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The Constitutionality of Polygamous Muslim Marriages in Uganda: A Comment on *Women's Probono Initiative v Attorney General* (Constitutional Petition No. 12 of 2021) [2025] UGCC 6 (10 July 2025)

Konstitusionalitas Pernikahan Poligami Muslim di Uganda: Sebuah Komentar atas Perkara Women's Probono Initiative melawan Jaksa Agung (Permohonan Konstitusional No. 12 Tahun 2021) [2025] UGCC 6 (10 Juli 2025)

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ABSTRACT: The Constitution of Uganda (1995) neither expressly permits nor prohibits polygamy. However, its drafting history shows that the delegates were aware that some Ugandans were in polygamous relationships (in particular polygyny). Neither the Customary Marriage (Registration) Act nor the Marriage and Divorce of Mohammedans Act expressly provides for polygamy. However, customary and Muslim marriages are potentially polygamous and there are many instances in which men in such marriages have several wives. There is no known ethnic or religious group in Uganda that practices polyandry. Unlike in some African countries, in Uganda polyandry is not an offence. The research question to be answered in the paper is whether polygamy is constitutional. In other words, whether the constitution could be interpreted as permitting polygamy. In *Women's Probono Initiative v Attorney General* (2025), the Constitutional Court of Uganda dealt with the question of whether polygynous marriages (both customary and Muslim) are unconstitutional on the ground that, inter alia, they discriminated against women (for example, by not allowing polyandry); they amount to torture and they violate the right to human dignity. The Court also dealt with the question of whether Islamic law which provides that a wife inherits less than a husband is discriminatory. The Court answered all the above questions in the negative. In this article, the author argues that the Court interpreted the Constitution correctly. However, the author suggests ways in which its decision could have been strengthened. The author also highlights some of the future implications of the Court's decision.

ABSTRAK: *Konstitusi Uganda (1995) tidak secara eksplisit mengizinkan maupun melarang poligami. Namun, sejarah pembuatannya menunjukkan bahwa para delegasi menyadari bahwa sebagian warga Uganda berada dalam hubungan poligami (terutama poligini). Baik Undang-Undang Perkawinan Adat (Pendaftaran) maupun Undang-Undang Perkawinan dan Cerai Muslim tidak secara eksplisit mengatur poligami. Namun, perkawinan adat dan Muslim berpotensi bersifat poligami, dan terdapat banyak kasus di mana pria dalam perkawinan semacam itu memiliki beberapa istri. Tidak ada kelompok etnis atau agama di Uganda yang mempraktikkan poliandri. Berbeda dengan beberapa negara Afrika, di Uganda poliandri bukanlah tindak pidana. Pertanyaan penelitian yang akan dijawab dalam makalah ini adalah apakah poligami konstitusional. Dengan kata lain, apakah konstitusi dapat diinterpretasikan sebagai memperbolehkan poligami. Dalam kasus Women's Probono Initiative v Attorney General (2025), Mahkamah Konstitusi Uganda menangani pertanyaan apakah pernikahan poligami (baik adat maupun Muslim) bertentangan dengan konstitusi dengan alasan, antara lain, bahwa hal tersebut mendiskriminasi perempuan (misalnya, dengan tidak memperbolehkan poligami); hal tersebut merupakan penyiksaan, dan melanggar hak atas martabat manusia. Mahkamah juga membahas pertanyaan apakah hukum Islam yang mengatur bahwa seorang istri mewarisi lebih sedikit daripada suaminya bersifat diskriminatif. Mahkamah menjawab semua pertanyaan di atas dengan jawaban negatif. Dalam artikel ini, penulis berargumen bahwa Mahkamah menafsirkan Konstitusi dengan benar. Namun, penulis mengusulkan cara-cara di mana putusan tersebut dapat diperkuat. Penulis juga menyoroti beberapa implikasi masa depan dari putusan Mahkamah.*

KeyworSds:
Muslim; customary; polygamy; Uganda; polyandry; divorce; marriage; polygyny

Kata Kunci:
Muslim; adat; poligami; Uganda; poliandri; perceraian; pernikahan; poligini

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1. Introduction

Muslim marriages are recognized in Uganda. Thus, section 3 (formerly section 2) of the Marriage and Divorce of Mohammedans Act[1] provides that:

> *All marriages between persons professing the Mohammedan religion, and all divorces from such marriages celebrated or given according to the rites and observances of the Mohammedan religion customary and usual among the tribe or sect in which the marriage or divorce takes place, shall be valid and registered as provided in this Act.*

Section 3 does not expressly provide that those Muslim marriages are polygamous.[2] In practice, Muslim marriages are potentially polygamous (polygynous) and there are many instances in which Muslim men have several wives.[3] However, according to the Quran, a Muslim man can marry a maximum of four wives at the same time.[4] As is the case with Muslim marriages, customary marriages are also potentially polygamous (polygynous). However, there is no maximum number of wives a man in a customary marriage can marry. Thus, he can marry as many wives as he wishes.[5] Ugandan legislation does not prohibit polyandry. This is different from some African countries such as Tanzania where polyandry is an offence.[6] However, in practice, only a man can marry more than one woman. By implication, marriages between a woman and more than one man are not recognized. The research question to be answered in this paper is whether the Constitution can be interpreted as permitting polygamous (polygynous) marriages. In Women's Probono Initiative v Attorney General,[7] the Constitutional Court of Uganda dealt with the question of whether polygynous marriages (both customary and Muslim) are unconstitutional on amongst other grounds that, they discriminated against women (by not allowing a woman to marry more than one man); they amount to torture (as men in polygynous marriages do not allocate equal time to all the wives and children); and that they violate the right to human dignity. The Court also dealt with the question of whether Islamic law which provides that a wife inherits less than a husband is discriminatory. The Court answered all the above questions in the negative. In this article, the author argues that the Court interpreted the Constitution correctly. This paper is novel in the sense that it is the first of its kind to assess the Constitutional Court's decision on the constitutionality of polygamous marriages. It is argued that although the Constitution does not expressly provide for polygamous marriages, its drafting history shows that the framers were aware that many Ugandans, Muslims and non-Muslims, were

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1 Marriage and Divorce of Mohammedans Act, Chapter 252.

