards St. Thomas, the apostle, as the first bishop of the East. Let me also bring to your notice that the Malankara Church Historian, E.M. Philip who had been a staunch partisan of the Patriarch, refers to the throne of St. Thomas, in his history of the Malankara Syrian Church (2nd Edition page 253). That being the case, can we say that St. Thomas, one among the twelve eminent apostles, had no throne at all.

Your Holiness says 'Also we could not find such a throne in the document given by Abdul Messiah II'. I am indeed happy that your Holiness respects and depends upon the Kalpana given by Abdul Messiah II. But it must caution your Holiness that the Kalpana you refer to may be the General Kalpana that he issued just before he left Malankara (1913). The earlier Kalpana issued by him from Niranam Church on the day he installed Mar Ivanios of Murimattom as Catholicos, had to be necessarily referred to. To make things clear, I shall quote a sentence from it. "According as you requested we have consecrated our spiritual and beloved Ivanious as Mapriano under the name Baselios of the East, on the throne of the Diocese of St. Thomas in India and other places". (1912). This is very definite and no one could say that a throne like this was a now find or one found without the knowledge of the throne of Antioch".

The rationale of this decision is once the Royal Court of Appeal allowed the Review Petition and dismissed the appeal as the ex-communication of Dionysius was contrary to principles of natural justice and he had not become heretic then the finding on authenticity of the canon rendered in the original order was rendered unnecessary. Therefore, the finding recorded on the authenticity of the canon and power of the Patriarch recorded in the earlier order could not operate as res judicate in subsequent proceedings.

Unlike in the Ugandan case of sumaya(supra) where court took into account of a sharia court decision to be deyermined by court again was res judicata, in this present case court looked the authority of principles of natural justice in line with the format of ex-communucation of Dionysius.

The court further observed that a plea of res judicata cannot be founded upon that decision because the defendant having succeeded on the other plea had no occasion to go further in appeal against the adverse finding recorded against him In a separate judgment written by Brother Jeevan Reddy, J., he agreed, although for different reasons, that the creation of catholicate in 1912 was valid and that the Constitution framed in 1934 was binding and it.

This matter when analysed in a broader perspective clearly tells to you that courts have considered different approaches to arrive at a different decision in line with religious disputes and issues arising thereby.

Religious Disputes in Courts

Religious disputes are very broad however many of which carry a wide sense of analysis. Some of the disputes arise from elders in church, On May 12 of 2014, Sister Mary Mukanyangezi, the commissioner of the Nun's Association under Kabale Diocese wrote to five nuns saying the church wouldn't renew their vows over alleged insubordination. Justice Michael Elubu gave Kabale

Catholic Diocese one month to reach a settlement with five nuns challenging their dismissal. The Sisters included Lucia Kehoda, Judith Twinobusingye, Justine Naturinda, Schola Asiimwe and Lucia Musimenta, all members of the Daughters of Our Lady Fatima, a congregation of nuns. On May 12, 2014, Sister Mary Mukanyangezi, the commissioner of the Nun's Association under Kabale Diocese wrote to the five nuns saying the church would no renew their vows over alleged insubordination.

They were also accused of telling lies in contravention of the canon rules of their congregation and of the Catholic Church.The Nuns were also accused of signing an affidavit in the Kampala High Court in support of Father Boniface Turyahikayo's civil suit against Bishop Rubaramira without permission from their superiors, despite having been advised not to do so. She therefore asked the nuns to vacate the diocese saying they will each receive 800,000 Uganda Shillings to assist them start a new life. However, the nuns petitioned court to quash their dismissal saying it was unlawful. Through their lawyers of Nyote and Company Advocates, the nuns want court to declare that the Diocesan Council which stopped the renewal of their vows was irregularly constituted and its decisions are null and void. The nuns also want court to declare that the grounds, which, the council based on to block the renewal of their vows, are illegal. They are also seeking that they be paid general damages and costs of the suit. The defendants in the suit include Kabale Diocese, Bishop Callist Rubaramira, Sister Mary Mukanyangezi,

Sister Mary Arinaitwe, Sister Schola Kyobutungi, Sister Odila Tindimubona and Sister Salane Beinomugisha.

Justice Micheal Elubu first heard the application on November , 1, 2014. The case came up again on Monday this week. The Judge has appointed Felix Bakanyebonera, Kabale based lawyer to mediate between the two groups before they return to court on July 9th. Court will then decide on how to proceed depending on the outcome of the mediation efforts.[103]

It is prudent to note that Religious disputes that are purely ecclesiastical or doctrinal such as the appointment of ministers are not within the jurisdiction of civil courts. This was observed by HON. JUSTICE SSEKAANA MUSA in a famous case of **Reverend Oode Okunya V Registered Trustees of the Church of Uganda[104].** The above case is discussed in details below.

In the case of **Reverend OodeOkunya V Registered Trustees of the Church of Uganda(supra)** the plaintiff was duly elected as the Bishop elect of Kumi Diocese after a thorough process of vetting and nomination**.** The Archbishop of the Church of Uganda communicated to the Plaintiff that there were complaints raised against him and issues concerning his first

[103]**Visit this story on https://ugandaradionetwork.net.**
[104](Civil Suit 33 of 2020)

relationship with the mother of his children a one Dinah for which the Plaintiff was to respond to in writing. The said letter also informed the Plaintiff that his consecration and enthronement as the 2nd Bishop of Kumi Diocese scheduled for 29thDecember 2019 was postponed till further notice. The Plaintiff made a response in regard to the allegations in writing to the Archbishop of the Defendant. The said lady in question Dinah Amongin and her father Mr. Onyait Stephen also wrote to the Archbishop in respect of the allegations against the Plaintiff. The House of Bishops sitting at Boroboro appointed a select committee of three bishops to investigate the matter. That among the issues that came before the Select Committee was the issue of the Bishop Elect's age. The Select Committee picked up the issue of age upon which the plaintiff was allowed to explain the discrepancy in his age and especially the date of birth of 1975 or 1970.He was informed by way of a letter about the postponing of his consecration and enthronement. The selective committee was appointed by the House of Bishops sitting at Boroboro to investigate the matter interalia the Bishop elects' years of age thereby revoking his election that he had not cringed 45 years as required.

In his judgmentHon. Justice Ssekaana Musa observed thatthe court is basically ignorant of the historical beliefs and the reasoning behind religion hence they apply the judicial mind to check the veracity of faiths and beliefs because of which their interpretation is different from the beliefs

of devotees. He further explained that the court has to understand that they are ill-equipped to deal with religious beliefs and practices because of remoteness and lack of familiarity hence should only interfere when any practices seriously damage the constitutional fabric. This makes it the main reason for prohibiting courts from litigating religion because they lack the ability to address religious questions.

His worry was that there is 'limited jurisprudential competence 'to decide such religious matters. Therefore, courts generally have extracted the prohibition against litigating religion from the 'church autonomy doctrine' which requires judicial deference to religious institutions "whenever the questions of discipline or of faith, or ecclesiastical rule, custom, or law have been decided by church judicatories."

One therefore would be asking a question who is the Church Judicatories? Like any institution, churches also have a mode of settling their disputes in a religious way.

He further used an authority in a similar case by Justice Stephen Mubiru, this was in Rev Father Cyril Adiga Nakari vs Right Reverend Ocan Odoki and Registered Trustees of Arua Diocese HCCS No. 002/2017, High Court Arua had this to say on Church/religious disputes that it was a suit in which deference to organs of governance with the religious community of the Church ought to be observed. The Courts should restrain and be slow to

intervene in internal affairs of the Church whenever it is still possible for the Church to correct its errors within its own institutional means." He went on further –"On the other hand, that the determination of who is morally and religiously fit to conduct pastoral duties or who should be excluded for non-conformity within the dictates of the religion falls within the core of religious functions. Civil Courts will defer to a religious organisation good faith understanding of who qualifies as its Minister where resolution of the dispute cannot be made without extensive inquiry by the Civil Court into religious law and policy, the court will not intervene.

Be that as it may, in reference to the above statement the learned Justices had tried to answer the Question of the day emanating from when courts do religion.

Another important case is **Moran Mar Basselios Catholicos vs Thukalan Paulo Avira & Ors**[105] judgement delivered by S. R. DAS, C. J, the dispute of the case arose on a controversy between the two rival sections of the Malankara Jacobite Syrian Christian community for a considerable length of time and which has brought in its train protracted litigation involving ruinous costs. In view of the disputes raging between the two sections of the

[105]Appeal (civil) 267 of 1958

community which resulted in acute dissensions in the Church, an attempt was made to restore good will and amity amongst the members of the community and at the instance of Lord Irwin, the then Viceroy of India, Patriarch Elias I visited Malabar in 1931. He however, died in Malabar before he could effect any settlement. In 1933 Ephraim was elected as Patriarch of Antioch without, it is said, notice to the Malabar community. Mar Geevarghese Dionysius and his supporters did not recognise Ephraim as the duly installed Patriarch. The plaintiffs have brought the suit out of which the present appeal has arisen claiming to be trustees and praying for a declaration of their own title as trustees and for a declaration that the defendants were not trustees and for possession of the trust properties and other incidental reliefs. It is perfectly clear that in a suit of this description if the plaintiffs are to succeed they must do so on the strength of their own title. The plaintiffs in this suit base their title to trusteeship on their election at a meeting of the churches alleged to have been held on August 22, 1935 at Karingasserai when the original plaintiff is said to have been elected the Malankara Metropolitan and the plaintiffs 2 and 3 as Kathanar and lay trustees. The court accepted the Appeal and found out that the M.D. Seminary meeting was properly held and the first defendant, who is now the sole appellant before us, was validly appointed as the Malankara Metropolitan and as such became the ex-officio trustee of the church properties. There is no question that the defendants 2 and 3 who are now dead had been previously elected by a meeting of the

Malankara Association duly convened and held and were properly constituted trustees. In this view of the matter it must follow that the plaintiffs cannot, even in their individual or representative capacity, question the title of the defendants as validly appointed trustees.

When Should Courts Do Religion

Justice Stephen Mubiru who extensively discussed the merit on which courts do religion. He expounded a lot on the reasons when courts should entertain matters related to religion. In his rich judgment, In the case of **Rev. Fr. Cyril Adiga Nakari V Registered Trustees of Arua Diocese and Anor**[106]**,** This was a suit before Justice Stephen Mubiru who extensively discussed the merit on which courts do religion, the facts of the case were that The plaintiff's claim against the defendants jointly and severally was for general damages for unlawful suspension from duty and defamation, interest and costs. The plaintiff was ordained priest in the Roman Catholic Church on 19th December, 1987 and has since then been involved in missionary work in the Diocese of Arua. He was on divers dates appointed by the second defendant as the curate of Adumi Parish, Chaplain of Muni National Teachers College and curate of Arua Town Parish. On or about 4th July, 2012 the first defendant reported a case to Arua Central Police Station by which he accused the plaintiff and three other priests in the Diocese of having

[106]Civil suit no. 0002 of 2017

hatched a plan to assassinate him. Investigations conducted into the accusation found it to be false and it was resolved that the first defendant makes a public apology to the three priests and their families. Instead the first defendant required the plaintiff and the other three priests to apologise to him. Amidst subsequent arrangements for the amicable resolution of the dispute, the plaintiff was surprised when on 22nd August, 2014 he was suspended from exercising his priestly ministry. He has since then been denied support and sustenance by the second defendant. He contends that the suspension is unlawful and the contents of the letter of suspension are defamatory of him. He prayed for judgement to be entered in his favor against the defendants.

Attempts for mediation in this case were unsuccessful, however, Mr. Michael Ezadri Onyafio raised a preliminary objection by which he contended that the suit is incompetent in so far as it is based on an alleged relationship of employment between the plaintiff and the defendants. In his submission, the plaintiff is not an employee but rather a person practicing an unremunerated vocation and calling with the Roman Catholic Church, whose relationship with the Church is governed by Canon Law. He claimed thst the plaintiffs' calling involves a vow or oath of celibacy, obedience and chastity which was administered in accordance with that law. He underwent a period of formation in various seminaries operated by the Church before he took those vows. He voluntarily submitted himself to the jurisdiction of the Church.

The first defendant too belongs to that vocation in which he serves as the plaintiff's supervisor and administrator in the official capacity of Bishop Ordinary. He is not the plaintiff's employer. In suspending the plaintiff, the first defendant invoked relevant provisions of Canon Law and in the same vein, the plaintiff being aggrieved by the decision invoked relevant provisions of the same law to appeal to the Holy See in Rome by way of "Hierarchical Recourse," where his appeal is still pending.

Following that assertion, counsel in that matter went ahead to Invoke the provisions of articles 2 and 29 (1) (c) of *The Constitution of the Republic of Uganda*, *1995*, Counsel submitted further that the Constitution protects religious laws which are not inconsistent with it. The plaintiff was trained and joined his calling as a priest of the Roman Catholic Church under Canon law, observed and practiced that law, until differences arose between him and the defendant that have resulted in this suit. In submitting themselves to Canon Law, the parties to the suit did not violate any provision of the Constitution and thus should be allowed to resolve their dispute in accordance with Canon Law, whose provisions entail adequate remedies for members of the Church who subscribe to it. In the alternative, he argued that the plaintiff ought to have proceeded by way of judicial review rather than ordinary suit since he is challenging an administrative decision of suspension. In his response, counsel for the plaintiff Mr. Samuel Ondoma submitted that the plaintiff is an employee of the Arua Diocese, the second defendant and the relationship

between him and the defendants is an employment relationship. He is serving under a contract of service as defined by *The Employment Act, 2006*. He was appointed a priest, Chaplain and curate in which capacity he agreed to work for remuneration, and remuneration is not necessarily a salary. Canon Law provides for the remuneration of priests, as per Canons 281and 1350. Priests and not employees of God just doing voluntary work but they are employees of the Church which provides them with the tools of their work, posts them, and supervises them. In their own mind, they know and believe that they are employees of the Church. It is the Church which suspended the plaintiff and not God. Nothing in Canon Law prevents a priest from invoking and asserting his civil rights or the criminal law against the Church, Bishop or fellow priest since the Constitution is supreme to Canon Law. He submitted that the Church has in various jurisdictions been held to account vicariously for the crimes and torts committed by errant priests, especially in the area of sexual misconduct. This has been possible by courts imputing a relationship of employment between the clergy and the Church. He cited a host of internet-based scholarly articles in support of this argument. The Church having failed to be just, honest and open internally, it should be subjected to external scrutiny. He prayed that the objection be overruled.

Justice Stephen Mubiru went ahead to argue that The suit raises poignant issues concerning the extent to which secular institutions of state may interfere with the internal management of religious institutions. Religion 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. he asserted that civil courts have no jurisdiction to prescribe the modes of worship, prayers and religious precedence where no question of civil right really arises. However, the right to worship is a civil right which can be agitated in a civil court.

The learned Justice went ahead to cite Articles 7 and 29 of *The Constitution of the Republic of Uganda*, *1995*, the relationship between Church and State is based on two principles. First: there is no State Church; Church and State are separated. This means on the one hand that the state should not identify itself with any ideology or religion, and, on the other hand, that it must not be institutionally attached to churches or to one single church. Second: "religious bodies" regulate and administer their affairs autonomously (independently but in cooperation with the state) within the limits of the law, i.e. the right of churches and other religious communities to conduct religious activities autonomously (e.g., build places of worship, conduct worship services, pray, proselytise, teach, select their own leaders, define their own doctrines, resolve their own disputes, etc. the judge was fully convinced that those religious bodies which are "recognized by the law" may then arrange and administer their inner affairs autonomously, for the accomplishment of their declared mission in the world. On that note he observed that they are entitled to organize themselves according to their own

creed, own, acquire and administer property, movable or immovable, and maintain institutions for religious or charitable purposes among other things the court cited.

The separation of Church and state not only means that the State should not interfere with the internal workings of any church, but also that no state pressure may be applied in the interest of enforcing the internal laws and rules of a church. Church autonomy means the right of religious communities to decide upon and administer their own internal religious affairs without interference by the institutions of government.

It should be noted that the relevant articles of The Constitution of the Republic of Uganda, 1995 provide for the manifestation of religion without listing the possible actions that would be permissible for expressing the belief. In that sense, one of the most challenging issue of Church autonomy is certainly the question of their freedom to hire and fire persons who serve in positions of substantial religious importance, persons that have a special ecclesiastical working relationship with their respective church. This in many instances fosters a clash between labour laws and the specific goals of the Church run institutions. Although Courts exist mainly to provide remedies for private wrongs, which are infringements or deprivation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries, by virtue of the constitutional guarantees, civil courts have no jurisdiction to decide questions of religious

rituals, rites and ceremonies except in so far as the decision of such questions is incidental to a decision of civil rights.

The learned justice introduced the principle of Religious autonomy is vital because it "permits religious organisations to define a specific mission, to decide how ministry and ecclesiastical government fulfil their mission and to determine the nature and extent of institutional interaction with the larger For purposes of preserving the autonomy of religious groups, Courts will exercise jurisdiction where they are not being asked to adjudicate on faith but are being asked whether the civil consequences of exercising a right in respect of faith are valid. For example the right to worship is a civil right, interference with which raises a dispute of a civil nature. A religious right is the right of a person believing in a particular faith to practice it, preach it and profess it. It may thus be civil in nature. *Prima facie* suits raising questions of religious rites and ceremonies only, are not maintainable in a civil Court, for they do not deal with legal rights of parties. However, a dispute about a religious office is a civil dispute as it involves disputes relating to rights which may be religious in nature but are civil in consequence. It does not cease to be one even if the said right depends entirely upon a decision of a question as to the religious rites or ceremonies. Therefore, a suit by a person claiming to be entitled to a religious office, for a declaration of his or her right to the office, calls for a decision on the civil consequences of religious belief or practice and is thus a suit of a civil nature which may be entertained by a civil court.

Departing from the case, It should be noted that distinction between a religious belief or practice and its civil consequences is demonstrated in the decision of an intermediate appellate court in New Jersey, where it was stated that; Courts can decide secular legal questions in cases involving some background issues of religious doctrine, so long as they do not intrude into the determination of the doctrinal issues.....In such cases, courts must confine their adjudications to their proper civil sphere by accepting the authority of a recognized religious body in resolving a particular doctrinal question, while, where appropriate, applying neutral principles of law to determine disputed questions which do not implicate religious doctrine...."Neutral principles" are wholly secular legal rules whose application to religious parties does not entail theological or doctrinal evaluations[107].

Justice Stephen mubiru observed on issues to determine whether courts should entertain Religious matters based on a three-pronged test: 1) the statute must have a secular legislative purpose; 2) its principal or primary effect must be one that neither advances nor inhibits religion; and 3) the statute must not foster an excessive government entanglement with religion.

Therefore, the distinction between a religious belief or practice and its civil consequences underlies the way that the English and Scottish courts have

[107]South Jersey Catholic School Teachers Association v. St. Teresa of the Infant Jesus Church Elementary School, 290 N.J. Super. 359, 675 A.2d 1155 (App. Div. 1996),

always, until recently, approached issues arising out of disputes within a religious community or with a religious basis. In both jurisdictions the courts do not adjudicate on the truth of religious beliefs or on the validity of particular rites. But where a claimant asks the court to enforce private rights and obligations which depend on religious issues, the judge may have to determine such religious issues as are capable of objective ascertainment. The court addresses questions of religious belief and practice where its jurisdiction is invoked either to enforce the contractual rights of members of a community against other members or its governing body or to ensure that property held on trust is used for the purposes of the trust (see *Shergill v. Khaira [2014] UKSC 33 para 45*).

The plaintiff in the instant suit on one hand seeks to enforce what he considers to be employment rights. Public interest in the enforcement of employment law is undoubtedly important, but so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a priest who has been fired or suspended sues his church alleging that his termination or suspension was unlawful, the courts are called upon to strike the balance between the two interests by examining whether the relationship between a priest and the church is bound by a contract of service. Fundamental rights can be limited only if this is inevitable to ensure another fundamental right or constitutional interest. The limitation has to be proportionate to the goal that is intended to be achieved. With this balancing test, courts consider whether a general law, if applied to a religious institution, would inhibit its freedom more broadly than justified and, in those circumstances, courts could exempt the church.

Whether in a given case the relationship of master and servant exists is a question of fact, which must be determined on a consideration of all material and relevant circumstances having a bearing on that question. The starting point of any consideration of the relationship between a Church and its priests must be an examination of the faith and doctrine to which they

subscribe and they seek to further. The law should not readily impose a legal relationship on members of a religious community which would be contrary to their religious beliefs. These beliefs and practices may be such, in the context of a particular church, that no intention to create legal relations is present.

Court took into consideration the different jurisdictions in handling the question as to whether the relationship between a church and the ministers of its faith creates an employer-employee relationship and rights cognisable by the civil courts. Suits filed for vindication of rights related to worship, of status, office or property are maintainable in civil courts and it is considered to be duty of the courts to decide even purely religious questions if they have a material bearing on the right alleged in the plaint regarding worship, status or office or property.

Consequently, there is nothing to prevent civil courts from entertaining disputes pertaining to religious office, including performance of rituals, which suits are always decided by the courts established by law (*Mar Marthoma and another, 1995 AIR 2001;*). In India, the right to worship and the right to conduct worship are civil rights, interference with which raises a dispute of a civil nature, but also because there is no other forum where such dispute can be resolved. Maintainability of the suit should not be confused with exercise of jurisdiction because even there, the courts may refrain from adjudicating upon purely religious matters, save suits where the right to property or to an office depends on decisions of questions as to religious faith, belief, doctrine or creed, as the courts "may be handicapped to enter into the hazardous hemisphere of religion" (see *Most. Rev. P.M.A. Metropolitan and others v. Moran Mar Marthoma and another, 1995 AIR 2001*).

To the contrary, in the United States the establishment clause prevents courts from determining doctrinal disputes. As a result, American courts will not entertain religious disputes at all. Decisions of religious tribunals are subject

only to such appeals as the religious body itself allows. In *Presbyterian Church v. Hull Church 393 US 440 (1969)* it was stated:

> But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secula r courts and have them [sic] reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

In the United States, under the legal doctrine known as the "ministerial exception," it is considered impermissible for the courts to contradict a church's determination of who can act as its ministers (see *Watson v. Jones, 13 Wall. 679*; *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America, 344 U. S. 94*; *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich, 426 U. S. 696. Pp. 10–12*). Courts have adopted the ministerial exception, not only in cases involving ministers, priests, rabbis and other clergy, but have also applied the exception to employees who are not clergy but perform functions "important to the spiritual and pastoral mission of the church." Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions (see *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal*

Employment Opportunity Commission, 565 U.S. 171 (2012). In that case United States Supreme Court unanimously ruled that federal discrimination laws do not apply to religious organizations' selection of religious leaders.

In south Africa, prior to the coming into force of the Constitution, under the principle of doctrinal entanglement, entailing a reluctance of the courts to become involved in doctrinal disputes of a religious character, the courts refused to adjudicate upon a doctrinal dispute between two schisms of a religious sect unless some proprietary or other legally recognised right was involved. As J. Witte in *"The South African Experiment in Religious Human Rights"* (1993) Journal for Juridical Science, at 24-25, noted;-

Active religious rights require that individuals be allowed to exercise their religious beliefs privately and groups be allowed to engage in private worship assembly. More fully conceived, active religious rights embrace an individual's ability to engage in religious assembly, religious speech, religious worship, observance of religious laws and ritual, payment of religious taxes, and the like. They also embrace a religious institution's power to promulgate and enforce internal religious laws of order, organisation, and orthodoxy, to train, select, and discipline religious officials, to establish and maintain institutions of worship, charity, and education, to acquire, use, and dispose of property and literature used in worship and rituals, to communicate with co-believers and proselytes, and many other affirmative acts in manifestation of the beliefs of the institution.

It would seem that even after the coming into force of the Constitution, the High court in its judgments such as that of *Taylor v. Kurtstag* and *Wittmann v. Deutsche Schulverein, Pretoria 1998 (4) SA 423 (T),* appears to accept that individuals who voluntarily commit themselves to a religious association's rules and decision-making bodies should be prepared to accept the outcome of fair hearings conducted by those bodies. The court has taken the position that a proper respect for freedom of religion precludes the courts from

pronouncing on matters of religious doctrine, which fall within the exclusive realm of the Church.

On the other hand, the position that has been taken by the courts in England is that by virtue of the spiritual nature of the functions of a priest, the spiritual nature of the act of ordination by the imposition of hands, and the doctrinal standards of the Church which are so fundamental to the church and to the position of every priest in it, it is impossible to conclude that any contract, let alone a contract of service, comes into being between a newly ordained priest and the Church when the priest is received into priesthood. The nature of the stipend too supports this view. In the spiritual sense, the priest sets out to serve God as his master. It is not right to say that in the legal sense that a priest is at the point of ordination undertaking by contract to serve the church or the Bishop as his master throughout the years of his ministry. There is a tendency to regard the spiritual nature of a minister of religion's calling as making it unnecessary and inappropriate to characterise the relationship with the church as giving rise to legal relations at all (see *Rogers v. Booth [1937] 2 All ER 751at754*). There is a presumption that ministers of religion are office-holders who do not serve under a contract of employment.

For example, in *Re Employment of Church of England Curates, [1912] 2 Ch 563* it was held that the position of a curate is the position of a person who holds an ecclesiastical office, and not the position of a person whose rights and duties are defined by contract at all. The relation between a curate and his vicar, or between him and his bishop, or between him and anyone else, is not the relation of employer and servant.

In *Methodist Conference v. Preston, [2013] 2 WLR 1350*, the plaintiff asserted unfair dismissal. The Conference said that as an ordained minister she was not an employee, and the court was without jurisdiction over such a claim. It was held that;

The essence of the arrangement between the Conference and a minister lay in the constitution of the Conference, and not in a contract. The relationship was established at and derived from the act of ordination, and was lifelong. The question of whether a minister of religion serves under a contract of employment can no longer be answered simply by classifying the minister's occupation by type: office or employment, spiritual or secular. Nor, in the generality of cases, can it be answered by reference to any presumption against the contractual character of the service of ministers of religion generally. Three points were decisive: First, the manner in which a minister is engaged is incapable of being analysed in terms of contractual formation. Secondly, the stipend and the manse are due to the minister by virtue only of his or her admission into full connexion and ordination. Third, the relationship between the minister and the Church is not terminable except by the decision of the Conference or its Stationing Committee or a disciplinary committee. There is no unilateral right to resign, even on notice.

In that case, the Court held by four votes to one that a Methodist minister was not, in fact, an employee. The reasons advanced by the court were that under the Constitution and Standing Orders of the Methodist Church:- a minister's engagement was incapable of being analysed in terms of contractual formation and neither admission to full connexion nor ordination were themselves contractual; a minister's duties were not consensual but depended on the unilateral decisions of the Conference; a stipend was paid and a manse provided by virtue only of admission into full connexion or ordination; the stipend and manse were not pay for an employed post but "a method of providing the material support to the minister without which he or she could not serve God"; disciplinary rights under the Church's Deed of Union were the same for ordinary members as for ministers; and the relationship between the Church and the minister was terminable only by Conference, its Stationing Committee or by a disciplinary committee and there was no unilateral right to resign, even on notice.

