



LEGAL ANALYSIS OF THE HUMAN RIGHTS ENFORCEMENT BILL 2015



DECEMBER 2016

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INTRODUCTION	4
BACKGROUND	5
STRUCTURE OF THE BILL	6
PART I - PRELIMINARY	6
PART II – ENFORCEMENT OF HUMAN RIGHTS AND FREEDOMS	6
PART III – MISCELLANEOUS	6
ANALYSIS OF THE PROVISIONS IN THE BILL	7
CONCLUSION	15



INTRODUCTION

The Human Rights Enforcement Bill (herein after ‘the Bill’) was published in the Uganda Gazette on 01 October 2015, as Bill No 26 of 2015.¹ The Bill is sponsored by the Human Rights Committee of Parliament and its main objective is to give effect to Article 50(4) of the Constitution by providing for the procedure of enforcing human rights under Chapter Four of the Constitution; and for related matters.² It was tabled in Parliament for its first reading on 10 November 2015 as a private Member’s Bill by the Chairperson of the Human Rights Committee, Hon. Jovah Kamateeka. The Bill is currently with the Committee on Legal and Parliamentary affairs for consideration, consultations and reviews.

From the perspective of an organisation that advocates for the rights of marginalised persons, it is a welcome gesture to see that Parliament is engaged in efforts to enact a law on enforcement of human rights. Having this law in place will hopefully bring to life the obligations of duty bearers and entitlements of rights holders as far as enforcement of human rights is concerned. This change is particularly welcome for people who belong to groups that are vulnerable to suffer rights violations and are in need of an effective mechanism to address their concerns.

With the above in mind, there is need to ensure that the law is not used by duty bearers to instead clamp down on the enjoyment of rights and freedoms, especially rights that are generally frowned upon, or rights of persons that are considered unacceptable. It is pertinent that the law is passed with provisions that will give adequate effect to its enabling article in the Constitution and that it, in practice, promotes the enjoyment of human rights for all persons.

This analysis looks at the Bill in its current form, analyses the provisions therein and their conformity with provisions of the Constitution and other laws, identifies gaps in the Bill in its current form and makes recommendations. The analysis has five parts: the introduction, the background, the structure of the Bill, the analysis of the provisions in the Bill and the conclusion. It is intended to contribute to the consultative process being done by the Committee on Legal and Parliamentary affairs, to ensure that the final law passed by Parliament is one that can adequately give effect to Article 50 of the Constitution and provide for a substantive framework within which human rights can be enforced in Uganda.

¹ Uganda Gazette No. 57, Volume CVIII dated 1st October 2015

² Paragraph 1 of the Memorandum to the Bill

The Constitution of the Republic of Uganda 1995, in Article 50 provides for the enforcement of rights and freedoms by courts of law. In its clause (1), it provides that:

Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.

Clause (4) of the same Article enjoins Parliament to make laws for the enforcement of rights and freedoms under Chapter Four of the Constitution. There is however currently no law that has been enacted by Parliament to specifically address issues of human rights enforcement, particularly in courts of law. In its absence, the provisions of the Constitution have nevertheless been operationalised, as various cases of human rights enforcement have been successfully filed with the High Court. As regards jurisdiction in terms of competent court, the cases have been filed in the High Court on the basis of Article 139 of the Constitution, which grants the High Court unlimited original jurisdiction over all civil and criminal cases. Although this is being done, there is still need to operationalise Article 50(4) of the Constitution, and fill in the gaps existing in human rights enforcement especially regarding the procedure of presentation of evidence, remedies and the relationship between enforcement by courts, and enforcement by other tribunals like the Uganda Human Rights Commission.³