2 It is important to note that in Uganda, the practice of a man being married to more than one woman is commonly known as polygamy. Thus, the word 'polygyny' is rarely used even in courts and Parliament.

3 In Uganda, the word polygamy is used to refer to polygyny. Thus, these words are used interchangeably where necessary. Otherwise, polygamy should be understood as polygyny.

4 In *HRS v AFNA* [2025] KEKC 16 (KLR) para 11, the Kenyan Qadhis Court held that 'Islamic marriage is potentially but limited polygamous marriage. At any one time, a Muslim husband is allowed to have under him more than one but not more than four wives. Allah the almighty in Qur'an.4.3 states: "And if you fear that you shall not be able to deal justly with the orphan-girl then marry (other) women of your choice, two, or three or four; but if you fear that you shall not be able to deal justly (with them) then only one or (the slaves) that your right hands possess. That is nearer to prevent you from doing injustice".' See also Majah v Majah (DC 127/2008) [2010] SCSC 65 (6 October 2010) (Supreme Court of Seychelles).

5 For example, in Sefo Tumwesigye v Vangirista Baganutengyera and Anor (Land Civil Suit No. 53 of 2015) [2021] UGHCLD 61 (31 March 2021), the deceased's father had six wives; in Uganda v Okello Bonny alias Akoc (HCT-10-CR-SC-0177 of 2022) [2025] UGHC 177 (10 April 2025), the accused had two wives; in Loum & Anor Vs Obwoma (Civil Suit No. 021 of 2016) [2019] UGHCCD 92 (11 April 2019), the deceased had four wives; in Mukwaya v Ssentamu and 7 Others (Civil Appeal No. 19 of 2021) [2022] UGHCCD 5 (19 January 2022), the deceased had three wives.

6 Section 152(1) of the Law of Marriage Act, Chapter 29 provides that '[a] married woman who is a party to a ceremony whereby she purports to marry another man commits an offence.' For the application of this section, see for example, *Selemani Joseph and Another v Republic* (Criminal Appeal 146 of 2019) [2020] TZHC 1804 (2 June 2020); Said v Kilu (Civil Appeal 38 of 1982) [1983] TZHC 682 (29 July 1983).

7 Women's Probono Initiative v Attorney General (Constitutional Petition No. 12 of 2021) [2025] UGCC 6 (10 July 2025).

in polygynous marriages. The drafters suggested ways in which the rights of women in those marriages could be better protected. Implied in their submissions is that they did not intend to abolish polygynous marriages. It is also argued that since the Constitution provides that marriage, divorce and inheritance of Muslims are to be governed by Muslim law, courts should be very reluctant in holding that such laws are discriminatory and contrary to the Constitution. They could invoke the religious doctrine when petitioned to deal with questions of that nature. However, where it is evident that Muslim laws are irreconcilable with the Constitution, courts should hold so but strike a balance between the two 'laws.' This could be justified under Article 43 of the Constitution (the limitations clause).

2. Method

The methodology used in this paper is doctrinal legal research. As Majeed, Hilal, and Khan demonstrated, 'doctrinal legal research has been the dominant and most influential research methods in law.'[8] They argued that

> *The beginning of the doctrinal legal research is the presence of a legal problem which is followed by finding the relevant legal material including statutory law, constitutional provision pertaining to the problem, by laws, judicial decisions, commentaries of the analysts, encyclopedias and dictionaries.*[9]

Other scholars have also explained the nature of doctrinal legal research.[10] In this paper, the legal question or problem is the constitutionality of polygyny and polygamy in Uganda. The purpose of this study is to examine the existing case law and legislation on the issue of polygamous marriages in Uganda. Thus, the author will assess the extent to which polygyny or polygamy complies with the Constitution of Uganda. In order to put the discussion in context, the author will first highlight the facts and decision in Women's Probono Initiative v Attorney General.[11] Thereafter, the author will analyze the judgement.

3. Findings and Discussion

3.1. Findings of the Court

In *Women's Probono Initiative v Attorney General*,[12] the petitioners argued that the Customary Marriage (Registration) Act and the Marriage and Divorce of Mohammedans Act, pieces of legislation permitting polygynous marriages were unconstitutional because, amongst other things, they discriminated against men and women in monogamous relationships.[13] On the issue of Muslim marriages, they argued expressly that 'the practice of one man marrying more than one wife is expressly allowed under the Marriage and Divorce of Mohammedan's Act.' This practice, they argued, contravened the right to equality and freedom from discrimination, leads to emotional suffering as children and wives 'compete for one man's attention', and it is against the dignity of women. They also argued that 'section 2 of the Marriage and Divorce of Mohammedans Act permits men to marry up to four wives.'[14] On the question of the right to property, the Court observed that:

> *The petitioner cites several social ills which they attribute to the practice of polygamy, and which (they assert) contravene article 3l (l) (b) [of the Constitution]. Key of these is the inherent imbalance in marital rights and responsibilities between husband and wife in the areas of inheritance and dissolution of*

8 Majeed, Hilal, and Khan, "Doctrinal Research in Law: Meaning, Scope and Methodology" at 559.
9 Ibid, 559.
10 See for example, Bhat, "Idea and Methods of Legal Research" at 143 – 168; Nyathi, "Re-Asserting the Doctrinal Legal Research Methodology in the South African Academy: Navigating the Maze."
11 *Women's Probono Initiative v Attorney General* (Constitutional Petition No. 12 of 2021) [2025] UGCC 6 (10 July 2025).
12 Ibid.
13 Ibid, paras 3 – 7.
14 Ibid, para 55.

