

Human Rights Awareness and Promotion Forum (HRAPF)

"Still no where to run"

EXPOSING THE DECEPTION OF MINORITY RIGHTS UNDER THE EQUAL OPPORTUNITIES ACT OF UGANDA"

**-an information book dedicated to advocacy
against the 'alien' section 15(6)(d) of the
Equal Opportunities Commission Act**

February 2010

ABOUT HUMAN RIGHTS AWARENESS AND PROMOTION FORUM (HRAPF)

Legal status

The Human Rights Awareness and Promotion Forum (HRAPF) is an independent, non partisan, Non governmental Organization. It is specifically interested in human rights advocacy and awareness with a special emphasis on Social, economic and cultural rights. It is fully registered with the NGO Board.

HRAPF'S Vision

To see human rights being considered as part and parcel of political and economic development.

HRAPF's mission

HRAPF stands for the promotion of human rights awareness and also for human rights protection, enforcement, observance and advocacy. Making human rights a reality for every one is our mission.

HRAPF'S Motto

Taking human rights to the common person

OBJECTIVES

Major objective

To ensure awareness of the basic rights of the person with a special emphasis on the rights that primarily matter to the common man, that is, the social, economic and cultural rights.

Specific objectives

- To sensitise the general population on the human rights regime. This involves the carrying out of seminars, conferences, lectures and giving talks at schools and other community settings. Raising awareness and knowledge on human rights is a key to human rights' protection.

- To generate data, information and knowledge on human rights abuses and how they can be remedied and avoided in the future.
- To monitor legislative and administrative developments in the country with a view to make human rights part of the system. The project would study actions taken by the government and the local authorities and assess their impact on the human rights and freedoms.
- To promote interest in human rights through presentations and sharing experiences with the target groups.
- To promote peaceful resolution of disputes that arises in society. Force is not the best way of resolving even the simplest conflict in society.
- To cooperate with government in order to curve out a niche for human rights in Uganda.
- To cooperate with the international community and other stakeholders in achieving all its objectives.
- To accord the common persons financial and legal help in order to enforce their rights.
- To directly promote the fundamental right to education, even through financial support if need be. The right to education is the key to awareness and enjoyment of all other rights, and therefore it should above all other rights be promoted. For example an educated people react in a more civilized way towards conflicts.

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Still no where to run

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Introduction

There is a real danger to that has not come to the notice of many Ugandans. The provision in the Equal Opportunities Commission Act that prohibits the commission from investigating injustices suffered by Uganda's minorities on the reasoning that such matters involve behaviour which is considered to be immoral and socially harmful, or unacceptable by the majority of the cultural and social communities in Uganda. This provision effectively locks out all minorities from redress envisaged by the Act since most of the matters of discrimination are 'socially acceptable by the majority'

With out a doubt if this provision continues on our law books, even for another day, it singly renders all the efforts that have been made in the areas of promotion of minority rights worse less.

The entire public should therefore take keen interest and actively participate in all legal efforts to have this 'alien' provision done away with.

A wealth of material is herein provided on how the provision came to be; the efforts so far made to have the provision removed from our law books and scholarly opinion on the provision of the law.

THE NEED FOR AN EQUAL OPPORTUNITIES COMMISSION THAT OFFERS EQUAL OPPORTUNITIES FOR ALL

Executive Summary

Minorities are not defined in the Constitution of the Republic of Uganda. However, “Vulnerable groups” have been defined in the National Equal Opportunity Policy of 2006, as categories of people who lack security and who are susceptible to risk and/or are exploited. A wide range of groups of people fall under this broad definition and includes women, children, the disabled, sexual minorities, commercial sex workers, ethnic and religious minorities, among others. Uganda has taken many positive steps towards the protection of these individuals through the bill of rights in chapter four of her constitution, as well as binding herself to several International Instruments which one way or another obligate her to protect the rights of Minorities within her territory.

However, Uganda is no exception to other African countries that are still battling with cultural, religious and social prejudices which hamper the full realization of her national and International obligations to these most vulnerable groups of individuals. These strongholds have led her to develop double standards in which only a select few of the minority are protected, while the rest, who are considered abominations, sinners or outcast, according to the several accepted majority, are relegated to the periphery in the bottomless sea of discrimination, the very evil from which Uganda claims she seeks to redeem her entire people.

The analyses herein are aimed at exposing this state of affairs in greater detail, with a hope that it will provoke objective and level headed decision making among the decision makers in this country. Decisions should be untainted with prejudices or veiled fears for ‘uncommon’ human beings, but who nevertheless, remain human beings. This is, in fact, what the Equal Opportunities’ law to which Uganda has bound herself requires, as it makes no qualifications as to which human beings are to be protected from discrimination.

Still no where to run

This book-let therefore exposes the sure impotence of the Equal Opportunities Act, 2007 in addressing the age-old evil of discrimination of minority groups. This Act by virtue of Sec. 15(6) (d) defeats the basic premise of the Act itself and even the vision of the Equal Opportunities policy pursuant to which it was made.

USING THE COURTS TO FIGHT DISCRIMINATION AGAINST MINORITIES IN UGANDA:

THE CASE OF JJUUKO ADRIAN V. ATTORNEY GENERAL OF UGANDA

Did you know?

That if you feel that any law, or any provision of the law or act done under that law, or any acts by any person infringe upon or threaten to infringe upon human rights, you can have it declared null and void by the courts of law and get redress --as well !

The case

The case of **Jjuuko Adrian v. Attorney General** of Uganda is Constitutional Petition No. 1 of 2009. It is currently pending before the Constitutional Court of Uganda¹.

The case seeks to challenge the constitutionality of section 15(6)(d) of the Equal Opportunities Commission Act of Uganda.

The Petition was filed under Article 2(1), 137(1), (3) of the constitution and rule 3 of the Constitutional Court (Petitions and References) Rules S.I 91/05.

The foregoing provisions provide in terms that the Constitution of the Republic of Uganda is the Supreme law of the land and any other law or custom that is inconsistent with it is null and void to the extent of its unconstitutionality and that any such law can be challenged in the constitutional court by petition supported by an affidavit.