In 2008, the Rules Committee established under Section 40 of the Judicature Act issued the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules S.I 55 of 2008, to provide for the procedure to be followed when applying to courts of law for enforcement of human rights. This was in pursuance of the Committee's duty to make rules regulating the procedure and practice of among others, the High Court.⁴ These rules were applied in the High Court in various cases of human rights enforcement. In 2011 however, the Constitutional Court in the case of *Bukenya Church Ambrose v Attorney General*⁵ nullified these Rules on the basis that they were unconstitutional as their issuance amounted to the usurping of the powers of Parliament. The rationale was that while the Rules Committee has the statutory duty of making rules of enforcement for courts, the duty to do that as far as human rights enforcement is concerned is expressly, vested with Parliament under Article 50(4) of the Constitution. Court held that although Parliament had not yet done this, the Committee had no powers to issue the rules, except under delegation from Parliament in an Act of Parliament. This decision took enforcement of human rights back to the original position of lack of an enabling law.

Against this background, the Human Rights Committee of Parliament drafted and tabled the Human Rights Enforcement Bill to provide a framework for the enforcement of human rights and freedoms and empower the Rules Committee to make rules in respect of the specific procedural matters relating to the protection and enforcement of fundamental rights and freedoms.

³ Uganda Human Rights Commission Act Cap 24, Sec 7

⁴ The Judicature Act CAP 13, Sec 41(1)

⁵ Constitutional Petition No 26 of 2010



STRUCTURE OF THE BILL

The Bill has 11 clauses that are divided into three parts. They are as follows;

Part I - Preliminary

The first part of the Bill deals with preliminary issues like the application of the proposed law and the interpretation section. The part has two clauses i.e. 1 and 2. Clause 1 is to the effect that the law shall apply to the enforcement of rights and freedoms guaranteed under Chapter Four of the Constitution, and it restricts such enforcement to applications made in the High Court. The clause also expressly disallows the application of the law to the mandate of the Uganda Human Rights Commission to investigate and hear cases of human rights violations. Clause 2 is the interpretation section of the Bill.

Part II – Enforcement of Human Rights and Freedoms

This part contains the substantive provisions of the Bill. It contains clauses 3, 4, 5, 6 and 7. Clause 3 attempts to reiterate Article 50(1) of the Constitution; Clause 4 provides for the jurisdiction of the High Court in regards to cases of human rights enforcement, including prohibition of the Court from hearing applications in cases where the applicant can get redress under another law; Clause 5 provides for the procedure of making an application on human rights enforcement which shall be by plaint and the quorum required to hear such cases which shall be one judge; Clause 6 provides for reference of matters concerning human rights enforcement from lower courts to the High Court; and Clause 7 provides for the powers of the High Court in relation to the remedies and orders they can make which shall not include declarations relating to the interpretation of the Constitution.

Part III – Miscellaneous

This is the last part of the Bill and it contains Clauses 8, 9, 10 and 11. Clause 8 provides for appeals of the High Court decisions to the Court of Appeal; Clause 9 provides for the application of the Civil Procedure Act and the Rules made thereunder to the applications in the High Court; Clause 10 mandates the Rules Committee to make rules giving effect to the provisions of the Bill; and Clause 11 provides the transitional provision.



ANALYSIS OF THE PROVISIONS IN THE BILL

This part will look at each of the provisions in the Bill and analyse them in light of the Constitution of Uganda and Uganda's international and regional human rights obligations. The section will also give recommendations.

a) **Clause I – Application**

Clause I of the Bill provides for the application of the proposed law. The clause provides that:

- (i) *This Act applies to the enforcement of rights and freedoms guaranteed by Chapter Four of the Constitution*
- (ii) *This Act shall apply to the enforcement of human rights by the High Court*
- (iii) *This Act does not apply to the investigation, protection or enforcement of rights and freedoms by the Uganda Human Rights Commission under articles 52 and 53 of the Constitution*

Analysis of the clause

This clause provides the ambit within which the proposed law will be implemented in terms of substance and forum. As regards substance, the proposed law shall apply to rights and freedoms guaranteed under Chapter Four of the Constitution. Chapter Four is the Bill of rights in the Constitution of Uganda as it provides for the different rights and freedoms that are recognised thereunder. In terms of forum, the clause limits the application of the law to human rights enforcement in the High Court. It expressly states that the law shall not apply to human rights enforcement by the Uganda Human Rights Commission.