> *polygamous marriages. It is argued that Sharia law recognizes a wife's right to inherit one-eighth of her deceased husband's estate if they have children, and one-fourth if they do not. Further that a woman whose husband has four wives must share that one-eighth with her three co-wives, yet the husband would inherit one-fourth of each wife's estate if they have children, and one-half if they did not.*[15]

They argued further that although there is equality between co-wives at the dissolution of a Muslim marriage, there was no equality between husband and wife as each was entitled to a different share.[16]

The respondent argued that polygyny is a cultural or religious practice which is recognized by the 'Customary Marriage (Registration) Act and the Marriage and Divorce of Mohammedans Act' and that adults who enter into polygynous marriages do so voluntarily and freely consent to such marriages well aware of the legal implications.[17] The respondents also argued that laws permitting polygynous marriages were not unconstitutional since those who entered into such marriages did so with their consent well aware of the nature of the same.[18] They added that the practice of Muslim polygynous marriages was constitutional because it was protected under the constitutional provisions on the right to freedom of thought, conscience and belief; the right to practice and manifest one's religion; the right of adult men and women to freely enter into marriages and the right to equality and freedom from discrimination.[19] They emphasized that those who contract polygynous marriages do so voluntarily in exercise of their right to found a family.[20] The Court summarized the relevant evidential principles and the issues before it and outlined the authorities the petitioners relied on for their submissions.[21] Thereafter, it explained the differences between equality and freedom from discrimination.[22] It explained why the legislative provisions that provide for the offence of bigamy for those in monogamous marriages was not discriminatory for 'failure' to criminalize the same conduct in case of men in polygynous marriages.[23] The Court 'noted the petitioner's submission that the Human Rights Committee in paragraph 24 of General Comment No. 28 to the Intonational Convention on Civil and political rights (ICCPR), stated that polygamy is incompatible with the principle of equality of treatment with regard to the right to marry.'[24] Relying on case law from other countries on the issue of equality and freedom from discrimination and on its interpretation of the Constitution, it held that the Human Rights Committee's 'opinion [that polygamy is incompatible with the right to equality] is flawed' and that 'in any event the Human Rights Committee's opinion is not binding on this court.'[25] It added that:

> *There is no doubt that both polygamy and monogamy are Constitutionally protected religious and cultural practices. Articles 29 (l) (b) (c) & 37 which provide for freedom of conscience and belief and the right to religion and culture are relevant. Therefore, article 21 (5) which provides that "Nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of this Constitution" saves the practices of polygamy and monogamy from any inconsistency claims. In conclusion of the equality issue, it is of note that the laws, terms and conditions relating to contracting, subsistence and dissolution of polygamous marriages differ from those of monogamous marriages. The two categories of marriages are therefore dissimilar/unequal. This means that monogamous men may only complain if they were unequally treated with fellow monogamous men. The same is true for polygamous men.*[26]

15 Ibid, para 116.
16 Ibid, paras 117 – 119.
17 Ibid, paras 58 - 62.
18 Ibid, paras 8 – 11.
19 Ibid, para 12.
20 Ibid, paras 13 – 14.
21 Ibid, paras 15 – 22, 63 – 65.
22 Ibid, paras 23 – 29.
23 Ibid, paras 30 – 42.
24 Ibid, para 43.
25 Ibid, para 43.
26 Ibid, paras 44 – 45.

It explained in detail why it disagreed with the petitioners' argument that legislation which permits polygyny discriminated against people in monogamous marriages.[27] It held that there was no evidence that some women in polygynous relationships were being discriminated against. It thus held that 'the complaint that women are unequally and discriminatorily treated under section 4 (2) of the Customary Marriage (Registration) Act and under section 2 [now section 3] of the Marriage and Divorce of Mohammedans Act is without basis...The impugned legal provisions do not in fact treat women differently or discriminate against them.'[28] It explained that customary marriages are potentially polygynous.[29] It held that:

> *Section 2 (now 3) of the Marriage and Divorce of Mohammedans Act also leaves issues relating to forms of marriages to the dictates of "the rites and observances of the Mohammedan religion customary and usual among the tribe or sect in which the marriage takes place". Therefore, the fact that Moslem women in Uganda do not contract polyandry marriages is not a function of the Marriage and Divorce of Mohammedans Act. Rather, it is a function of "the rites and observances of the Mohammedan religion customary and usual among the tribe or sect in which the marriage takes place". A Constitutional challenge premised on a claim that section 2 of the Marriage and Divorce of Mohammedans Act contravenes article 2l (1)-(3) of the Constitution cannot be sustained.*[30]

Against that background, it held that section 3 of the Marriage and Divorce of Mohammedans Act does not violate the right to freedom from discrimination on the ground of sex under Article 21 of the Constitution.[31] It also held that there was no evidence that polygamy violated women's rights to freedom from torture and to found a family. It held further that the petitioners failed to adduce evidence to show that polygyny was responsible for the spread of HIV/AIDS. It added that there was no need for affirmative action for women in polygynous marriages.[32] On the question of the right to property in polygamous marriages, the Court held that:

> *The property rights of monogamous wives differ from those of polygamous ones. Comparing the entitlements of monogamous wives with those of a polygamous one is not helpful since the two categories of wives are "unequal". Therefore, while ... [we] acknowledge the fact that all the cited social ills exist in polygamous settings, given that the practice of polygamy is a choice, a conclusion that its practice contravenes women's rights to an equal share of property contrary to Article 3l (1) (b) of the constitution would contradict the concept of human rights.*[33]

The Court held that 'the practice…of one man marrying more than one wife at any given time does not contravene women's rights to an equal share of property at, in and upon dissolution of marriage guaranteed under Article 31(1)(b) of the Constitution.'[34] The Court held further that section 3 of the Marriage and Divorce of Mohammedans Act did not violate the women's right to dignity.[35] It concluded that 'the government's failure to outlaw polygamy' did not violate any constitutional provision.[36]

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27 Ibid, paras 46 – 53.
28 Ibid, para 66.
29 Ibid, paras 68 – 73.
30 Ibid, para 74.
31 Ibid, para 75.
32 Ibid, paras 76 – 115.
33 Ibid, paras 121 – 122.
34 Ibid, para 123.
35 Ibid, paras 124 – 126.
36 Ibid, para 127.