Background of the case

The Equal Opportunities Commission Act, 2007 establishes the Equal opportunities Commission which seeks to “**eliminate discrimination and inequalities against any individual or group of persons on the ground of sex, age, race, colour, ethnic origin, tribe, birth, creed, opinion or disability, and take affirmative**

¹¹ The constitutional court is the court of first instance for constitutional matters in Uganda. Appeals from its decisions go to the Supreme Court.

action in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom for the purpose of redressing imbalances which exist against them".²

The commission as established under the Act has the powers of a tribunal under Section 15 which are widely expressed but most importantly it has powers to investigate and provide a remedy on matters under its jurisdiction. These powers if effectively used can eliminate discrimination against minority groups.³

However there is a hitch in section 15(6) which deals with matters that the commission may not investigate. Others are acceptable but what is problematic is the provision in section 15(6)(d) hereunder reproduced.

Section 15(6); the commission shall not investigate;

d) any matter involving behaviour which is considered to be-

i) immoral and socially harmful, or

ii) unacceptable

by the majority of the cultural and social communities in Uganda.

The Act does not define what these behaviours are. However a peep into the parliamentary Hansards shows that the clause was inserted in order to shut out homosexuals “*who would flock the commission enmass seeking and claiming equal protection with other minorities*”.

Little did the legislators know that by the provision has the unfortunate effect of leaving out every minority group making the commission set up to help minorities to instead deny them access for redress? The commission effectively locked them out. Quite Ironical!

The legal basis of the case

The petition is brought under Article 137(3) of the Constitution of the Republic of Uganda, 1995 which provides that;

² Quoted from the long title to the Equal Opportunities Commission Act No. ...2007.

³ Section 15(1)-(7)

- (3) A person who alleges that—
- (a) an Act of Parliament or any other law or anything in or done under the authority of any law; or
- (b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.

This provision also promotes public interest litigation but it specifically applies to matters that call for the interpretation of the constitution. The Ugandan constitution allows any spirited person or organisation even if that person is not affected by a law, to bring a case against the violation of another person or persons' rights.

It is also grounded in Article 2 of the constitution which provides that the constitution is the supreme law and therefore any law that is inconsistent with it is null and void to the extent of its inconsistency.

It is also based on the Constitutional Court (petitions and references) rules which provide that the matter must be brought by way of petition.

The petition is based on particular provisions of the constitution basically the right to freedom from discrimination under Article 21 of the constitution.

The legal issues for determination

The legal issues for court to determine have not yet been formulated. This is because the parties have not yet held a scheduling conference to decide on the legal. This is a requirement of the law. However, from the petition itself and the evasive response of the respondents, the following legal issues can be discerned;

1. Whether Section 15(6)(d) of the Equal Opportunities Commission Act violates article 20(1) of the constitution which regards human rights as inherent and not granted by the state.

2. Whether Section 15(6)(d) of the Equal Opportunities Commission Act violates Article 20(2) of the constitution which enjoins the state to respect, uphold and preserve the fundamental rights of the person.
3. Whether Section 15(6)(d) of the Equal Opportunities Commission Act is inconsistent or contrary to Articles 21(1) and (2) which protect the right to equality of all persons before and under the law in all spheres of political, economic, social and cultural life.
4. Whether Section 15(6)(d) of the Equal Opportunities Commission Act is inconsistent with Article 28(1) of the constitution which grants the right to a fair hearing before an impartial tribunal.
5. Whether Section 15(6)(d) of the Equal Opportunities Commission Act is inconsistent with Article 36(1) of the constitution which protects the rights of minorities.

The key rights sought to be enforced

The key rights that the petition seeks to enforce are;

1. The right to equality before the law.
2. The right to freedom from discrimination.
3. The rights of minorities to be included in the policy and decision making of the state.
4. The right to a fair hearing before an impartial tribunal.

The legal remedies sought

The petitioner seeks the following remedies from the court;

1. A declaration that Section 15(6)(d) of the Equal Opportunities Commission Act is unconstitutional.
2. Any other order or declaration that court may deem fit.
3. Costs of the suit

Current progress of the case

The case is being handled by Mr. Ladislaus Rwakafuuzi, a reknown human rights lawyer who is actively aided by the petitioner in the prosecution of this matter.

Despite constant reminders to the Attorney General and court's calls for scheduling of the matter, the state has continued to shy away from kick-starting the petition. Ever since the state tendered in their reply to the petition, they have consistently refused to sit down with the court and the petitioner to have the matter scheduled. Despite this however, the court has gone ahead to fix the case for hearing in the next session of the constitutional court sittings. **The matter will thus be heard in January 2010.**

Conclusion

It is noteworthy that most laws in Uganda are no longer discriminative of minorities. The weed-out of discriminative laws has been accelerated by the Ugandan courts particularly the constitutional Court. But the constitutional only acts when matters are brought before it by vigilant persons. Therefore letting Section 15(6)(d) go without a challenge would have been a disastrous betrayal of an entire generation and beyond of minority groups.. The courts in Uganda have since 1995 been very proactive in preserving the rights of individuals at times even in open defiance to the state and its interests. Since bottom--top mechanisms of achieving equality for minorities are rather unsuccessful, starting with the law through strategic litigation is the best way for the human rights movement in Uganda, and HRAPF is actively engaged in this field.

Where to, from here?

The case has not yet been set down for hearing, but the petitioner is keen on following up on its progress to ensure that the matter is heard sooner than later and that the impugned section of the law is scrapped from the statute books soonest most. In the meantime, the petitioner is seeking for any other interim means in which he can publicize the existence of the Equal Opportunities Commission Act, about which very few Ugandans are aware, and the existence of draconian provisions such as section 15 (6) (d) which may cause victimization of some unsuspecting and unknowing members of the public. Unless this is done, and done now, the human rights of minorities against discrimination promised by the Act stand to be denied—by the same Act.