The clause provides that the Act shall only apply to enforcement of Human Rights in the High Court. This is very restrictive as Article 50(4) requires Parliament to make laws regarding the general enforcement of human rights under the Constitution and not just enforcement in the High Court. The law should be inclusive enough to cover all human rights enforcement in different courts and state institutions like the Uganda Human Rights Commission and Equal Opportunities Commission. While it is true that such courts and bodies have establishing laws and rules that govern them and their procedure, this Act can refer to them, and provide that the procedure provided therein is what is to apply to cases before such bodies. However, these bodies should also be bound by general provisions regarding enforcement of human rights provided for in the Bill, such as the provisions on the expediency with which human rights cases should be handled.

Recommendation

The Bill should expand its application to other courts and bodies, to ensure that the general principles relating to human rights enforcement apply to all forums that enforce

human rights. Expanding its application would also clarify the relationship between the enforcement in the High Court and enforcement in other bodies.

b) **Clause 2 – Interpretation**

Clause 2 provides the interpretation of the different words used in the Bill. The words defined are: application; competent court; minister; rules committee; and subordinate court.

Analysis of the clause

The clause provides definitions of the different words and how they should be used in interpretation of the text of the Bill. Application is defined to mean an application to court for the enforcement of the rights enshrined in Chapter Four of the Constitution; competent court to mean the High Court; minister to mean the minister responsible for justice; rules committee to mean the committee established under the Judicature Act; and a subordinate court to mean all courts lower than the High court.

Recommendation

The Clause should be left as it is

c) **Clause 3 – Enforcement of human rights**

Clause 3 of the Bill provides that:

“In accordance with article 50 of the Constitution, any person or organization may bring an action for the enforcement or protection of human rights”.

Analysis of the clause

The clause reinforces article 50(1) of the Constitution and states the main function of the proposed law. It confers a right on any person or organisation to bring an action for the enforcement of rights. This is the clause that would provide a basis and *locus standi* for actions filed in the High Court under this law.

While the Bill makes it clear that actions may be brought by both ‘persons’ and ‘organizations’, it lacks certain specificities, which are provided for in the Constitution, on when one can actually file an application for enforcement of human rights. This could have a limiting effect on the enforcement of article 50. As an enabling legislation, it is essential that the Human Rights Enforcement Act should not be narrower than the Constitution itself.

In the first place, article 50(1) of the Constitution provides that both the infringement of rights as well as *threatened* infringements are actionable. This article clearly gives instances that would give rise to a cause of action under the law and these are infringement or *threatening* of the enjoyment of a given right.

Secondly, article 50(2) provides that ‘Any person or organisation may bring an action against the violation of another person’s or group’s human rights.’ This provision allows for the filing of

public interest cases that the Bill seems to leave out. It is a progressive element of the 1995 Constitution to allow an applicant whose own rights have not been affected to approach a court for the enforcement of the rights of another.⁶ Although the clause in the Bill alludes to article 50 of the Constitution, it should be made very clear in the law that it is supposed to give effect to the article in the Constitution and that applications for the enforcement of rights can be made on behalf of another person or group. Public interest litigation is a very important component of enforcement of human rights and should be specifically provided for. Having an article that is open to interpretation risks being abused and used to discourage public interest litigation.