3.2. Discussion

The Court's decision raises important issues that should be examined closely. The first issue relates to the constitutionality of polygamous marriages. Unlike the position in Rwanda[37] or Guinea Bissau,[38] for example, where the constitution or legislation prohibits polygamy, legislation in Uganda does not prohibit polygamous marriages. The Constitution of Uganda does not expressly permit polygamous marriages. As mentioned above, Article 31(1) of the Constitution provides that '[a] man and a woman are entitled to marry only if they are each of the age of eighteen years and above and are entitled at that age- (a) to found a family; and (b) to equal rights at and in marriage, during marriage, and at its dissolution.' The Court interpreted Articles 31 and 29(1) (freedom of religion)[39] to conclude that polygamous marriages are not unconstitutional. Although the Constitution does not expressly permit polygamous marriages, its drafting history shows that the framers approved of polygynous marriages. Thus, had the Court referred to the drafting history of the Constitution, it would have concluded that it also supports the view that the Constitution should be interpreted as permitting polygynous marriages. In other words, this would have strengthened its decision. Since the drafting history is important to this issue, the author will illustrate it in detail.

The drafting history of the Constitution can be divided into two parts: one, the submissions that Ugandans made to the Uganda Constitutional Commission (the Commission) and; two, the debates of the Constituent Assembly. The discussion will start with the submissions Ugandans made to the Commission. In 1998, the government of Uganda embarked on the process of enacting a new constitution. As a result, it established the Constitutional Commission (the Commission). The Commission traversed the whole country and gathered peoples' views on the issues they wanted to be addressed in the new constitution. In its report, the Commission raised the issue of marriages and in particular 'oppressive and old-fashioned traditions, customs and practices in the various tribes and communities which tend to reduce them to the status of children.'[40] The Commission highlighted the following oppressive and old-fashioned practices: early child marriages, the commercialization of bride-price, widow inheritance, female genital mutilation, and prohibiting women from eating certain types of food.[41] The Commission also highlighted the fact that in some communities, women's right to property was not recognized before, during and after marriage.[42] Of great importance, the Commission did not mention polygyny as one of the 'oppressive and old-fashioned traditions, customs and practices.' This was the case although the Commission referred to literature on polygamy in particular and Muslim marriages in general.[43] This implies that Ugandans who made submissions to the Commission did not oppose polygyny. It also indicates that members of the Commission did not take issue with polygamous marriages. In the Draft Constitution prepared by the Commission and debated by the Constituent Assembly, the Commission did not suggest that polygynous marriages should be abolished. Clause 60(1) of the Draft Constitution provided for the protection of the family and stated that 'men and women of full age shall have the right to marry and to found a family and shall be entitled to equal rights in marriage,

[37] Article 17 of the Constitution of Rwanda (2003) provides that '(1) A civil monogamous marriage between a man and a woman is the only recognised marital union. (2) However, a monogamous marriage between a man and a woman contracted outside Rwanda in accordance with the law of the country of celebration of that marriage is recognised.'

[38] Nazare v. Guinee Bissau, Judgment, ECW/CCJ/APP/12/17; ECW/CCJ/JUD/15/18 (ECOWAS CCJ, May. 24, 2018) p. 6, where it is argued that 'the Defendant State also argued that its national legislation does not recognize polygamy.'

[39] Article 29 (1) provides that 'Every person shall have the right to-(a) freedom of speech and expression, which shall include freedom of the press and other media; (b) freedom of thought, conscience and belief which shall include academic freedom in institutions of learning; (c) freedom to practise any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with this Constitution; (d) freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition; and (e) freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organisations.'

[40] Report of the Constitutional Commission: Analysis and Recommendations (1992) para 7.64.

[41] Ibid, para 7.69.

[42] Ibid, para 7.65.

[43] Ibid, at 879.

during marriage and at its dissolution.' Clause 60(2) of the Draft Constitution provided that 'marriage shall be entered into with the free consent of the intending parties.'

The Draft Constitution was debated by the Constituent Assembly. Since polygamy had not been specifically mentioned in any of the provisions of the Draft Constitution, the delegates did not debate it directly. However, some of the delegates raised the issue of polygamy. The submissions can be classified into three categories. In the first category, you find delegates who observed that polygamy existed in Uganda. They neither supported nor opposed it. They argued, for example, that the people they represented were of different backgrounds and these included Muslims, protestants, Catholics, atheists, polygamous (polygynous) and monogamous.[44] In the second category one finds a delegate who argued that Islamic law permits polygamy (polygyny) but under strictly defined circumstances. In other words, a Muslim man who wishes to marry more than one woman should comply with specific conditions stipulated under Islamic law.[45] In the final category, one delegate argued that there was a need for the constitution to include a provision on the right to property of women in polygamous (polygynous) marriages especially after the death of their husbands. They should have the same rights as those in monogamous marriages.[46] Thus, the drafting history of the Constitution shows that none of the delegates opposed polygyny. However, some of them argued that there was a need for the rights of women in polygamous marriages to be protected. This meant, amongst other things, that such women had to be treated equally. The above drafting history shows that the framers never intended to abolish polygamy. Rather, they acknowledged its existence in Uganda and suggested ways in which it could be better practiced without violating some of the rights in the Constitution. Thus, the drafting history of the Constitution supports the view that the Constitution does not outlaw polygyny and should be interpreted as permitting it. However, it should not be exercised in violation of the rights enshrined in the Constitution. These include the right to property and the right to equality.