THE LEGAL REGIME PROTECTING MINORITIES IN INTERNATIONAL AND DOMESTIC HUMAN RIGHTS LAW

I. Uganda's National Obligations to Minorities

The Constitution of the Republic of Uganda, 1995

Article 20; Fundamental and other human rights and freedoms

- (1) Fundamental rights and freedoms of the individual are inherent and not granted by the State.
- (2) The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons.

Explanation; Whether you are a woman, child, disabled, sexual minority, you are a HUMAN BEING, and as such entitled to equal protection by the law.

Article 21: Equality and freedom from discrimination

- (1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.
- (2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

How do you know you are being discriminated against?

Article 21(3): For the purposes of this article, “*discriminate*” means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

Explanation; that no person or group or government is permitted under the law to (mis)treat another person or group differently and to that person or group's disadvantage just because they are women, children, disabled, prostitute, sexual minority or belonging to any other minority group.

Did you know that as a marginalized person, government is obligated to protect you through special legislation?

Article 32: Affirmative action in favour of marginalized groups

(1) Notwithstanding anything in this Constitution, the State shall take affirmative action in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them.

Article 36. Protection of rights of minorities.

Minorities have a right to participate in decision-making processes, and their views and interests shall be taken into account in the making of national plans and programmes.

Note: The government in purported exercise of its responsibility to make laws protecting minorities came up with the Equal Opportunities Act, 2007 whose Sec. 15(instead undermines efforts to achieve 'equal opportunities for all Ugandans without discrimination'.

Rights are not to be enjoyed at the expense of minority rights and public interest.

Article 43. General limitation on fundamental and other human rights and freedoms

(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.

Explanation; well as the majority groups are entitled to enjoy their rights they should not enjoy their rights at the expense of marginalized groups like women, children, and the disabled, among others.

The general society, comprising the ‘big numbers’ and ‘power’, should also not restrict the enjoyment of rights to the minority, comprising the ‘small numbers’ and ‘powerless’ on the public interest group but only where such a limitation of the enjoyment of the rights is ‘acceptable and demonstrably justifiable in a free and democratic society’.

Minority groups to enjoy rights even though not expressly listed in the Constitution

Art. 45. Human rights and freedoms additional to other rights.

The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned.

The Equal Opportunities Commission Act, 2007

Under Article 32(2) of the Constitution, Parliament shall make relevant laws, including laws for the establishment of an Equal Opportunities Commission, for the purpose of giving full effect to clause (1) of this article.

In 2007, The Government of Uganda took a positive step and set up the Equal Opportunities Commission to eliminate discrimination and take affirmative action in

favour of marginalized groups. The Act establishing the commission is analyzed in detail in later Chapters of this manual.

II. Uganda's International Legal Obligations to MINORITIES and protection from Discrimination

From the outset, it should be observed that Uganda has committed itself to observe its obligations to minorities as a signatory to many of the conventions and treaties. Under international law Uganda state has the core obligations **TO RESPECT; TO PROTECT; AND TO PROMOTE** the rights of MINORITIES in Uganda.

The UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

Clearly, from its preamble, the UDHR which now forms a part of International Customary Law reveals the right of equality of all human beings as the bed-rock of all human rights:

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political

or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

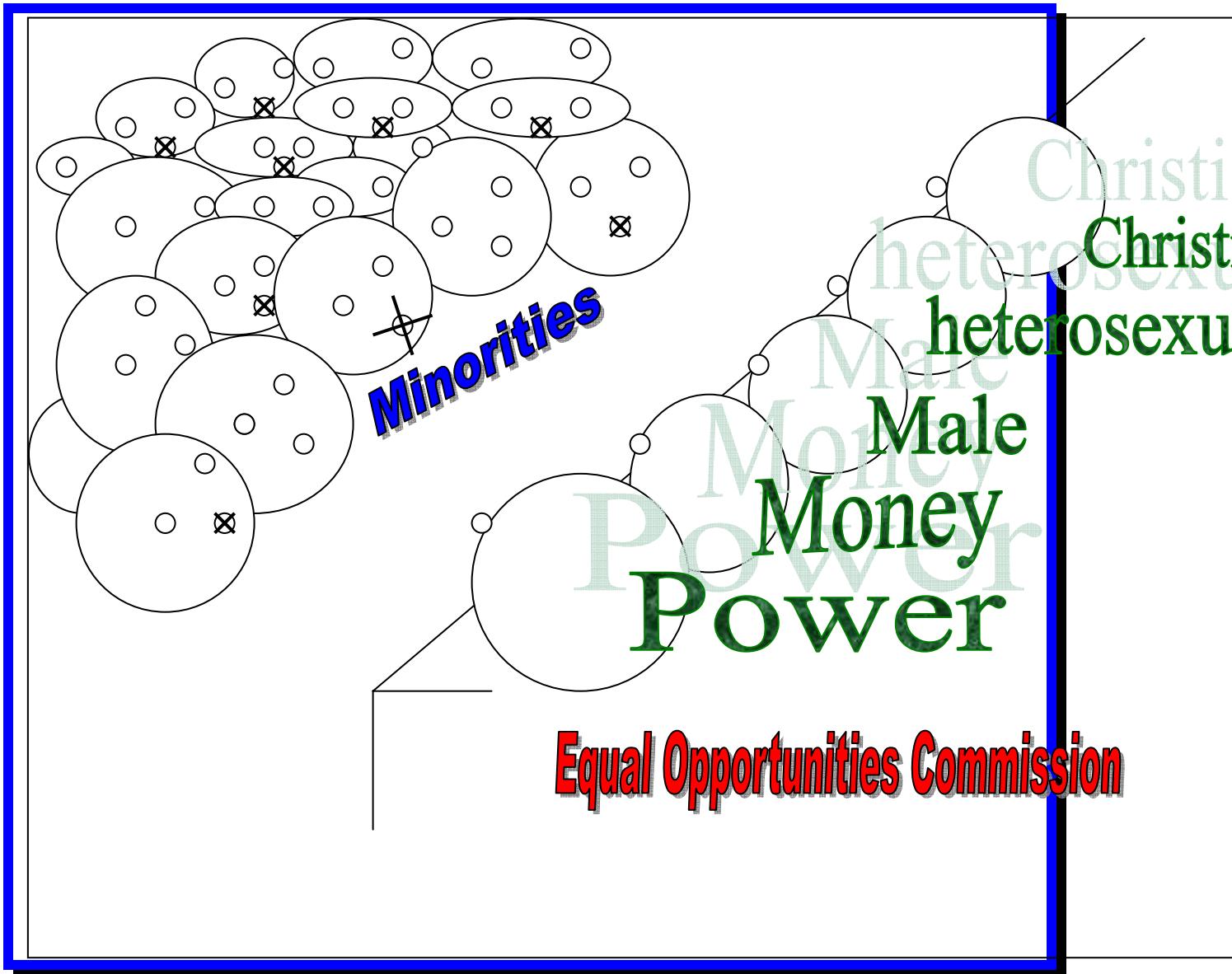
The Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights on 25 June 1993,