In President of the Methodist Conference v. Parfitt[108], *[1984] 2 WLR 84*, the plaintiff sought to assert that he as a minister of the Methodist Church who had been received into full connection had a contract of employment with the church. Having that contract, he said that he had been unfairly dismissed.

It was held in that case of President of the Methodist Conference (supra) The spiritual nature of a priest's position and relationship with the church, the arrangements between the priest and the church in relation to his stationing throughout his ministry and the spiritual discipline which the church is entitled to exercise over the priest in relation to his career are more or less doctrinal rather than contractual. The relationship is non-contractual. Therefore, unless there was some special arrangement with a priest, that priest's rights and duties arise from his or her status under the Church's Constitution or doctrine rather than from any contract.

In Davies v. Presbyterian Church of Wales[109], a minister of the Presbyterian Church of Wales who had been inducted pastor of a united pastorate in Wales claimed unfair dismissal. Describing the role of a minister of the church, Lord Templeman said;

The duties owed by the pastor to the church are not contractual or enforceable. A pastor is called and accepts the call. He does not devote his working life but his whole life to the church and his religion. His duties are defined and his activities are dictated not by contract but by conscience. He is the servant of God. If his manner of serving God is not acceptable to the church, then his pastorate can be brought to an end by the church in accordance with the rules. The law will ensure that a pastor is not deprived of his salaried pastorate save in accordance with the provisions of the book of

[108][1984] QB 368, [1983] 3 All ER 747
[109][1986] 1 WLR 32

rules but an industrial tribunal cannot determine whether a reasonable church would sever the link between minister and congregation.

Similarly, in the Australian case of Ermogenous v. Greek Orthodox Community of SA Inc [2002] HCA 8; 209 CLR 95, Archbishop Ermogenous had been engaged by the Greek Orthodox Community of SA Inc (an incorporated association) to undertake a range of duties, which included acting as Archbishop of the Greek Orthodox Church in South Australia, conducting religious services and carrying out other clerical duties. Having been removed from his position in 1994 after working in it since 1970, he claimed that he ought to have been paid annual leave and long service leave owed to him as an employee of the Association. The Industrial Magistrate at first instance found in favour of the Archbishop, and a judge of the Industrial Relations Court of South Australia upheld this decision. But on appeal to the Full Court of the Supreme Court of South Australia, the decision was overturned on the basis that there was a long-standing "presumption" that a church and clergyman did not have "intention to create legal relations" under contract law. The decision of the High Court was that in general it was no longer appropriate to rely on such a presumption (or indeed on other "presumptions" relating to "intention" in this area), and hence that the matter had to be sent back to the Full Court for further consideration of the actual intention of the parties in the relevant circumstances. There were a number of features of the case pointing to the parties all believing that legal obligations were involved, including PAYE deductions and reference to the Archbishop's "salary." In the end, having looked at the matter again, the Full Court on remittal from the High Court held that there was no sufficient reason to overturn the decision of the Industrial Magistrate at first instance, and hence the outcome of the litigation was that the Archbishop indeed was an employee of the Association.

Nevertheless, a similar view can be found in subsequent decisions even in England. For example, in *Percy v. Board of National Mission of the Church of*

Scotland[110], the plaintiff was an "associate minister" of the Church of Scotland (which is something like the "established" church in Scotland), and wanted to bring a sex discrimination claim under the relevant legislation. The legislation did not hinge on the standard "employee" criterion, it was a bit broader, referring to someone who "contracted personally to execute any work or labour", and so the decision could be confined to that specific phrase. It was accepted that she did not have a contract of service. But the statutory test of "employment" for the purposes of sex discrimination claims is broader than the test for unfair dismissal claims

In Davies v. Presbyterian Church of Wales[111], the House of Lords held that the mere fact that a relationship founded on the rules of a church was non-contractual did not mean that that there were no legally enforceable obligations at all. But they were inclined to find those obligations in the law of trusts, and adhered to the familiar distinction between an employment and a religious vocation.,

In that case (supra) Lord Templeman[112], with whom the rest of the committee agreed, he observed it is possible for a man to be employed as a servant or as an independent contractor to carry out duties which are exclusively spiritual.

But in the present case the applicant could point to any contract between himself and the church. The book of rules does not contain terms of employment capable of being offered and accepted in the course of a religious ceremony. The duties owed by the pastor to the church are not contractual or enforceable. A pastor is called and accepts the call. He does not devote his working life but his whole life to the church and his religion. His duties are defined and his activities are dictated not by contract but by conscience. He

[110][2006] 2 AC 28, [2006] 4 All ER 1354
[111][1986] 1 WLR 323
[112]At p 329

is the servant of God. If his manner of serving God is not acceptable to the church, then his pastorate can be brought to an end by the church in accordance with the rules. The law will ensure that a pastor is not deprived of his salaried pastorate save in accordance with the provisions of the book of rules but an industrial tribunal cannot determine whether a reasonable church would sever the link between minister and congregation.

More importantly to look at, is the court holding that the duties owed by the church to the pastor are not contractual. The law imposes on the church a duty not to deprive a pastor of his office which carries a stipend, save in accordance with the procedures set forth in the book of rules.

The ecclesiastical rules do not necessarily contain terms of employment capable of being offered and accepted in the course of a religious ceremony. This means that there is no employment capable of allowing an unfair dismissal or suspension issue to arise. An arrangement under which there is no obligation on the priest to do work or on the Church to provide work or even remunerate that work, cannot be a contract of service.

In Preston (formerly Moore) v. President of the Methodist Conference[113], the plaintiff was ordained as a Minister (or, to use the correct terms, received into full connexion with) the Methodist Church in 2003, following a period of time as a Probationer Minister. In 2006 she was appointed to the post of Superintendant Minister to the Redruth Circuit in Cornwall. On 10th June 2009, she submitted a letter of resignation. On 9th September 2009, she commenced proceedings in the Employment Tribunal alleging unfair constructive dismissal. Her claim raised a preliminary issue: was she an employee of the Church within the meaning of Section 230 of *The Employment Rights Act 1996*. The Conference replied that she was not an employee entitled to make such a claim. It was held that the plaintiff did not have a contract of employment with the Church. The court explained that

[113][2013] 2 AC 163

the modern authorities made clear that the question whether a minister serves under an employment contract can no longer answered by classifying the minister's occupation by type: office or employment, spiritual or secular. Nor can it be answered by any presumption against the contractual character of the service of ministers. The primary considerations are the manner in which a minister is engaged, and the rules governing his service. This depends on the intentions of the parties and, as with all such exercises any such evidence of the parties' intentions falls to be examined against the factual background. Part of that background is the fundamentally spiritual purpose of the functions of a minister of religion.

In that case, the constitution and standing orders of the Methodist Church showed that: (1) A minister's engagement is incapable of being analysed in terms of contractual formation. Neither admission to full connection nor ordination are themselves contracts. (2) A minister's duties thereafter are not consensual. They depend on the unilateral decisions of the Conference. (3) The stipend and manse are due to a minister by virtue only of admission into full connection or ordination, and while a minister remains in full connection and in active life, these benefits continue even in the event of sickness or injury. (4) The disciplinary rights under the Church's Deed of Union, which determine the way a minister may be removed, are the same for ordinary members as well as ministers. (5) The relationship between the Church and the minister is only terminable by the Conference or its Stationing Committee or by a disciplinary committee, and there is no unilateral right to resign, even on notice. The ministry described in the constitution and standing orders is a vocation, by which candidates submit themselves to the discipline of the Church for life. Absent special arrangements with a minister, a minister's rights and duties arise from their status in the Church's constitution and not from any contract.

The standing orders showed that a circuit's invitation is no more than a proposal to the Conference's Stationing Committee that they should recommend the candidate to the Conference for stationing in their circuit.

Looking at the different decisions above, It is clear from the foregoing decisions that historically, the courts have tended to regard clergy as office-holders rather than as employees. Whereas debate exists as regards personnel who are not themselves in ministerial positions but whose work furthers the mission of the religious organisation, or lay personnel who perform essentially secular tasks for religious organisations or one of its affiliated entities that is secular to a greater or lesser degree, there is a high degree of convergence to the extent of almost being universally accepted that matters involving the appointment, discipline and removal of personnel performing the functions of ministers or those involved in representing the group or in teaching doctrine, are generally acknowledged as exclusively religious matters and thus enjoy the protection of religious autonomy with respect to civil laws.

In the case of The status of the clergy has traditionally been regulated by the internal canonical regulations of the denomination concerned. The courts have tended to proceed on three principles:

That clergy are normally to be regarded as ecclesiastical office-holders whose rights and duties are defined not by an employment contract but by the law relating to the office held, which exists independently of the person occupying that office;

That the functions of a minister of religion are vocational and spiritual in nature and therefore incompatible with the existence of a contract (on this view ministerial functions arise by way of a religious act such as ordination, not as the result of a contractual agreement between parties); and

That even if there is evidence of some kind of contract, such evidence has to point to it being a contract of employment.

The question whether a minister of religion serves under a contract of employment can no longer be answered simply by classifying the minister's occupation by type: office or employment, spiritual or secular. Nor, in the generality of cases, can it be answered by reference to any presumption against the contractual character of the service of ministers of religion generally. In Preston, the primary considerations in deciding whether the individual is employed under a contract of employment include; (a) the manner in which the individual was engaged and the character of the rules and terms governing their service; (b) the intentions of the parties, and the fact that the arrangements included the payment of a stipend, the provision of accommodation and the performance of recognised duties did not without more resolve the issue; (c) the constitution and standing orders (of the Methodist Church) which showed that the manner in which the minister was engaged was incapable of analysis in terms of contractual formation; (d) the rights and duties of the minister arose from the constitution of the church and not from contract; (e) the relationship was not terminable at the will of the parties.

The effect of the majority of authorities cited above, which is I believe equally applicable in this country, is that in each case the court must examine the rules and practices of the particular church and any special arrangements that have been made with the minister or priest to determine whether their actions were intended in any respect to give rise to contractual rights and obligations. In making that assessment the court cannot disregard either the religious background to the relationship or the fact that for doctrinal reasons the church and the minister do not regard contractual arrangements as necessary and organise their relationship accordingly.

The correct approach is to examine the rules and practices of the particular church and any special arrangements made with the particular minister. The spiritual nature of the work and the spiritual discipline under which it is performed must be very relevant considerations when it has to be decided

whether or not there is a contractual relationship. Some arrangements, properly examined, might well prove to be inconsistent with contractual intention, even though there is no presumption to that effect. The Court should carefully analyse the particular facts, which will vary from church to church, and probably from religion to religion, before reaching a conclusion. It is open to a court to find, provided of course a careful and conscientious scrutiny of the evidence justifies such a finding, that there is an intention to create legal relations between a Church and one of its Ministers.

In the individual case, whether or not an employer / employee relationship exists will depend on the Court's reading of the specific facts and to some extent on the ecclesiology and doctrine of ministry of the Church concerned. In Sharpe v. Worcester Diocesan Board of Finance Ltd and another [2015] IRLR 663; [2015] ICR 1241, it was held that is now abundantly clear that cases concerning the employment status of a minister of religion cannot be determined simply by asking whether the minister is an office holder or is in employment. As the Employment Judge recognised in this case, an individual appointed to work in a particular post may be both the holder of an office and an employee working under a contract of service. Whether there is payment of a salary, whether it is fixed, and whether the worker's duties are subject to the control of the employer are important matters to be considered in determining this issue.

The primary considerations are the manner in which the minister was engaged, and the character of the rules or terms governing his or her service. But, as with all exercises in contractual construction, these documents and any other admissible evidence on the parties' intentions fall to be construed against their factual background. Part of that background is the fundamentally spiritual purpose of the functions of a minister of religion. In modern times, against the background of the broad schemes of statutory protection of employees, it should not readily be assumed that those who are engaged to perform work and receive remuneration intend to forgo the

benefits of that protection, even where the work is of a spiritual character. Ministers of religion should, in appropriate cases, have the benefit of modern employment legislation.

Where there is a dispute as to employment status, the focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise, the court will have to examine all the relevant evidence. That will, of course, include the written terms themselves, read in the context of the whole agreement. It will also include evidence of how the parties conduct themselves in practice and what their expectations of each other are. Evidence of how the parties conduct themselves in practice may be so persuasive that the court can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conduct themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations. The question is whether the incidents of the relationship described in the documents, properly analysed, are characteristic of a contract and, if so, whether it is a contract of employment. Mutuality of obligation where there were mutual obligations, namely the provision of work in return for money. One for the personal performance of work or services.

Whether or not clergy of a religious organisation in pastoral charges are "employed" appears to depend on the ecclesiology and self-understanding of the particular Church in question. State acknowledgment of Church autonomy is acknowledgement of the potential of the churches for making and enforcing internal laws. Under the principle of separation, churches administer the issues they regard to be within their competence independently.

In the Roman Catholic Church, candidates for priesthood are ordained by a Bishop of the Diocese within which they are ordinarily resident and are then by appointment stationed where the Church needs them to operate. They

can be sent anywhere they are required, the Church not needing their consent to the posting. They cannot resign at will, needing permission of the Pope. Their ordination is to a life-long ministry of word, sacrament and pastoral responsibility. The duties of parish clergy are set out in ecclesiastical legislation, particularly in the Canons and the Ordinal. The benefits and terms associated with the office of priest include a "stipend" but there is no provision for determining any particular sum. Each parish has a discretion to fix the amount paid. There is no opportunity for an individual to negotiate the level of stipend. There is no scale rising with experience, service, or size of the parish. The stipend is not regarded by the Church as the consideration for the services of its priests. It is regarded as a method of providing the material support to the priest without which he could not serve God (see Herbermann, Charles, ed. (1913). "Priesthood" Catholic Encyclopedia. New York: Robert Appleton Company).

In the Church's view, the sale of a priest's services in a labour market would be objectionable, as being incompatible with the spiritual character of their ministry. By virtue of the oath of canonical obedience, the Bishop is in a position of supervisory authority over the priest. The role of the priest in charge of a local congregation is simply not intended by either party to create obligations that are enforceable by the "secular" legal system at all. The "spiritual" nature of the duties concerned mean that, on the classic contractual analysis, there is no intention to create legal relations. A correct appreciation of the spiritual nature of the relationship between a priest and the Church shows that the arrangements between the priest and the Church in relation to his stationing throughout his ministry, and the spiritual discipline which the Church is entitled to exercise over the priest in relation to his cases, were non-contractual.

If there is a religious belief that there is no enforceable contractual relationship, then that is a factor in determining whether the parties must be taken to have intended to enter into a legally binding contract. Therefore, a

priest is not employed by the Church under a contract of service and, accordingly, the court has no jurisdiction to consider a priest's claim of unfair dismissal (see President of the Methodist Conference v. Parfitt [1984] 1 QB 368; Rogers v. Booth [1937] 2 All ER 751, and Davies v. Presbyterian Church of Wales [1986] 1 WLR 323).

In Davies v. Presbyterian Church of Wales [1996] ICR 280 Lord Templeman reiterated the "servant of God" approach and concluded that;

The duties owed by the pastor to the church are not contractual or enforceable. A pastor is called and accepts the call. He does not devote his working life but his whole life to the church and his religion. His duties are defined and his activities are dictated not by contract but by conscience. He is the servant of God. If his manner of serving God is not acceptable to the church, then his pastorate can be brought to an end by the church in accordance with the rules. The law will ensure that a pastor is not deprived of his salaried pastorate save in accordance with the provisions of the book of rules but an industrial tribunal cannot determine whether a reasonable church would sever the link between minister and congregation.

In Buckley v. Cahal Daly [1990] NIJB 8, a Roman Catholic priest in Northern Ireland sought a declaration that he had been removed unlawfully from his position, Campbell J held that since the Roman Catholic Church was a voluntary association its canon law relating to the status of clergy existed as the terms of a contract. Applying Canons 265 to 275 (on incardination) of the

Codex Iuris Canonici 1983 he concluded that "there is no direct power in the courts to decide whether A or B holds a particular station according to the rules of a voluntary association."

Similarly in JGE v. The Portsmouth Roman Catholic Diocesan Trust [2012] EWCA Civ 938 (12 July 2012), it was held that a Roman Catholic priest was not an employee of the local bishop. The court considered that (1) each case must be judged on its own particular facts; (2) there is no general presumption of a lack of intent to create legal relations between the clergy and their church; (3) a factor in determining whether the parties must be taken to have intended to enter into a legally binding contract will be whether there is a religious belief held by the church that there is no enforceable contractual relationship; (4) it does not follow that the holder of an ecclesiastical office cannot be employed under a contract of service. Having done so, the court then decided that "applying those principles to the facts in this case, I am completely satisfied that there is no contract of service in this case: indeed there is no contract at all. The appointment of Father Baldwin by Bishop Worlock was made without any intention to create any legal relationship between them. Pursuant to their religious beliefs, their relationship was governed by the canon law, not the civil law. The appointment to the office of parish priest was truly an appointment to an ecclesiastical office and no more. Father Baldwin was not the servant nor a true employee of his bishop."

In the instant case, the majority of annexures attached to the plaint and the written statement of defence indicate that the relationship between the plaintiff and the defendants was initiated and maintained under the "Codex Juris Canonici," the official code of canon law in force in the Roman Catholic Church, introduced in 1918 and revised in 1983, otherwise referred to as Canon Law. A Canon is explained in Black's Law Dictionary as "a law, rule or ordinance in general, and of the church in particular. An ecclesiastical law or statute. A rule of doctrine or discipline. A criterion or standard of judgment. A body of principles, standards, rules, or norms." Canon means both a norm and attribute of the scripture. Canons are the principal scriptural bases for the religious practices observed in a Church. Canon law is thus drawn from sources in scripture, custom, and various decisions of

church bodies and individual church authorities. Over the centuries these have been gathered in a variety of collections that serve as the law books for the church. Canon law refers to the law internal to the church.

Canons are the principal scriptural bases for the religious practices observed in a Church. Annexure "A" to the plaint, the letter by which the plaintiff was admitted to the Holy Order of Diaconate in the Roman Catholic Church, cites several provisions of the 1983 edition of the "Codex Juris Canonici." According to Canon 1025 thereof, it is required that a candidate for the Diaconate must have completed the period of probation according to the norm of law, is endowed in the judgment of his own bishop or of the competent major superior with the necessary qualities, is not prevented by any irregularity or impediment, and has fulfilled the prerequisites according to the norm of Canons 1033-1039 (the prerequisites for ordination), has provided the necessary testimonials and documents mentioned in Canon 1050 (relating to receipt of specified sacraments and attestations about the sound doctrine of the candidate, his genuine piety, good morals, and aptitude to exercise the ministry, as well as, after a properly executed inquiry, about his state of physical and psychic health), and proof that the investigation as regards suitability mentioned in Canon 1051 has been completed (by public announcements, or other sources of information).

According to Canon 1031 thereof, the Diaconate may only be conferred on a person who has completed the twenty-fifth year of age and possess sufficient maturity; an interval of at least six months is to be observed between the diaconate and the presbyterate. Those destined to the presbyterate are to be admitted to the order of deacon only after completing the twenty-third year of age, must have completed the fifth year of the curriculum of philosophical and theological studies (see Canon 1032), must undergo a retreat of at least five days (see Canon 1039), and must make a profession of faith according to the formula approved by the Apostolic See (see Canon 833.6).

Annexure "A" to the plaint, indicates that the process of initiating the plaintiff into priesthood began with his compliance with canon 1036, which provides as follows;

Can. 1036 In order to be promoted to the order of diaconate or of presbyterate, the candidate is to present to his bishop or competent major superior a declaration written in his own hand and signed in which he attests that he will receive the sacred order of his own accord and freely and will devote himself perpetually to the ecclesiastical ministry and at the same time asks to be admitted to the order to be received.

The plaintiff made that declaration in his own handwriting on 29th April, 1986 (see annexures "A" and "B" to the written statement of defence), requesting the then Bishop Ordinary of Arua Diocese, to be ordained Deacon in the Catholic Church, stating therein that "I make this request of my free will....and by so doing I sincerely offer myself to serve God in (sic) his people." According to Canon 1026, a person must possess due freedom in order to be ordained. It is absolutely forbidden to force anyone in any way or for any reason to receive orders or to deter one who is canonically suitable from receiving them. The Rite of Ordination is what makes one a priest, having already been a deacon (see Cannons 1010 - 1017). The three main roles of priesthood are; offering the Eucharist, hearing confessions, and counselling (see

The Rite of Ordination occurs within the context of Holy Mass. After being called forward and presented to the assembly, the candidates are interrogated. Each promises to diligently perform the duties of the Priesthood and to respect and obey his ordinary. Then the candidates lie prostrate before the altar, while the assembled faithful kneel and pray for the help of all the saints in the singing of the Litany of the Saints. The essential part of the rite is when the bishop silently lays his hands upon each candidate (followed by all priests present), before offering the consecratory prayer, addressed to God the

Father, invoking the power of the Holy Spirit upon those being ordained. After the consecratory prayer, the newly ordained is vested with the stole and chasuble of those belonging to the Ministerial Priesthood and then the bishop anoints his hands with chrism before presenting him with the chalice and paten which he will use when presiding at the Eucharist. Following this, the gifts of bread and wine are brought forward by the people and given to the new priest; then all the priests present, concelebrate the Eucharist with the newly ordained taking the place of honour at the right of the bishop. If there are several newly ordained, it is they who gather closest to the bishop during the Eucharistic Prayer (see Herbermann, Charles, ed. (1913). "Priesthood" Catholic Encyclopedia. New York: Robert Appleton Company).

In offering himself to serve God, the plaintiff did not negotiate or anticipate a salary. Clerics are required to foster simplicity of life and to refrain from all things that have a semblance of vanity (see Canon 282.1). Accordingly, Canon law requires them to use for the good of the Church and works of charity, those goods which come to them in the course of exercise of their ecclesiastical office and which are left offer, after provision has been made for their decent support and for the fulfilment of all the duties of their own state (see Canon 282.2). They have no specific remuneration for their services but live on such stipends as come to them in the course of performance of their ecclesiastical ministry. The arrangement includes the payment of a stipend and the provision of accommodation. This is apparent from Canon 281.1 which provides as follows;

Can. 281.1 Since clerics dedicate themselves to ecclesiastical ministry, they deserve remuneration which is consistent with their condition, taking into account the nature of their function and the conditions of places and times, and by which they can provide for the necessities of their life as well as for the equitable payment of those whose services they need..

The question is whether the parties intended these benefits and burdens of the ministry to be the subject of a legally binding agreement between them. The question whether an arrangement is a legally binding contract depends on the intentions of the parties. The mere fact that the arrangement includes the payment of a stipend, the provision of accommodation and recognised duties to be performed by the priest, does not without more resolve the issue. Upon review of the relevant provisions of the "Codex Juris Canonici," it becomes apparent that the duties of a priest are derived from his priestly status and not from any contract. Priesthood is not employment but an office of a public nature, filled by successive incumbents, whose duties are defined not by agreement but by the rules of the institution. The lifelong commitment of the priest and the characterisation of the stipend as maintenance and support, all point to the fact that the status of a priest in the Roman Catholic Church is not that of a person who undertakes work defined by contract but of a person who holds an ecclesiastical office, and who performs the duties of that office subject to the laws of the Church to which he belongs and not because of being subject to the control and direction of any particular master.

A priest of the Roman Catholic Church is engaged or called to serve on a "spiritual basis" (see Canon 232.2). The concept of a priest as a person called by God, a servant of God and the pastor of God's local church members seems to me to be central to the relationship. The notion of being "called" has deep roots in Christianity. It refers to the belief that certain individuals are chosen by the church to perform religiously important tasks or roles. The priest is supposed to perform sacramental duties and to provide spiritual leadership. The clergy thus enjoy only a "spiritual" and not a legal basis of engagement. In general the circumstances leading to ordination, the duties and privileges of a priest in the Roman Catholic Church are inconsistent with an intention to create contractual relations.

The plaintiff in the instant suit has obligations, flowing from ecclesiastical law, but no contractual obligations. Hence he is unable to rely on the

provisions of unfair dismissal in The Employment Act, 2006 or other legislation relating to employees and "workers" in complaining about events which led up to his suspension from his ministry. Apart from his ordination, the plaintiff does not point to any other occasion on which any specific terms were accepted by him, acting with the intention to bring about a contractual relationship with the defendants. The basis of the entire process was religious. His status as priest flowed from his understanding that he was called of God to a spiritual ministry and the relationship between him and the Church is a spiritual one governed by religious conscience. The same was held in Rogers v. Booth[114].

As Wallis JA (Fourie AJA concurring) of The Supreme Court of Appeal of South Africa in Ecclesia De Lange v. The Presiding Bishop of the Methodist Church of Southern Africa (726/13) [2014] ZASCA 151at para 56, (29 September2014) observed; "It is difficult to discern in this any intention to create a contractual relationship between the minister and the church, anymore than it is possible to discern an intention by a member or the church to enter into contractual relations when the member is confirmed. The nature of the process, its origin in the ordinand's sense of divine call, the manner in which ordination occurs and the description of the task undertaken by the minister once admitted to full connexion, is wholly inconsistent with the minister and the church, at the point of ordination, separately having an intention to enter into a contractual relationship (the animus contrahendi)."

In Uganda, there is no court practice established yet as to how far courts may intervene in ecclesiastical matters.

[114][1937] 2 All ER 751)

In Rev. Fr. Boniface Turyahikayo v. Bishop of Kabale Diocese[115] where it was held that Judicial Review as a remedy is available to challenge disciplinary decisions of the Church.

It was held in Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 565 U.S. 171 (2012) that the First Amendment guarantees religious organizations autonomy in matters of internal governance, including the selection of those who will minister the faith. A religious organisation's right to choose its ministers would be hollow, however, if secular courts could second-guess the organisation's sincere determination that a given person is a "minister" under the organisation's theological tenets. The Constitution guarantees religious bodies "independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

In his opinion, Justice Alito, with whom Justice Kagan joined, concurring, in Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 565 U.S. 171 (2012) commented that;

Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith. When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters. Religious teachings cover the gamut from moral conduct to metaphysical truth, and both the content and credibility of a religion's message depend vitally on the character and conduct of its teachers. A religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses. For this reason, a religious body's right to

[115]H. C. Misc. Civil Application No. 60 of 2012

self-governance must include the ability to select, and to be selective about, those who will serve as the very "embodiment of its message" and "its voice to the faithful." Petruska v. Gannon Univ., 462 F. 3d 294, 306 (CA3 2006). A religious body's control over such "employees" is an essential component of its freedom to speak in its own voice, both to its own members and to the outside world.