The Court also dealt with the issue of whether polygamy is contrary to Uganda's international human rights obligations. Uganda is a state party to international and regional human rights treaties. Some of these international treaties have been interpreted by their enforcement bodies as prohibiting polygamy. In other words, these treaty bodies consider polygamy to be a 'harmful practice.'[47] Uganda ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003). Article VI(c) of the Protocol provides that '[m]onogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected.' Thus, the Protocol does not require states parties, including Uganda, to abolish polygamy. What they are required to do is to protect and promote the rights of women in polygamous marriages. This brings us to the question of the legal effect of jurisprudence and practice of the international human rights bodies. Although

[44] Proceedings of the Uganda Constituent Assembly (1994 – 1995) at 1446 (Mr Wamulongo). See also 324 (Mr Bateganya)(polygamists); 424 (Mrs Byenkya)(polygamists and monogamists); 984 (Mr Lubega) (polygamists); 1197 (Mrs Betty Okwir)(polygamists); 1629 (Mr Adyebo)(polygamists).

[45] Ibid, at 5721 (Mr Lubulwa Migadde).

[46] Ibid, at 1010 (Mr Ndege).

[47] See for example, CEDAW/C/NPL/CO/7 (CEDAW 2025) para 25; CEDAW/C/LKA/CO/9 (CEDAW 2025) para 62; CEDAW/C/COG/CO/8 (CEDAW 2025) para 22(b); CEDAW/C/BEN/CO/5 (CEDAW 2024) para 43(b); CEDAW/C/KWT/CO/6 (CEDAW 2024) para 64(e); CRC/C/GMB/CO/4-7 (CRC 2025) para 26(b); CRC/C/NAM/CO/4-6 (CRC 2024) para 26(c); CRC/C/EGY/CO/5-6 (CRC 2024) para 30(b); CRC/C/RUS/CO/6-7 (CRC 2024) para 28(a); CCPR/C/NAM/CO/3 (CCPR 2024) para 11(b); CCPR/C/SOM/CO/1 (CCPR 2024) para 16(b); CCPR/C/ETH/CO/2 (CCPR 2022) para 14(c); CCPR/C/BWA/CO/2 (CCPR 2021) para 13; CCPR/C/TGO/CO/5 (CCPR 2021) para 19.

there are cases in which the Constitutional Court[48] and the Supreme Court[49] have referred to the jurisprudence and practice of international and regional human rights bodies on the ground that they are persuasive, in Women's Probono Initiative v Attorney General,[50] the Court expressly declined to rely on the recommendation of the Human Rights Committee to the effect that polygamy is a harmful practice which violates women's right to equality. It held that the Human Rights Committee's reasoning on this issue is 'flawed' and was not binding on it. This shows, amongst other things, that the Court is only prepared to rely on the practice or jurisprudence of international human rights bodies when doing so better protects a constitutional or fundamental right or freedom. Hence, it is not prepared to invoke international human rights jurisprudence if doing so would lead to 'misinterpreting' a constitutional provision. The effect of this approach is that international human rights jurisprudence is persuasive in Uganda if it does not contradict with the constitution. Although this rule is not expressly provided for in the Constitution, it can be inferred from the Court's judgment. This approach is similar to that adopted in some countries where international law can only be recognized as law domestically if it does not contradict with the constitution or an Act of Parliament.[51] Thus, the constitution is the supreme law of the land. Domestically, it is above international law. However, the challenge is that in Uganda, there is no express constitutional provision that permits polygyny. Hence, the Court's reasoning implies that international human rights jurisprudence is only persuasive if it is not contrary to the constitutional provisions as interpreted by the Constitutional Court.

The Court also defined different types of marriages and explained the extent to which they were applicable to Uganda. It observed as follows:

> *The word "polygamy" is defined as a marital practice in which a person has more than one spouse [emphasis added] at the same time, while "polyandry" is defined as the practice of a woman having more than one husband at the same time. "Polygyny" on the other hand is defined as the practice of a man having more than one wife at same time.*[52]

It added that 'going by its definition, the word "polygamy" is gender neutral.'[53] It held further that:

> *Section 2 (now 3) of the Marriage and Divorce of Mohammedans Act also leaves issues relating to forms of marriages to the dictates of "the rites and observances of the Mohammedan religion customary and usual among the tribe or sect in which the marriage takes place". Therefore, the fact that Moslem women in Uganda do not contract polyandry marriages is not a function of the Marriage and Divorce of Mohammedans Act. Rather, it is a function of "the rites and observances of the Mohammedan religion customary and usual among the tribe or sect in which the marriage takes place". A Constitutional challenge premised on a claim that section 2 of the Marriage and Divorce of Mohammedans Act contravenes article 21 (1)-(3) of the Constitution cannot be sustained.*[54]

Implied in the Court's reasoning above is that since section 3 of the Marriage and Divorce of Mohammedans Act does not expressly prohibit a woman from marrying more than one man at the same time, it does not violate the right to equality. According to the Court, since the petitioners had not challenged 'the

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[48] For example, in the following cases, the Court referred to the Human Rights Committee's General Comments: Legal Brains Trust (LBT) Limited and 2 Others v Attorney General (Constitutional Petition 23 of 2015) [2023] UGCC 102 (12 September 2023); Human Rights Network for Journalists Ltd and Another v Attorney General (Constitutional Petition No. 25 of 2018) [2023] UGCC 97 (17 March 2023).

[49] For example, in the following cases, the Court referred to the Human Rights Committee's General Comments and case law: Attorney General v Susan Kigula & 417 Others [2009] UGSC 6 (21 January 2009); Attorney General v Kabaziguruka (Constitutional Appeal 2 of 2021) [2025] UGSC 1 (31 January 2025).

[50] Women's Probono Initiative v Attorney General (Constitutional Petition No. 12 of 2021) [2025] UGCC 6 (10 July 2025).