Para 5 provides:

All Human Rights are universal, indivisible, interdependent and interrelated. The International Community must treat Human Rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic, and cultural systems, to promote and protect all Human Rights and Fundamental freedoms.

ILLUSTRATIONS OF THE IMPLICATIONS OF SECTION 15(6)(D)

"Okay, you may now speak...but only those we think are human"





If some are left out, then why call it the Equal Opportunities Commission at all?

Still no where to run



The commission will leave some minorities vulnerable to further marginalization by virtue of section 15 (6) (d)

PART II

SCHOLARLY ARTICLES ON THE EQUAL OPPORTUNITIES COMMISSION ACT OF UGANDA 2007

GIVING WITH ONE HAND, TAKING AWAY WITH THE OTHER: THE UGANDAN EQUAL OPPORTUNITIES COMMISSION (EOC) ACT, 2007

Sylvia Tamale

Dean of Law, Makerere University (July 2008)

1. The Equal Opportunities Commission (EOC) Bill was finally passed into law in Uganda on April 4, 2007 and became enforceable on May 18, 2007. The Ugandan women's movement, together with other marginalized and vulnerable groups fought hard for almost ten years to have the law passed. The fact was that out of the numerous commissions established by the 1995 Constitution of the Republic of Uganda, only the EOC had not been set up by 2006.
2. As an enabling law, the EOC bill was also extremely important in fulfilling the National Equal Opportunities Policy (2006). The Policy clearly states that "Equal opportunities deal with issues and concerns of marginalisation, discrimination, injustice, exclusion, unfairness and inequality in access to resources, services and benefits." [The National Equal Opportunities Policy, p. 10]. Its vision is for "A just and fair society where all persons have equal opportunity to participate and benefit in all spheres of political, economic, social and cultural life." [ibid. p. 30]

3. The Ministry of Gender, Labour and Social Development and the Parliamentary Standing Committee on Equal Opportunities spearheaded the process of passing the bill.

4. The Functions of the Commission are clearly spelt out in the Act as:

To monitor, evaluate and ensure that policies, laws, plans, programs, activities, practices, traditions, cultures, usages and customs of—

- (a) organs of state at all levels;
- (b) statutory bodies and agencies;
- (c) public bodies and authorities;
- (d) private businesses and enterprises;
- (e) non governmental organizations; and
- (f) social and cultural communities,

are compliant with equal opportunities and affirmative action in favour of groups marginalized on the basis of sex, race, colour, ethnic origin, tribe, creed, religion, social or economic standing, political opinion, disability, gender, age or any other reason created by history, tradition or custom (section 14.1).

4. During the second reading of the bill, Hon. Jalia Bintu, the Chairperson of the Parliamentary Standing Committee on Equal Opportunities proposed an amendment to the bill by inserting a caveat to the powers of the Commission. In her words, *Mr Chairman, in our amendment the following new sub-clause 6(d), is inserted immediately after sub-clause 6(c) to read as follows: [The Commission shall not investigate] any matter involving behaviour which is considered to be-*

- i) *immoral and socially harmful; or*
- ii) *unacceptable by the majority of the cultural and social communities in Uganda.*

5. Hon. Syda Bumba, the Minister of Gender, Labour and Social Development, provided an emphatic endorsement of Hon. Bintu's proposed amendment:

On the amendment on immoral behaviour or generally unacceptable conduct by the majority of our people, it is very important that we include that clause. This is because the homosexuals and the like have managed to forge their way through in other countries by identifying with minorities. If it is not properly put in the clause, they can easily find their way through fighting discrimination. They can claim that since they are part of the minority, they can fight against marginalisation. [Parliamentary Hansard, December 12, 2006]

6. Hon. Nelson Gagawala Wambuzi (Bulamogi County) sounded a word of caution on this particular amendment:

Thank you, Mr Chairman. I stood up to ask for clarification from the honourable minister and the chairperson of the committee on the issue of morality being incorporated. I want to know whether our ladies may not suffer some inconvenience at some stage particularly on the issues of dress code, which might come up and become a very controversial society issue.

For our ladies in the whole of Uganda, big and small, young and old, this issue of dress code can become serious. Some ladies may want very short skirts, others in Karamoja may want to actually move without anything and others may want to put on -(Interjections)- As I said, I am just wondering whether she is comfortable with it. I wonder whether she has thought through it so that later when it comes, as you know we are following affirmative action and it is really for the ladies, I feel that I need to be made comfortable. Thank you, Mr Chairman.

7. The Minister dismissed Hon. Wambuzi's caution with an unconvincing reassurance:

Mr Chairman, I want to thank my honourable colleague for his concern for their ladies. We have already taken into account those kinds of concerns. What we are trying to do is to ensure that their ladies are not discriminated. If the code of dress is going to be the cause of their discrimination, then that is a matter which is going to be dealt with by the commission.

