

A publication of
Human Rights
Awareness and
Promotion Forum
(HRAPF)



THE HUMAN RIGHTS ADVOCATE

SECTION 15(6)(D)
OF THE EQUAL OPPORTUNITIES
COMMISSION ACT: IMPLICATIONS FOR
MARGINALISED GROUPS.

Welcome to the first edition of the Human Rights Advocate. The Human Rights Advocate is a bi annual human rights magazine produced by Human Rights Awareness and Promotion Forum- Uganda (HRAPF).

HRAPF is an independent, not for profit, non-partisan, non-governmental organisation. HRAPF is incorporated under the laws of Uganda. HRAPF is specifically interested in human rights awareness and advocacy. It employs legal aid service provision, legal and policy analysis, legal research and documentation, and strategic litigation to further its objectives.

This magazine is produced under the Advocacy and Networking Program which focuses on legislative advocacy in favour of marginalised groups.

This inaugural edition of the Human Rights Advocate is dedicated to Section 15(6)(d) of the Equal Opportunities Commission Act, 2007. The provision stops the Equal Opportunities Commission from investigating matters that are considered as 'immoral and socially harmful, or unacceptable by the majority of the cultural and social communities in Uganda.' in one stroke undermines the very essence of the Commission- to promote 'equal opportunities and affirmative action in favour of groups marginalised '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.'

So while, the establishment of the Equal Opportunities Commission is a very welcome development and will go a long way in the protection of the rights of marginalised groups in Uganda, HRAPF believes that Section 15(6)(d) of the Act is contrary to the Constitution of Uganda, disregards the spirit of government policy and the provisions of the Act itself, and flaunts Uganda's international obligations with respect to human rights.

Section 15(6)(d) has been challenged in the Constitutional Court of Uganda by the Executive Director of HRAPF, Mr. Adrian Jjuuko. The petition, *Jjuuko Adrian v. Attorney General* was heard by the Constitutional Court in October 2011 but has been pending decision ever since. HRAPF is also currently involved in advocacy efforts to introduce the Equal Opportunities Commission among marginalised communities, while continuing the campaign against Section 15(6)(d).

This issue builds on the information booklet, 'Still no where to run: exposing the deception of Minority Rights under the Equal Opportunities Commission Act of Uganda', which was published by HRAPF in February 2010. As such, articles from that booklet have been reproduced in this issue of the magazine, and new

ones have been added.

This first edition issue contains six articles. Each of the articles covers an aspect of the Equal Opportunities Commission Act. The first article, written by Edward Mwebaza and Jay Jacobson, concerns the powers and functions as well as the current status of the Equal Opportunities Commission. The second, written by Prof. Sylvia Tamale of the School of Law, Makerere University, chronicles the legislative history of section 15(6) (d) and discusses how it is a provision that ought not to have been part of the Act. The third by Adrian Jjuuko analyses the provision from a gendered perspective while the fourth article, by Jay Jacobson and Adrian Jjuuko, is a commentary on Section 15(6)(d) and the Constitutional framework of Uganda. The fifth article by Adrian Jjuuko analyses the consistence of Section 15 (6)(d) of the Equal Opportunities Commission Act 2007 with Uganda's obligations under International Human Rights Law and the sixth article, again by Adrian Jjuuko, gives an overview of the case of Adrian Jjuuko v Attorney General so far. Finally, the Press Statement issued on the same matter on Women's Day 2013 is reproduced as the last item.

We hope that the readers find this issue a useful resource as far as Section 15(6)(d) of the Equal Opportunities Commission Act and its effects on marginalised groups is concerned.

HRAPF would like to acknowledge the support of various individuals and bodies that have made the publication of this magazine possible.

HRAPF wishes to thank the Equal Opportunities Commission, especially the Chairperson, Ms. Ritah Matovu and Commissioner Ms. Zaminah Malole with whom HRAPF has been engaged in the process of seeking information about the EOC and the progress so far made in setting up the tribunal.