[51] See for example, Article 211(3) of the Constitution of Malawi (1994); Article 144 of the Constitution of Namibia (1990); section 232 of the Constitution of South Africa (1996); section 326(1) of the Constitution of Zimbabwe (2013).

[52] Women's Probono Initiative v Attorney General (Constitutional Petition No. 12 of 2021) [2025] UGCC 6 (10 July 2025) para 69.

[53] Ibid, para 70.

[54] Ibid, para 74.

rites and observances of the Mohammedan religion customary and usual among the tribe or sect in which the marriage takes place', the Court could not declare such 'rites' unconstitutional. The Court did not look at the effect of the law that was being challenged. In practice, Ugandan Muslim 'tribes' or 'sects' do not recognize polyandry. This is understandable because, as courts have held, Islam prohibits polyandry.[55] In fact, a submission by some human rights activists during Parliament's consultation on the Marriage Bill that Ugandan law should recognize polyandry was widely criticised in Uganda.[56] This is not unique to Uganda. In some African countries such as Lesotho[57] and Kenya,[58] polyandry is not recognized. Thus, it was very unlikely for the Court to find that the law should have provided for polyandry.

The Court also held that polygyny does not violate women's right to equality and freedom from discrimination. This is because there was no evidence that women in polygynous relationships were being treated differently. If there was evidence that some women in polygynous marriages were being treated differently compared to others in similar relationships, it would have found the treatment discriminatory if it could not be justified on any valid ground. However, this would not have rendered polygyny unconstitutional. It should be recalled that the petitioners argued that:

> *Sharia law recognizes a wife's right to inherit one-eighth of her deceased husband's estate if they have children, and one-fourth if they do not. Further that a woman whose husband has four wives must share that one-eighth with her three co-wives, yet the husband would inherit one-fourth of each wife's estate if they have children, and one-half if they did not.*[59]

However, the Court did not resolve that issue directly. Instead, it held that those who enter into Muslim marriages do so voluntarily fully aware of the consequences of such marriages. The Court's conclusion on this issue did not answer the petitioner's question satisfactorily. One would have expected to the Court to explain why the formula mentioned above, where a wife inherits one-eight when her husband dies and the husband inherits one-fourth or one-half when his wife dies, does not amount to discrimination on the ground of sex under Article 21 of the Constitution and does not violate Article 31 of the Constitution which provides for the right to equality during marriage and at its dissolution. The answer to this question lies in other constitutional provisions. As the Court observed, one of the rules of constitutional interpretation is that the constitution has to be interpreted as an integral whole.[60] Article 129(1)(d) of the Constitution empowers Parliament to establish subordinate courts 'including Qadhis' courts for marriage, divorce, inheritance of property and guardianship, as may be prescribed by Parliament.' Parliament is yet to establish such courts.[61] However, what is clear is that

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55 In *STM v RMD* (Civil Case 202 of 2015) [2015] KEKC 41 (KLR) (22 October 2015) (Judgment) para 6, the Kenyan Qadhis Court held that 'Islam does not allow polyandry, a lady can only be married to one husband at a time. Only after she is divorced and after expiry of edda period can she married to another man. Separation of any length of time is immaterial, divorce is only effective upon pronouncement by the husband or the court with necessary jurisdiction upon following due process.' In Majah v Majah (2010) Seychelles Law Report 327 at 336, the Seychelles Supreme Court held that 'It is truism that in Islam, a limited form of polygamy is permitted; whereas polyandry is completely prohibited.'

56 'Women activists dismiss polygamy in Marriage Bill' 5 February 2025. Available at https://www.parliament.go.ug/news/3556/women-activists-dismiss-polygamy-marriage-bill

57 Thaele and Others v Thaele and Others (CIV/APN 318 of 91) [1991] LSCA 129 (18 October 1991), the Lesotho Court of Appeal held that polyandry is 'unheard of' in Lesotho. See also Moletsane v Moletsane and Others (C of A (CIV) 10 of 2004) [2004] LSCA 11 (20 October 2004) para 12

58 Milena Bora v Liana Tamburelli [2016] KEHC 6933 (KLR); Syprose Adhiambo v Richard Odhiambo [2007] KEHC 1120 (KLR); Republic v Paul Odhiambo Ogunde [2019] KEHC 7963 (KLR); K O & another v J O [2018] KEHC 7737 (KLR) para 21; MGA v ASM [2013] KEHC 3348 (KLR); GOA v JOO [2017] KEHC 10120 (KLR); POM v MNK [2017] KEHC 4231 (KLR); Mary Wanjuhi Muigai v Attorney General & another [2015] KEHC 7841 (KLR) para 70.

59 Women's Probono Initiative v Attorney General (Constitutional Petition No. 12 of 2021) [2025] UGCC 6 (10 July 2025) para 116.

60 Ibid, para 36.

61 However, in August 2025, one of the legislators moved a motion to introduce a Private Member's Bill to regulate this issue. See https://www.newvision.co.ug/category/news/mp-basalirwa-proposes-law-to-formalise-islami-NV_216055

the Constitution allows Muslims to practice their own law of inheritance. This is one of the elements of the right to freedom of religion. Thus, Muslim men and women are presumed to have consented to be governed by the Quranic rules that govern inheritance. Those who object to this approach can always do so through their right to freedom of testation by leaving wills.[62] Thus, a combined reading of Articles 129(1)(d) and 21(4)(b) and (5) shows that Parliament can enact legislation which allows those who practice the Islamic faith to follow Islamic law of inheritance. Article 21(4)(b) empowers Parliament to make legislation 'as is required or authorised to be made under this Constitution' and Article 21(5) provides that '[n]othing shall be taken to be inconsistent with this article which is allowed to be done under any provision of this Constitution.' Article 129(1)(d) allows Parliament to establish Qadhis' courts to deal with Muslim personal law. Thus, enacting legislation allowing such courts to enforce Muslim personal law is permitted by the Constitution.