8. The bill was passed with the above amendment, appearing as Section 15 (6)(d) in the final legislation:

The Commission shall not investigate any matter involving behaviour which is considered to be—

- (i) **immoral and socially harmful, or**
- (ii) **unacceptable by the majority of the cultural and social communities in Uganda.**

9. The insertion of section 15(6) (d), not only violated the Constitution and the vision and objectives of its mother policy (the Equal Opportunities Policy), it also nullified its own basic premise. In its preamble, the Act states that it is “to give effect to the state’s constitutional mandate to eliminate discrimination and inequalities against any individual or group of persons on the ground of sex, age, race, colour, ethnic origin, tribe, birth, creed or religion, health status, social or economic standing, political opinion or disability, and take affirmative action in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom for the purposes of redressing imbalances which exist against them...”
10. The legislation is clearly meant to address issues of marginalisation that affect “social minorities” and to ensure that they are accorded equal opportunities as “social majorities.” Therefore to say that the Commission requires the

authorization of the “social majority” to address the issues and concerns of “social minorities” simply defeats the core purpose of the legislation. It is a classic case of giving with one hand and taking away with the other. Indeed, it also unduly constrains the Commission from exercising its discretion, which is a basic feature of protective institutions such as courts, or human rights commissions. Moreover, to take that discretion away when the Constitution does not make any proviso regarding ‘immorality’ or ‘social acceptability’ is overly broad.

11. Section 15(6)(d) is as absurd as it is repugnant to the basic principles of substantive equality. It has no place in a democratic society that is committed to a fully-fledged system of minority protection. Most importantly, it violates Articles 20, 21, 32(1) and 32(2) of the Constitution, which provide for the inherent nature of human rights, equality and freedom from discrimination and affirmative action in favour of marginalized groups.

PLAYING OSTRICH HEAD IN THE SAND: THERE IS NO ROOM FOR SECTION 15 (6) (D) IN A LAW INTENDED TO END DISCRIMINATION AGAINST THE MINORITY IN UGANDA.

Namwase Sylvie

“Cultural identity can never provide an adequate guide for living. We all have multiple identities, and even if I accept that I have a primary cultural Identity, I may not want to conform to it. Besides, it would not be very practical. I operate in the market, live through my body, struggle in the grip of others. If I am to regard myself only as a cultural being, I allow myself little room to maneuver or to question the world in which I find myself.” Adam Kuper, Culture; the Anthropologist’s Account pg. (supra) pg.

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“Human rights adhere to the human being by virtue of being human and for no other reason. This means the human being holds rights not only against the state but also against society, his/her community and his/ her family”

Abdulla Ahmed An- Naim, “Human Rights in the Muslim world” pg. 399

Introduction

The Equal Opportunities Commission Act

In **2007** the Government of Uganda enacted the Equal opportunities Commission Act. The commission is one of the ten commissions provided for under the 1995 constitution of Uganda. The Equal Opportunities Commission has its origins in **Article 32(2)** of the Constitution on the protection of minorities. The Commission is aimed at availing equal opportunities to all Ugandans without discrimination on any grounds whatsoever. The long title of the Act provides Verbatim:

“An Act to make provision in relation to the Equal Opportunities Commission pursuant to articles 32 (3) and 32 (4) and other relevant provisions of the Constitution; to provide for the composition and functions of the Commission; to give effect to the State’s constitutional mandate to eliminate discrimination and

inequalities against any individual or group of persons on the ground of sex, age, race, colour, ethnic origin, tribe, birth, creed or religion, health status, social or economic standing, political opinion or disability, and take affirmative action in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom for the purpose of redressing imbalances which exist.”

An appreciation of the long title of the Act, the spirit of the constitution of the Republic of Uganda, 1995 and the Policy on which the Act is based, reveals an intention to protect all minorities especially those misunderstood by the cultural and societal majority. This begs the question: where did section 15 (6) (d) of the Equal Opportunities Commission Act,2007 (*to be detailed shortly*) departing from all these principles, come from?

The National Equal Opportunities Policy

The National Equal Opportunities Policy, paragraph 2.9 acknowledges that Human rights need to be mainstreamed into the development model process, and that these include principles such as equality before the law, individual and collective freedoms. Paragraph 3.1 acknowledges the use of the rights-based approach as a major guiding principle for the Policy.

The Policy also acknowledges all the International Principles illustrated in **part ...above** which relate to non discrimination and equality of all human beings. Paragraph 2.11.3 upholds Article 3 of the UDHR which provides: “All Human beings are borne free and equal in dignity and rights.”

The **Vision** of the Policy in Paragraph 4.1 is to see;

“A just and fair society where all persons have equal opportunity to participate and benefit in all spheres of political, economic, social and cultural life.”

The **mission** of the policy is;

“To provide a frame work for redressing imbalances which exist against marginalized groups while promoting **equality** and **fairness for all.**”

Some of the Priority areas enunciated in the policy are as listed below:

In paragraph 5.4(c): Under gender, the strategy is to sensitize communities on negative cultural practices which limit opportunities for marginalized men and women.

Awareness-raising is a priority area provided in paragraph **5.8.1**. Again, I will reproduce this verbatim:

*“Communities often marginalize and **discriminate against marginalized groups because of negative belief, norms and customs.** This is mainly due to the **limited understanding** by the communities **of the underlying causes** as well as of the **rights, potentials, and abilities** of the **marginalized groups.** The policy will put in place a mechanism to address the limited understanding. ...”*

The foregoing provision touches squarely on the most shunned minority rights issues such as the human rights of homosexuals and sex workers, which the very Equal Opportunities Commission Act seeks to suffocate through cosmetic provisions such as the impugned section 15(6) (d) of the Equal Opportunities Commission Act. For who does the cultural society frown upon the most in this country to the extent that they are not considered fit to live among people of upright moral standing (*some prominent political figure has condemned homosexuals to live in seclusion on an island where they would eventually become extinct!*) than the homosexual and the commercial sex worker? Suffice it to say, that the latter's services are utilized in one

form or the other by a good majority of the people of “*upright moral standing*” and the former are sons, daughters, nieces and nephews of many an ignorant member of this ‘straight society’.

Of even more bizarre irony is a comparison of the functions of the Equal Opportunities Commission to the suffocating section 15 (6) (d).