HRAPF also seeks to acknowledge the contributors of articles to this issue: Prof. Sylvia Tamale of the School of Law, Makerere University; Mr. Edward Mwebaza; Mr. Jay Jacobson; and Mr. Adrian Jjuuko. HRAPF also acknowledges the contribution of HRAPF members, the Board of Directors and staff who helped in compiling, contributing to and critiquing the magazine right from its conception.

Above all, HRAPF acknowledges the support of The Foundation for Open Society Initiatives (FOSI), who provided the financial and other support that has made the production of this inaugural issue of the magazine possible.

HRAPF intends to produce the Human Rights Advocate bi annually with a thematic focus on different laws/bills.

Once again, welcome to this inaugural issue of the Human Rights Advocate.

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ABOUT HUMAN RIGHTS AWARENESS AND PROMOTION FORUM (HRAPF)

THE ESTABLISHMENT OF THE EQUAL OPPORTUNITIES COMMISSION: A WELCOME DEVELOPMENT DESPITE SECTION 15(6)(D)

Article 32(2) of the Constitution of the Republic of Uganda, 1995 as amended by Section 11 of the Constitutional Amendment Act 2005 directs parliament to make laws establishing the Equal Opportunities Commission (EOC) in order to give effect to the provisions of Article 32(1) which mandate the State to take affirmative action in favour of groups marginalised 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.

Despite this provision, the Equal Opportunities Commission Act was only passed in 2007, twelve years after the coming into force of the Constitution, and more than a year after the commencement of the Constitutional Amendment Act, 2005 which had required that the Equal Opportunities Commission be established within one year after the coming into force of the constitutional amendment. The Act provides for the Equal Opportunities Commission. It is the last of the ten constitutional commissions to be established, and this came only after relentless advocacy by women rights organisations and other groups, and after a constitutional amendment.

Despite the delay in establishing the Commission, the good news is that it was finally established, and the Commissioners appointed. The Commission is in the process of establishing the Tribunal which is one of its core functions. It has also drafted a strategic plan that will guide its operations. These developments are highly commendable and go a long way to ensure that equal opportunities and affirmative action for minorities and marginalised groups are realised.

The Commission's functions are: to monitor, evaluate and ensure that policies, laws, plans, programs, activities, practices, traditions, cultures, usages and customs of organs of state at all levels, statutory bodies and agencies, public bodies and authorities, private businesses and enterprises, non-governmental organisations and social and cultural communities, are compliant with equal opportunities and affirmative action in favour of

groups marginalised 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.

To achieve these functions, the Equal Opportunities Commission is given powers to investigate on its 'own initiative or on a complaint made by any person or group of persons, any act circumstance, conduct, omission, programme, activity or practice which seems to amount to or constitute discrimination, marginalisation or to otherwise undermine equal opportunities'.

The Commission has the powers of a court to: require the attendance of anyone before it, require the production of any documents, inspect any documents, require persons to take oaths and answer questions put to them, and summon witnesses. It is an offence to: fail to appear without reasonable excuse, refuse to produce documents, misbehave before the Commission or refuse to be sworn. The Commission can receive evidence, and draw its own conclusions of fact, as well as adopt any findings, decision or judgment of a court or tribunal. It can recommend to or order any institution, body, authority or person to adopt or take particular steps or actions to promote equal opportunities. It can also recommend to any Minister, institution, body or authority to adopt new legislation which promotes equal opportunities and this recommendation must be implemented within six months

With these wide-ranging powers, the Commission has a huge potential to change the landscape for women and other marginalised groups for the better.

However, Section 15(6)(d) of the Equal Opportunities Commission Act undoes all this when it provides that the Commission shall not investigate practices that are regarded as 'immoral or socially unacceptable by the majority of the cultural and social communities in Uganda'. The provision does not define what these practices are, and herein lies the problem. The provision

can very easily be used to stop the Commission from investigating the very practices that have exacerbated discrimination against women and other marginalised groups.

This provision has been challenged in court on the basis that it is unconstitutional as it encourages discriminatory practices against marginalised groups. The ruling in this petition is still pending; perhaps when it comes out, it will go a long way to clear the obstacles that Section 15(6)(d) poses.