That statement underscores the fact that a religious organisation's fate is inextricably bound up with those whom it entrusts with the responsibilities of preaching its word and ministering to its adherents. There are difficulties inherent in separating the message from the messenger. I am persuaded by the interpretation and application given to the First Amendment by the Courts in the United States to hold that Articles 7 and 29 (1) (c) of The Constitution of the Republic of Uganda, 1995 protect the roles of religious leadership, worship, ritual, and expression; the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith.

Religious organisations have substantial autonomy to engage, discipline, fire and take other employment decisions that take into account both religious beliefs and religious conduct of employees. Religious autonomy means that religious authorities must be free to determine who qualifies to serve in positions of substantial religious importance. Accordingly, religious groups must be free to choose the personnel who are essential to the performance of these functions. If a Church believes that the ability of a priest to conduct worship services or important religious ceremonies or rituals, or to serve as a messenger or teacher of its faith or perform such other key functions has been compromised, then the constitutional guarantee of religious freedom protects the Church's right to remove the priest from his position. The Constitution creates a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs. "forcing a group to

accept certain members may impair its ability to express those views, and only those views, that it intends to express" (Boy Scouts of America v. Dale, 530 U. S. 640, 648 (2000). The Constitution leaves it to the collective conscience of each religious group to determine for itself who is qualified to serve as a teacher or messenger of its faith. In the result, all church offices ought to be filled by the exclusive decision of the church concerned. No state body (including the courts) is entitled to rule over the canonical aspects of church offices.

The plaintiff's other claim is in defamation. He pleads that he was defamed by the defendants. In a suit for defamation, the exact words or their substance, in case of slander, should be set out in full in the plaint

Abortion in The Concept of Religion in Court

In a religious setting Arbortion is termed as killing adopted as "Murder" by different legal jurisdictions however with an exception in matters regarding saving of the life of a mother. In Uganda under article 22 of the constitution[116] In a Christian perspective in Exodus God's Fifth Commandment is clear that, "You shall not commit murder." Which means, the religion prohibits killing of a human being. It is clear in this religion God forbids us to take the life of another person, and this most certainly includes abortion. God's Word also says, "Before I formed you in the womb I knew you, before you were born I set you apart"[117]. Psalm 139:16 says that "Your eyes saw my unformed body. All the days ordained for me were written in Your book before one of them came to be." It follows therefore that However

[116] 1995 as amended

[117] (Jeremiah. 1:5)

in jurisdiction such as United States of America Arbortion has been legalized in that concept, the Abortion remains a sin against God, whether or not it is legal in our society; therefore, we must "obey God rather than men"[118]religion under Christian setting is wrong and there's no exception. In the case of Roe v. Wade,[119] was a landmark decision of the U.S. Supreme Court in which the Court ruled that the Constitution of the United States conferred the right to have an abortion. The decision struck down many federal and state abortion laws, and caused an ongoing abortion debate in the United States about whether, or to what extent, abortion should be legal, who should decide the legality of abortion, and what the role of moral and religious views in the political sphere should be. This decision not only was a landmark in U.S but also other jurisdictions took it to be persuasive.

The facts of this were that Jane roe in 1969 became pregnant with her third child. She wanted an abortion, but she lived in Texas where abortion was illegal, except when necessary to save the mother's life. Her attorneys, Sarah Weddington and Linda Coffee, filed a lawsuit on her behalf in U.S. federal court against her local district attorney, Henry Wade, alleging that Texas's abortion laws were unconstitutional. A three-judge court of the U.S. District Court for the Northern District of Texas heard the case and ruled in her favor.0 The parties appealed this ruling to the Supreme Court.

On January 22, 1973, the Supreme Court issued a 7–2 decision holding that the Due Process Clause of the Fourteenth Amendment to the United States Constitution provides a fundamental "right to privacy", which protects a pregnant woman's right to an abortion. The Court also held that the right to abortion is not absolute and must be balanced against the government's interests in protecting women's health and prenatal life. The Court resolved these competing interests by announcing a pregnancy trimester timetable to

[118] (Acts 5:29)
[119]410 U.S. 113 (1973),

govern all abortion regulations in the United States. The Court also classified the right to abortion as "fundamental", which required courts to evaluate challenged abortion laws under the "strict scrutiny" standard, the most stringent level of judicial review in the United States.

The Supreme Court's decisionin Roe was among the most controversial in U.S. history. In addition to the dissent, Roe was criticized by some in the legal community, including some in support of abortion rights who thought that *Roe* reached the correct result but went about it the wrong way, and some called the decision a form of judicial activism. Others argued that Roe did not go far enough, as it was placed within the framework of civil rights rather than the broader human rights. Anti-abortion politicians and activists sought for decades to restrict abortion or overrule the decision; polls into the 21st century showed that a plurality and a majority, especially into the late 2010s to early 2020s, opposed overruling Roe. Despite criticism of the decision, the Supreme Court reaffirmed Roe's "central holding" in its 1992 decision, Planned Parenthood v. Casey. Casey overruled Roe's trimester framework and abandoned its "strict scrutiny" standard in favor of an "undue burden" test.

In June 2022, the Supreme Court overruled Roe in **Dobbs v. Jackson Women's Health Organization**[120] on the grounds that the substantive right to abortion was not "deeply rooted in this Nation's history or tradition", it was held that the Constitution does not confer a right to abortion; Roe and Casey are overruled; and the authority to regulate abortion is returned to the people and their elected representatives. In the context of religion basing on the Ten Commandments of the Christendom faith, commandment Number six (6) prohibits Christians from killing. The question now would arise at what stage does a fetus become a living?

[120]No. 19–1392.

In line with article 22 of our constitution 1995 as amended, a right of life is not absolute in a way that it can be taken away from you.

Article 22[121] provides under **clause 1** that No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction inte unborn human being if the **probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.**

The court further more noted thatthe Court found out that the right to abortion is not deeply rooted in the Nation's history and tradition. The underlying theory on which Casey rested—that the Fourteenth Amendment's Due Process Clause provides substantive, as well as procedural, protection for "liberty"—has long been controversial.

In the case of Uganda v Kafuruka Alice[122] where a postmortem examination was performed by DR. SENDI BWOCH a specialist pathologist. He observed that On opening the body of the deceased he found a dead baby of 34 to 36 weeks' gestation. The baby in the uterus was macerated. Court further held in the eyes of the Law the foetus is taken to be part of the mother until it has an existence independent of the mother. This is an intention to cause seriously bodily injury to foetus is an intention to cause serious bodily injury to a part of the mother, just as an intention to injure her arm or leg would be so viewed[123]

Court futher held that So the doctrine of transferred malice is applicable even where the intention is to terminate a life of a foetus which is not an

[121] 1995 constitution of Uganda

[122](HCT-05-CR-SC 191 of 2002) [2006] UGHC 2 (03 February 2006);

[123]Attorney General's Reference (No. 3 of 1994) 1996 2 ALL ER

independent human life and on this doctrine the offence committed is murder c/s 188 and 189[124]because malice aforethought is established.

We shall however analyse the case of Hyde V Hyde and Woodmansee (1866) (infra) in more details to appreciate the concept of courts doing religion.

Courts of Probable Cause in the Hyde's Case

HYDE v. HYDE AND WOODMANSEE

[L.R.] 1 P. & D. 130

COUNSEL: Attorney for petitioner: W. Shaw.

JUDGE: Lord Penzance

DATES: 1866 March 20

Mormon Marriage – Polygamy

[124]Penal Code Act cap 120

Marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others.

A marriage contracted in a country where polygamy is lawful, between a man and a woman who profess a faith which allows polygamy, is not a marriage as understood in Christendom; and although it is a valid marriage by the lex loci, and at the time when it was contracted both the man and the woman were single and competent to contract marriage, the English Matrimonial Court will not recognise it as a valid marriage in a suit instituted by one of the parties against the other for the purpose of enforcing matrimonial duties, or obtaining relief for a breach of matrimonial obligations.

THIS was a petition by a husband for a dissolution of marriage on the ground of adultery. There was no appearance by the respondent or the co-respondent. The cause was heard by the Judge Ordinary on the 20th of January, 1866.

The following facts were proved. The petitioner was an Englishman by birth, and in 1847, when he was about sixteen years of age, he joined a congregation of Mormons in London, and was soon afterwards ordained a priest of that faith. He made the acquaintance of the respondent, then Miss Hawkins, and her family, all of whom were Mormons, and they became engaged to each other. In 1850, Miss Hawkins and her mother went to the Salt Lake City, in

the territory of Utah, in the United States; and in 1853 the petitioner, who had in the meantime been employed on a French mission, joined them at that place. The marriage took place at Salt Lake City in April, 1853, and it was celebrated by Brigham Young, the president of the Mormon church, and the governor of the territory, according to the rites and ceremonies of the Mormons. They cohabited as man and wife at Salt Lake City until 1856, and had children. In 1856, the petitioner went on a mission to the Sandwich Islands, leaving the respondent in Utah. On his arrival at the Sandwich Islands, he renounced the Mormon faith and preached against it. A sentence of excommunication was pronounced against him in Utah in December, 1856, and his wife was declared free to marry again. In 1857 a correspondence passed between the petitioner and his wife, who continued to live in Utah. In his letters he urged her to leave the Mormon territory, and abandon the Mormon faith, and to join him. In her letters she expressed the greatest affection for him, but refused to change her faith, or to follow him out of the Mormon territory. He did not return to Utah, and one of the witnesses was of opinion that he could not have done so after he had left the Mormon church without danger to his life. In 1857 he resumed his domicile in England, where he has ever since resided, and for several years he has been the minister of a dissenting chapel at Derby. In 1859 or 1860, the respondent contracted a marriage according to the Mormon form at Salt Lake City with

the co-respondent, and she has since cohabited with him as his wife, and has had children by him.

At the time when the marriage between the petitioner and the respondent was celebrated, polygamy was a part of the Mormon doctrine, and was the common custom in Utah. The petitioner and the respondent were both single, and the petitioner had never taken a second wife. A counsellor of the Supreme Court of the United States proved that a marriage by Brigham Young in Utah, if valid in Utah, would be recognised as valid by the Supreme Court of the United States, provided that the parties were both unmarried at the time when it was contracted, and that they were both capable of contracting marriage. The Supreme Court, however, had no appellate jurisdiction over the courts of other States in matrimonial matters; and the matrimonial court of each State had exclusive jurisdiction within its own limits. Utah was a territory not within any State. There was a matrimonial court, having primary jurisdiction, in that territory, and the judge was nominated by the President of the United States, with the consent of the Senate. The judge was bound to recognise the laws which the people of Utah made for themselves, as long as they did not conflict with the laws of the United States. No evidence was given as to the law of that court respecting Mormon marriages.

Dr. Spinks, for the petitioner. The Court cannot perhaps recognise a polygamous marriage, but this is not a polygamous marriage, for both the parties were single at the time when it was contracted.

The fact that polygamy is permitted by the law of the country where the marriage was contracted does not render it invalid, or there can be no such thing as a valid marriage in polygamous countries. A marriage between two persons competent to contract marriage, and valid by the law of the place where it was contracted, is valid in every country in the world.

THE JUDGE ORDINARY. It is necessary to define what is meant by "marriage." In Christendom it means the union of two people who promise to go through life alone with one another. It does not mean the same thing in Utah, as the man is at liberty to marry as many women as he pleases.]

That is not the question. It does not follow that because the consequences of a marriage in Utah and in England are different, the marriage in Utah is not to be recognised as valid in England. The validity of the marriage must be determined by the law of the place where it was contracted; the consequences of the marriage depend upon the law of the country where the parties reside, whether temporarily or permanently, after the marriage.

THE JUDGE ORDINARY. It would be extraordinary if a marriage in its essence polygamous should be treated as a good marriage in this country.

Different incidents of minor importance attach to the contract of marriage in different countries in Christendom, but in all countries in Christendom the parties to that contract agree to cohabit with each other alone. It is inconsistent with marriage as understood in Christendom, that the husband should have more than one wife.]

Cur. adv. vult.

THE JUDGE ORDINARY. The petitioner in this case claims a dissolution of his marriage on the ground of the adultery of his wife. The alleged marriage was contracted at Utah, in the territories of the United States of America, and the petitioner and the respondent both professed the faith of the Mormons at the time. The petitioner has since quitted Utah, and abandoned the faith, but the respondent has not. After the petitioner had left Utah, the respondent was divorced from him, apparently in accordance with the law obtaining among the Mormons, and has since taken another husband. This is the adultery complained of.

Before the petitioner could obtain the relief he seeks, some matters would have to be made clear and others explained. The marriage, as it is called, would have to be established as binding by the lex loci, the divorce would have to be determined void, and the petitioner's conduct in wilfully separating himself from his wife would have to be accounted for. But I expressed at the hearing

a strong doubt whether the union of man and woman as practised and adopted among the Mormons was really a marriage in the sense understood in this, the Matrimonial Court of England, and whether persons so united could be considered "husband" and "wife" in the sense in which these words must be interpreted in the Divorce Act. Further reflection has confirmed this doubt, and has satisfied me that this Court cannot properly exercise any jurisdiction over such unions.

Marriage has been well said to be something more than a contract, either religious or civil – to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of "husband" and "wife" is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite lights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

There are no doubt countries peopled by a large section of the human race in which men and women do not live or cohabit together upon these terms – countries in which this Institution and status are not known. In such parts the men take to themselves several women, whom they jealously guard from the rest of the world, and whose number is limited only by considerations of material means. But the status of these women in no way resembles that of the Christian "wife." In some parts they are [*134] slaves, in others perhaps not; in none do they stand, as in Christendom, upon the same level with the man under whose protection they live. There are, no doubt, in these countries laws adapted to this state of things – laws which regulate the duties and define the obligations of men and women standing to each other in these relations. It may be, and probably is, the case that the women there pass by some word or name which corresponds to our word "wife." But there is no magic in a name; and, if the relation there existing between men and women is not the relation which in Christendom we recognise and intend by the words "husband" or "wife," but another and altogether different relation, the use of a common term to express these two separate relations will not make them one and the same, though it may tend to confuse them to a superficial observer. The language of Lord Brougham, in *Warrender v. Warrender* , is very appropriate to these considerations:– "If, indeed, there go two things under one and the same name in different countries – if that which is called marriage is of a different nature in each – there may be some room for holding

that we are to consider the thing to which the parties have bound themselves according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing, a different status from Turkish or other marriages among infidel nations, because we clearly should never recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put on any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding the Christian marriage to be the same everywhere. Therefore, all that the Courts of one country have to determine is whether or not the thing called marriage – that known relation of persons, that relation which those Courts are acquainted with, and know how to deal with – has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had; the relation has been constituted; and those Courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer." "Indeed, if we are to regard the nature of the contract in this respect as defined by the lex loci, it is difficult to see why we may not import from Turkey into England a marriage

of such a nature as that it is capable of being followed by, and subsisting with, another, polygamy being there the essence of the contract."

Now, it is obvious that the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy. The matrimonial law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created. Thus conjugal treatment may be enforced by a decree for restitution of conjugal rights. Adultery by either party gives a right to the other of judicial separation; that of the wife gives a right to a divorce; and that of the husband, if coupled with bigamy, is followed by the same penalty. Personal violence, open concubinage, or debauchery in face of the wife, her degradation in her home from social equality with the husband, and her displacement as the head of his household, are with us matrimonial offences, for they violate the vows of wedlock. A wife thus injured may claim a judicial separation and a permanent support from the husband under the name of alimony at the rate of about one-third of his income. If these and the like provisions and remedies were applied to polygamous unions, the Court would be creating conjugal duties, not enforcing them, and furnishing remedies when there was no offence. For it would be quite unjust and almost absurd to visit a man who, among a polygamous community, had married two women, with divorce from the first woman, on the ground that, in our view of marriage, his conduct amounted to adultery coupled with bigamy. Nor would it be much

more just or wise to attempt to enforce upon him that he should treat those with whom he had contracted marriages, in the polygamous sense of that term, with the consideration and according to the status which Christian marriage confers.

If, then, the provisions adapted to our matrimonial system are [*136] not applicable to such a union as the present, is there any other to which the Court can resort? We have in England no law framed on the scale of polygamy, or adjusted to its requirements. And it may be well doubted whether it would become the tribunals of this country to enforce the duties (even if we knew them) which belong to a system so utterly at variance with the Christian conception of marriage, and so revolting to the ideas we entertain of the social position to be accorded to the weaker sex.

This is hardly denied in argument, but it is suggested that; the matrimonial law of this country may be properly applied to the first of a series of polygamous unions; that this Court will be justified in treating such first union as a Christian marriage, and all subsequent unions, if any, as void; the first woman taken to wife as a "wife" in the sense intended by the Divorce Act, and all the rest as concubines. The inconsistencies that would flow from an attempt of this sort are startling enough. Under the provisions of the Divorce Acts the duty of cohabitation is enforced on either party at the request of the other, in a suit for restitution of conjugal rights. But this duty

is never enforced on one party if the other has committed adultery. A Mormon husband, therefore, who had married a second wife would be incapable of this remedy, and this Court could in no way assist him towards procuring the society of his wife if she chose to withdraw from him. And yet, by the very terms of his marriage compact, this second marriage was a thing allowed to him, and no cause of complaint in her who had acquiesced in that compact. And as the power of enforcing the duties of marriage would thus be lost, so would the remedies for breach of marriage vows be unjust and unfit. For a prominent provision of the Divorce Act is that a woman whose husband commits adultery may obtain a judicial separation from him. And so utterly at variance with Christian marriage is the notion of permitting the man to marry a second woman that the Divorce Act goes further, and declares that if the husband is guilty of bigamy as well as adultery, it shall be a ground of divorce to the wife. A Mormon, therefore, who had according to the laws of his sect, and in entire accordance with the contract and understanding made with the first woman, gone through the same ceremony with a second, might find himself in the predicament, under the application of English law, of having no wife at all; for the first woman might obtain divorce on the ground of his bigamy and adultery, and the second might claim a decree declaring the second ceremony void, as he had a wife living at the time of its celebration: and all this without any act done with which he would be expected to reproach himself, or of which either woman would have the

slightest right to complain. These difficulties may be pursued further in the reflection that if a Mormon had married fifty women in succession, this Court might be obliged to pick out the fortieth as his only wife, and reject the rest. For it might well be that after the thirty-ninth marriage the first wife should die, and the fortieth union would then be the only valid one, the thirty-eight intervening ceremonies creating no matrimonial bond during the first wife's life.

Is the Court, then, justified in thus departing from the compact made by the parties themselves? Offences necessarily presuppose duties. There are no conjugal duties, but those which are expressed or implied in the contract of marriage. And if the compact of a polygamous union does not carry with it those duties which it is the office of the marriage law in this country to assert and enforce, such unions are not within the reach of that law. So much for the reason of the thing.

There is, I fear, little to be found in our books in the way of direct authority. But there is the case of *Ardaseer Cursetjee v. Perozeboye* , in which the Privy Council distinctly held that Parsee marriages were not within the force of a charter extending the jurisdiction of the Ecclesiastical Courts to Her Majesty's subjects in India, "so far as the circumstances and occasions of the said people shall require." And the following passage sufficiently indicates the grounds upon which the Court proceeded:– "We do not pretend to know

what may be the duties and obligations attending upon the matrimonial union between Parsees, nor what remedies may exist for the violation of them; but we conceive that there must be some laws or some customs having the effect of laws which apply to the married state of persons of this description. It may be that such laws and customs do not afford what we should deem, as between Christians, an adequate relief; but it must be recollected that the parties themselves could have contracted for the discharge of no other duties and obligations than such as from time out of mind were incident to their own caste, nor could they reasonably have expected more extensive remedies, if aggrieved, than were customarily afforded by their own usages."

In conformity with those views the Court must reject the prayer of this petition, but I may take the occasion of here observing that this decision is confined to that object. This Court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England.

Petition dismissed.

Analysing Hydes' Case (Supra)

AUTHORS' ARGUMENTS ON HYDES' CASE

Therefore, In Hyde V Hyde you will conclude with me that it gives the Christendom understanding of marriage for life and it has to be between a man and a female however, albeit courts have departed from that religious perspective.

The distinct decision came in the early 2000s when court decided not to do religion but influenced by the social and political pressure from the society. This followed a new definition to do away with the religious definition of Hydes' case (supra) is no longer the position the law. In Bellinger V Bellinger[2001] EWCA Civ 1140, Lord Justice Thorpe gave a new position to capture also people under a civil partnership, transsexual people and also to depart from "for life" since Marriages could be dissolved and parties left to part new lives separately. He defined marriage to be a contract by which parties to it elect and it is determined by the state both in its formation and dissolution.

This is how far the Modern Family Law has changed from the twentieth century. Having discussed the above, the question of the day will still be when should courts do religion?

Section 2 of the Marriage and Divorce of Mohammedans Act provides that Muslims may handle their marriage and divorce matters in accordance with their customs (Sharia)

Hussein Katambas' Case

HUSSEIN KATAMBA V UNRA[125] . The case was before His Lordship Honorable JUSTICE OWKO ANTHONY OJOK, Judge. The facts of the case were that the plaintiff brought the suit seeking a declaration that the defendant is a trespasser on the plaintiffs kibanja situate at Mabuye Katende; an order that the defendant vacates the suit kibanja; a permanent injunction restraining the defendant from further trespass onto the suit kibanja; general damages, and costs 15 of the suit. It was the plaintiffs case that by the license of the former kibanja owner he has been utilizing the kibanja situate at Mabuye — Katende where there is a cultural site called "Nabukalu" as its cultural head for healing purposes. That the plaintiff 20 later agreed with the owner of the suit land and purchased the same; becoming the real owner of the suit land.

The plaintiff alleged that the defendant without his consent drew plans for the Kibuye Busega- Mpigi Express road through his kibanja and has threatened to demolish and remove the plaintiffs cultural site for purposes of

[125]H.C.C.S No. 18 of 2021

the road 25 construction. The plaintiff requested the defendant to redesign the road plan such that the road does not pass through the plaintiffs cultural site but in vain.

Further More it was submitted that it was the plaintiffs evidence that the late Nabukalu Nnabuto was not buried by the king of Buganda which led her spirit to find a resting place in a tree at Mabuye Katende. He stated that all lineal descendants from the Mutuba of 15 Kakiika Mbega started congregating at the said site to seek divine assistance and this is what turned the site into a cultural site.

However, that in cross examination he admitted that this evidence was based on information he received from communication with medium spirits. Considering that he is 42 years, the evidence he adduced in support of this tree being a 20 cultural site was hearsay since the events alleged to have taken place as said in paragraphs 2-7 took place in the 1800's. The tree and suit kibanja cannot be said to be a cultural site for the Lugave clan when it was owned for a long time by people outside the Lugave clan.

Counsel cited Section 3 of the Historical Monuments Act which provides for 25 protected objects, and under the said section the Minister is required to declare any object of archaeological, paleontological, ethnographical, traditional or historical interest to be a protected object through a statutory instrument.

ANALYSIS OF COURT:

The plaintiff in the instant case averred that he is the owner of the suit land having purchased the same from Ngondwe Pontiano Mayega and is a devoted 10 traditionalists who has powers to speak to spirits and in particular his

ancestors. And he is apparently the only one who can communicate with Nabukalu who is found at the suit property. The plaintiff claimed that the suit property has served as a cultural site since the 1800s and he therefore purchased the same for purposes of preservation for himself and his lineage. The plaintiff in his evidence 15 continuously referred to the suit land as his cultural site as opposed to referring to it as the Lugave clan cultural site.

I also note that the plaintiff brought a lineal head as one of his witnesses however, this witness was not possessed with any information in regard to how long the cultural site had been in existence nor could he state the kind of cultural 20 rituals that are performed at the site. His statement was full of blank statements and no evidence that could guide court in determination of this case as none of it corroborated the plaintiffs evidence. The evidence in no way proved that the suit land was a cultural site belonging to the lugave clan and had been in existence since 1800s.

Therefore, court held that, the plaintiff is not entitled to the amount of compensation sought in his requisition letter and the same is baseless. The plaintiff was also unable to prove that there were any graveyards at the suit property, nor did he adduce any 10 evidence in regard to the destroyed banana plants. The plaintiffs claim in my view is an individual claim and not one for the benefit of the lugave clan.

It also further noted that it is mind boggling that the plaintiff claimed six main houses yet the suit land was not in possession of even a single grass thatched house to say the least. And since the court cannot hear from spirits as it only bases on viable 15 evidence adduced before it, the Judge was unable to find the claim for UGX 500,000,000/= justifiable. He also observed that the plaintiff failed to prove to the court the existence of a cultural site for the lugave clan on the suit land for which he sought this enormous compensation and that It was rather gluttonous of the plaintiff to want to reap from what he did not sow. The defendant can proceed with the road construction over the suit land. The court so ordered.

In the case of **Rev. Charles Oode Okunya V The Registered Trustees of the Church of Uganda**[126], the facts of the case were that On 19th November 2019, the Plaintiff was duly elected as the Bishop elect of Kumi Diocese after a thorough process of vetting and nomination. Subsequently, by letter dated 16th December 2019, the Archbishop of the Church of Uganda communicated to the Plaintiff that there were complaints raised against him and issues concerning his first relationship with the mother of his children a one Dinah for which the Plaintiff was to respond to in writing. The said letter also informed the Plaintiff that his consecration and enthronement as the 2nd Bishop of Kumi Diocese scheduled for 29th December 2019 was postponed

[126]CIVIL SUIT NO. 305 OF 2020

till further notice. The Plaintiff made a response in regard to the allegations in writing to the Archbishop of the Defendant. The said lady in question Dinah Amongin and her father Mr. Onyait Stephen also wrote to the Archbishop in respect of the allegations against the Plaintiff. The House of Bishops sitting at Boroboro appointed a select committee of three bishops to investigate the matter. That among the issues that came before the Select Committee was the issue of the Bishop Elect's age. The Select Committee picked up the issue of age upon which the plaintiff was allowed to explain the discrepancy in his age and especially the date of birth of 1975 or 1970. The Select Committee made a report to the House of Bishops sitting at Mityana on the 01st day of February 2020. The House of Bishops accordingly proceeded to revoke the plaintiff's election on grounds that he falsified his age by way of statutory declaration and had not attained the age of 45 years by the time he was elected. The plaintiff at the time of his nomination was not qualified to be elected a Bishop of Kumi since he had not yet made the mandatory age requirement of 45 years. Justice Ssekaana Musa held that the House of Bishops was right and justified to revoke the election of Plaintiff as the second Bishop of Kumi Diocese. For reasons stated herein this suit is dismissed with costs to the defendant.

Scholars have regularly pointed out that in secular states the involvement of courts in religious matters is commonplace. There are two main reasons for this. One is that in the modern state, "religion is, in part, constituted by means

of law, but simultaneously as something that is constituted to stand at arm's length from the law" (Lambek 2013:1)[127].1 The second follows on from the first: as Jurinski (2004:3) remarks in the case of the USA, "the courts have become arbiters of what kinds of restrictions the government can impose on religious practice, and what role religion will play in public life." In fact, the courts seldom restrict themselves to being keepers of religious boundaries. As Sen (2007:6) observes, comparing India and the United States, "the line between interpretation of law and legislation often gets blurred in Supreme Court rulings. ... This has meant that the Court ... actively intervenes and shapes public discourse."