Recommendation

The Bill fails to provide guidelines on what should give rise to an application for enforcement of human rights. This should be included to know when one has a cause of action for enforcement of human rights. HRAPF also suggests that, at a minimum, the Bill ought to echo the standing provisions of the Constitution with regards to public interest litigation. In its current form, the Bill does not make it clear that a person or organisation can institute an action on behalf of another person or a group. Also there is currently no law that operationalises the constitutional provisions on public interest litigation. The Act should have a detailed section on public interest litigation.

d) Clause 4 – High Court to determine matters relating to human rights

Clause 4 of the Bill provides:

- 1) *The High Court shall hear and determine any application relating to the enforcement or violation of human rights.*
- 2) *The High Court shall not exercise its powers under this section if it is satisfied that adequate redress for the violation is available to the person concerned under any other law.”*

Analysis of the clause

The clause aims to set out the boundaries of the High Court’s jurisdiction in terms of the Human Rights Enforcement Act. The Clause suggests that if there is a remedy available to an applicant under any other law, the High Court ought to not exercise its jurisdiction in terms of article 50 of the Constitution. It also provides that the High Court shall hear and determine *any* application relating to the enforcement or violation of human rights.

The clause attempts to erode the High Court’s ‘unlimited original jurisdiction’ conferred upon it by article 139 of the Constitution. This is unconstitutional but also prone to abuse in that it gives the High Court room to decline jurisdiction over a matter by citing this provision, when in fact such decline could be based on the prejudices of a particular judge. For example in cases where the applicant is a person belonging to a sexual minority group, a High Court judge may be tempted to decline exercising human rights jurisdiction due to the political considerations and complexities surrounding the human rights of these groups in Uganda or due to personal prejudices by claiming that such person has remedies under other laws.

⁶ See I Currie and J de Waal *The Bill of Rights Handbook* (2005) 80.

The Bill does not specify which other laws could provide redress in matters of human rights violations other than this one. If the intention of this clause is to avoid having the same matter heard concurrently by the High Court and a body like the Uganda Human Rights Commission, then this should be made clear and safeguards against that put in place.

In the circumstances, considering that this will be the primary law providing for remedies of human rights violations, using other laws to limit the jurisdiction of the court in awarding such remedies is a claw back, which might have the effect of limiting the applicability and efficacy of this law.

Also by providing that the High Court shall hear any application relating to enforcement and violation of human rights, the provision almost excludes jurisdiction of other courts and bodies clothed with the mandate to entertain such applications.

Recommendation

The Human Rights Enforcement Act should not limit the jurisdiction of the High Court to hear matters concerning human rights enforcement. The High Court has unlimited original jurisdiction in all matters under the Constitution. As such, the Act can only limit the circumstances under which the High Court may not take on a matter and this is usually where it is pending before another judicial or quasi judicial body such as the Uganda Human Rights Commission. The clause should also not appear to exclude the jurisdiction of other courts or bodies. Considering that both clauses are problematic, we recommend that the provision be removed altogether.

e) Clause 5 – Procedure for enforcement or violation of human rights

Clause 5 states that:

- 1) *An action for enforcement of human rights or relating to a violation of human rights shall be made by plaint*
- 2) *Every action shall be heard in open court by a single judge*

Analysis of the clause

The provision provides for the procedure by which an application for redress in case of violation or enforcement of human rights should be made. The procedure provided for is by plaint. The clause also provides for the quorum of judges to hear applications of enforcement and violation of human rights as a single judge, and in open court. It is important to have it captured in the law that the hearing of applications on human rights shall be done in open court as it fosters transparency, accountability and encourages persons to apply to courts for redress.

The procedure provided for- plaint, creates a contradiction in the Bill. In the Bill's summary, the procedure provided for is a notice of motion. This needs to be reconciled. In practice, applications for enforcement of human rights in the High Court are by way of Notice of Motion, just like other applications. This procedure is easier, quicker and less cumbersome and allows for evidence by affidavit. It is the procedure provided for in the Bill's summary and it is the procedure that was provided for in the now annulled Judicature (Fundamental

Rights and Freedoms)(Enforcement Procedure) Rules, 2008. HRAPF recommends that Notice of Motion should remain the procedure for filing applications for enforcement of human rights.

Secondly, the issue of having open court for the handling of human rights applications should be made subject to Article 28(2) of the Constitution. The clause as it is now uses language that makes it mandatory for applications under this law to be heard in open court, which may not be practicable in all circumstances and might lead to further violation of one's rights. Article 28(2) provides for exceptions where a case may not be heard in open court and these include morality, public order and national security. In the alternative, the provision as to open court should be left out completely.