It is also yet to be seen how the Equal Opportunities Commission itself deals with Section 15(6)(d). We must keep our fingers crossed for only time will tell what the fate of Section 15(6)(d) will be.

In the meantime, the EOC should be supported as it establishes itself and prepares to take on the gargantuan tasks ahead of them. Civil Society organisations should work closely with the EOC to identify priorities and to make the Commission known and useful to the people.



EQUAL OPPORTUNITIES LINE

Equal Opportunities Commission Support

Use the EOC to solve cases of marginalization and human rights violations in your communities.

⁶Above Section 6(3)

FEATURE

THE EQUAL OPPORTUNITIES COMMISSION OF UGANDA: AN OVERVIEW

Edward Mwebaza, Human Rights Awareness and Promotion Forum – Uganda (HRAPF) and Jay Jacobson, Member of the Bar of the State of New York, U.S.A. (Ret.) and Legal Volunteer, Human Rights Awareness and Promotion Forum- Uganda (HRAPF)



Edward Mwebaza

Jay Jacobson

As laws go, the Equal Opportunities Commission Act, 2007 (the “Act”) is neither very long nor very complicated. Including two brief Schedules, it runs 16 pages. Parliament established the Commission in 2007, twelve years after the coming into force of the 1995 Constitution that had mandated parliament to establish the Commission, and more than one year after the Constitution (Amendment) Act, 2005 which required that the Commission be established within one year of the coming into force of the amendment.

Article 32(3) of the Constitution mandated parliament to establish a commission called ‘the Equal Opportunities Commission whose composition and functions shall be determined by an Act of Parliament.’

Parliament established the Commission as “a body corporate with perpetual succession and a common seal which may sue or be sued in its corporate name and, may do, enjoy or suffer anything that bodies corporate lawfully do, enjoy or suffer.”¹

The Commission was established as “independent” and “not subject to the control of any person or authority.”² Independence, however, would go only so far. Commissioners would be

appointed by the President, and approved by Parliament.³ But, in deciding the make-up of the Commission, Parliament did require that it should have five members, at least one of whom would be a person with a disability, the other a youth, and at least two of the Commissioners would be women.⁴ Other than the physical attributes mentioned in the prior sentence, the only other requirements are that the Commissioners be persons of high moral character, proven integrity, and with a record of experience in and commitment to equal opportunities or human rights. The current roster of Commissioners is: Mrs. Rita S. Matovu, Chairperson, Mrs. Zaminah Malole representing persons with disabilities, Mrs. Erinah Baingana representing women, and Mr. Wafula Sirabo representing the youth. The fifth Commissioner’s seat is vacant.

The Commissioners are appointed for a five year term, and are eligible for one renewal term.⁵ The Commissioners may be removed by the President of Uganda for any one of a series of improper acts, or for demonstrated inability to carry out the functions of the office.⁶ Certain conflicts of interest are prohibited: a Commissioner may not be a member of Parliament or of the East African Legislative Assembly, nor may a Commissioner be a member of the executive of a political party or a public officer.⁷ Although no sums are mentioned in the enabling legislation, emoluments are determined by Parliament, and are a charged on the Consolidated Fund.⁸

¹ The Equal Opportunities Commission Act, 2007, Section 2(2)

² Above, Section 3

³ Above, 5(2)

⁴ Above, 5(1)

⁵ Above Section 6(1)

⁶ Above Section 6(3)

⁷ Above Section 10

⁸ Above Section 8

The Secretariat of the Commission is led by the Secretary, a public officer of high moral character and proven integrity who is qualified to be appointed as Permanent Secretary within the Uganda civil service.⁹ Ms. Catherine Amal currently holds the post.¹⁰ The Secretary is responsible for implementing the policy decisions of the Commission and the day-to-day administration and management of the Commission. Provision is also made for the dismissal of the Secretary, in accordance with protections consistent with the Secretary's standing within the Uganda civil service.¹¹ The Oath taken by the Secretary and each officer of the Commission makes a specific commitment that the Secretary or officer will not directly or indirectly reveal to any unauthorised person, or otherwise than in the course of duty, the contents or any part of the contents of any documents, communication or information of which the Secretary or officer becomes aware.¹²