Related to the above is the question of whether Ugandan courts are prepared to hold that Islamic law of inheritance which, as a general rule, allocates a lesser share to women compared to that of men is discriminatory on the ground of sex.[63] This will inevitably require courts to decide whether the law that is based on the Quranic provisions on inheritance is contrary to the Constitution and in particular the right to equality. This would raise the question of religious doctrine. There are several decisions in which the High Court has held that courts do not have the jurisdiction to deal with questions of religious doctrine.[64] Adults who choose to conduct their personal affairs according Muslim law are presumed to have consented to have their property, after death, being governed by that law. It is freedom of choice. They consent to enter into such marriages fully aware, or presumed to be fully ware, of the fact that they will be governed by Islamic inheritance law. Therefore, a Ugandan court that attempts to interpret Muslim inheritance law and 'bring it in conformity' with the Constitution could be entering the arena of religious doctrine. Ugandan courts have held that Muslims have a right to distribute their estate or the deceased Muslim's estate according to Sharia. This is an integral element of the right to practice their religion.[65] Relying on religious doctrine may not be enough to resolve the issue of whether religious inheritance law which differentiates between women and men solely on the ground of sex is not discriminatory and therefore unconstitutional. Since Islamic inheritance law is

8 August 2025. In Mwanga Mastullah Ashah and Islamic Women's Initiative for Justice Law and Peace v Attorney General (Constitutional Petition No. 0010 of 2024) (17 December 2025), the Constitutional Court held that Article 129(1)(d) of the Constitution does not oblige Parliament to enact legislation to establish Qadhis' courts. It added that Parliament has the discretion to determine when to enact such legislation. The Court also added that the prolonged delay by Parliament to enact such legislation did not violate Muslims' rights to access justice, equality and freedom from discrimination. In other words, it did not 'amount to a constitutional violation.' This was so because Muslims, especially women, could still approach the 'secular' courts to deal with their personal disputes involving marriage, divorce or inheritance. The challenge is that the Court does not clarify whether secular courts are required to follow Sharia when resolving such disputes. This silence implies that such courts are more likely to follow 'secular' law since most of the judicial officers are not trained in Sharia. The easiest way to address this challenge is for Parliament to take its constitutional responsibility seriously and enact legislation establishing Qadhis' courts. As the facts of the case showed, the informal Qadhis' courts at the Uganda Muslim Supreme Council are ineffective, hand down contradictory decisions and disrespected by some Muslims.

62 See generally, *Edirisa Miyingo v Ismail Ssempijja and Another* (Civil Appeal 189 of 2019) [2025] UGCA 273 (19 August 2025).

63 However, there are several instances in which Islam law provides that women inherit more than men. See for example, Batool, 'The Role of Sharī'ah in Provision of Shares of Inheritance to Women.'

64 See for example, Nsimbe Swaibu and Another v Uganda Muslim Supreme Council and Others (Miscellaneous Cause 65 of 2025) [2025] UGHCCD 88 (1 July 2025); Magezi & 3 Others v Sendowoza & 3 Others (Miscellaneous Application 811 of 2024) [2024] UGHCCD 198 (20 November 2024); Adiga v Sabino & Anor (Civil Suit No. 0002 OF 2017) [2018] UGHCCD 4 (11 January 2018); Uganda Moslem Supreme Council v Yudaya & 2 Others & Ssewante v Yudaya & 3 Others (Miscellaneous Application 536 of 2024; Miscellaneous Application 541 of 2024; Miscellaneous Application 549 of 2024) [2025] UGHCCD 2 (3 January 2025).

65 See for example, *Edirisa Miyingo v Ismail Ssempijja and Another* (Civil Appeal 189 of 2019) [2025] UGCA 273 (19 August 2025); Abdu Kiwunda Mukasa and Another v Hajji Amis Kirumba Mukasa and Another (Civil Suit No. 190 of 2018; Civil Suit No. 209 of 2022) [2025] UGHCFD 81 (17 March 2025); Mukasa & 9 Others v Mukasa & Another (Civil Suits 190 of 2018 & 209 of 2022) [2025] UGHCFD 10 (17 March 2025).

recognized by Article 129(d) of the Constitution, it is lawful and constitutional. The argument that it is discriminatory ignores the fact that the right to freedom from discrimination is not absolute. It is governed by the limitations under Article 43 of the Constitution. As discussed in detail below, although Article 43 of the Constitution provides for a limitation on the enjoyment of rights and freedoms in the Bill of Rights, it adds that such a limitation has to be 'acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.' International human rights bodies have urged states to abolish legislation that discriminates between women and men in inheritance.[66] Thus, Muslim inheritance law does not pass the first permissible ground of limitation under Article 43(2)(c) – that is, justifiable in a free and democratic society. However, since Muslim inheritance law is permitted by the Constitution, the limitation it imposes on the right to equality is justifiable on the second ground under Article 43(2)(c) – provided for in the Constitution. Therefore, any court approached to determine whether Muslim/Islamic inheritance law is disciminatoty against women has to strike a balance between Islamic law and the Constitution.