Applying God's Law: Religious Courts and Mediation in the U.S.

Across the United States, religious courts operate on a routine, everyday basis. The Roman Catholic Church alone has nearly 200 diocesan tribunals that handle a variety of cases, including an estimated 15,000 to 20,000 marriage annulments each year.[1] In addition, many Orthodox Jews use rabbinical courts to obtain religious divorces, resolve business conflicts and settle other

[127] Kirsch and Turner (2009). As Agrama (2010) argues, the discourse on secularism constantly blurs the distinction it claims to establish between a religious domain and a secular one, and the management of this indeterminacy is at the very root of the state's power as a "secular" political entity.

disputes with fellow Jews. Similarly, many Muslims appeal to Islamic clerics to resolve marital disputes and other disagreements with fellow Muslims.

For the most part, religious courts and tribunals operate without much public notice or controversy. Occasionally, however, issues involving religious law or religious courts garner media attention. The handling of clergy sexual abuse cases under Catholic canon law, for example, has come under scrutiny[128]. Internal church proceedings aimed at disciplining Protestant clergy have generated news coverage because they have highlighted debates over same-sex marriage and openly gay ministers. There also have been public protests against Orthodox Jewish men who refused to grant their wives a religious divorce.[129] Meanwhile, bills aimed at banning the use of Islamic (sharia) law – or at restricting the application of religious or foreign law in general – have been introduced in more than 30 state legislatures. (For more details on those legislative initiatives, see the map graphic **"State Legislation Restricting Use of Foreign or Religious Law.")**

Disputes over the laws of various religious traditions have occasionally made their way into U.S. civil courts, but the Supreme Court consistently has ruled that judges and other government officials may not interpret religious doctrine or rule on theological matters. In such cases, civil courts must either

[128] https:///www.pewresearch.org/religion/2013/04/08/applying-gods-law-religious-courts-and-mediation-in-the-us/
[129] ibid

defer to the decisions of religious bodies or adjudicate religious disputes based on neutral principles in secular law. For example, in recent years the Episcopal Diocese of Virginia has battled in state court with several congregations over control of buildings, property and funds after the congregations voted to join more theologically conservative branches of the worldwide Anglican Communion. So far, the cases have been decided in favor of the diocese using contract and real estate law rather than church law.

Role of Mediation in Religious Legal Disputes

Grievances within a faith tradition often are settled amicably or adjudicated by the religious community itself without involvement from religious or secular courts. Indeed, many religious groups encourage members who are accused of (non-criminal) moral wrongdoing or who are involved in a financial dispute with another member of the religious group to engage in mediation in an effort to come to a voluntary agreement. In many cases, more formal tribunals and the like are employed only after such efforts at mediation fail.

For many Christians, mediation is more than just a cost-efficient way to resolve disputes. Some cite biblical passages, such as St. Paul's First Letter to the Corinthians, which urge believers to bring their grievances to fellow believers rather than to outside authorities. In addition, some Christians believe that mediation helps to promote reconciliation and forgiveness for

everyone involved. “God has called us to something that’s more glorifying than proving what’s right or even just,” according to Annette Friesen, who works as a conciliation and training consultant at Peacemaker Ministries’ Institute for Christian Conciliation in Billings, Mont.

Mediation also has a place in other faith traditions. For instance, a saying (or hadith) of the Prophet Muhammad speaks of the risks judges take when they make wrong or unjust decisions. As a result, mediation is often viewed as a better course of action than settling the dispute in court, according to Imam Moujahed Bakhach, who directs the Mediation Institute of North Texas in Fort Worth. “Many Muslims like mediation for resolving problems because it allows them to work things out without necessarily disclosing private matters in a public place,” Bakhach says.

Jews – particularly the Orthodox, who often view Jewish law (halakhah) as governing nearly every aspect of daily life – also frequently turn to religious mediators to resolve disputes with fellow Jews. “Mediation is strongly favored in Jewish law, and rabbinic literature contains high praise for parties who are able to settle their disputes rather than engage in litigation,” according to Rabbi Shlomo Weissmann, director of Beth Din of America, a rabbinical court in New York City. “While there is no specific process for mediation that all or most rabbis follow, rabbis encourage settlement and will attempt to mediate disputes whenever that is possible.”

When mediation is not possible, either because the parties are unable to come to a settlement or because the case involves accusations of a particularly serious nature, churches and other religious groups may turn to religious courts or tribunals.

View a specific religious affiliation:

African Methodist Episcopal Church

Assemblies of God

Buddhism

Catholic Church

Church of Jesus Christ of Latter-day Saints

Episcopal Church of the United States

Evangelical Lutheran Church in America

Hinduism

Islam

Judaism

Lutheran Church – Missouri Synod

Presbyterian Church, U.S.A.

Southern Baptist Convention

Unitarian Universalist Association

United Methodist Church

About This Report

This report by the Pew Research Center focuses on religious courts and mediation, examining how some of the country's major Christian denominations and other religious groups – 15 groups in total – routinely decide internal matters and apply their religious laws.

Some of the legal codes – Islamic sharia and Jewish halakhah, for example – are quite comprehensive, covering many aspects of individual, family and community life, from marriage and divorce to death and inheritance. Other religious legal traditions, including those of many Protestant denominations, focus largely on internal church governance, including the expulsion of members and disciplining of wayward clergy.

Each entry includes links to official documents and other resources to help readers who want to delve more deeply into a particular religious group's laws or judicial system**.**

African Methodist Episcopal Church

The African Methodist Episcopal Church (AME), one of the nation's largest African-American churches, has a hierarchical structure with a number of layers. Near the bottom of this hierarchy is the Quarterly Conference, a local administrative body within each AME congregation that meets four times a year and is made up of local church leaders. Quarterly Conferences, in turn,

are part of larger regional groupings that meet once a year, called Annual Conferences. Ordained and lay delegates elected by the Annual Conferences convene every four years in what is called the General Conference.

Disciplining Church Members

The church's ecclesiastical law is outlined in its Book of Discipline. Lay members may be subject to discipline if they disrupt their congregation or behave in ways that, in the words of the church's chief executive and general superintendent, Bishop Clement Fugh, "exclude them from the grace and glory" of the church. This can include being rowdy during services, being drunk in public or refusing to submit to the authority of church leadership.

Allegations of such misconduct go to a group of the local congregation's leaders – known as the Board of Stewards – which investigates and issues an opinion on the credibility of the charges, says Fugh. The board then presents its findings to a committee it has appointed to hear the case. During the hearing, the accused may speak and call witnesses on his or her behalf. The committee then votes on whether to affirm the decision of the Board of Stewards. Possible punishments include suspending membership or barring the offender from holding leadership positions in the church.

Those who believe they have been unfairly disciplined may appeal to their congregation's Quarterly Conference during its next meeting. The appeal is heard by the members of the conference – a presiding elder as well as a group

of leaders from the congregation. The conference's decision is final, Fugh says.

Disciplining Religious Leaders

Disciplining clergy is a more complicated process, in part because the AME Church handles sexual misconduct and other kinds of misconduct differently, Fugh explains.

Sexual Misconduct

Any sexual misconduct involving a minor is immediately turned over to civil authorities for investigation. When charges of other kinds of sexual impropriety arise – for example, when a minister is alleged to have had an extramarital affair with an adult congregant – the Board of Stewards of the minister's congregation reports the charge to the presiding elder of that congregation. The presiding elder then refers the allegation to the Judicial Committee of the Annual Conference to which the church belongs, which then investigates the matter.

If the Judiciary Committee finds the charge is credible, it convenes a Trial Committee –comprised of 12 elders from the Annual Conference – and holds a formal trial. During the trial, the Judiciary Committee provides the evidence against the accused and may call witnesses. The accused may be represented by a secular lawyer, church elder or other counselor and may also

call witnesses. Members of the Trial Committee act as judges and rule on the charge. A person can challenge the ruling of a Trial Committee by appealing to the Judicial Council, a body of nine ministers and laypersons elected by the General Conference as the highest judicial body in the church. The Judicial Council reviews the trial and issues a ruling, which is final.

Other Misconduct

According to Fugh, when an ordained minister is charged with committing a non-sexual offense, a church panel called the Ministerial Efficiency Committee handles the complaint. Offenses that might come before this group include unethical behavior, such as theft, as well as preaching ideas that are inconsistent with AME doctrine, such as proclaiming that homosexuality is not a sin. The Ministerial Efficiency Committee hears evidence in the case and makes a report to the Annual Conference to which the church belongs. The report includes the committee's opinion on the guilt or innocence of the accused and, if appropriate, a recommended punishment, such as a formal reprimand or suspension. At the Annual Conference's next meeting, it reviews the report and votes on the charge. Its decision is final.

Fugh notes, however, that the AME Church rarely employs this complex judicial system. Though there are more than 4,000 AME congregations in the United States, he says, "very few" cases arise each year against either laypersons or ministers.

Assemblies of God

The Assemblies of God, the largest Pentecostal denomination in the U.S., according to Pew Research's 2007 U.S. Religious Landscape Survey, is a fellowship of churches that gives its roughly 12,500 congregations substantial autonomy. At the same time, it has a two-tiered hierarchy – consisting of 64 regional District Councils and a national General Council – which exercises limited authority over congregations and credentials their ministers. Under this governance structure, local congregations control many areas of church life, including disciplining lay members for misconduct. But regional and national church authorities play an important role in settling some disputes, notably those involving clergy.

Disciplining Clergy

The church's bylaws list 14 offenses that can bring about the dismissal of a minister, including sexual immorality, incompetence, financial impropriety, and being contentious and uncooperative toward district leadership. "The ones that get invoked most often involve sexual misconduct, misusing money and having a contentious spirit," according to James Bradford, general secretary of the church. "We usually dismiss fewer than 125 pastors each year, out of a total of over 35,000 credentialed ministers," he adds.

When an Assemblies of God minister is accused of wrongdoing, the complaint is taken up by the superintendent of the district where the pastor's

church is located. If, after an investigation, the superintendent finds the charges to be credible, he calls the minister before the district's governing board. Here, the minister has a formal opportunity to hear the evidence against him and to respond. If the board determines that the charges are true, it can either suspend the minister (often with the hope of rehabilitating him) or dismiss him. The severity of the disciplinary action usually depends on the offense and the willingness of the minister to repent. "Our first instinct is always rehabilitation and restoration," according to Duane Durst, superintendent for the New York District. However, Durst says, there are some offenses that lead to automatic dismissal. "Child abuse and molestation, using child pornography, homosexual conduct: these are absolute knockouts," he says.

If the district board finds the pastor culpable and the pastor continues to maintain his innocence, he can appeal to the national church's General Council and its 20-member Credentials Committee. The committee can either affirm the district's decision or, if it determines that the case was not handled properly, return it to the district for reconsideration. The committee does not have the authority to overturn the district's decision, however. If the district's decision is affirmed, the accused pastor can appeal one more time – to the General Presbytery, the national church's 300-member policymaking body. However, the General Presbytery will consider an appeal only if there

is new exculpatory evidence. Otherwise, the decision is affirmed and no further appeals are allowed.

Conflicts Between Pastors and Congregations

Church officials also play a role in mediating conflicts between pastors and their congregations. These conflicts are "usually about control – who's in charge and how are they in charge," according to Durst, who has mediated these types of disputes as a district superintendent.

If the pastor, the church's board of elders or 30 percent of the congregation's members request it, the district superintendent will intervene to try to resolve a dispute. Usually, the superintendent appeals to each side to understand the other. For example, if a congregation brings a complaint about the way a new pastor is allocating church resources, the superintendent will attempt to mediate the dispute and find a solution that both sides can live with. "We remind the congregation that they chose this pastor and that they need to understand that there are significant differences between him and his predecessor," Durst says. "And we tell the pastor that he needs to earn [the congregation's] trust before he can make big changes." This strategy works "about half the time," Durst says, adding, "Often how we handle the problem is much more important than the problem itself."

Buddhism

There is no unified Buddhist law or central Buddhist authority in the United States. While American Buddhists may agree on some core ethical principles, Buddhist communities in the U.S. are largely autonomous and may enforce rules differently. This contrasts with Buddhism in Asia, where the religion's major sects are organized around monasteries that are deeply rooted in Buddhist law, according to Charles Prebish, professor emeritus of religious studies at Penn State University and Utah State University. "Buddhism, as it [has] moved west, has never been a strongly monastic tradition," Prebish says.

The basic law or code of ethics embraced by all major Buddhist sects is called the Vinaya. Each sect has its own variant of the Vinaya, usually consisting of more than 200 rules to which all monks and nuns are expected to adhere. The four most important rules are maintaining celibacy, not stealing, not killing and not making false claims to spiritual attainment. Laypersons are traditionally expected to follow five rules, which prohibit killing, lying, stealing, taking intoxicants and having illicit sex.

According to Thanissaro Bhikkhu, abbot of Metta Forest Monastery in northern San Diego County, Buddhist sects in the United States are not as hierarchical as those in Asia.[10] Instead, he says, Buddhist sects in the U.S. can best be described as "membership organizations of individual and independent monasteries." Even within each sect, he says, there is no

authority enforcing a standard interpretation of the Vinaya. “There is no pope. Each community is its own authority,” he says.

The cohesiveness of Buddhist law in America is further diluted by the diversity within communities, according to Paul Numrich, professor of religion in the Theological Consortium of Greater Columbus, Ohio. Some Buddhist communities include monks or nuns from more than one sect – another practice that differentiates American Buddhists from their Asian counterparts. Accordingly, Buddhist monks and nuns in American communities must adjust the Vinaya to smooth out sectarian differences. In addition, Numrich says, American monasteries tend to bend the rules to accommodate modern life – for example, by allowing monks to wear shoes or ride in cars, something generally not done in Asian monasteries.

Though various American Buddhist communities have their own ethical standards, monks and nuns – and, to a lesser degree, laypeople – still are subject to discipline if they break their commitments to the Buddhist way of life. According to Prebish, when monks violate the Vinaya, or when lay Buddhists break one of the five central rules, they often receive some form of punishment. For severe offenses, monastics can be expelled from their communities and lose their status as monks and nuns. Laypeople also can have their membership in a religious community revoked.

Disciplining Monastics

According to Thanissaro Bhikkhu, monks at his monastery are rarely punished for minor infractions, such as eating at the wrong time of day. However, when a monk is accused of a more serious offense, such as theft, sexual immorality or "starting strife about the [monastery's] rules or teachings," an investigation usually follows. Normally a council of about four abbots from nearby monasteries will meet with the accused and the accuser (who does not have to be a fellow monastic or even a Buddhist) to ask questions and determine whether the monk is culpable. If the abbots believe the charges are credible, they will attempt to obtain a confession. A speedy confession is important because it can result in leniency. When a monk will not confess to a violation of the Vinaya, even a minor one, his whole community can vote on his status as a member of the group. With a unanimous vote, the community can expel a wayward monk or even defrock him, making him ineligible to enter another monastery.

After confessing to a minor offense, a monk might be put on probation. According to Thanissaro Bhikkhu, the probationary period usually lasts six days plus the number of days the monk concealed the violation. Probation normally consists of removing the monk from some of his daily duties, especially anything involving leadership of novices.

Disciplining Lay Buddhists

There also is one situation in which lay Buddhists attached to the monastery might be disciplined, Thanissaro Bhikkhu says. “If the monks are convinced a particular [layperson] is trying to defame the monks or trying to harm the monks, they can get together as a community and refuse to accept alms from that person,” he says. In Buddhism, the giving of alms is more than an act of charity; it helps lay Buddhists achieve spiritual enlightenment by lessening their attachment to material things. Therefore, when monks refuse to accept alms from someone, they make it difficult for the person to continue to move forward in their practice of the faith.

According to Thanissaro Bhikkhu, if a lay Buddhist breaks state or federal law, Buddhist monks would not become involved. “There’s no ecclesiastical court that deals with that kind of” misconduct, he says.

Catholic Church

Based on ancient Roman civil law and developed over many centuries, Catholic canon law is complex and extensive, affecting the lives of both ordained and lay Catholics. In the United States, canon law cases are administered primarily by local tribunals, which largely handle marriage-related cases in which no one is on trial. Less frequently, American canon law tribunals will adjudicate disciplinary cases against clergy.

The Canon Law Court System

Canon law is administered by a three-tiered hierarchy of courts within the church, says Michael Ritty, founder of a canon law consultancy in Feura Bush, N.Y. At the lowest level, each of the church's 195 dioceses in the United States has a Court of First Instance, which acts as a trial court. The size and activities of these courts vary widely, according to Nicole Delaney, director of the tribunal for the Diocese of Phoenix. Some have large staffs and handle many cases each month, while others (generally in smaller dioceses) are small and devoted almost exclusively to granting marriage annulments.

In addition, each diocese sends all appeals to an appellate court, known as a Court of Second Instance, usually administered by the nearest larger diocese, known as an archdiocese. The final authority on all penal and non-penal cases is the Holy See, the church's highest authority headed by the pope and headquartered at the Vatican in Rome. The Holy See has a number of final appeals courts. For instance, all marriage appeals are disposed of by a tribunal called the Roman Rota. Most of the appeals in penal cases end up at a court called the Apostolic Signatura. However, appeals in penal cases involving charges of sexual abuse are handled by a tribunal at the Congregation for the Doctrine of the Faith, which oversees church doctrine.

The Judicial Process

At the lowest (diocesan) level, trials are overseen by canon lawyers acting as judges, who rule after reviewing evidence that has been collected by the court

and presented by counselors, who are known as advocates. While one judge is adequate for uncontested marital cases, three judges are used when the trial involves the possibility of excommunication, the dismissal of a priest, or a marital case where major issues are being contested.

"This is not an adversarial system like we have in secular courts in the United States," Ritty says. "Judges rather than advocates examine witnesses." However, Ritty adds, advocates for the parties involved do have an opportunity to present arguments, with the defense advocate always speaking last.

In addition to the judges and the advocates for the parties involved, there are often court officials who are tasked with representing various positions. For instance, in marriage annulment cases, where the presumption of an intact marital bond must be disproved, a person called the Defender of the Bond argues before the court in favor of preserving the marriage. In contentious penal cases, such as those involving priestly misconduct, an official known as the Promoter of Justice is tasked with seeking the public's good, somewhat like a prosecutor in secular courts.

The Appeals Process

According to Delaney, judges' decisions in marriage and penal cases must be ratified by the Court of Second Instance. Since the Court of Second Instance

acts as an appeals court, it primarily reviews procedural matters, ensuring that the trial at the Court of First Instance was conducted properly.

If the Courts of First and Second Instance return different rulings in a marriage case, the Rota in Rome settles the matter. In addition, any party can appeal directly to Rome, even if there is not a split decision, says Monsignor Thomas Green, professor of canon law at the Catholic University of America in Washington, D.C.

Types of Cases

Green says that "the vast majority" of cases in canon law tribunals are marital. These include annulments as well as dispensations for Catholics to marry non-Catholics.[130] According to statistics compiled by the Canon Law Society of America, between 15,000 and 20,000 marriage annulment cases per year have come before Catholic Courts of First Instance in recent years in the United States.[131] The vast majority of these petitions for annulment ultimately were granted.

According to Green, most other canon law trials in the U.S. involve penal cases, which involve serious wrongdoing that often breaks secular criminal laws. The most serious, including those involving sexual abuse allegations,

[130] https:///www.pewresearch.org/religion/2013/04/08/applying-gods-law-religious-courts-and-mediation-in-the-us/
[131] https:///www.pewresearch.org/religion/2013/04/08/applying-gods-law-religious-courts-and-mediation-in-the-us/

bypass the local tribunals and are tried in Rome. In total, Green estimates that American Catholics are involved in 25,000 to 30,000 non-penal and penal cases each year.

In penal cases, the official known as the Promoter of Justice acts not only as the public prosecutor but also as the chief investigator. Indeed, a penal trial will not proceed unless the Promoter of Justice informs officials that there is sufficient evidence to try someone for specific canon law offenses.

Church of Jesus Christ of Latter-day Saints

Disciplining Church Members and Religious Leaders

When a member of the Church of Jesus Christ of Latter-day Saints (Mormons) seriously violates its teachings or doctrines, local ecclesiastical leaders first attempt to facilitate repentance and reconciliation. “Our first hope is always confession and contrition,” says Richard E. Bennett, a professor of Mormon history and doctrine at Brigham Young University in Provo, Utah. “We want to give people a chance to repent and change their lives.” In addition to encouraging repentance, the church’s disciplinary process also aims to protect the innocent from harm and to safeguard the integrity of the church, Bennett says.

There are a host of offenses that constitute misconduct – ranging from criminal activity to apostasy, which Mormons define as teaching doctrines or

advocating practices in direct opposition to the church. In most cases, only the most serious offenses lead to formal proceedings. In less serious cases, the local bishop (the lay leader of a Mormon ward, or congregation) may impose discipline informally, with an eye toward putting the person back on the right track. Even serious cases that do not involve members of the all-male priesthood are usually handled by the bishop or by a disciplinary council that he convenes.

The church does not have paid, professional clergy. "In our church, there is a lay priesthood, and it extends to all worthy male members," **Bennett says.**[132] **If a transgression involves a member** of the priesthood or serious charges (such as serial adultery or the commission of criminal felonies) against anyone in the church, the case may come before a body known as a Stake High Council. A Mormon stake consists of several wards and is headed by a stake president, who is also a layman. The Stake High Council is made up of 13 male members of the church – the stake president and a dozen other local leaders.

Disciplinary Procedures

The Stake High Council's intent is not to punish or rebuke the accused, says Bruce Hafen, president of the LDS Temple in St. George, Utah. "This is not punitive. The majority of cases come from those who have confessed rather

[132] ibid

than those who have been accused," he says. Often, a case involves someone who has confessed but has since repeated their bad behavior. "The most common offenses are adultery and other sexual offenses," Hafen says, adding that a typical Stake High Council hears an average of three or four cases a month.

To prevent injustice or misunderstandings, up to six members of the Stake High Council are prepared to speak on behalf of the alleged transgressor, while six others defend the best interests of the church and any potential innocent victims, such as children, who might be involved. After the proceedings, the stake president determines guilt or innocence as well as what course of action to take in cases in which the person is found guilty.

Someone who is found guilty can be put on probation, which involves stripping the person of certain church privileges (such as the right to receive sacramental bread and water during services or the right to teach Sunday school) for a short period of time. Disfellowship, which allows a Mormon to retain church membership but not hold any offices or participate in important ceremonies such as baptisms or administration of Communion, is a more serious punishment. "Probation is often less formal than disfellowship," Hafen says, and other congregants often do not know when someone is on probation. Disfellowship is more severe and more public, Hafen adds.

In the most serious cases, a person can be excommunicated, which means a complete loss of church membership. However, even those who have been excommunicated for serious offenses can work to be readmitted into the church or, if they belonged to the lay priesthood, to regain their office.

Disciplinary decisions at every level may be appealed to the president of the entire church (who is viewed by Mormons as a prophet and seer) and his top two counselors. These three function as the First Presidency, the highest governing body of the church. But, according to Bennett, they rarely intervene unless there is clear evidence that local authorities acted inappropriately. The First Presidency "almost always supports what was done at the local level," he says.

Religious Marriage and Divorce

Mormons also have rules governing marriage and divorce. Because they believe that a marriage "sealed" in a Mormon temple ensures that the husband and wife will remain together for eternity, divorce is not taken lightly. Still, if a couple is no longer living together and their efforts and those of the church to preserve the marriage have failed, they can petition the First Presidency to grant a cancellation of their sealing, which is essentially an annulment. These petitions are quite common and the requests are usually granted. Once the marriage is dissolved, each party is free to marry another person in the temple.

Episcopal Church of the United States

Disciplining Clergy

The governing structure, rules and procedures of the Episcopal Church are set out in its Constitution and Canons, which were first ratified by the church in 1785 and last amended in 2012. One part of the Constitution and Canons concerns the disciplining of deacons, priests and bishops. Clergy can face disciplinary action for a variety of offenses. These include conducting worship services that differ significantly from approved church liturgy; failing to safeguard church property or money; failing to perform clerical duties; and misconduct, ranging from committing a crime to having a sexual relationship with a congregant.

When accusations are made against a priest or deacon, they are reviewed by a church official known as an intake officer, usually a high-ranking member of the clergy who serves the diocese in this position for a set period of time. If the intake officer believes the accusations fall within the disciplinary offenses outlined in the Constitution and Canons, the local bishop will attempt, usually successfully, to settle the issue without formal proceedings, says Stephen Hutchinson, chancellor of the Episcopal Diocese of Utah. If, however, negotiations fail, the case is handed to a disciplinary body known as a Conference Panel, which brings together all parties – including the bishop, the intake officer and the accused cleric – in an attempt to resolve the case.

"This is not a trial, but a discussion," Hutchinson says, adding, "The goal here is to determine the best way forward."

If no agreement or reconciliation is reached, the case against the priest or deacon moves to a Hearing Panel, where civil lawyers for both sides present evidence and examine witnesses. Ultimately, a three-judge panel, made up of clergy and laymen, issues a verdict. If the cleric is found guilty, he or she can appeal the decision to a diocesan body known as a Provincial Court of Review. The court of review can overturn the verdict only if they find procedural flaws in the trial; it does not reconsider the Hearing Panel's findings of fact in the case.

Bishops are treated differently from other members of the clergy. If the allegations concern deviation from church doctrine, the bishop is tried before a panel of fellow bishops. If the charges concern other issues, such as misuse of money or sexual impropriety, the bishop is tried before a panel of bishops and priests or one consisting of deacons and lay members. As with the trials of priests and deacons, proceedings against bishops also involve civil lawyers and the presentation of evidence and witnesses. In addition, any decision can be appealed to a Court of Review for Bishops, which consists of nine bishops. Like the Provincial Court of Review, the Court of Review for Bishops can only overturn a verdict if they discover procedural flaws in the trial.

Disciplining Laypeople

Although the Episcopal Church rarely disciplines lay congregants, cases against laymen occasionally arise. “You can still be excommunicated in the Episcopal Church by bringing scandal upon the church – by publishing untrue things about the church or its members or repeatedly disrupting church services,” Hutchinson says. When a lay Episcopalian is accused of these kinds of offenses, it is up to his or her priest to determine whether excommunication is warranted. But excommunications can be appealed to the local bishop.

Excommunication is rare – Hutchinson notes, for example, that there has been only one excommunication in the Utah diocese since he began working there in 1985 – and it is not necessarily permanent. According to Hutchinson, sincere repentance can end excommunication. There also are lighter forms of discipline. For example, a congregant might lose certain privileges but still retain church membership. “Sometimes people are simply prevented from coming to the communion rail,” says David Beers chancellor to the church’s presiding bishop, Katharine Jefferts Schori.