Lastly the clause requiring that a single judge hear the application seems redundant as it is already provided for under section 20 of the Judicature Act. The section is to the effect that subject to any written law, all matters before the High Court shall be heard and disposed off by a single judge. While the section is not mandatory or conclusive in application, any other law that seeks to legislate on the quorum of any matter before the High Court would be relevant if it intends to change this general position. Since this Bill does not intend to do so, merely re-stating the position of the Judicature Act does not serve any purpose and it remains redundant.

Recommendation

It is recommended that the clause be amended to include reference to provide for a notice of motion; to leave room for instances when cases may not be heard in open court; and to remove the provision as to quorum of Court when entertaining applications under this law. This improves the procedure, enhances the right to fair trial and avoids the redundancy created by duplicating the provision of an already existing law.

f) Clause 6 – Reference of human rights matters by subordinate courts

The clause provides that:

- 1) *Where in any proceedings in a subordinate court or tribunal any question arises as to the violation of a fundamental right or freedom guaranteed under Chapter Four of the Constitution, the Magistrate or person presiding shall, refer the question to the High Court for determination*
- 2) *The Magistrate or person presiding shall immediately stay the proceedings in the subordinate court or tribunal until the High Court determines the question referred to it*
- 3) *The Magistrate presiding in a subordinate court or tribunal shall dispose of the question referred to the High Court in accordance with the determination of the High Court.*

Analysis of the clause

The clause provides for human rights references to the High Court. Like it is common with courts and tribunals given special mandate to handle a special type of cases, the provision requires that if there is a question as to enforcement of human rights or violation of human rights that arises in any case that is being tried by a court or tribunal subordinate to the

High Court, then such question should be referred to the High Court for determination, as it is vested with the mandate to handle such cases. This is usually intended to create uniform jurisprudence regarding a certain nature of cases.

The provision also requires that when such reference is made, then the proceedings in the subordinate court should be stayed until the reference to the High Court is determined. Normally this is required when the issue that has been referred is essential to the determination of the case from which it arose. Although it might not be in all cases that a question of whether there was a violation of human rights or not is essential to the determination of a case that is not in itself a case on violation of human rights, there is need for the safe guard to be put in place, such that even other types of cases can be decided with a human rights based approach, where need be.

There is thus no problem with the clause as it will help create reliable jurisprudence and build the expertise and capacity of the High Court to handle cases of human rights violations and enforcement.

Recommendation

The clause should be left as it is.

g) Clause 7 – Power of the High Court in Human Rights cases

The clause states that:

- 1) *Where the High Court determines that a basic human right has been violated, unlawfully denied or should be enforced, the court may make all such orders as the court considers necessary and appropriate to secure the enjoyment of the right or freedom or to compensate the person for the violation*
- 2) *For the avoidance of doubt, the High Court shall not make any orders or declarations relating to the interpretation of the constitution.*

Analysis of the clause

The provision provides for the remedies that can be awarded by the High Court in cases brought under this law. The provision is kept as wide and as open as possible to give court enough discretion to provide as many remedies as it deems fit, without being constrained. The provision also provides a safe guard against this wide discretion by expressly providing that the High Court shall not make any declarations relating to the interpretation of the Constitution. This is important as human rights are provided for in the Constitution and their enforcement is direct enforcement of the Constitution. This could easily be mixed up with interpretation of the Constitution, which is the constitutional preserve of the Constitutional Court.

There is no problem with the clause as it gives court room to give remedies that are fit for any particular case. Cases of human rights violations and enforcement are diverse in nature and it is important that the available remedies are not restrictive, but rather are discretionary and given to suit particular circumstances of particular cases.