Another important issue that arises from the court's decision relates to the limitation of rights in the Bill of Rights. The petitioners argued that 'the continued legal recognition of polygamy amounts to derogation [sic] from the right to freedom from torture and cruel, inhuman or degrading treatment or punishment contrary to Article 43 of the Constitution.'[67] In dismissing this argument, the Court held that those who enter into polygamous relationships do so in exercising their individuality and the rights to practice their culture and religion.[68] Thus, polygamy does not amount to torture. Although the Court reproduced Article 43,[69] it did not discuss the limitations under Article 43 in detail. It is necessary to have a closer look at this provision in detail. Article 43 of the Constitution is the general limitations clause. It states that:

> *1. In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.*
> *2. Public interest under this article shall not permit (a) political persecution; (b) detention without trial; (c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.*

Of great importance to this study are the limitations under Article 43(2) which the Court did not discuss. Under Article 43(2), for a limitation on the enjoyment of the right in the Bill of Rights to pass constitutional scrutiny, it has to fall in one of the two categories. One, it has to be 'acceptable and demonstrably justifiable in a free and democratic society', and two, it has to be provided in the Constitution. The Constitution does not define what amounts to a 'free and democratic society.' However, the drafting history of Article 43 shows that the framers understood a free and democratic society to be given its literal meaning. Courts are to rely on practice and jurisprudence from such countries in interpreting Article 43.[70] Courts have applied Article 43(2)(c) in several cases.[71] Free and democratic societies have approached the issue of polygamy differently. In some countries, polygamy is prohibited. However, it is allowed in others. There is no uniform approach in these

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66 See for example, CEDAW/C/MEX/CO/10 (CEDAW 2025) paras 45 and 46; CEDAW/C/THA/CO/8 (CEDAW 2025) para 49(a); CEDAW/C/TUV/CO/5-6 (CEDAW 2025) para 52(a); CEDAW/C/LKA/CO/9 (CEDAW 2025) para 62(a); CEDAW/C/MNE/CO/3 (CEDAW 2024) para 47(b); CCPR/C/BDI/CO/3 (CCPR 2023) para 12; CCPR/C/LSO/CO/2 (CCPR 2023) para 17; CCPR/C/LKA/CO/6 (CCPR 2023) para 20.

67 Women's Probono Initiative v Attorney General (Constitutional Petition No. 12 of 2021) [2025] UGCC 6 (10 July 2025) para 113.

68 Ibid, para 114 – 115.

69 Ibid, para 96.

70 Proceedings of the Uganda Constituent Assembly (1994 – 1995) at 1861 – 1862.

71 See for example, ABC Capital Bank and 30 Others v Attorney General and Another (Constitutional Petition No. 14 of 2018) [2023] UGCC 18 (9 March 2023); Ntare Adens v Ssenyonyi and Ors (Constitutional Petition No. 16 of 2019) [2021] UGCC 38 (27 April 2021) p. 66; Nampongo and Anor v Attorney General (Constitutional Petition No. 43 of 2012) [2021] UGCC 37 (9 February 2021); Onyango Obbo and Another v Attorney General (Constitutional Appeal 2 of 2002) [2004] UGSC 44 (11 February 2004); Uganda Projects Implementation And Management Centre Vs. Uganda Revenue Authority [2010] UGSC 17 (28 October 2010).

countries. This takes us to the second ground under Article 43(2)(c) – provided for by the Constitution. As mentioned above, the Constitution does not expressly provide for polygamy. However, the Court read the right to polygamy into the constitution because it was implied in the right to practice one's culture and religion. Thus, polygamy is indirectly permitted by the Constitution.

4. Conclusion

The research question was whether the constitution of Uganda permits polygamy. The scope of the article is limited to the textual analysis of the relevant legislation and case law. The author does not discuss empirical data on violence against women in polygynous/polygamous relationships in Uganda since those data are not yet available in Uganda. This explains why the petitioners did not adduce those data in court. In this article, the author has analyzed the case of Women's Probono Initiative v Attorney General,[72] in which the Constitutional Court dealt with the constitutionality of polygamous marriages. It has been illustrated that although the Constitution does not expressly provide for polygamous marriages, its drafters were aware that many Ugandans were in polygynous marriages. The drafters of the Constitution suggested ways in which the rights of women in polygamous marriages could be better protected. Thus, the answer to the research question is that the Court interpreted the Constitution correctly when it held that it permits polygamy. Thus, polygyny is very likely to remain legal in Uganda for the foreseeable future.[73] This is the case although international human rights bodies such as the Committee on the Elimination of All Forms of Discrimination against Women and the Human Rights Committee are very likely to urge Uganda to abolish polygamy so as to comply with its international human rights obligations. However, African human rights bodies such as the African Commission on Human and Peoples' Rights are very likely to urge Uganda to protect the rights of women in polygamous relationships. This is so because, as mentioned above, Article 6(c) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003) obliges Uganda, as a state party to the Protocol, to 'enact appropriate national legislative measures to guarantee that monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected.' Although Uganda made a reservation the provision of the Protocol dealing with abortion, it did not make a reservation on Article 6(c).[74] The fact that polygamy will remain lawful in Uganda for the foreseeable future has implications for the rights of women in such relationships. As mentioned above, one of the issues that arose in the case was that of the right to equality. This right is protected under Article 21 of the Constitution.[75] Women in polygynous marriages have to enjoy the same rights. Their husbands have to treat them equally in all aspects. Failure to do so, courts will intervene to protect their rights. For a better understanding of the extent to which women in polygynous/polygamous marriages are potentially discriminated against in Uganda, researchers will have to conduct empirical studies to that effect.

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[72] Women's Probono Initiative v Attorney General (Constitutional Petition No. 12 of 2021) [2025] UGCC 6 (10 July 2025).

[73] In *Innocent Ngobi Ndiko and Others v Attorney General and Others* (Constitutional Petition No. 23 of 2020) [2025] UGCC 11 (18 August 2025) para 52, Justice Egonda-Ntende held that 'Marriage is interpreted differently by societies around the world. In the African and Uganda context where polygamy is permissible under customary marriage, marriage is generally accepted as the voluntary union of one or more spouses.'

[74] Only Ethiopia and Saharawi Republic made reservations on Article 6(c). See https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS_ON_THE_RIGHTS_OF_WOMEN_IN_AFRICA.pdf (accessed 28 November 2025).

[75] For a recent discussion of Article 21, see *Human Rights Awareness Promotion Forum Uganda & Others v Attorney General* (Constitutional Petitions 25 & 10 of 2017) [2025] UGCC 24 (14 November 2025) (in which the court held that criminalizing abortion does not violate the right to freedom from discrimination).

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