Evangelical Lutheran Church in America

Disciplining Religious Leaders

The governing structure and rules of the Evangelical Lutheran Church in America (ECLA) are set out in its Constitution, Bylaws and Continuing Resolutions. These documents lay out disciplinary procedures for cases

involving alleged misconduct by ordained ministers and certified lay ministers (known as rostered leaders), such as a church's musical director or director of religious education. Both ordained ministers and rostered leaders may be censured, suspended or removed from office for a variety of offenses, ranging from deviation from church doctrine to adultery or the commission of a crime.

In cases where someone makes accusations against a minister or other church leader, the local bishop investigates the allegations, including speaking with the accused and his or her accusers. If the minister admits to serious wrongdoing, such as having a sexual relationship with a congregant, the bishop typically will ask the minister to resign from the congregation and perhaps from the official roster of ministers as well. But if the minister claims to be innocent or refuses to resign from the ministry, the bishop may bring formal charges or appoint a committee of clergy and lay representatives from the synod (regional district) to investigate the allegations further and make a recommendation as to whether formal disciplinary charges should be brought.

If formal charges are filed against the minister, the case goes before a discipline hearing committee made up of 12 clergy and lay members. Half the members are drawn from the synod in which the charges arose and half come from other synods of the ELCA. As the formal process unfolds, the accused remains free to terminate the proceedings by resigning from his or her post.

Once the disciplinary hearing gets underway, however, the proceedings follow special rules. The accuser – usually the bishop who brought the charges – and the accused have the opportunity to present evidence and confront witnesses. "This has many, though not all, of the same procedures you'd find in a trial, including limited discovery, right to counsel, right to cross-examine accusers and right to a record of the proceedings," says Robert W. Tuttle, a professor of law at George Washington University and legal counsel to the ELCA's Metro Washington, D.C., Synod. If a majority of the members hearing the case determine that the accused has committed the charged offense, he or she can appeal the decision to a churchwide Committee on Appeals, which reviews the disciplinary hearing to ensure that it was properly conducted. If the appeals committee finds no reason to question the disciplinary hearing, the decision of the disciplinary committee is affirmed and no more appeals are permitted.

Disciplining Congregations

The ELCA Constitution also details procedures for disciplining congregations, which can be censured or even ejected from the church for deviating from church doctrine or disregarding the church's constitution. The process for disciplining a congregation is similar to that used by the church in cases involving ministers. If the local bishop determines that the charges against the congregation have merit, and if the congregation refuses

to address the problem, a disciplinary committee of 12 clergy and lay persons is formed and a trial takes place. Congregations judged to be in violation of church doctrine and rules can appeal the decision to a churchwide appeals committee (a body elected by the churchwide assembly), which has the final say.

Disciplining Church Members

The ECLA also has rules for congregations to follow when disciplining church members for repeatedly being disruptive or other public misconduct. "Before any formal actions are taken, the pastor and others take the person aside and warn him to stop," says Tuttle. If the person does not stop the behavior, the congregation's governing body, the Congregation Council (a body elected by the congregation's members), can hold a hearing and impose disciplinary measures by a two-thirds vote of the council's members. This decision can be appealed to the local synod and no further. Discipline can range from an admonition or warning to suspension of membership to expulsion from that congregation.

Hinduism

Hinduism has no governing structure or single body of law. "There are many markers of identity in Hinduism, but there is no centralized authority," says Vasudha Narayanan, a professor of religion at the University of Florida in

Gainesville. “In terms of law, there are many different codes of righteous behavior, as well as local custom and practice.”

Disciplining Clergy

In the United States, most Hindu temples have their own rules and practices, usually determined by each temple’s lay board of trustees. In practice, this means that certain types of misconduct by a priest might be handled differently by different temples. “Priests serve at the pleasure of the board of trustees, which means that when they decide you have to go, you have to go,” Narayanan says.

At the Hindu Temple of Atlanta, for instance, a body known as the Executive Committee for Religious Activities is responsible for investigating any allegation of serious priestly misconduct. “They investigate the charges and, if they are credible, the president of the temple, in consultation with the committee, will take action,” says B. Krishna Mohan, who co-founded the temple. “If it’s serious, we usually tell [the priest] that his services are no longer needed and that he should go,” Mohan adds.

Misconduct among worshipers is almost never an issue, Narayanan says. “If you were behaving badly, you would not be censured or denied access to worship,” she says. Mohan agrees: “If someone is doing something wrong in their personal life, such as adultery, we do not tell that person to stop,” he says. However, inappropriate behavior at the temple can lead to a reprimand.

"If someone comes in drunk or has dressed inappropriately, we will take them aside and tell them to fix it," Mohan says.

Islam

Islamic law, or sharia, is the code of religious belief and conduct that governs many aspects of Muslim life. It covers a broad range of areas, including crime and punishment; marriage, divorce and inheritance; banking and contractual relations; and diet and attire. Some elements of sharia, especially concerning worship and other religious practices, are clearly outlined in the Quran, the Islamic holy book, while other questions are settled according to different clerics' interpretations of general sharia principles.

The purpose of sharia is to allow Muslims to live their earthly lives according to Allah's wishes, according to Sheik Abdool Rahman Khan, an expert on sharia law and chairman of the Shariah Council of the Islamic Circle of North America, a Muslim education and advocacy group in New York City: "We believe that if we do not do things properly in this world, then we will have consequences in the hereafter."

Disputes Between Individuals

Sharia sometimes plays an important role in helping Muslims resolve disputes, particularly domestic ones. Indeed, the most common disputes involving sharia, at least in the United States, probably concern issues surrounding the dissolution of a marriage, such as asset allocation or child

custody, says Lee Ann Bambach, an attorney who is completing a Ph.D. in religious studies at Emory University in Atlanta. Inheritance and contract dispute cases also occasionally come up, she says.

In many Muslim countries, marital and other disputes often come before sharia courts, where a judge sometimes renders a decision after hearing only from the two parties involved, without other evidence or witnesses. In the United States, there are no sharia courts operating at this time, Bambach and other experts say. However, a number of Muslim imams offer voluntary dispute-resolution services to American Muslims based on principles of Islamic religious law.

For example, Imam Talal Eid runs the Islamic Institute of Boston, an organization that handles religious divorces, inheritance disputes and child-custody cases for Muslims across the United States. Most of his cases center on divorces, often involving women trying to obtain an Islamic divorce from an uncooperative husband. “I investigate, and if the wife’s claims are legitimate, I will talk to the husband and try to convince him. If the husband continues to refuse to grant a [religious] divorce, I grant her one,” he says. Eid does not call his institute a sharia court, but he does liken its work to that of a Jewish beit din, or rabbinical court (see below).

According to Bambach, many U.S. Muslims take marital and other problems to local imams and ask them to use sharia principles to resolve the disputes.

But because there is no single credentialing organization or centralized hierarchy for American imams, there also are no standard procedures for dispute resolution, she says.

Abed Awad, an attorney in Hasbrouck Heights, N.J., who is an expert on sharia, says the ground rules for dispute resolution are often set by the imam and other participants in an ad hoc manner at the beginning of each case. "These things tend to spring up as the need arises," he says.

According to Khan, at the Islamic Circle of North America the resolution of each case also must be in line with secular American law and procedure. For instance, he says, "I let people know that I cannot issue a [religious] divorce decree unless a court has given them a [civil] divorce document first."

Eid follows the same procedure. "Today you have to mix modern and Islamic law," he says.

Judaism

Orthodox Judaism

For Orthodox Jews in the United States, religious law, or halakhah, is central to everyday life. Jewish law regulates personal and religious conduct, as well as communal conduct, including how to resolve disputes, says Rabbi Yosef Chaim Perlman, administrator of the Badatz Bais Aharon court in Brooklyn, N.Y. Religious law governs most aspects of an Orthodox Jew's life "from the

moment he opens his eyes in the morning ... until he closes his eyes to go to sleep, and everything in between," Perlman says.

In general, Jewish law and rabbinic teaching discourage one Jew from suing another in **civil court.**[133] Instead, rabbinical courts, called battei din (the singular is beit din, also commonly spelled beth din), adjudicate a wide range of conflicts, says Rabbi Shlomo Weissmann, director of the Beth Din of America in New York. These religious tribunals handle not only divorces but also employment and commercial conflicts, disagreements between tenants and landlords, and many other contentious issues. In addition, rabbinical courts oversee conversions to Orthodox Judaism.

The focus of religious courts can vary, as each Orthodox community has its own beit din to serve the needs of its members. For example, Weissmann says divorces make up the majority of cases in his beit din – more than 300 per year. By contrast, Perlman estimates that only a quarter of the cases that come before his beit din involve marital disputes. Perlman says Jews in his community also use the beit din for such purposes as arbitrating commercial agreements. "Their Jewish education" has made them feel more responsibility to take disputes to a beit din, as well as more aware of the wide range of services the religious tribunal offers, he says.

[133] https:///www.pewresearch.org/religion/2013/04/08/applying-gods-law-religious-courts-and-mediation-in-the-us/

Religious Divorce

Nevertheless, granting Jewish divorces is an important task for most battei din, including Perlman's. When both the husband and wife agree on the terms, obtaining a Jewish divorce, known as a get, is largely routine. On other occasions, however, rabbinical authorities can help adjudicate issues such as child custody and the division of property, which also must be ratified by a secular court to have the force of law.

In Orthodox Judaism, a woman cannot obtain a divorce – and therefore cannot remarry – without her husband's consent. Sometimes, in order to obtain money or attempt to stop a divorce, a husband will refuse to grant his wife a get, no matter how broken the marriage may be. In such cases, a beit din cannot divorce the couple. But both Perlman and Weissmann say that to sway an obstinate husband, rabbis may issue rulings calling on the community to exert social pressure on the man by, for example, barring him from the synagogue or protesting outside his home or workplace until he relents.

How Courts Operate

A beit din usually consists of a panel of three rabbis, although some panels have as few as one or as many as five members, Perlman says. It is also common for a beit din to have a pool of community leaders from whom to draw judges, including some who are experts in secular law or business rather

than rabbis. This is why the composition of the court can vary from case to case, Weissmann says.

Each party is permitted to bring an attorney or other counselor to the trial, and the counselors can call witnesses to testify. After hearing arguments, examining witnesses and considering the evidence presented by both sides, the judges issue a ruling. This decision is usually unanimous, but when unanimity is not possible, the decision is made by majority vote.

Battei din sometimes take civil laws and decisions into account in their rulings. This is particularly true in divorce cases when a civil divorce already has been granted. Rabbinical courts also might use civil law to help resolve business conflicts, especially if the parties have contractually agreed beforehand to arbitrate disputes using secular American law.

Conservative Judaism

Conservative Judaism is often viewed as a middle ground between the Orthodox and the Reform movements. “Like the Orthodox, we believe that Jewish law is binding, but like the Reform, we believe that the law evolves over history,” says Rabbi Elliot Dorff, professor of philosophy at American Jewish University in Los Angeles. “The Orthodox would not consciously change the law, but we are willing to do so when warranted by changing circumstances and new knowledge, such as science and economics,” Dorff

adds. At the same time, he says, Conservative Jewish law does not place as much emphasis on personal autonomy as Reform Jewish law does.

According to Rabbi Daniel Shevitz of Congregation Mishkon Tephilo in Venice, Calif., Conservative rabbinical courts have two primary functions: issuing divorces and annulments, and approving conversions.

Religious Divorce

Like the Orthodox, Conservative Jews require divorced couples to receive a get before they can remarry in a Conservative synagogue. Unlike the Orthodox, however, when a husband is unwilling to give his wife a Jewish divorce, Conservative authorities can annul the marriage without his permission and permit the woman to remarry. "There is a Talmudic tradition that says that every marriage is predicated on the assent of the rabbinical court," says Shevitz. "So under circumstances where a divorce is in order but consent is not given [by the husband], [the rabbinical court] can annul the marriage after we have exhausted all other options," he says.

Conversions

When overseeing conversions, rabbinical courts "make sure that the educational requirements have been fulfilled by the potential convert, that the person is doing this of their own free will, and that they are actively involved in the Jewish community," Shevitz says, outlining key requirements for a Conservative conversion**.**

Other Questions

Like Orthodox and Reform Jews, Conservative Jews also turn to rabbinical authorities for guidance in how to apply age-old Jewish laws to today's issues and problems. The Conservative movement's panel of legal experts, the Committee on Jewish Law and Standards, is made up of 25 rabbis as well as five non-voting lay experts and one non-voting cantor (liturgical singer). The committee sets policy on questions of Jewish law for the movement as a whole. "They receive questions and write legal opinions on everything from big public issues like homosexuality to questions of religious ritual," says Dorff, who currently chairs the committee.

While these opinions occasionally make significant changes in how law is interpreted (for example, a recent opinion allows Conservative rabbis to marry same-sex couples), they also build upon opinions handed down earlier – very much like secular American courts respect prior precedent. "Past precedent is important, when we consider these big issues," Dorff says.

While Jewish law may not play as large a role in the daily lives of Reform Jews as it does for Orthodox or Conservative Jews, halakhah is still an important part of Reform Jewish life. "For us, it's a source of wisdom and knowledge, of values and guidance, but it does not have an absolute claim, in terms of rules or directives," says Rabbi Richard Jacobs, president of the Union for

Reform Judaism, the umbrella organization of Reform Jewish congregations in the United States.

Reform Jews turn to religious law to help them think through modern issues, ranging from questions of war and peace to more personal matters, such as whether it is appropriate to use certain devices on the Sabbath, Jacobs and other Reform Jewish leaders say. These types of questions are often addressed by a body known as the Responsa Committee of the Reform Rabbinical Association, which is made up of rabbis who are some of the most respected legal experts in the Reform movement. When a question is presented to the Responsa Committee, its members deliberate, vote on a decision and issue a non-binding legal opinion meant to guide Reform Jews rather than mandate that they follow a certain rule or directive. "In Reform Judaism, personal autonomy is very important," Jacobs says.

Reform Judaism does not require its members to obtain a Jewish divorce document (known as a get) in order to remarry within the movement. Even if the Reform movement issued such documents, they would not have any value outside of Reform Judaism because the Orthodox and Conservative branches of Judaism would not recognize a Reform get, according to Rabbi Mark E. Washofsky, the Solomon B. Freehof Professor of Jewish Law and Practice at Hebrew Union College-Jewish Institute of Religion in Cincinnati, Ohio.

Washofsky says Reform Jews typically do not rely on rabbinical courts to settle financial or other disputes between members of the movement. "We don't have a problem as a movement saying to our members: 'Go to the civil authorities,' " he says. In the United States today, unlike in some countries in centuries past, Jews have the same standing under the law as other Americans, he says, so they have no need to seek redress outside of the civil court system.

According to Washofsky, Reform rabbis generally convene rabbinical courts only for the purpose of formalizing a conversion to Judaism. But, he says, some Reform rabbis will formalize conversions without convening a beit din.

Lutheran Church-Missouri Synod

The Lutheran Church-Missouri Synod gives its 6,100 congregations a lot of autonomy in non-doctrinal matters. However, the national church body does have rules and procedures for resolving disputes within the church and for disciplining clergy.

Disputes Within the Church

The dispute-resolution system is aimed at reconciling the parties rather than "win-lose" adjudication, says Richard Nuffer, professor of pastoral ministry and missions at Concordia Theological Seminary in Fort Wayne, Ind. The system typically addresses conflicts between congregations and their pastors, Nuffer says.

If a dispute arises, a pastor or his congregation can ask their district president (there are 35 districts in the U.S.) to appoint a "reconciler" who is trained in the church's reconciliation process. The reconciler meets with the parties and tries to work out a mutually agreeable resolution. If no resolution is reached, either party may advance the matter to three ascending appellate bodies at the national level: a Dispute Resolution Panel, an Appeals Panel and a Review Panel.

Dispute Resolution Panels consist of three judges who are in ministerial positions in the church and are trained reconcilers. While the panels' proceedings do not follow the same adversarial process as a civil trial (for example, counsel or representatives for the parties involved do not question witnesses), they have some similar elements: the judges collect evidence, question the parties and, at the end of the process, vote on a resolution to the dispute. After a verdict has been reached, either party can appeal to a three-judge Appeals Panel, which examines the case to determine whether there were procedural errors. A final appeal can be made to a three-person Review Panel, which also looks for procedural errors. The Review Panel's ruling is final; no further appeals are possible.

Disciplining Religious Leaders

In addition to this dispute-resolution system, the church also has a disciplinary process for pastors and other church workers. Grounds that may

trigger the disciplinary process include persistent adherence to false doctrine; persistent offensive conduct against members of the congregation or others; actions contrary to the church's core doctrines or to the conditions of membership in the synod; inability to perform the duties of office because of physical, mental or emotional disability; neglecting or refusing to perform the duties of the office; and sexual misconduct.

The district president who oversees the church where the accused works is the only person who can begin the disciplinary process. He may form a Referral Panel, comprised of three local, high-ranking church officials, to provide advice. If the Referral Panel determines that the charges are credible, the case is sent to a Hearing Panel for disposition. The Hearing Panel, administered by the national church, considers evidence and listens to witnesses before coming to a decision. If the accused is not satisfied with the result, he can take the matter to a Final Hearing Panel. The decision of the Final Hearing Panel is binding upon the parties and not subject to further appeal.

The most severe sanction in the disciplinary process is removal of a pastor or lay worker from the synod, in effect firing the individual. Sanctions short of removal include "restricted status" and "suspended status." Pastors or lay workers on restricted status may not serve in a church other than their own. The restricted status can eventually be removed if new exonerating evidence emerges or the person's behavior improves. Those on suspended status are

usually one step away from full expulsion. Not surprisingly, suspended employees may not serve in any church (including their own) and will likely be permanently removed from office unless new exonerating evidence is produced.

Presbyterian Church, U.S.A.

The Presbyterian Church, U.S.A. (PCUSA), has a hierarchical governance structure comprised of the elders of an individual congregation and its pastor (known as a session), the district presbytery, the regional synod and the national General Assembly. Each of these institutions within the church is a court.

The rules for church discipline are outlined in the denomination's Book of Order. Individual Presbyterians or governing bodies can be subjected to the judicial process when, in the words of the Book of Order, they are accused of committing "any act or omission ... that is contrary to the Scriptures or the Constitution of the Presbyterian Church (U.S.A.)." This description encompasses a wide range of offenses, from sexual immorality to procedural irregularities during church ceremonies.

Types of Cases

PCUSA courts administer two types of cases: disciplinary and remedial. Disciplinary cases involve trying and correcting individual Presbyterians (usually ministers, elders or deacons) who are accused of behavior that violates Christian scripture or the church's constitution. For example, if a minister is suspected of stealing money or sexual impropriety, he or she may face a disciplinary trial. On the other hand, if one of the church's councils or governing bodies is accused of failing to properly carry out its duties, it may face a remedial trial. For example, if a regional presbytery ordains a minister who openly refuses to marry interracial couples, someone within that presbytery may initiate a remedial charge against it. The process for both disciplinary and remedial trials is similar.

As in many other churches, disciplinary actions against ministers and other church members are not supposed to be motivated by revenge. "The purpose [of church discipline] is not retribution [or] to get even. The purpose is to honor God by preserving the purity of the church," says the Rev. Joyce Lieberman, manager for polity guidance and training in the PCUSA's Office of Constitutional Services in Louisville, Ky.

The Judicial Process

To open a disciplinary case, any member of the church can file an allegation of wrongdoing with a clerk at the appropriate church body, depending on whose jurisdiction is most relevant, according to Lieberman. In disciplinary

cases, allegations are then taken up by a group of three to five appointed church members, known as the Investigating Committee. If the allegation seems credible to the Investigating Committee, and the parties have not come to a resolution, the Investigating Committee files official charges against the accused.

In remedial cases, any member of a church council may file a complaint. No investigation is required and the case proceeds directly to trial.

According to the Rev. David McCarthy, professor of religion at Hastings College in Hastings, Neb., trials may take place either at the session level or before a higher-level body known as a Permanent Judicial Commission. The parties can bring lawyers, but everyone who participates in the trial must be a church member.

In disciplinary trials, the accused is presumed innocent unless at least two-thirds of the Permanent Judicial Commission or session votes for a guilty verdict. In remedial trials, the complaint "must be proven by a preponderance of the evidence to a majority of the [commission] members," says Laurie Griffith, manager of judicial process and social witness for the PCUSA.

The Appeals Process

Parties may appeal, usually on procedural grounds, McCarthy says. Procedural problems are not uncommon, he adds, because trials are rare and participants are often inexperienced. In addition, misconduct can be difficult

to prove, so Investigating Committees dismiss many allegations without filing formal charges. Some cases also are dismissed when witnesses refuse to participate in the investigation. In addition, McCarthy says, pre-trial resolution efforts often are successful. And when charges do make it to the level of the Permanent Judicial Commission, the accused frequently quits the church.

Southern Baptist Convention

The Southern Baptist Convention (SBC), the largest Protestant denomination in the United States according to Pew Research's 2007 U.S. Religious Landscape Survey, is less hierarchical than many other Protestant denominations. Although the SBC is organized at three levels – local, regional and national – the national leadership has no authority over individual congregations or the local and regional associations of churches, according to Malcolm Yarnell, professor of systematic theology at Southwestern Baptist Theological Seminary in Fort Worth, Texas. Southern Baptists "believe in local church autonomy," he says. "We don't make law in the strictest sense of the term. ... Because we believe Christ is present to the local church, they have all the guidance they need."

Disciplining Religious Leaders, Congregations and Church Members

In lieu of ecclesiastical law, Southern Baptists maintain a doctrinal statement, the Baptist Faith and Message, by which member churches must abide.

Because Southern Baptist churches are self-governing, a pastor who preaches or practices something that other Baptists believe contradicts that document must be held accountable by his congregation, which is expected to either censure or remove him. If they do not, the members of the local, regional or national association to which his church belongs can vote to expel his entire church.

Short of expelling a church from a Baptist association, there is no uniform mechanism for disciplining individual congregants, pastors or churches for failing to abide by their commitment to the Baptist Faith and Message, Yarnell says. Rather, the denomination's focus on church autonomy means each congregation elects its own leaders, who have the authority to write their own disciplinary and dispute-resolution procedures.

Disputes Over Church Doctrine

According to Bob Welch, professor of church administration at the New Orleans Baptist Theological Seminary, the action most likely to earn a church or pastor a dismissal from the SBC in recent years has been affirming that homosexuality is a valid lifestyle. Voters at the annual meeting of the church's top governing body, the National Convention, added a statement against homosexuality to the Baptist Faith and Message in 2000. After this action was taken some churches left the convention while others joined it.

If, in the future, a consensus builds within the denomination that this position or any other element of Southern Baptist doctrine should be changed, Welch says, members can remove it from the statement of faith the same way it was added – by bringing the issue to the floor at the annual convention and winning a majority of the votes.

Unitarian Universalist Association

The Unitarian Universalist Association (UUA) has very little church law because its structure is largely congregational rather than hierarchical, says the Rev. Richard Nugent, director of the Unitarian Universalist Office of Church Staff Finances. Congregations are fully autonomous and set their own standards for choosing ministers, disciplining church leaders and resolving disputes. "The one exception," Nugent says, "is clergy credentialing."

Clergy Credentialing

Clergy credentialing, also known as "fellowshipping," is distinct from ordination. It is the process by which the national association of Unitarian Universalists gives a minister or potential minister its stamp of approval. This process usually precedes ordination, which is "a privilege and a right of congregations," says Nugent.

While most ministers receive their credentials from the national church before being ordained, fellowshipping is not a requirement for ordination. Indeed, a small number of ordained UUA ministers have not been fellowshipped.

The body that administers clergy credentials is called the Ministerial Fellowship Committee, which consists of at least 14 ordained and lay Unitarians appointed by the Board of Trustees of the Unitarian Universalist Association. The committee may choose not to grant fellowship to a candidate because of problems with the candidate's temperament and ability to form healthy relationships, according to Nugent. The committee also can terminate the fellowship of a minister who exhibits, in Nugent's words, "abuse of ministry."

When the committee revokes or denies the fellowship of a minister or potential minister, he or she may appeal the decision to the committee's Board of Review. The board has eight members – some ordained and some lay – who are elected by the General Assembly of the UUA. According to the UUA Bylaws, the Board of Review is not charged with examining new

evidence but only reviewing the process to make sure it was carried out properly. Once the board makes its decision, the result is final.[134]

United Methodist Church

The United Methodist Church uses its internal legal system mainly to adjudicate charges against ministers and other church officials. Though the denomination's Book of Discipline also includes instructions for disciplining laypeople, this element of Methodist law is rarely if ever applied today, says the Rev. Tim Rogers, pastor of Mt. Hebron United Methodist Church in West Columbia, S.C.

Disciplining Religious Leaders

The church's judicial procedures typically do not come into play unless a minister or church employee has "violated the covenants of the church in a serious way," Rogers says. Such offenses include theft, adultery, sexual, racial and other kinds of harassment, and spreading teachings incompatible with Methodist doctrine. According to Rogers, the vast majority of cases center on alleged sexual misconduct or financial impropriety. United Methodist

[134] For More Information; Unitarian Universalist Bylaws; Unitarian Universalist Congregational Governance

Church leaders defer to civil authorities to investigate serious criminal charges, such as child abuse.

According to Rogers, the legal system within the American wing of the denomination resembles the U.S. judicial system, with juries, an appeals process and a supreme court called the Judicial Council. Any person, including someone who is not a member of the United Methodist Church, can file a complaint against a Methodist minister. The minister's immediate supervisor, normally a district superintendent, then initiates a process of gathering evidence.

According to Lewis Parks, professor of theology, ministry and congregational development at Wesley Theological Seminary in Washington, D.C., the church provides opportunities for the accused to confess or to reach an agreement with the accuser. But if a Committee on Investigation finds the charges are credible and the accused does not confess, the case may go to a trial.

Methodist trials are overseen by an active or retired bishop who does not preside in the same geographic region (conference) as the accused. The jury consists of 13 ministers who are selected using rules similar to those employed when secular courts choose a jury, giving both sides opportunities to strike potential jurors they feel are inadequate to the task. If the accused is found guilty by the jury, he or she can appeal the decision to a Committee of Appeals

and, finally, to the church's highest judicial body – the Judicial Council. If the conviction is not overturned on appeal, the severest punishment, according to Parks, is the revocation of ministerial credentials.

For all its complexity, this trial system is rarely used, according to Rogers and Parks, who say their respective conferences handle only about one case per year. Rogers estimates that there are no more than five cases per year among all 66 United Methodist Church conferences in the United States.

Reviewing Church Laws

In addition to hearing appeals from convicted church officials, the Judicial Council also has the authority to hear appeals against laws passed or decisions made by the church's highest governing authority – the General Conference. If a majority of the church's bishops or one-fifth or more of the members of the General Conference request such an appeal, the Judicial Council will determine whether the law or decision in question comports with the church's constitution.