Recommendation

The clause should be left as it is.

h) Clause 8 – Appeal

The clause provides that:

Any person aggrieved by a decision of the High Court made under this Act may appeal to the Court of Appeal

Analysis of the clause

The clause provides for the right of appeal in case a person is not satisfied with the decision of the High Court. This is an important provision as the right to appeal is statutory and not a matter of course. Considering that the High Court will be the court of first instance in cases under this Act, it is important that there is an appeal avenue to further interests of justice.

The clause has no problem as it gives parties the right to appeal to a higher court in case they are not satisfied with the decision of the High Court.

Recommendation

The clause should remain as it is.

i) Clause 9 – Application of Civil Procedure Act

The clause provides that:

Subject to this Act, the Civil Procedure Act and the rules made under it shall apply in relation to an application made under this Act.

Analysis of the clause

The Civil Procedure Act, and the Civil Procedure Rules are the principle legislations that govern civil proceedings in Uganda. This clause expressly brings the application of these legislations to applications made under the Act. This in essence means that the cases instituted under this Act shall follow the same procedures and rules as are laid out in the Civil Procedure Act and Rules.

Recommendation

The clause should be left as it is.

j) Clause 10 – Rules of Procedure

The clause provides that;

- 1) *Subject to the provisions of this Act, the Rules committee may, after consultation with the Minister make rules to give effect to the provisions of this Act.*
- 2) *Without prejudice to sub-section (1), the Rules committee may make rules-*
 - (a) *Prescribing the fees payable under the Act*

- (b) *Prescribing the time for applications*
- (c) *Rules of evidence and procedure*

Analysis of the clause

The clause provides for rules to be made governing the procedural aspects of instituting cases under this law. The Rules committee is given the powers to make rules as to the time for applications, rules of evidence and procedure and even fees. This clause could have been included pursuant to the fact that the Rules committee had previously made rules regarding the enforcement of human rights, which were subsequently declared unconstitutional by the Constitutional Court. The framers presumably found it pertinent to now authorise the committee to make rules under an existing law that would legitimize them.

While rules would be commendable, in most cases they are only necessary to operationalize provisions of an Act, especially an Act that provides for court enforcement like this one. However, some things as listed under the provision should be dealt with in the Bill itself rather than in the Rules for example evidence and issues of time limitations.

Recommendation

The provision should be amended to remove evidence and issues of time for applications from the ambit of the rules and to the ambit of the Bill. These are substantive issues that should not be left to the Rules committee. The rules should handle issues of fees, service etc.

k) Clause 11 – Transitional provision

The clause provides that:

Where at the commencement of this Act any proceedings are pending before any court for the enforcement of human rights or freedoms protected under Chapter Four of the Constitution, the proceedings shall be transferred to the High Court if the hearing of the case has not commenced.

Analysis of the clause

This provision seeks to bring all cases whose subject matter falls under this law into the jurisdiction of the High Court. It is to the effect that if and when this Bill is passed into law and its enforcement commences, all cases that were previously filed with other courts should be transferred to the High Court. This will only apply to cases whose hearing has not commenced. This seems quite ambitious and is likely to cause confusion. It would also be problematic to bring already instituted cases under a new law since they could have been filed using different modes and procedures not provided for under this law, and handling them under it would be impossible, even when the cases have not been heard yet. In such cases, the parties would be required to re-file their cases in accordance with the new law, which would be burdensome. Since the law also provides for different remedies than what is available now, litigants would be required to change prayers, nature of evidence and their defences to suit what is provided for under the new law.

Recommendation

This provision should be removed to allow for already filed cases to be handled in accordance with the laws under which they were filed, to avoid unfairness, injustice and prejudice.



CONCLUSION

The Human Rights Enforcement Bill 2015 has been long overdue. It is exciting that the Human Rights Committee of Parliament has taken the necessary steps to introduce such a Bill. However, it should not narrow the avenues available for enforcement of human rights under the Constitution but should instead make them more open. The Bill should also not restrict its applicability to just the High Court but rather to all human rights enforcement forums.



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