In Section 14 of the Act, some of the commission’s functions are to ensure that *policies, laws, traditions, cultures, usages and customs of all organs of state, statutory bodies, public bodies, private enterprises and so forth are compliant with equal opportunities and affirmative action in favour of marginalized groups*. The commission further has powers to *examine any law, proposed law, policy, culture tradition, or plan likely to have an effect of nullifying or impairing equal opportunities to persons in employment or enjoyment of Human Rights*.

Further, it has powers to *prepare and publish guidelines for implementation of equal opportunities and the avoidance of, among others, acts and cultures that undermine equal opportunities, as well as to monitor the compliance in Uganda with provisions of International and regional conventions and treaties to which Uganda is a party, that relate to the functions of the commission*. It may also *rectify or settle any act, omission or circumstance that is found to constitute discrimination, marginalization or which otherwise undermines equal opportunities*.

Review the offending sec. 15(6)d

One wonders then, whether the commission is not the biggest offender of the Equal Opportunities Act and shouldn’t in fact be the first subject of its own investigation! This is because of the absurdity of the following provision in--**Section 15 (6) (d) which provides;**

The commission shall not investigate-

- d) any matter involving behaviour which is considered to be-**
- i) immoral and socially harmful, or**

ii) unacceptable by the majority of the cultural and social communities in Uganda

Apparently, in their attempt to protect the minority from discrimination by society, the legislators could not save them from the real danger; the *Majority*.

The majority here is not necessarily the numbers but rather that part of society which controls the biggest part of the resources and hence has all the decision-making power. The majority therefore determine what is “culturally acceptable”, and in fact define it more often than not to suit their needs at the expense of the freedom of the minority. One scholar has written:

“The same elite that use culture as a defense against external criticisms based on Universal Human rights often ruthlessly suppress inconvenient local customs whether of majority or of a minority. The lack of local cultural sensitivity shown by many national elites ...suggest a very high degree of self-interest”

JACK Donnelly: Universal Human Rights in Theory and Practise (1989) pg 552

Some Gendered and Sexual-rights perspectives on Sec. 15(6)(d)

It is no big mystery who owns the most resources and power in this country and consequently, along whose lines culture has been defined. It is the man as opposed to the woman. One doesn't have to look so far to find that this is the truth: Right from the fact that this country has only had male Presidents, down to the disproportionate ratio of male to female political figures and to the smallest unit where it all begins; the home, where the man is considered the head of the family. This position comes with a lot of privileges which can not easily be relinquished.

It also explains our cultural constructions where we build social structures and concretize them with cultural norms and taboos whose basic purpose is to ensure that the status quo remains undisturbed with the man always at the top of the prism. For the man to remain the head of the house-hold, and consequently head in all other spheres of life, he needs to thrive within the heterosexual structure of the family otherwise homosexual relations and unions erode the power play between

male and female in the house hold and slowly but surely what superimposes man at the top of the social and cultural structure soon becomes irrelevant. This trend of events whittles away the man's authority over the woman in other spheres of life such as business, science and technology. The woman will easily question why she too cannot be a doctor, and likewise the society around her, will subconsciously permit her to dare dream of the unknown, by not questioning or frowning upon her decisions. Prejudices such as "it appears man like" would no longer arise. She will be let into the "male domain" of the astronaut, doctor, truck driver, builder, architect, fire fighter, among others.

In light of the commission's mandate to protect minority rights in the Constitution, this provision of the Act is self defeating.

We have witnessed in this country, the dispersing of conferences and seminars organized for the sensitization of sexual workers on their rights and protection. (*Never mind that during the heads of the common wealth States' summit, special zones were gazetted in this very country for activities of commercial sex workers!*) We have witnessed angry mobs attack peaceful gatherings of homosexuals and they are left to go scot-free, apparently because they were helping rid society of 'undesirables' albeit illegally.

What is all this if it is not, to use the expression in paragraph **5.8.1** of the Equal Opportunities Policy, "...marginalization of a group due to ...a **limited understanding by the community of the underlying causes of what they consider evil, as well as of the rights, potentials and abilities of these marginalized groups**"

It does not help that we have a prominent female decision maker to thank for the existence of the impugned section 15 (6) d in the Act.

The Parliamentary Hansards clearly show that when introducing the provision in parliament, Hon. Syda Bbumba the then Minister of Labour, Gender and social Development said;

*“On the amendment on immoral behavior or generally unacceptable conduct by the majority of our people, it is very important that we include that clause. This is because the homosexuals and **the like** (emphasis mine) have managed to forge their way through in other countries by identifying with minorities. If it is not properly put in the clause, they can easily find their way through fighting discrimination. They can claim that since they are part of the minority, they can fight against marginalization”- Parliamentary Hansard, December 12, 2006.*

I must say the honorable minister could not have stated the matter more accurately. What her statement all but translates is the following:

*“We admit that homosexuals (**and the like**) are minorities and they are discriminated against, but all the same, we don’t want them making any claims under this umbrella or in fact any where at all.”*

Needless to state that homosexuals are *human beings* before they are *homosexuals*, just like women are *human beings* before they are women and just like any one else is a human being before they are whatever identity label society has chosen to give them. And, the very fact that they are being targeted for exclusion from equal opportunity legislation in a National Parliament hardly disqualifies them from the category of **marginalized** and **discriminated** minorities! That is what they are.

If incidents such as the foregoing arise again, which they are bound to in a “culturally driven” country like ours, how is the Commission going to protect these groups? Or will it claim like the good minister did, that they are not groups that have been **“marginalized** on the basis of gender, age, disability or **any other reason** created by **history, tradition or custom ...”**

A roving look around our society today reveals that aside from women, no other minority group fits the foregoing description more perfectly than Sex workers and sexual minorities.