The Meaning of "Religion" and The Role of the Courts asserted the right to make findings about what a religious organization believes or how it practices its beliefs, where such findings are necessary for the resolution of a civil legal dispute. Such decisions could be very controversial because no

religion provides completely agreed and comprehensive statements concerning absolutely every belief and practice. There are always considerable differences of opinion among co-religionists and there will, therefore, be controversy around any future judicial decision. But fourthly, the Court acknowledged this possibility by formulating the test as one of "objective discernment." While there is really no other standard it could adopt, the ambiguity in such a test is obvious and the Court did not offer any further assistance as to sources to which a court could look to make that decision, for example, founding documents, theological statements, canonical codes, leading clergy or expert witnesses. The Court suggested that expert evidence could be heard but whether this means leading clergy, academic experts or expertise of some other sort was not stated.

Fifthly, the content of the religious issues is comprehensive, extending to doctrine, liturgy and polity; any religious matter is open to objective discernment by a court. Polity or governance are typically easier to determine because most religious organizations have written codes of practice or canon law, and their content is somewhat similar to the codes of practice and procedure courts are accustomed to in the civil law. But doctrine and liturgy are much more controversial and difficult to discern objectively. Sixthly, the notion that a court may objectively discern religious propositions assumes certain characteristics about "religion" for civil legal purposes: (1) the religious beliefs are held by a group; (2) there is a system of beliefs for objective

discernment; (3) the belief system may or may not be "true;" (4) the belief claims very likely have a spiritual or non-scientifically provable nature so that a court ought not to opine on their truth because not scientifically provable; and (5) there is no requirement for a supreme being for the belief system to be objectively discernible. In short, the implicit understanding of "religion" in Shergill accords with that explicit in Hodkin.

Seventhly, the reluctance of the Court to express opinions about the truth of any religious beliefs or practices implicitly suggests that the Law Lords may consider religious beliefs to be about ultimate meaning, with or without a supreme being, on which a court ought not to express an opinion, but show humility. Eighthly, by pinning the determination of a civil legal issue onto a judicial determination of a religious matter, the Court demonstrated a treatment of religion as a serious matter, rather than as a factor to be discounted when making civil legal decisions. Ninthly, there is nothing in the decision to suggest either that religious organizations are to be treated any differently from secular organizations, or that where secular organizations, for example, humanist organizations, are at issue that their secular belief systems would not be accorded similar treatment by a court, that is, an objective discernment of their beliefs would be made if this was required for a civil legal decision.[135]

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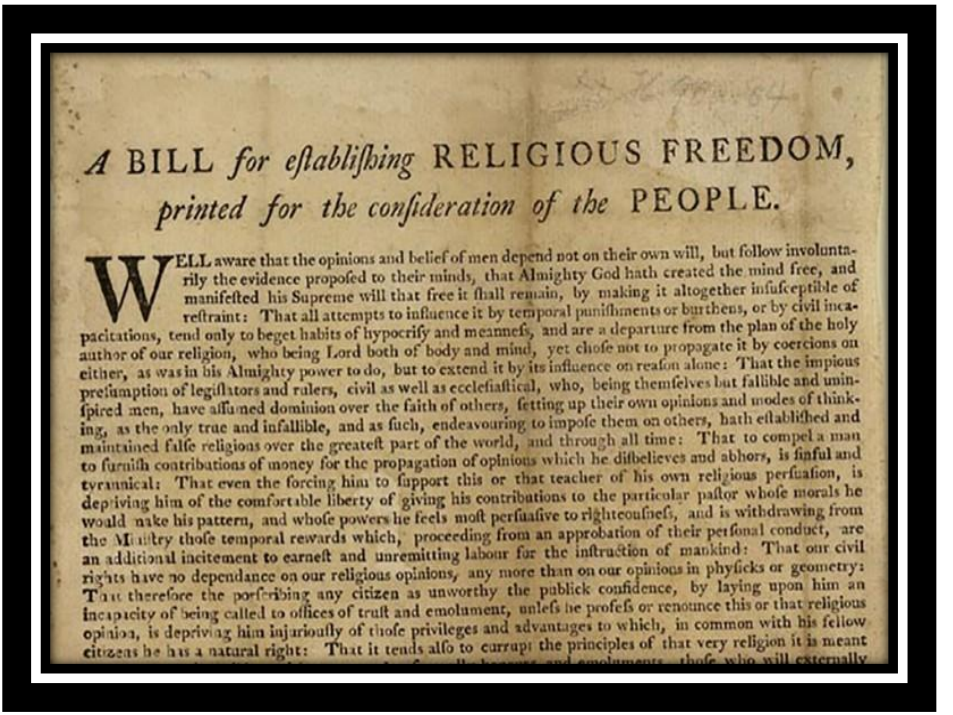
Taking Hodkin and Shergill together, it can be concluded that while the UK Supreme Court continues to take "religion" seriously for the purposes of litigation, it is unclear what "religion" might be beyond a belief system to which a group of persons adhere and whose specific beliefs can be objectively discerned. The truthfulness, and relatedly the harmfulness, of any religious beliefs will not be adjudicated beyond, presumably, the criminal or human rights law. This neutrality is, at one level, attractive, but at another, may leave religion unprotected against future judicial assault, because it is detached from ultimate meaning in life, which courts apparently will not protect. It remains to compare this new English position with Canadian approaches.

Thomas Jeffersons' Theory on Religious Beliefs



A BILL for eſtabliſhing RELIGIOUS FREEDOM,
printed for the conſideration of the PEOPLE.

WELL aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence propoſed to their minds, that Almighty God hath created the mind free, and manifeſted his Supreme will that free it ſhall remain, by making it altogether inſuſceptible of reſtraint: That all attempts to influence it by temporal puniſhments or burthens, or by civil incapacitations, tend only to beget habits of hypocriſy and meanneſs, and are a departure from the plan of the holy author of our religion, who being Lord both of body and mind, yet choſe not to propagate it by coercions on either, as was in his Almighty power to do, but to extend it by its influence on reaſon alone: That the impious preſumption of legiſlators and rulers, civil as well as eccleſiaſtical, who, being themſelves but fallible and uninſpired men, have aſſumed dominion over the faith of others, ſetting up their own opinions and modes of thinking, as the only true and infallible, and as ſuch, endeavouring to impoſe them on others, hath eſtabliſhed and maintained falſe religions over the greateſt part of the world, and through all time: That to compel a man to furniſh contributions of money for the propagation of opinions which he diſbelieves and abhors, is ſinful and tyrannical: That even the forcing him to ſupport this or that teacher of his own religious perſuaſion, is depriving him of the comfortable liberty of giving his contributions to the particular paſtor whoſe morals he would make his pattern, and whoſe powers he feels moſt perſuaſive to righteouſneſs, and is withdrawing from the Miniſtry thoſe temporal rewards which, proceeding from an approbation of their perſonal conduct, are an additional incitement to earneſt and unremitting labour for the inſtruction of mankind: That our civil rights have no dependance on our religious opinions, any more than on our opinions in phyſicks or geometry: That therefore the proſcribing any citizen as unworthy the publick confidence, by laying upon him an incapacity of being called to offices of truſt and emolument, unleſs he profeſs or renounce this or that religious opinion, is depriving him injuriouſly of thoſe privileges and advantages to which, in common with his fellow citizens he has a natural right: That it tends alſo to corrupt the principles of that very religion it is meant

"Church and state (disambiguation).

The **separation of church and state** is a philosophical and jurisprudential concept for defining political distance in the relationship between religious organizations and the state. Conceptually, the term refers to the creation of a secular state (with or without legally explicit church-state separation) and to **disestablishment**, the changing of an existing, formal relationship between the church and the state.[136] Although the concept is older, the exact phrase

[136] https:///www.pewresearch.org/religion/2013/04/08/applying-gods-law-religious-courts-and-mediation-in-the-us/

"separation of church and state" is derived from "wall of separation between church and state", a term coined by Thomas Jefferson. The concept was promoted by Enlightenment philosophers such as John Locke.

In a society, the degree of political separation between the church and the civil state is determined by the legal structures and prevalent legal views that define the proper relationship between organized religion and the state. The arm's length principle proposes a relationship wherein the two political entities interact as organizations each independent of the authority of the other. The strict application of the secular principle of *laïcité* is used in France, while secular societies such as Norway, Denmark, and England maintain a form of constitutional recognition of an official state religion.

The philosophy of the separation of the church from the civil state parallels the philosophies of secularism, disestablishmentarianism, religious liberty, and religious pluralism. By way of these philosophies, the European states assumed some of the social roles of the church and the welfare state, a social shift that produced a culturally secular population and public sphere. In practice, church–state separation varies from total separation, mandated by the country's political constitution, as in India and Singapore, to a state religion, as in the Maldives.

Late antiquity

St. Augustine

An important contributor to the discussion concerning the proper relationship between Church and state was St. Augustine, who in *The City of God*, Book XIX, Chapter 17, examined the ideal relationship between the "earthly city" and the "city of God". In this work, Augustine posited that major points of overlap were to be found between the "earthly city" and the "city of God", especially as people need to live together and get along on earth. Thus, Augustine held that it was the work of the "temporal city" to make it possible for a "heavenly city" to be established on earth.

Medieval Europe

For centuries, monarchs ruled by the idea of divine right. Sometimes this began to be used by a monarch to support the notion that the king ruled both his own kingdom and Church within its boundaries, a theory known as caesaropapism. On the other side was the Catholic doctrine that the Pope, as the Vicar of Christ on earth, should have the ultimate authority over the Church, and indirectly over the state, with the forged Donation of Constantine used to justify and assert the political authority of the papacy.[137] This divine authority was explicitly contested by Kings, in the like of the, 1164, Constitutions of Clarendon, which asserted the supremacy of Royal courts over Clerical, and with Clergy subject to prosecution, as any other subject of the English Crown; or the 1215 Magna Carta that asserted the

[137] htpps//e..wikipedia.org/wiki/separation -of –church-and-state#EMA

supremacy of Parliament and juries over the English Crown; both were condemned by the Vatican.[138] Moreover, throughout the Middle Ages, the Pope claimed the right to depose the Catholic kings of Western Europe and tried to exercise it, sometimes successfully, eg. 1066, Harold Godwinson,[139] sometimes not, e.g., in 1305 with Robert the Bruce of Scotland,[140] and later Henry VIII of England and Henry III of Navarre.

In the West the issue of the separation of church and state during the medieval period centered on monarchs who ruled in the secular sphere but encroached on the Church's rule of the spiritual sphere. This unresolved contradiction in ultimate control of the Church led to power struggles and crises of leadership, notably in the Investiture Controversy, which was resolved in the Concordat of Worms in 1122. By this concordat, the Emperor renounced the right to invest ecclesiastics with ring and crosier, the symbols of their spiritual power, and guaranteed election by the canons of cathedral or abbey and free consecration.[141]

Reformation

At the beginning of the Protestant Reformation, Martin Luther articulated a doctrine of the two kingdoms. According to James Madison, perhaps one of

[138] htpps//e..wikipedia.org/wiki/separation -of –church-and-state#
[139] IBID
[140] Ibid
[141] Ibid

the most important modern proponents of the separation of church and state, Luther's doctrine of the two kingdoms marked the beginning of the modern conception of separation of church and state.[142]

Antichristus, a woodcut by Lucas Cranach the Elder of the pope using the temporal power to grant authority to a generously contributing ruler

Those of the Radical Reformation (the Anabaptists) took Luther's ideas in new directions, most notably in the writings of Michael Sattler (1490–1527), who agreed with Luther that there were two kingdoms, but differed in arguing that these two kingdoms should be separate, and hence baptized believers should not vote, serve in public office or participate in any other way with the "kingdom of the world". While there was a diversity of views in the early days of the Radical Reformation, in time Sattler's perspective became the normative position for most Anabaptists in the coming centuries. Anabaptists came to teach that religion should never be compelled by state power, approaching the issue of church-state relations primarily from the position of protecting the church from the state.

In 1534, Henry VIII, angered by the Pope Clement VII's refusal to annul his marriage to Catherine of Aragon, decided to break with the Church and set himself as ruler of the Church of England, unifying the feudal Clerical and Crown hierarchies under a single monarchy. With periodic intermission,

[142] Ibid

under Mary, Oliver Cromwell, and James II, the monarchs of Great Britain have retained ecclesiastical authority in the Church of England, since 1534, having the current title, *Supreme Governor of the Church of England*. The 1654 settlement, under Oliver Cromwell's Commonwealth of England, temporarily replaced Bishops and Clerical courts, with a Commission of Triers, and juries of Ejectors, to appoint and punish clergy in the English Commonwealth, later extended to cover Scotland. Penal Laws requiring ministers, and public officials to swear oaths and follow the Established faith, were disenfranchised, fined, imprisoned, or executed, for not conforming.

One of the results of the persecution in England was that some people fled Great Britain to be able to worship as they wished. After the American Colonies revolted against George III of the United Kingdom, the Constitution of United States was amended to ban the establishment of religion by Congress.

John Locke and the Enlightenment

John Locke, English politicalphilosopher argued for individual conscience, free from state control.

The concept of separating church and state is often credited to the writings of English philosopher John Locke (1632–1704).[143] Roger Williams was first

[143] Ibid AFP

in his 1636 writing of "Soul Liberty" where he coined the term "liberty of conscience". Locke would expand on this. According to his principle of the social contract, Locke argued that the government lacked authority in the realm of individual conscience, as this was something rational people could not cede to the government for it or others to control. For Locke, this created a natural right in the liberty of conscience, which he argued must therefore remain protected from any government authority. These views on religious tolerance and the importance of individual conscience, along with his social contract, became particularly influential in the American colonies and the drafting of the United States Constitution.

In his *A Letter Concerning Toleration*, in which Locke also defended religious toleration among different Christian sects, Locke argued that ecclesiastical authority had to be distinct from the authority of the state, or "the magistrate". Locke reasoned that, because a church was a voluntary community of members, its authority could not extend to matters of state. He writes:

It is not my business to inquire here into the original of the power or dignity of the clergy. This only I say, that, whencesoever their authority be sprung, since it is ecclesiastical, it ought to be confined within the bounds of the Church, nor can it in any manner be extended to civil affairs, because the

Church itself is a thing absolutely separate and distinct from the commonwealth.

At the same period of the 17th century, Pierre Bayle and some fideists were forerunners of the separation of Church and State, maintaining that faith was independent of reason.[144] During the 18th century, the ideas of Locke and Bayle, in particular the separation of Church and State, became more common, promoted by the philosophers of the Age of Enlightenment. Montesquieu already wrote in 1721 about religious tolerance and a degree of separation between religion and government[145]. Voltaire defended some level of separation but ultimately subordinated the Church to the needs of the State [146] while Denis Diderot, for instance, was a partisan of a strict separation of Church and State, saying "*the distance between the throne and the altar can never be too great*".[147]

Jefferson and the Bill of Rights

Thomas Jefferson, the third President of the United States, whose letter to the Danbury Baptists Association is often quoted in debates regarding the separation of church and state

[144] htpps//e..wikipedia.org/wiki/separation -of –church-and-state#-Bayle22-22
[145] Ibid DarienMC Whirter
[146] htpps//e..wikipedia.org/wiki/separation -of –church-and-state#

In English, the exact term is an offshoot of the phrase, "wall of separation between church and state", as written in Thomas Jefferson's letter to the Danbury Baptist Association in 1802. In that letter, referencing the First Amendment to the United States Constitution, Jefferson writes:

Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State[148].

Jefferson was describing to the Baptists that the United States Bill of Rights prevents the establishment of a national church, and in so doing they did not have to fear government interference in their right to expressions of religious conscience. The Bill of Rights, adopted in 1791 as ten amendments to the Constitution of the United States, was one of the earliest political expressions of religious freedom [*citation needed*]. Others were the Virginia Statute for Religious Freedom, also authored by Jefferson and adopted by Virginia in 1786; and the French Declaration of the Rights of the Man and of the Citizen of 1789.

[148] Ibid -jefferson

The metaphor "a wall of separation between Church and State" used by Jefferson in the above quoted letter became a part of the First Amendment jurisprudence of the U.S. Supreme Court. It was first used by Chief Justice Morrison Waite in *Reynolds v. United States* [149]. American historian George Bancroft was consulted by Waite in the *Reynolds* case regarding the views on establishment by the framers of the U.S. constitution. Bancroft advised Waite to consult Jefferson. Waite then discovered the above quoted letter in a library after skimming through the index to Jefferson's collected works according to historian Don Drakeman.

In various countries

Countries have varying degrees of separation between government and religious institutions. Since the 1780s a number of countries have set up explicit barriers between church and state. The degree of actual separation between government and religion or religious institutions varies widely. In some countries the two institutions remain heavily interconnected. There are new conflicts in the post-Communist world.

Countries with a state religion

[149] (1878)

The many variations on separation can be seen in some countries with high degrees of religious freedom and tolerance combined with strongly secular political cultures which have still maintained state churches or financial ties with certain religious organizations into the 21st century. In England, there is a constitutionally established state religion but other faiths are tolerated. The British monarch is the Supreme Governor of the Church of England, and 26 bishops (Lords Spiritual) sit in the upper house of government, the House of Lords.

In other kingdoms the head of government or head of state or other high-ranking official figures may be legally required to be a member of a given faith. Powers to appoint high-ranking members of the state churches are also often still vested in the worldly governments. These powers may be slightly anachronistic or superficial, however, and disguise the true level of religious freedom the nation possesses. In the case of Andorra there are two heads of state, neither of them native Andorrans. One is the Roman Catholic Bishop of Seu de Urgell, a town located in northern Spain. He has the title of Episcopalian Coprince (the other Coprince being the French Head of State). Coprinces enjoy political power in terms of law ratification and constitutional court designation, among others.

Australia

H. B. Higgins, proponent of Section 116 in the Australian pre-Federation constitutional conventions

The Constitution of Australia prevents the Commonwealth from establishing any religion or requiring a religious test for any office:

Ch 5 § 116 The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The language is derived from the United States' constitution, but has been altered. Following the usual practice of the High Court, it has been interpreted far more narrowly than the equivalent US sections and no law has ever been struck down for contravening the section. Today, the Commonwealth Government provides broad-based funding to religious schools. The Commonwealth used to fund religious chaplains, but the High Court in *Williams v Commonwealth* [150]found the funding agreement invalid under Section 61. However, the High Court found that Section 116 had no relevance, as the chaplains themselves did not hold office under the Commonwealth. All Australian parliaments are opened with a Christian

[150] HCA 23, (2012) 248 CLR156

prayer, and the preamble to the Australian Constitution refers to "humbly relying on the blessing of Almighty God".

Although the Australian monarch is Charles III, also British monarch and Governor of the Church of England, his Australian title is unrelated to his religious office and he has no role in the Anglican Church of Australia. The prohibition against religious tests has allowed former Anglican Archbishop of Brisbane Peter Hollingworth to be appointed Governor-General of Australia, the highest domestic constitutional officer; however, this was criticised.[151]

Despite inclusion in the "States" chapter, Section 116 does not apply to states because of changes during drafting, and they are free to establish their own religions. Although no state has ever introduced a state church (New South Wales restricted religious groups during the early colonial period), the legal body corresponding to many religious organisations is established by state legislation. There have been two referendums to extend Section 116 to states, but both failed. In each case the changes were grouped with other changes and voters did not have the opportunity to expressly accept only one change. Most states permit broad exemptions to religious groups from anti-discrimination legislation; for example, the New South Wales act allowing

[151] htpps//e..wikipedia.org/wiki/separation -of –church-and-state#cite-note-hogan

same-sex couples to adopt children permits religious adoption agencies to refuse them.

The current situation, described as a "principle of state neutrality" rather than "separation of church and state", has been criticised by both secularists and religious groups. On the one hand, secularists have argued that government neutrality to religions leads to a "flawed democrac[y]" or even a "pluralistic theocracy" as the government cannot be neutral towards the religion of people who do not have one. On the other hand, religious groups and others have been concerned that state governments are restricting them from exercising their religion by preventing them from criticising other groups and forcing them to do unconscionable acts.

Azerbaijan

Azerbaijan and its main cities

Islam is the dominant religion in Azerbaijan, with 96% of Azerbaijanis being Muslim, Shia being in the majority. However, Azerbaijan is officially a secular state. According to the Constitution of Azerbaijan, the state and mosque are separate. Article 7 of the Constitution defines the Azerbaijani state as a democratic, legal, secular, unitary republic. Therefore, the Constitution provides freedom of religions and beliefs.

The Azerbaijani State Committee for Work with Religious Organizations controls the relations between the state and religions.

Ethnic minorities such as Russians, Georgians, Jews, Lezgis, Avars, Udis and Kurds with different religious beliefs to Islam all live in Azerbaijan. Several religions are practiced in Azerbaijan. There are many Orthodox and Catholic churches in different regions of Azerbaijan.

Brazil

Rui Barbosa had a large influence upon the text adopted as the 1891 Constitution of Brazil.

Brazil was a colony of the Portuguese Empire from 1500 until the nation's independence from Portugal, in 1822, during which time Roman Catholicism was the official state religion. With the rise of the Empire of Brazil, although Catholicism retained its status as the official creed, subsidized by the state, other religions were allowed to flourish, as the 1824 Constitution secured religious freedom. The fall of the Empire, in 1889, gave way to a Republican regime, and a Constitution was enacted in 1891, which severed the ties between church and state; Republican ideologues such as Benjamin Constant and Ruy Barbosa were influenced by laïcité in France and the United States. The 1891 Constitutional separation of Church and State has been maintained ever since. The current Constitution of Brazil, in force

since 1988, ensures the right to religious freedom, bans the establishment of state churches and any relationship of "dependence or alliance" of officials with religious leaders, except for "collaboration in the public interest, defined by law".

China

China, during the era of the Han Dynasty, had established Confucianism as the official state ideology over that of Legalism of the preceding Qin Dynasty over two millennium ago. In post-1949 modern-day China, owing to such historic experiences as the Taiping Rebellion, the Chinese Communist Party had no diplomatic relations with the Vatican for over half a century, and maintained separation of the church from state affairs,[44] and although the Chinese government's methods are disputed by the Vatican,[45]Pope Benedict XVI had accepted the ordination of a bishop who was pre-selected by the government for the Chinese Patriotic Catholic Association in 2007. However, a new ordination of a Catholic bishop in November 2010, according to BBC News, has threatened to "damage ties" between China and the Vatican. The Constitution of the People's Republic of China guarantees, in its article 36, that:

No state organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion.

No one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the state. Religious bodies and religious affairs are not subject to any foreign domination.

Hong Kong

Main articles: Religion in Hong Kong, Hong Kong Basic Law, Hong Kong Sheng Kung Hui, and Catholic Church in Hong Kong

Croatia

"Constitution no. 1", which is kept in the great hall of the Palace of the Constitutional Court and is used on the occasion of the presidential inauguration

Freedom of religion in Croatia is a right defined by the Constitution, which also defines all religious communities as equal in front of the law and separated from the state. Principle of separation of church and state is enshrined in Article 41 which states:

All religious communities shall be equal before the law and clearly separated from the state. Religious communities shall be free, in compliance with law, to publicly conduct religious services, open schools, academies or other institutions, and welfare and charitable organizations and to manage them,

and they shall enjoy the protection and assistance of the state in their activities.

Public schools allow religious teaching (Croatian: *Vjeronauk*) in cooperation with religious communities having agreements with the state, but attendance is not mandated. Religion classes are organized widely in public elementary and secondary schools.

The public holidays also include religious festivals of: Epiphany, Easter Monday, Corpus Christi Day, Assumption Day, All Saints' Day, Christmas, and Boxing Day. The primary holidays are based on the Catholic liturgical year, but other believers are allowed to celebrate other major religious holidays as well.

The Roman Catholic Church in Croatia receives state financial support and other benefits established in concordats between the Government and the Vatican. In an effort to further define their rights and privileges within a legal framework, the government has additional agreements with other 14 religious communities: Serbian Orthodox Church (SPC), Islamic Community of Croatia, Evangelical Church, Reformed Christian Church in Croatia, Protestant Reformed Christian Church in Croatia, Pentecostal Church, Union of Pentecostal Churches of Christ, Christian Adventist Church, Union of Baptist Churches, Church of God, Church of Christ, Reformed Movement of Seventh-day Adventists, Bulgarian Orthodox

Church, Macedonian Orthodox Church and Croatian Old Catholic Church.

Finland

The Constitution of Finland declares that the organization and administration of the Evangelical Lutheran Church of Finland is regulated in the Church Act, and the organization and administration of the Finnish Orthodox Church in the Orthodox Church Act. The Lutheran Church and the Orthodox Church thus have a special status in Finnish legislation compared to other religious bodies, and are variously referred to as either "national churches" or "state churches", although officially they do not hold such positions. The Lutheran Church does not consider itself a state church, and prefers to use the term "national church".

The Finnish Freethinkers Association has criticized the official endorsement of the two churches by the Finnish state, and has campaigned for the separation of church and state.

France

See also: Laïcité, 1905 French law on the Separation of the Churches and the State, and Catholic Church in France.

Motto of the French republic on the tympanum of a church in Aups, Var département, which was installed after the 1905 law on the Separation of the State and the Church. Such inscriptions on a church are very rare; this one was restored during the 1989 bicentennial of the French Revolution.

The French version of separation of church and state, called *laïcité*, is a product of French history and philosophy. It was formalized in a 1905 law providing for the separation of church and state, that is, the separation of religion from political power.

This model of a secularist state protects the religious institutions from state interference, but with public religious expression to some extent frowned upon. This aims to protect the public power from the influences of religious institutions, especially in public office. Religious views which contain no idea of public responsibility, or which consider religious opinion irrelevant to politics, are not impinged upon by this type of secularization of public discourse.

Former President Nicolas Sarkozy criticised "negative *laïcité*" and talked about a "positive *laïcité*" that recognizes the contribution of faith to French culture, history and society, allows for faith in the public discourse and for government subsidies for faith-based groups.[152] He visited the Pope in December 2007 and publicly emphasized France's Catholic roots, while

[152] Ibid. christiantoday.com

highlighting the importance of freedom of thought, advocating that faith should come back into the public sphere. François Hollande took a very different position during the 2012 presidential election, promising to insert the concept of *laïcité* into the constitution. In fact, the French constitution only says that the French Republic is "*laïque*" but no article in the 1905 law or in the constitution defines *laïcité*.

Nevertheless, there are certain entanglements in France which include:

- The most significant example consists in two areas, Alsace and Moselle (see Local law in Alsace-Moselle § Religion for further detail), where the 1802 Concordat between France and the Holy See still prevails because the area was part of Germany when the 1905 French law on the Separation of the Churches and the State was passed and the attempt of the laicist Cartel des gauches in 1924 failed due to public protests. Catholic priests as well as the clergy of three other religions (the Lutheran EPCAAL, the Calvinist EPRAL, and Jewish consistories) are paid by the state, and schools have religion courses. Moreover, the Catholic bishops of Metz and of Strasbourg are named (or rather, formally appointed) by the French Head of State on proposition of the Pope. In the same way, the presidents of the two official Protestant churches are appointed by the State, after proposition by their respective Churches. This makes the French

President the only temporal power in the world to formally have retained the right to appoint Catholic bishops, all other Catholic bishops being appointed by the Pope.