The dire effects of this law

Several other eventualities in which the impugned section 15 would leave the minority bereft of any protection would arise in scenarios of marital rape, widow inheritance, children's rights of choice, such as choice of religion, minority harmless religious practices, among others. All these present several avenues in which the commission would leave the minority vulnerable to even further marginalization by the majority who may find their demands "immoral", "socially unacceptable" or "harmful". And all this in the name of "culture", of which it has been written:

"..Unlike scientific knowledge, the wisdom of culture is subjective. Its most profound insights are relative, not universal laws..." Adam Kuper: Culture; the Anthropologist's Account pg.376

In light of the above, it is clear that section (15) (6) (d) is a gross misdirection for the Equal Opportunities Commission. The Equal Opportunities Policy, the spirit of the long title of the Equal Opportunities Act, and above all, the constitution of the Republic of Uganda, contain the correct guiding principle to dealing with minority rights and fulfilling the objective of the Act; the Rights-Based Approach.

Conclusive remarks

"..Human Rights are a legal devise for the protection of smaller numbers of people faced with the power of the greater numbers..." PANNIKAR, "Is the notion of Human Rights a Western Concept?" 120 Diagnoses 75 (1982).

This principle which I believe is what informed the legislation of the Equal Opportunities Commission Act, is what should continue as the basic guiding principle of the Commission if it is to truly fulfill its mandate of protecting the minority.

The legislature should stop playing ostrich head in the sand. The double standards and prejudice in society which found their way into the Equal Opportunities Commission Act are obvious and they are exposed by section 15 (6) (d) of the very Act.

The **entire minority (emphasis added)** in Uganda should be freed of their shackles and from all prejudices created by history and cultural fallacies, misconceptions and injustice, if Uganda is to ever achieve true ‘Equality of all persons’ that it prominently provides for in The Constitution of the Republic of Uganda, 1995.

**PROTECTION OF INDIVIDUALS FROM DISCRIMINATION OR GALVANISING
DISCRIMINATORY CULTURAL PRACTICES? A GENDERED ANALYSIS OF THE
ROLE OF SECTION 15(6)d OF THE EQUAL OPPORTUNITIES COMMISSION
ACT**

BY ADRIAN JUUKO*

“In a particular society where structurally based inequalities characterize the relationship between men and women, all institutions and practices will reflect and reinforce these inequalities and despite its liberal rhetoric, the law unquestionably also functions in this way”⁴

Abstract

This paper discusses the implications and the constitutional validity of section 15(6) (d) of the Equal Opportunities Commission Act of Uganda. It is based on the premise that this law is unconstitutional for it is very discriminative against all groups of minorities. That the law is self - defeating and that it is not in tandem with the spirit and letter of the rest of the Act and the government policy on equal opportunities.

Introduction

After a very long struggle by various human rights activists and groups⁵, the Equal Opportunities Commission has been set up.⁶. The commission is intended to *“eliminate discrimination and inequalities against any individual or group of persons on the ground of sex, age, race, colour, ethnic origin, tribe, birth, creed, opinion or disability, and take affirmative action in favour of groups marginalized on the basis of*

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⁴ See Anne R. Edwards; Sex/gender, sexism and criminal justice; some theoretical considerations, 165 (1989)

⁵ UWONET was one of the leaders in this struggle.

⁶ This commission is the last of all commissions provided for by the constitution to be set up. It is provided for under Article 32(2) of the 1995 constitution and it was supposed to be set up within two years.

gender, age, disability or any other reason created by history, tradition or custom for the purpose of redressing imbalances which exist against them".⁷

The Government first developed a policy- the Equal Opportunities Policy⁸ which policy was meant to be the background to the Act. The policy among others observed that cultural practices were among the greatest factors inhibiting the enjoyment of equal opportunities in Uganda⁹.

Below we analyze the effect of this provision on minorities and more especially women.

The Commission under the Act

The commission as established under the Act has the powers of a tribunal under Section 15 which are widely expressed, and which if put in effect can effectively eliminate discrimination.¹⁰

However there is a hitch in section 15(6) which deals with matters that the commission may not investigate. Others are usual but what is unusual is found in section 15(6) (d). For purposes of clarity, let us reproduce it;

Section 15(6); the commission shall not investigate-

d) any matter involving behaviour which is considered to be-

i) immoral and socially harmful, or ii) unacceptable.

by the majority of the cultural and social communities in Uganda.

A gendered analysis

This provision above all defeats the aim of the constitution, the Act itself and the National Equal Opportunities Policy, 2007¹¹.

This provision means that the perceptions of the majority of what is acceptable and moral is what is to guide the operation of a commission that was set up to handle matters that accrue out of discrimination of the minority by the majority!

⁷ Quoted from the long title to the Equal Opportunities Commission, Act 2007.

⁸ The Republic of Uganda; The National Equal opportunities Policy, July 2006.

⁹ Para 1:3 deals with the causes of discrimination and includes it.

¹⁰ Section 15(1)-(7).

¹¹ Officially cited as The Republic of Uganda; The National Equal Opportunities Policy; Equitable Development for sustainable Creation of wealth, July 2007, which sets the framework for the operationalisation of the constitutional provisions and from which the Act was developed.

That in case some one brings up a complaint of discrimination which is based on a cultural custom or norm or on a moral issue then that cannot be investigated by the commission!¹²

The other term that the Act uses is “socially harmful”. Whatever this term means, it together with ‘immorality’ and ‘unacceptability’ are meant to defeat the aim of the Act.

It is thus highly doubtful that if the commission is set up, it will have any matters to investigate at all for almost all matters that affect minorities are looked at by the majority as socially unacceptable, immoral and destructive to the patriarchal social fabric.

This will render the commission totally irrelevant to the people it is supposed to help¹³. They on the other hand will continue to be overborne and exploited on the whims of their more numerous (read powerful)¹⁴ brethren.

A gendered analysis of this provision shows that the government is rather further entrenching patriarchy yet it sought to deal away with it. This is the irony of the year. Most of the practices that stand in the way of, for example women’s full realization of their full potential are deeply embedded within the moral customs and practices of the majority. Women at work, women in the market, women in politics¹⁵, women eating specific foods, women talking, women sitting in the same class for the same qualifications etc are all unacceptable in the traditional conservative social rubric. All women without exception who have made it in all those fields are ‘rebels’. Society simply tolerates them but otherwise if society’s views are sought as to what should be done, the majority would regard such women as immoral, grossly obscene and that their practices are harmful to the social economic rubric of society.