- In French Guiana the Royal Regulation of 1828 makes the French state pay for the Roman Catholic clergy, but not for the clergy of other religions.

- In the French oversea departments and territories since the 1939 décret Mandel the French State supports the Churches.

- The French President is *ex officio* a co-prince of Andorra, where Roman Catholicism has a status of state religion (the other co-prince being the Roman Catholic Bishop of Seu de Urgell, Spain). Moreover, French heads of states are traditionally offered an honorary title of Canon of the Papal Archbasilica of St. John Lateran, Cathedral of Rome. Once this honour has been awarded to a newly elected president, France pays for a *choir vicar*, a priest who occupies the seat in the canonical chapter of the Cathedral in lieu of the president (all French presidents have been male and at least formally Roman Catholic, but if one were not, this honour could most probably not be awarded to him or her). The French President also holds a seat in a few other canonical chapters in France.

- Another example of the complex ties between France and the Catholic Church consists in the *Pieux Établissements de la France à Rome et à Lorette*: five churches in Rome (Trinità dei Monti, St. Louis of the French, St. Ivo of the Bretons, St. Claude of the Free County of Burgundy, and St. Nicholas of the Lorrains) as well as a chapel in Loreto belong to France, and are administered and paid for by a special foundation linked to the French embassy to the Holy See.
- In Wallis and Futuna, a French overseas territory, national education is conceded to the diocese, which gets paid for it by the State
- A further entanglement consists in liturgical honours accorded to French consular officials under Capitations with the Ottoman Empire which persist for example in Lebanon and in ownership of the Catholic cathedral in Smyrna (Izmir) and the extraterritoriality of St. Anne's in Jerusalem and more generally the diplomatic status of the Holy Places.

GERMANY

Courtroom with Crucifix in Nuremberg, Germany, June 2016

The German constitution guarantees freedom of religion,[153] but there is not a complete separation of church and state in Germany. Officially recognized

[153] Section 4 of the Germany Basic laws

religious bodies operate as *Körperschaften des öffentlichen Rechts* (corporations of public law, as opposed to private). For recognized religious communities, some taxes (*Kirchensteuer*) are collected by the state this is at the request of the religious community and a fee is charged for the service. Religious instruction is an optional school subject in Germany.[55] The German State understands itself as neutral in matters of religious beliefs, so no teacher can be forced to teach religion. But on the other hand, all who do teach religious instruction need an official permission by their religious community. The treaties with the Holy See are referred to as concordats whereas the treaties with Protestant Churches and umbrellas of Jewish congregations are called "state treaties". Both are the legal framework for cooperation between the religious bodies and the German State at the federal as well as at the state level.

Greece

In Greece, there is considerable controversy about the separation between the State and the Church, causing many debates in the public sphere regarding if there shall be a more radical change in the Article 3, which is maintaining the Eastern Orthodox Church of Christ as the prevailing religion of the country. The actual debate concerning the separation of the Church from the State often becomes a tool for polarization in the political competition. More specifically, Article 3 of the Greek constitution argues the following:

1. "The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do the holy apostolic and synodal canons and sacred traditions. It is autocephalous and is administered by the Holy Synod of serving Bishops and the Permanent Holy Synod originating thereof and assembled as specified by the Statutory Charter of the Church in compliance with the provisions of the Patriarchal Tome of June 29, 1850 and the Synodal Act of September 4, 1928.

2. The ecclesiastical regime existing in certain districts of the State shall not be deemed contrary to the provisions of the preceding paragraph.

3. The text of the Holy Scripture shall be maintained unaltered. Official translation of the text into any other form of language, without prior sanction by the Autocephalous Church of Greece and the Great Church of Christ in Constantinople, is prohibited."

Moreover, the controversial situation about the no separation between the State and the Church seems to affect the recognition of religious groups in the country as there seems to be no official mechanism for this process.

India

Main articles: Secularism in India, Religion in India, Freedom of religion in India, Hindu nationalism, and Hindutva

Despite 80% of Indian population are Hindus, under the Constitution of India, India is a secular country and there are no special provisions favouring specific religions in its constitution. Jawaharlal Nehru declared India is a secular state in order to avoid Hindu nationalism and religious conflicts between Hinduism, Islam, Sikhism and other religions. Religious instructions are prohibited in schools wholly owned by the state.

As a result of such government power over religion, politicians are sometimes accused of playing votebank politics, i.e. of giving political support to issues for the sole purpose of gaining the votes of members of a particular community, including religious communities. Both the Indian National Congress (INC) and the Bharatiya Janata Party (BJP) have been accused of exploiting the people by indulging in vote bank politics. The Shah Bano case, a divorce lawsuit, generated much controversy when the Congress was accused of appeasing the Muslim orthodoxy by bringing in a parliamentary amendment to negate the Supreme Court's decision. After the 2002 Gujarat violence, there were allegations of political parties indulging in vote bank politics.[64]

Italy

Further information: History of Roman Catholicism in Italy and Holy See-Italy relations

In Italy the principle of separation of church and state is enshrined in Article 7 of the Constitution, which states: "The State and the Catholic Church are independent and sovereign, each within its own sphere. Their relations are regulated by the Lateran pacts. Amendments to such Pacts which are accepted by both parties shall not require the procedure of constitutional amendments."

Ireland

Further information: Constitution of the Republic of Ireland, History of Roman Catholicism in Ireland, and Holy See-Ireland relations

Japan

Shinto became the state religion in Japan with the Meiji Restoration in 1868, and suppression of other religions ensued[154] Under the American military occupation (1945–52) "State Shinto" was considered to have been used as a propaganda tool to propel the Japanese people to war. The Shinto Directive issued by the occupation government required that all state support for and

[154] htpps//e..wikipedia.org/wiki/separation -of –church-and-state#cite-note-japan 2012

involvement in any religious or Shinto institution or doctrine stop, including funding, coverage in textbooks, and official acts and ceremonies.

The new constitution adopted in 1947, Articles 20 and 89 of the Japanese Constitution protect freedom of religion, and prevent the government from compelling religious observances or using public money to benefit religious institutions.

South Korea

Freedom of religion in South Korea is provided for in the South Korean Constitution, which mandates the separation of religion and state, and prohibits discrimination on the basis of religious beliefs. Despite this, religious organizations play a major role and make strong influence in politics.

Mexico

The issue of the role of the Catholic Church in Mexico has been highly divisive since the 1820s. Its large land holdings were especially a point of contention. Mexico was guided toward what was proclaimed a separation of church and state by Benito Juárez who, in 1859, attempted to eliminate the role of the Roman Catholic Church in the nation by appropriating its land and prerogatives.[155] [156]

[155] Ibid. mexhistory
[156] Ibid. leylerdoclements

President Benito Juárez confiscated church property, disbanded religious orders and he also ordered the separation of church and state. His Juárez Law, formulated in 1855, restricting the legal rights of the church was later added to the Constitution of Mexico in 1857.[157] In 1859 the *Ley Lerdo* was issued – purportedly separating church and state, but actually involving state intervention in Church matters by abolishing monastic orders, and nationalizing church property.

In 1926, after several years of the Mexican Revolution and insecurity, President Plutarco Elías Calles, leader of the ruling National Revolutionary Party, enacted the Calles Law, which eradicated all the personal property of the churches, closed churches that were not registered with the State, and prohibited clerics from holding a public office. The law was unpopular; and several protesters from rural areas, fought against federal troops in what became known as the Cristero War. After the war's end in 1929, President Emilio Portes Gil upheld a previous truce where the law would remain enacted, but not enforced, in exchange for the hostilities to end.

Norway

An act approved in 2016 created the Church of Norway as an independent legal entity, effective from 1 January 2017. Before 2017 all clergy were civil

[157]Ibid. coerverpasztor2004

servants (employees of the central government). On 21 May 2012, the Norwegian Parliament passed a constitutional amendment that granted the Church of Norway increased autonomy, and states that "the Church of Norway, an Evangelical-Lutheran church, remains Norway's people's church, and is supported by the State as such" ("people's church" or *folkekirke* is also the name of the Danish state church, Folkekirken), replacing the earlier expression which stated that "the Evangelical-Lutheran religion remains the public religion of the State." The final amendment passed by a vote of 162–3. The three dissenting votes were all from the Centre Party.

The constitution also says that Norway's values are based on its Christian and humanist heritage, and according to the Constitution, the King is required to be Lutheran. The government will still provide funding for the church as it does with other faith-based institutions, but the responsibility for appointing bishops and provosts will now rest with the church instead of the government. Prior to 1997, the appointments of parish priests and residing chaplains was also the responsibility of the government, but the church was granted the right to hire such clergy directly with the new Church Law of 1997. The Church of Norway is regulated by its own law (*kirkeloven*) and all municipalities are required by law to support the activities of the Church of Norway and municipal authorities are represented in its local bodies.

Philippines

In Article II "Declaration of Principles and State Policies", Section 6, the 1987 Constitution of the Philippines declares, "The separation of Church and State shall be inviolable." This reasserts, with minor differences in wording and capitalization, a declaration made in Article XV, Section 15 of the 1973 Constitution.[158]

Similarly, Article III, Section 5 declares, "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights."; echoing Article IV, Section 8[159].

ROMANIA

Romania is a secular state and has no state religion. However, the role of religion in society is regulated by several articles of the Romanian Constitution.

Art 29[160]. Freedom of Conscience. (1) Freedom of thought and opinion, as well as freedom of religion, cannot be limited in any way. No one shall be coerced to adopt an opinion or adhere to a religious faith against their will.

[158] htpps//e..wikipedia.org/wiki/separation -of –church-and-state#cite-note-1973-const-76
[159] 1973 Constitution verbatim
[160] Romanian Constitution

(5) Religious cults are autonomous in relation to the state, which provides support including the facilitation of religious assistance in the army, hospitals, penitentiaries, retirement homes and orphanages.

Art 32[161]. Right to education (7) The state assures freedom of religious education, according to the requirements of each specific cult. In state schools, religious education is organized and guaranteed by law.

Saudi Arabia

The legal system of Saudi Arabia is based on Sharia, Islamic law derived from the Quran and the Sunnah (the traditions) of the Islamic prophet Muhammad, and therefore no separation of mosque and state is present.

Singapore

Singapore is home to people of many religions and does not have any state religion. The government of Singapore has attempted to avoid giving any specific religions priority over the rest.

In 1972 the Singapore government de-registered and banned the activities of Jehovah's Witnesses in Singapore. The Singaporean government claimed that this was justified because members of Jehovah's Witnesses refuse to perform

[161] ibid

military service (which is obligatory for all male citizens), salute the flag, or swear oaths of allegiance to the state. Singapore has also banned all written materials published by the International Bible Students Association and the Watchtower Bible and Tract Society, both publishing arms of the Jehovah's Witnesses. A person who possesses a prohibited publication can be fined up to $2,000 Singapore dollars and jailed up to 12 months for a first conviction[162].

Spain

Further information: Catholic Church and the Spanish Civil War and Catholic Church in Spain

In Spain, commentators have posited that the form of church-state separation enacted in France in 1905 and found in the Spanish Constitution of 1931 are of a "hostile" variety, noting that the hostility of the state toward the church was a cause of the breakdown of democracy and the onset of the Spanish Civil War. Following the end of the war, the Catholic Church regained an officially sanctioned, predominant position with General Franco. Religious freedom was guaranteed only in 1966, nine years before the end of the regime.

[162] htpps//e..wikipedia.org/wiki/separation -of –church-and-state#cite-note-IRFR

Since 1978, according to (section 163)[163] "No religion shall have a state character. The public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate cooperation relations with the Catholic Church and other confessions."

SWEDEN

The Church of Sweden was instigated by King Gustav I (1523–60) and within the half century following his death had become established as a Lutheran state church with significant power in Swedish society, itself under the control of the state apparatus. A degree of freedom of worship (for foreign residents only) was achieved under the rule of Gustav III (1771–92), but it was not until the passage of the Dissenter Acts of 1860 and 1874 that Swedish citizens were allowed to leave the state church – and then only provided that those wishing to do so first registered their adhesion to another, officially approved denomination. Following years of discussions that began in 1995, the Church of Sweden was finally separated from the state as from 1 January 2000. However, the separation was not fully completed. Although the status of state religion came to an end, the Church of Sweden nevertheless remains Sweden's national church, and as such is still regulated by the government through the law of the Church of Sweden. Therefore, it would be more appropriate to refer to a change of relation between state and church

[163] Spanish Constitution

rather than a separation. Furthermore, the Swedish constitution still maintains that the Sovereign and the members of the royal family have to confess an evangelical Lutheran faith, which in practice means they need to be members of the Church of Sweden to remain in the line of succession. Thusly according to the ideas of cuius regio, eius religio one could argue that the symbolic connection between state and church still remains.

SWITZERLAND

The articles 8 ("Equality before the law") and 15 ("Freedom of religion and conscience")[164] guarantees individual freedom of beliefs It notably states that "No person may be forced to join or belong to a religious community, to participate in a religious act or to follow religious teachings".

Churches and state are separated at the federal level since 1848. However, the article 72 ("Church and state") of the constitution determine that "The regulation of the relationship between the church and the state is the responsibility of the cantons". Some cantons of Switzerland recognise officially some churches (Catholic Church, Swiss Reformed Church, Old Catholic Church and Jewish congregations). Other cantons, such as Geneva and Neuchâtel are *laïques* (that is to say, secular).

[164] of the Federal Constitution of the Swiss Confederation

Turkey

Turkey, whose population is overwhelmingly Muslim, is also considered to have practiced the laïcité school of secularism since 1928, which the founding father Mustafa Kemal Atatürk's policies and theories became known as Kemalism.

Despite Turkey being an officially secular country, the Preamble of the Constitution states that "there shall be no interference whatsoever of the sacred religious feelings in State affairs and politics." In order to control the way religion is perceived by adherents, the State pays imams' wages (only for Sunni Muslims), and provides religious education (of the Sunni Muslim variety) in public schools. The State has a Directorate of Religious Affairs, directly under the President bureaucratically, responsible for organizing the Sunni Muslim religion – including what will and will not be mentioned in sermons given at mosques, especially on Fridays. Such an interpretation of secularism, where religion is under strict control of the State is very different from that of the First Amendment to the United States Constitution, and is a good example of how secularism can be applied in a variety of ways in different regions of the world. The exercise of their religion in Turkey by the Greek Orthodox and the Armenian Apostolic communities is partly regulated by the terms of the Treaty of Lausanne. No such official recognition extends to the Syriac communities.

UNITED KINGDOM

The Church of England, a part of the worldwide Anglican Communion, is an established church, and the British Sovereign is the titular Supreme Governor, and cannot be a Roman Catholic. Until the Succession to the Crown Act 2013, the monarch could not be married to a Catholic.

Around a third of state schools in England have a religious affiliation, with the vast majority being Christian. At faith schools, the worship must be in accordance with the religion or religious denomination of the school. In state run Christian schools in England, Wales and Northern Ireland (but not in privately run schools), there is a requirement for a daily act of worship that is "wholly or mainly of a Christian character", although in England, up to 76% of Christian affiliated faith schools do not comply with the law and the requirement is not enforced by Ofsted. Non-Christian faith schools are exempt (instead having to have their own form of worship) and sixth-form pupils (in England and Wales) and parents of younger pupils can opt out. Official reports have recommended removing the requirement entirely. The High Court of the United Kingdom has ruled in favour of challenges, brought by pupil families supported by the British Humanist Association, to secondary-level religious studies exam syllabuses that excluded non-religious worldviews.[165]

[165] htpps//e..wikipedia.org/wiki/separation -of –church-and-state#guardian 2015

In England, senior Church appointments are Crown appointments; the Church carries out state functions such as coronations; Anglican representatives have an automatic role on Standing Advisory Councils on Religious Education; and 26 diocesan bishops have seats in the House of Lords, where they are known as the Lords Spiritual as opposed to the layLords Temporal. The Lords Spiritual have a significant influence when they vote as a bloc on certain issues, notably moral issues like abortion and euthanasia. The Anglican Church also has specific legal rights and responsibilities in solemnised marriages that are different from other faith organisations. Non-religious couples can have a civil wedding with no religious elements, but non-religious humanist weddings are not yet legally recognised in their own right. Collective worship makes prayer and worship of a Christian character mandatory in all schools, but parents can remove their children from these lessons, and sixth formers have the right to opt out.

The Church of Scotland (or Kirk) is the largest religious denomination in Scotland, however, unlike the Church of England it is Presbyterian and (since 1921) not a branch of the state, with the Sovereign holding no formal role in the Church other than being an ordinary member. However, though the Kirk is disestablished, Scotland is not a secular polity. The Kirk remains a national church to which the state has special obligations; it is conventional that the monarch, who is head of state, must attend the Church when she visits Scotland, and they swear in their accession oath to maintain and preserve the

church. The state also gives numerous preferences to the Church of Scotland and Catholic Church, particularly in education. The blasphemy law has not been abolished in Scotland, though it has fallen into disuse. Non-religious couples can have a civil wedding with no religious elements, and humanist weddings have been legally recognised since 2005, and enshrined in Scottish law since 2017. Collective worship makes prayer and worship of a Christian character mandatory in all schools, but parents can remove their children from these lessons, though sixth formers have no right to opt out.

The Church in Wales was disestablished in 1920 (although certain border parishes remain part of the Established Church of England).[166] Unlike the UK Government and to some extent the Scottish Government, the Welsh Government has no religious links, though state-funded religious schools are routinely approved in Wales. Collective worship makes prayer and worship of a Christian character mandatory in all Welsh schools.

The Church of Ireland was disestablished as early as 1871. Northern Ireland is regarded as the most traditionally Christian country within the UK. Publicly funded Schools in Northern Ireland are either State or Catholic maintained schools. State schools can be classed as: Controlled (by the Education Authority), Voluntary Grammar, Integrated and Special Schools. Irish-Medium Schools are operated by both the State and the Catholic

[166] Ibid. Enyedi 2003

Church. Despite the common notion of 'Protestant' and 'Catholic' Schools among many citizens, all State schools accept all religions without bias, with the exception of Integrated schools which require a set ratio of 40:40:20 Protestant, Catholic and Other (Mixed or non-Christian Religious).[*citation needed*] An identification with the "Protestant" or "Roman Catholic" community is sought on equal opportunities-monitoring forms regardless of actual personal religious beliefs; as the primary purpose is to monitor cultural discrimination by employers. Atheists should select which community they come from, however participation is not compulsory. Religious Education is compulsory for all children up to the age of 16, with the four major Church denominational bodies (The Catholic Church, The Presbyterian Church in Ireland, The Church of Ireland and the Methodist Church) agreeing on the content of the syllabus, focussing on Christianity and Secular Ethics. World Religions have to be introduced between the ages of 11 and 14. An act of collective Christian worship is mandatory in all Northern Irish schools, usually consisting of a short Bible reading, lesson or dramatisation and a prayer during morning assembly.[*citation needed*]

United States

James Madison, drafter of the Bill of Rights

The First Amendment, which was ratified in 1791, states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof." However, the phrase "separation of church and state" itself does not appear in the United States Constitution. The states themselves were free to establish an official religion, and twelve out of the thirteen had official religions. The First Great Awakening (c. 1730-1755) had increased religious diversity in the Thirteen Colonies, and this combined with the American Revolution prompted the five southernmost states to disestablish the Church of England between 1776 and 1790.[167] The Second Great Awakening (starting c. 1790) further increased religious diversity and prompted another round of disestablishments including New Hampshire (1817), Connecticut (1818), and Massachusetts (1833).

The phrase of Jefferson (see above) was quoted by the United States Supreme Court first in 1878, and then in a series of cases starting in 1947. The Supreme Court did not consider the question of how this applied to the states until 1947; when they did, in *Everson v. Board of Education*[168], the court incorporated the establishment clause, determining that it applied to the states and that a law enabling reimbursement for busing to all schools (including parochial schools) was constitutional.

[167] htpps//e..wikipedia.org/wiki/separation -of –church-and-state#cite-note mtsu
[168] 330 U.S.1(1947)

Prior to its incorporation, unsuccessful attempts were made to amend the constitution to explicitly apply the establishment clause to states in the 1870s and 1890s.

The concept was argued to be implicit in the flight of Roger Williams from religious oppression in the Massachusetts Bay Colony to found the Colony of Rhode Island and Providence Plantations on the principle of state neutrality in matters of faith.

Williams was motivated by historical abuse of governmental power, and believed that government must remove itself from anything that touched upon human beings' relationship with God, advocating a "hedge or wall of Separation between the Garden of the Church and the Wilderness of the world" in order to keep religion pure.

Through his work Rhode Island's charter was confirmed by King Charles II of England, which explicitly stated that no one was to be "molested, punished, disquieted, or called in question, for any differences in opinion, in matters of religion".

Williams is credited with helping to shape the church and state debate in England, and influencing such men as John Milton and particularly John Locke, whose work was studied closely by Thomas Jefferson, James Madison, and other designers of the U.S. Constitution. Williams theologically derived his views mainly from Scripture and his motive is seen as religious, but

Jefferson's advocation of religious liberty is seen as political and social. Though no states currently have an established religion, almost all of the state constitutions invoke God and some originally required officeholders to believe in the Holy Trinity.

Early treaties and court decisions

The Treaty of Paris

In 1783, the United States signed a treaty with Great Britain that was promulgated "in the name of the Most Holy and Undivided Trinity".[169] It was dipped in religious language, crediting "'Divine Providence' with having disposed the two parties to 'forget all past misunderstandings,' and is dated 'in the year of our Lord' 1783".

The Treaty of Tripoli

In 1797, the United States Senate ratified a treaty with Tripoli that stated in Article 11:

As the Government of the United States of America is not, in any sense, founded on the Christian religion; as it has in itself no character of enmity against the laws, religion, or tranquility, of Mussulmen; and, as the said States never entered into any war, or act of hostility against any Mahometan nation,

[169] htpps//e..wikipedia.org/wiki/separation -of –church-and-state#BittkerldlemanRavitch

it is declared by the parties, that no pretext arising from religious opinions, shall ever produce an interruption of the harmony existing between the two countries.

According to Frank Lambert, Professor of History at Purdue University, the assurances in Article 11 were intended to allay the fears of the Muslim state by insisting that religion would not govern how the treaty was interpreted and enforced. President John Adams and the Senate made clear that the pact was between two sovereign states, not between two religious powers.

Supporters of the separation of church and state argue that this treaty, which was ratified by the Senate, confirms that the government of the United States was specifically intended to be religiously neutral. The treaty was submitted by President Adams and unanimously ratified by the Senate.

Church of the Holy Trinity v. United States

In the 1892 case *Church of the Holy Trinity v. United States*,[170] Supreme Court Justice David Brewer wrote for a unanimous Court that "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. ... [T]his is a Christian nation."[171]

[170] 143 U.S,457 (1892)

[171] htpps//e..wikipedia.org/wiki/separation -of –church-and-state#Finkelman

Legal historian Paul Finkelman writes that:

Brewer, the son of a Congregationalist missionary to Asia Minor, quoted several colonial charters, state constitutions, and court decisions that referred to the importance of Christian belief in the affairs of the American people; cited the practice of various legislative bodies of beginning their sessions with prayer, and noted the large number of churches and Christian charitable organizations that exist in every community in the country as evidence that this is a Christian nation. In doing so, Brewer expressed the prevailing nineteenth-century Protestant view that America is a Christian nation.

Use of the phrase

The phrase "separation of church and state" is derived from a letter written by President Thomas Jefferson in 1802 to Baptists from Danbury, Connecticut, and published in a Massachusetts newspaper soon thereafter. In that letter, referencing the First Amendment to the United States Constitution, Jefferson writes:

Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an

establishment of religion, or prohibiting the free exercise thereof", thus building a wall of separation between Church & State.[172]

Another early user of the term was James Madison, the principal drafter of the United States Bill of Rights. In a 1789 debate in the House of Representatives regarding the draft of the First Amendment, the following was said:

August 15, 1789. Mr. [Peter] Sylvester [of New York] had some doubts. ... He feared it [the First Amendment] might be thought to have a tendency to abolish religion altogether. ... Mr. [Elbridge] Gerry [of Massachusetts] said it would read better if it was that "no religious doctrine shall be established by law." ... Mr. [James] Madison [of Virginia] said he apprehended the meaning of the words to be, that "Congress should not establish a religion, and enforce the legal observation of it by law." ... [T]he State[s] ... seemed to entertain an opinion that under the clause of the Constitution. ... it enabled them [Congress] to make laws of such a nature as might ... establish a national religion; to prevent these effects he presumed the amendment was intended. ... Mr. Madison thought if the word "National" was inserted before religion, it would satisfy the minds of honorable gentlemen. ... He thought if the word "national" was introduced, it would point the amendment directly to the object it was intended to prevent.

[172] htpps//e..wikipedia.org/wiki/separation -of –church-and-state#jefferson .

Madison contended "Because if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body." Several years later he wrote of "total separation of the church from the state". "Strongly guarded as is the separation between Religion & Govt in the Constitution of the United States", Madison wrote, and he declared, "practical distinction between Religion and Civil Government is essential to the purity of both, and as guaranteed by the Constitution of the United States." In a letter to Edward Livingston Madison further expanded,

We are teaching the world the great truth that Govts. do better without Kings & Nobles than with them. The merit will be doubled by the other lesson that Religion flourishes in greater purity, without than with the aid of Govt.

Thomas Jefferson's tombstone. The inscription, as he stipulated, reads, "Here was buried Thomas Jefferson, author of ... the Statute of Virginia for Religious Freedom ...."

This attitude is further reflected in the Virginia Statute for Religious Freedom, originally authored by Jefferson and championed by Madison, and guaranteeing that no one may be compelled to finance any religion or denomination.

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

Under the United States Constitution, the treatment of religion by the government is broken into two clauses: the establishment clause and the free exercise clause. Both are discussed in regard to whether certain state actions would amount to an impermissible government establishment of religion.

The phrase was also mentioned in an eloquent letter written by President John Tyler on July 10, 1843. During the 1960 presidential campaign the potential influence of the Catholic Church on John F. Kennedy's presidency was raised. If elected, it would be the first time that a Catholic would occupy the highest office in the United States. John F. Kennedy, in his Address to the Greater Houston Ministerial Association on 12 September 1960, addressed the question directly, saying,

I believe in an America where the separation of church and state is absolute – where no Catholic prelate would tell the President (should he be Catholic) how to act, and no Protestant minister would tell his parishioners for whom to vote – where no church or church school is granted any public funds or

political preference – and where no man is denied public office merely because his religion differs from the President who might appoint him or the people who might elect him. I believe in an America that is officially neither Catholic, Protestant nor Jewish – where no public official either requests or accepts instructions on public policy from the Pope, the National Council of Churches or any other ecclesiastical source – where no religious body seeks to impose its will directly or indirectly upon the general populace or the public acts of its officials – and where religious liberty is so indivisible that an act against one church is treated as an act against all. [...] I do not speak for my church on public matters – and the church does not speak for me. Whatever issue may come before me as President – on birth control, divorce, censorship, gambling or any other subject – I will make my decision in accordance with these views, in accordance with what my conscience tells me to be the national interest, and without regard to outside religious pressures or dictates. And no power or threat of punishment could cause me to decide otherwise. But if the time should ever come – and I do not concede any conflict to be even remotely possible – when my office would require me to either violate my conscience or violate the national interest, then I would resign the office; and I hope any conscientious public servant would do the same.

The United States Supreme Court has referenced the separation of church and state metaphor more than 25 times, though not always fully embracing

the principle, saying "the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state". In *Reynolds*, the Court denied the free exercise claims of Mormons in the Utah territory who claimed polygamy was an aspect of their religious freedom. The Court used the phrase again by Justice Hugo Black in 1947 in *Everson*. In a minority opinion in *Wallace v. Jaffree*[173], Justice Rehnquist presented the view that the establishment clause was intended to protect local establishments of religion from federal interference. Rehnquist made numerous citations of cases that rebutted the idea of a total wall of separation between Church and State. A result of such reasoning was Supreme Court support for government payments to faith-based community projects. Justice Scalia has criticized the metaphor as a bulldozer removing religion from American public life.

Pledge of Allegiance

Critics of the American Pledge of Allegiance have argued that the use of the phrase "under God" violates the separation of church and state. While the pledge was created by Francis Bellamy in 1891, in 1954, the Knights of Columbus, a Catholic organization, campaigned with other groups to have

[173] 466 U.S.924(1984)

the words "under God" added to the pledge. On June 14, 1954, President Dwight Eisenhower signed the bill to make the addition.

Since then, critics have challenged the existence of the phrase in the Pledge. In 2004, Michael Newdow, an ordained atheist minister of the Universal Life Church challenged a Californian law which required students to recite the pledge. He said the law violated his daughter's right to free speech. The Supreme Court ruled in favor of the school system in *Elk Grove Unified School District v. Newdow*[174], mainly due to the fact that the father could not claim sufficient custody of the child over his ex-wife who was the legal guardian and had opposed the lawsuit. Additionally, the Supreme Court stated that teachers leading students in the pledge was constitutional, and therefore the pledge should stay the same.

Religious views

Islam

The separation of mosque and state happened very early on in Islamic history. Muslim scholars were endowed and separated from the state, which they became very critical of. The state needed the scholars to legitimize their rule while the scholars did not need the state. Thus, the scholars were generally independent, with some bumps in history like the mihna being the exception

[174] 542 U.S .1 (2004)

rather than the rule. Richard Bulliet writes that during the colonial and postcolonial periods of the Muslim world, a main goal of the political tyrants was to remove the independence of the scholars via removing their economic and social independence. The result is the doors of tyranny opened up which is still visible today in many parts of the Muslim world.[175][176][177] The Constitution of Medina which, in the words of Dr. Craig Considine, was one of the earliest forms of secular governance, providing as it did, equal religious and communal rights to Muslims, Jews and pagans, while recognising them all as bound together by the identity of the city-state.

Ahmadiyya

According to the Ahmadiyya Muslim Community's understanding of Islam, Islamic principles state that the politics of government should be separate from the doctrine of religion. Special preference should not be given to a Muslim over a non-Muslim.

Christianity

Further information: Christian state, Christian democracy, and Christian Reconstructionism

[175] htpps//e..wikipedia.org/wiki/separation -of –church-and-state#Firas
[176] htpps//e..wikipedia.org/wiki/separation -of –church-and-state#bulliet
[177] Ibid Halaq

Historically, the Catholic Church and the Eastern Orthodox Church have deemed a close relationship between church and state desirable wherever possible as per the 2105 of the Catechism of the Catholic Church. The Orthodox churches have historically at times formed a "symphonia" with the state, whether de jure or de facto. On the other hand, while some Protestants hold views similar to those above, some Protestants refuse to vote, carry arms, or participate in civil government in any way, often leading to their persecution, as happened to Anabaptists, their descendants including the Amish, Mennonites, and Quakers, in the 20th Century. Anabaptist Protestants and Jehovah's Witnesses, in many countries, believing by not participating they are closer to the Kingdom of God, since "Jesus answered (Pilate), 'My kingdom is not of this world: if my kingdom were of this world, then would my servants fight (to defend him).' " John 18:36. For them, the term "Christian nation" cannot be a valid governmental position, leaving only Christian people, possibly in Christian communities, beyond which are the "things which are Caesar's" – Matthew 22:21.

Methodism

In its section on National Reform, the *Book of Discipline* of the Allegheny Wesleyan Methodist Connection states, with respect to Church and state relations:[178] [179]

It shall be the duty of the ministers and members of the Wesleyan Methodist Connection to use their influence in every feasible manner in favor of a more complete recognition of the authority of Almighty God, in the secular and civil relations, both of society and of government, and the authority of our Lord Jesus Christ as King of nations as well as King of saints.

As such, the Allegheny Wesleyan Methodist Church advocates for Bible reading in public schools, chaplaincies in the Armed Forces and in Congress, blue laws (reflecting historic Methodist belief in Sunday Sabbatarianism), and amendments that advance the recognition of God.

Reformed

The Reformed tradition of Christianity (Congregationalist, Continental Reformed, Presbyterian denominations) have also addressed the issue of the

[178] htpps//e..wikipedia.org/wiki/separation -of –church-and-state#AWMC2014
[179] htpps//e..wikipedia.org/wiki/separation -of –church-and-state#WMC 1896

relationship between the Church and state. In its 1870 General Assembly, the Presbyterian Church in the United States stated:[180]

We should regard the successful attempt to expel all religious instruction and influence from our public schools as an evil of the first magnitude. Nor do we see how this can be done without inflicting a deadly wound upon the intellectual and moral life of the nation...We look upon the state as an ordinance of God, and not a mere creature of the popular will; and, under its high responsibility to the Supreme Ruler of the world, we hold it to be both its right and bound duty to educate its children in those elementary principles of knowledge and virtue which are essential to its own security and well-being. The union of church and state is indeed against our American theory and constitutions of government; but the most intimate union of the state with the saving and conservative forces of Christianity is one of the oldest customs of the country, and has always ranked a vital article of our political faith.

Catholicism

The first full articulation of the Catholic doctrine on the principles of the relationship of the Catholic Church to the state (at the time, the Eastern Roman Empire) is contained in the document Famuli vestrae pietatis, written

[180] htpps//e..wikipedia.org/wiki/separation -of –church-and-state#Thompson 1902

by Pope Gelasius I to the Emperor, which states that the Church and the state should work together in society, that the state should recognize the Church's role in society, with the Church holding superiority in moral matters and the state having superiority in temporal matters. Monsignor John A. Ryan speaks of this Catholic doctrine thusly: "If there is only one true religion, and if its possession is the most important good in life, for states as well as individuals, then the public profession, protection, and promotion of this religion, and the legal prohibition of all direct assaults upon it, becomes one of the most obvious and fundamental duties of the state. For it is the business of the state to safeguard and promote human welfare in all departments of life."

In the 1864 Syllabus of Errors, issued by Pope Pius IX, the idea that "the Church ought to be separated from the State, and the State from the Church" is condemned.

In his 1906 encyclical, Vehementer Nos, Pope Pius X condemns separation, writing

That the State must be separated from the Church is a thesis absolutely false, a most pernicious error. Based, as it is, on the principle that the State must not recognize any religious cult, it is in the first place guilty of a great injustice to God; for the Creator of man is also the Founder of human societies, and preserves their existence as He preserves our own. We owe Him, therefore, not only a private cult, but a public and social worship to honor Him.

Gaudium et spes ("Joy and Hope"), the 1965 Pastoral Constitution on the Church in the Modern World, noted that "... the Church has always had the duty of scrutinizing the signs of the times and of interpreting them in the light of the Gospel."[181] The mission of the Church recognized that the realities of secularization and pluralism exist despite the traditional teaching on confessional statehood. Because of this reality of secularisation, it also recognized and encouraged the role of the laity in the life of the Church in the secular world, viewing the laity as much-needed agents of change in order to bring about a transformation of society more in line with Catholic teaching. "This council exhorts Christians, as citizens of two cities, to strive to discharge their earthly duties conscientiously and in response to the Gospel spirit." This was further expanded in *Apostolicam Actuositatem*, Decree on the Apostolate of the Laity, of 18 November 1965.

Apostolicam Actuositatem, the Second Vatican Council's "Decree on the Apostolate of the Laity", was issued 18 November 1965. The purpose of this document was to encourage and guide lay people in their Christian service. "Since the laity, in accordance with their state of life, live in the midst of the world and its concerns, they are called by God to exercise their apostolate in the world like leaven, with the ardor of the Spirit of Christ." Francis Cardinal Arinze explains that lay persons "...are called by Baptism to witness to Christ

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in the secular sphere of life; that is in the family, in work and leisure, in science and cultural, in politics and government, in trade and mass media, and in national and international relations".[182]

The Catholic teaching in *Dignitatis Humanae*, the Second Vatican Council's Declaration on Religious Freedom (1986), states that all people are entitled to a degree of religious freedom as long as public order is not disturbed and that constitutional law should recognize such freedom.[132]"If, in view of peculiar circumstances obtaining among peoples, special civil recognition is given to one religious community in the constitutional order of society, it is at the same time imperative that the right of all citizens and religious communities to religious freedom should be recognized and made effective in practice. At the same time, the document reiterated that the Church "leaves untouched traditional Catholic doctrine on the moral duty of men and societies toward the true religion and toward the one Church of Christ". The traditional teaching of the duty of society towards the Church is described in the current edition of the Catechism of the Catholic Church, number 2105.

Pope John Paul II, in his 2005 letter to the Bishops of France proposed that not only is Separation of State and Church permissible, it is in fact a part of the Church's Social Doctrine. The Pope writes:

[182] Ibid Arinze

"Correctly understood, the principle of *laïcité* (secularity), to which your Country is deeply attached, is also part of the social teaching of the Church. It recalls the need for a clear division of powers (cf. *Compendium of the Social Doctrine of the Church,* nn. 571-572) that echoes Christ's invitation to his disciples: "Render to Caesar the things that are Caesar's, and to God the things that are God's" (Lk 20: 25). For its part, just as the non-denominational status of the State implies the civil Authority's abstention from interference in the life of the Church and of the various religions, in the spiritual realm it enables all society's members to work together at the service of all and of the national community. Likewise, as the Second Vatican Ecumenical Council recalled, the management of temporal power is not the Church's vocation for: "The Church, by reason of her role and competence, is not identified with any political community nor bound by ties to any political system" (Pastoral Constitution *Gaudium et Spes,* n. 76 2; cf. n. 42). Yet, at the same time, it is important that all work in the general interest and for the common good. The Council also stated: "The political community and the Church... each serves the personal and social vocation of the same human beings. This service will redound the more effectively to the welfare of all insofar as both institutions practise better cooperation" (*ibid.* 3)"

Letter of Pope John Paul II to The Bishops of France

The Catholic Church takes the position that the Church itself has a proper role in guiding and informing consciences, explaining the natural law, and

judging the moral integrity of the state, thereby serving as check to the power of the state. The Church teaches that the right of individuals to religious freedom is an essential dignity.

Catholic philosopher Thomas Storck argues that, once a society becomes "Catholicised" and adopts the Church as the state religion, it is further morally bound: "'the just requirements of public order' vary considerably between a Catholic state and a religiously neutral state. If a neutral state can prohibit polygamy, even though it is a restriction on religious freedom, then a Catholic state can likewise restrict the public activity of non-Catholic groups. "The just requirements of public order" can be understood only in the context of a people's traditions and modes of living, and in a Catholic society would necessarily include that social unity based upon a recognition of the Catholic Church as the religion of society, and the consequent exclusion of all other religions from public life. Western secular democracies, committed to freedom of religion for all sects, find no contradiction in proscribing polygamy, although some religions permit it, because its practice is contrary to the traditions and mores of these nations. A Catholic country can certainly similarly maintain its own manner of life."

If, under consideration of historical circumstances among peoples, special civil recognition is given to one religious community in the constitutional order of a society, it is necessary at the same time that the right of all citizens

and religious communities to religious freedom should be acknowledged and maintained.

The Church takes stances on current political issues, and tries to influence legislation on matters it considers relevant. For example, the Catholic bishops in the United States adopted a plan in the 1970s calling for efforts aimed at a Constitutional amendment providing "protection for the unborn child to the maximum degree possible".

Benedict XVI regards modern idea of freedom (meaning the Church should be free from governmental coercion and overtly political influence from the state) as a legitimate product of the Christian environment, in a similar way to Jacques Le Goff. However, contrary to the French historian, the Pope rejects the conception of religion as just a private affair.

Friendly and hostile separation

Scholars have distinguished between what can be called "friendly" and "hostile" separations of church and state. The friendly type limits the interference of the church in matters of the state but also limits the interference of the state in church matters. The hostile variety, by contrast, seeks to confine religion purely to the home or church and limits religious education, religious rites of passage and public displays of faith.

The hostile model of secularism arose with the French Revolution and is typified in the Mexican Revolution, its resulting Constitution, in the First

Portuguese Republic of 1910, and in the Spanish Constitution of 1931. The hostile model exhibited during these events can be seen as approaching the type of political religion seen in totalitarian states.

The French separation of 1905 and the Spanish separation of 1931 have been characterized as the two most hostile of the twentieth century, although the current church-state relations in both countries are considered generally friendly.[183] Nevertheless, France's former President Nicolas Sarkozy at the beginning of his term considered his country's current state of affairs a "negative *laïcité*" and wanted to develop a "positive *laïcité*" more open to religion.[184] The concerns of the state toward religion have been seen by some as one cause of the civil war in Spain[149] and Mexico.

The French Catholic philosopher and drafter of the *Universal Declaration of Human Rights*, Jacques Maritain, noted the distinction between the models found in France and in the mid-twentieth century United States.[185] He considered the U.S. model of that time to be more amicable because it had both "sharp distinction and actual cooperation" between church and state, what he called a "historical treasure" and admonished the United States, "Please to God that you keep it carefully, and do not let your concept of

[183] Arguing cooperative politics
[184] htpps//e..wikipedia.org/wiki/separation -of –church-and-state#christiantoday
[185] htpps//e..wikipedia.org/wiki/separation -of –church-and-state#christ and culture - revisted

separation veer round to the European one."[150]Alexis de Tocqueville, another French observer, tended to make the same distinction: "In the U.S., from the beginning, politics and religion were in accord.

By their actions, the Founding Fathers made clear that their primary concern was religious freedom, not the advancement of a state religion. Individuals, not the government, would define religious faith and practice in the United States. Thus the Founders ensured that in no official sense would America be a Christian Republic. Ten years after the Constitutional Convention ended its work, the country assured the world that the United States was a secular state, and that its negotiations would adhere to the rule of law, not the dictates of the Christian faith. The assurances were contained in the Treaty of Tripoli of 1797 and were intended to allay the fears of the Muslim state by insisting that religion would not govern how the treaty was interpreted and enforced. John Adams and the Senate made clear that the pact was between two sovereign states, not between two religious powers.

Tyler wrote, "The United States have adventured upon a great and noble experiment, which is believed to have been hazarded in the absence of all previous precedent – that of total separation of Church and State. No religious establishment by law exists among us. The conscience is left free from all restraint and each is permitted to worship his Maker after his own

judgment. The offices of the Government are open alike to all. No tithes are levied to support an established Hierarchy, nor is the fallible judgment of man set up as the sure and infallible creed of faith. The Mahommedan, if he will to come among us would have the privilege guaranteed to him by the constitution to worship according to the Koran; and the East Indian might erect a shrine to Brahma if it so pleased him. Such is the spirit of toleration inculcated by our political Institutions . ... The Hebrew persecuted and down trodden in other regions takes up his abode among us with none to make him afraid . ... and the Aegis of the Government is over him to defend and protect him. Such is the great experiment which we have cried, and such are the happy fruits which have resulted from it; our system of free government would be imperfect without it.") quoted in Nicole Guétin[186],

Establishment Clause (Separation of Church and State)

Vashti McCollum was one of the cases in which the Supreme Court began to interpret the First Amendment's religious establishment clause known as "separation of church and state." (AP Photo/Herbert K. White. Reprinted with permission of The Associated Press)

[186] Religious ideology in American politics: a history (2009) p. 85

The first clause in the Bill of Rights states that "Congress shall make no law respecting an establishment of religion."

Establishment clause of First Amendment often interpreted to require separation of church and state

For approximately the first 150 years of the country's existence, there was little debate over the meaning of this clause in the Constitution. As the citizenry became more diverse, however, challenges arose to existing laws and practices, and eventually, the Supreme Court was called upon to determine the meaning of the establishment clause.

Though not explicitly stated in the First Amendment, the clause is often interpreted to mean that the Constitution requires the separation of church and state.

'Separation of church and state' metaphor rooted in early American fears of government involvement

Roger Williams, founder of Rhode Island, was the first public official to use this metaphor. He opined that an authentic Christian church would be possible only if there was "a wall or hedge of separation" between the "wilderness of the world" and "the garden of the church." Williams believed that any government involvement in the church would corrupt the church.

The most famous use of the metaphor was by Thomas Jefferson in his 1802 letter to the Danbury Baptist Association. In it, Jefferson declared that when the American people adopted the establishment clause they built a “wall of separation between the church and state.”

Jefferson had earlier witnessed the turmoil of the American colonists as they struggled to combine governance with religious expression. Some colonies experimented with religious freedom while others strongly supported an established church.

Thomas Jefferson created the most famous use of the metaphor "separation of church and state" in a letter where he mentioned a "wall of separation." (Image via White House Historical Association, painted by Rembrandt Peale in 1800, public domain)

Jefferson fought to disestablish Anglican church in Virginia colony

One of the decisive battlegrounds for disestablishment was Jefferson’s colony of Virginia, where the Anglican Church had long been the established church.

Both Jefferson and fellow Virginian James Madison felt that state support for a particular religion or for any religion was improper. They argued that compelling citizens to support through taxation a faith they did not follow violated their natural right to religious liberty. The two were aided in their

fight for disestablishment by the Baptists, Presbyterians, Quakers, and other "dissenting" faiths of Anglican Virginia.

During the debates surrounding both its writing and its ratification, many religious groups feared that the Constitution offered an insufficient guarantee of the civil and religious rights of citizens. To help win ratification, Madison proposed a bill of rights that would include religious liberty.

As presidents, though, both Jefferson and Madison could be accused of mixing religion and government. Madison issued proclamations of religious fasting and thanksgivings while Jefferson signed treaties that sent religious ministers to the Native Americans. And from its inception, the Supreme Court has opened each of its sessions with the cry "God save the United States and this honorable court."

Public school religion cases allow Supreme Court to define establishment clause protection

It was not until after World War II that the Court interpreted the meaning of the establishment clause.

In *Everson v. Board of Education* (1947)[187], the Court held that the establishment clause is one of the liberties protected by the due process clause of the Fourteenth Amendment, making it applicable to state laws and local

[187] 330 U.S.1 (1947)

ordinances. Since then the Court has attempted to discern the precise nature of the separation of church and state.

In 1971 the Court considered the constitutionality of a Pennsylvania statute that provided financial support to nonpublic schools for teacher salaries, textbooks, and instructional materials for secular subjects and a Rhode Island statute that provided direct supplemental salary payments to teachers in nonpublic elementary schools.

The Schempp family, brought suit that led to a 1963 ruling by the Supreme Court in Abington School District v. Schempp that banned bible reading and the recitation of The Lord's Prayer in public schools, saying that it violated the First Amendment's establishment clause requiring separation of church and state. (AP Photo/John F. Urwiller, used with permission from The Associated Press.)

Lemon test developed to vet laws dealing with religious establishment

In *Lemon v. Kurtzman* (1971)[188], the Court established a three-pronged test for laws dealing with religious establishment. To be constitutional a statute must have "a secular legislative purpose," it must have principal effects that neither advance nor inhibit religion, and it must not foster "an excessive government entanglement with religion.

[188] 403 U.S.602(1971)

Twenty-six years later the Court modified the Lemon test in *Agostini v. Felton* (1997) by combining the last two elements, leaving a "purpose" prong and a modified "effects" prong.

In *County of Allegheny v. American Civil Liberties Union* (1989)[189], a group of justices led by Justice Anthony M. Kennedy in his dissent developed a coercion test: the government does not violate the establishment clause unless it provides direct aid to religion in a way that would tend to establish a state church or involve citizens in religion against their will.

Endorsement test used in cases involving religious displays on public property

Justice Sandra Day O'Connor proposed an endorsement test that asks whether a particular government action amounts to an endorsement of religion.

In *Lynch v. Donnelly* (1984)[190], O'Connor noted that the establishment clause prohibits the government from making adherence to a religion relevant to a person's standing in the political community. Her fundamental concern was whether government action conveyed a message to non-adherents that they are outsiders. The endorsement test is often invoked in religious display cases.

[189] 492 U.S.(1989)
[190] 465 U.S.668(1984)

In *McCreary County v. American Civil Liberties Union* (2005), the Court ruled that the display of the Ten Commandments in two Kentucky courtrooms was unconstitutional but refused in the companion case, *Van Orden v. Perry* (2005)[191], to require the removal of a long-standing monument to the Ten Commandments on the grounds of the Texas State Capitol.

David Harlow, left, and Michael Stys, view the Ten Commandments monument on display at the State Judicial Building in Alabama in 2002. A

[191] 545 U.S.677(2005)

U.S. District Court ruled that placing the monument in the state building was a violation of the separation of church and state. (AP Photo/Dave Martin. Used with permission from The Associated Press)

Court says in neutrality test that government must treat religous groups the same

Questions involving appropriate use of government funds are increasingly subject to the neutrality test, which requires the government to treat religious groups the same as it would any other similarly situated group.

In a test of Ohio's school voucher program, the Court held 5-4 in *Zelman v. Simmons-Harris* (2002) that Ohio's program is part of the state's general, neutral undertaking to provide educational opportunities to children and does not violate the establishment clause. In his opinion for the majority, Chief Justice William H. Rehnquist wrote that the "Ohio program is entirely neutral with respect to religion."

More recently, in 2022, the Supreme Court ruled 6-3 in *Carson v. Makin* that Maine could not exclude families who send their children to religious schools from its state-funded tuition reimbursement program. The program helped children who live in rural areas without public schools nearby, but said the tuition could not be used for religious schools. The court, in a ruling written by Justice John Roberts Jr., said that the policy violated the parents' right to freely exercise their religion and that a public benefit that flowed to a religious

school based on a parent's choice did not "offend" the establishment clause of the First Amendment.

From the colonial era to the present, religions and religious beliefs have played a significant role in the political life of the United States. Religion has been at the core of some of the best and worst movements in the country's history. As religious diversity continues to grow, concerns about separation of church and state are likely to continue.

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While many of George Washington's contemporaries portrayed him as a devout Christian, Thomas Jefferson's foes depicted him as an infidel and an atheist. Given how similar their religious views and practices were, these radically different appraisals of Washington and Jefferson are ironic. Religion mesmerized, tantalized, alarmed, and sometimes inspired Jefferson, and he discussed religious issues, movements, and leaders often in his conversation and correspondence and occasionally in his addresses and published writings. Religious issues played a major role in Jefferson's life and presidency. He wrote the Virginia Statute for Religious Freedom (1786) that disestablished the Episcopal Church, enshrined the principle of freedom of conscience, and helped prepare the way for the First Amendment. Since 1947 his metaphor

of a "wall of separation" between church and state has dominated constitutional debate over the proper place of religion in public life and policy. Although he repudiated much of orthodox Christianity, the Virginian was a deeply religious man. Jefferson's alleged lack of faith was a major issue in the hotly contested election of 1800. In an effort to discover the historical Jesus, he devised two different editions of the Gospels for his own use that eliminated all miraculous elements and focused on Christ's ethical teachings. Although his supporters, his opponents, and academicians have, for the past two centuries, debated the nature of his faith and whether he should be labeled an Episcopalian, a deist, or a Unitarian, many scholars do not recognize how important Jefferson's religious convictions were to his philosophy of government and career. Jefferson's character and views of slavery are also examined.

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About this book

The separation of church and state is a philosophical and jurisprudential concept for defining political distance in the relationship between religious organizations and the state. Conceptually, the term refers to the creation of a secular state (with or without legally explicit church-state separation) and to disestablishment, the changing of an existing, formal relationship between the church and the state, Although the concept is older, the exact phrase "separation of church and state" is derived from "wall of separation between church and state", a term coined by Thomas Jefferson. The concept was promoted by Enlightenment philosophers such as John Locke.

In Uganda the concept has found resonance in cases where, Doctrines of 'church autonomy' and 'ministerial exception' are affirmed in Uganda: Rev. Charles Oode Okunya v The Registered Trustees of the Church of Uganda, HCCS No. 305/2020 where religious disputes that are purely ecclesiastical or doctrinal such as the appointment of ministers are not within the jurisdiction of civil courts. However, an exception may be made where the dispute is either civil or involves property.

Others like Julius Rwabinumi v Hope Bahimbisomwe (Civil Appeal 30 of 2007) [2008] UGCA 19 (19 June 2008); Ambayo v Aserua (Civil Appeal 100 of 2015) [2022] UGCA 272 (15 November 2022); Sharon and Ors v Makerere University (Constitutional Appeal 2 of 2004) [2006] UGSC 210 (01 August 2006);

"Separation of church and state" is a metaphor paraphrased from Thomas Jefferson and used by others in expressing an understanding of the intent and function of the Establishment Clause and Free Exercise Clause of the First Amendment to the United States Constitution which reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."

The principle is paraphrased from Thomas Jefferson's "separation between Church and State." It has been used to express the understandings of the intent and function of this amendment, which allows freedom of religion. It is generally traced to a January 1, 1802, letter by Jefferson, addressed to the Danbury Baptist Association in Connecticut, and published in a Massachusetts newspaper.
Jefferson wrote.

Believing with you that religion is a matter which lies solely between Man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties."

After retiring from the presidency, Madison wrote of "total separation of the church from the state. "Strongly guarded as is the separation between Religion and Government in the Constitution of the United States," Madison wrote, and he declared, "practical distinction between Religion and Civil Government is essential to the purity of both, and as guaranteed by the Constitution of the United States." In a letter to Edward Livingston Madison further expanded, "We are teaching the world the great truth that Government. do better without Kings & Nobles than with them. The merit will be doubled by the other lesson that Religion flourishes in greater purity, without than with the aid of Govt."

The philosophy of the separation of the church from the civil state parallels the philosophies of secularism, disestablishmentarianism, religious liberty, and religious pluralism. By way of these philosophies, the world assumed some of the social roles of the church and the welfare state, a social shift that produced a culturally secular population and public sphere, In practice, church–state separation varies from total separation, mandated by the country's political constitution, as in India and Singapore, to a state religion, the question however is what should the case be for Uganda