¹² Tuhaise supra suggests that in general society; these complaints do not attract attention.

¹³ According to Percy Night Tuhaise; Gender roles and sexual inequality; domestic labour and the burden of housewives in Uganda; EAJPHR vol. 2, 1999 pp 146.

The ideology of traditional gender roles has been further strengthened and institutionalized by the state through its laws and policies, and its general tolerance of systems and beliefs that reflect such an ideology.”

¹⁴ Read powerful.

¹⁵ See generally Sylvia Tamale; When hens begin to crow; Gender and parliamentary politics in Uganda, Fountain Uganda, 1999.

So, if the commission will not protect women from such practices then it has no reason for existence. The sure effect of this is that women will remain under the yoke of patriarchy with no hope of rescue by the commission set up to rescue them!

Still, the subjection of the operation of a human rights tribunal to the motifs of customary law, and practices is mind boggling. One wonders where the two meet. Issues of morality are rarely compatible with human rights, since the former deals with society yet the latter is concerned with individuals¹⁶. The Commission is supposed to realize the human rights of women, but it cannot if it has to put the majority before the individual woman. It is society that violates individual's rights. Uganda ratified the major human rights instruments including the CEDAW which enjoins states to deal away with exploitative and restrictive practices on women. This is a violation of international law. Still, it is the woman sufferer that loses and her rights will continue being violated in the full view of the commission set up to help her.

It is also pertinent to note that Section 15(6) d is a violation of the of the 1995 constitution, the Act itself and that of the Equal Opportunities Policy.

Section 15(6) d is unconstitutional. The 1995 constitution of Uganda is the supreme law of the land¹⁷. Under article 2(2), “*if any other law or any other custom is inconsistent with any of the provisions of this constitution, the constitution shall prevail, and that other law or custom shall, to the extent of its inconsistency be void*”.

In light of this it is rather plain and obvious that Article 15(6) d is inconsistent with the constitution.

Article 32 provides for affirmative action in favour of “*groups marginalized on the basis of gender, age, disability or any other reasons created by history, tradition or custom, for the purpose of redressing imbalances that exist against them*”¹⁸.

Article 33 elaborates on women’s rights. Under Article 33(1) women shall be accorded full and equal dignity of the person with men. The state is also enjoined to

¹⁶ The African states are clamoring for a theory of cultural relativism today to observe such practices.

¹⁷ Article 2(1) of the 1995 Constitution, as amended.

¹⁸ Article 32(1).

provide the facilities and opportunities necessary to enhance the welfare of women to enable them realize their full potential.¹⁹

More fundamental of all is Article 33(6) which is to the effect that laws, cultures or traditions which are against the dignity, welfare or interest of women or which undermine their status are prohibited.

The provision is against Article 21 which provides for equal treatment, and a host of other incidental provisions. So, the provision cannot stand constitutional scrutiny, and thus it is void to the extent of its inconsistency²⁰

For the Act and the policy, they both emphasize that discrimination based on customs and practices is one of the root causes of imbalances. The Long title of the Act²¹ reflects this, as does Section 1 while defining discrimination. Section 14(1) is also cognizant of this fact. So, the offending provision defeats the spirit and even the letter of The Equal opportunities Act of which it is a component! This inconsistency will work to the disadvantage of the very populations that the Act is meant to protect.

Section 15(6)d is also in violation of the Equal opportunities Policy since the policy aims at redressing imbalances caused by among others, “cultural...background”²²

All in all, Section 15(6) d is not an acceptable provision, if the rights of minorities especially women are to be protected. Though the commission is not yet operational, it is possible to predict that nothing good will come out of it if it insists on following the views and interests of the domineering majority, in its bid to protect the for-long-suppressed minorities.

Conclusion

Section 15(6) d is out of touch with reality. It cannot and it can never guarantee the rights of minorities if it still insists on majority rule. Morality per se is not a bad

¹⁹ Article 32(2).

²⁰ Article 2(2).

²¹ Already quoted.

²² See foreword by the Minister of Labour, Gender and Social Development.

concept, but those aspects that make it oppressive as a concept need to be weeded out.

It is wholly disheartening for a commission set up to investigate cases of abuse of individual rights to be seen condoning the same practices that lead to the discrimination in the first place. Uganda should avoid falling into such pitfalls and copy the examples from some where else as earlier indicted above.

Otherwise the provision as it stands cannot protect minorities and especially it cannot protect the women of this world. Women in Uganda have been and continue to be the most suppressed under the patriarchal moral system. They are not to talk or be seen in public, their sphere is the domestic sphere. Is this what the parliament intended women to remain like? If no step is taken, this is how our mothers and sisters will remain.

Whatever the reason for the provision was, the effect of the provision is the biggest consideration. The law will exclude almost all minorities from accessing the commission. The role of the law in society is supposed to be protection of the disadvantaged. If a law is discriminative, it cannot stand constitutional scrutiny the world over. Therefore Section 15(6) d of the Equal Opportunities Commission Act cannot be left to stand. It must be expunged---sooner rather than later.

Best practices elsewhere.

Our former colonial masters the British are now at a different stage altogether. They have in place an Equal opportunities commission that is all embracing. It's not limited by any references to the majority preferences. South Africa uses the Truth and Reconciliation Committee to promote equality for all races and also for all sexes. Australia has a more elaborate law and in fact each of the states has its own system. However, they try as much as possible to focus on the individual rights rather than the communities preferences. Never the one to be outdone, the USA also has various commissions in place. The most visible one is the Equal Employment Opportunities commission²³. Of course semblances of provisions like our Section 15(6) do not surface.

So, all in all Uganda should stay the operation of Section 15(6) d as soon as possible and instead adopt the better practices from other countries elsewhere.

²³ www.wikipedia.org/wiki/equal-employment-opportunity-commission.html

Still no where to run

APPENDIX

FULL TEXT OF THE UGANDA EQUAL OPPORTUNITIES COMMISSION ACT 2007

Still no where to run