In addition to the Secretary, the Commission may have such other officers and employees as may be necessary for the discharge of its functions.¹³ Such staff are appointed by the Commission in consultation with the Public Service Commission.¹⁴ The Commission may also hire consultants or experts to assist it in the discharge of its functions.¹⁵

Parliament anticipated that the Commission would have offices around the country and granted discretion to site those offices where the Commission determined.¹⁶ The

Commission expects to operate a 'circuit tribunal system' that is expected to bring services closer to the grassroots.¹⁷ At present, the offices of the Commission are at Plot 7, Luthuli Close, Bugolobi.

Though independent, the Commission is administratively set up under the Ministry of Gender, Labour and Social Development.

Regular meetings of the Commission are supposed to be held every three months.¹⁸ Special meetings may be called by the Chairperson at that person's discretion, and shall be called by the Chairperson when requested to do so by three of the Commissioners.¹⁹ Three members constitute a quorum, and in the Act, Parliament encouraged the Commission to come to decisions by consensus.²⁰ In the Act, the Commission is instructed with respect to certain basic conflict of interest situations.²¹ Specific provision is made in the Act for experts to attend meetings of the Commission, to participate in the discussions, but not to vote.²²

The scope of the Commission's authority is impressive. It is authorised 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.²³

The Commission deals with more than policies, laws, plans and programs; it gets to inquire into traditions, into cultures, into usages and into customs. Ordinarily, it would be expected to look at all public bodies, but in this case, it is authorised to go into private businesses and enterprises (without regard to size), into NGOs, and into social and cultural communities. It examines to determine if the laws, policies, traditions, cultures and customs are compliant with equal opportunities and affirmative action in favor of marginalised groups. However, due to the broad range of functions granted to the Commission, there is concern that this may inhibit the Commission from undertaking aggressive actions at least early on in its life.

Beyond examining laws, policies and traditions, cultures and customs, the Commission has further authority. It is specifically empowered to investigate, either on its own initiative or in response to a complaint filed by one or more individuals or groups, any act or any circumstance or any conduct or any practice which constitutes discrimination, marginalization, or otherwise undermines equal opportunities.²⁴

⁹Above Section 11(1)

¹⁰See the Equal Opportunities Commission, Celebration of International Women's Day, Press statement, The New Vision, 8th March 2013

¹¹The Equal Opportunities Commission Act, Section 11(4)

¹²Above second schedule

¹³Above Section 11(6)

¹⁴Above Section 11(7)

¹⁵Above Section 11(9)

¹⁶Above Section 12

¹⁷Equal Opportunities Commission, n 10 above

¹⁸Above Section 13(1)

¹⁹Above Section 13(2)

²⁰Above Section 13(5)

²¹Above Section 13(9) and (10)

²²Above Section 13(7)

²³Above Section 14(1)

Discrimination is a key concept under these powers. It is defined in Section 1 as meaning:

‘[A]ny act, omission, policy, law, rule, practice, distinction, condition, situation, exclusion or preference which, directly or indirectly, has the effect of nullifying or impairing equal opportunities or marginalising a section of society or resulting in unequal treatment of persons in employment or in the enjoyment of rights and freedoms on the basis of sex, race, colour, ethnic origin, tribe, birth, creed, religion, health status, social or economic standing, political opinion or disability.’

This definition is clearly broad enough to permit the Commission to examine issues of discrimination against persons marginalised because of health issues, of social and economic standing, and, of course, on the basis of sex.

The Commission may also examine any law, proposed law, policy, culture, tradition, usage, custom or plan which is likely to have the effect of nullifying or impairing equal opportunities to persons in employment or enjoyment of human rights.²⁵ Of particular relevance, of course, is the reference to “employment”. Marginalised persons who have found so many barriers to employment may now find that the Commission is a forum to which they may apply for assistance in getting a foot in the door to decent jobs with fair wages. And, the Commission has power to see to it that discharge of a marginalised person from one of those jobs on grounds that amount to discrimination will be brought up before it for consideration.

The Commission is authorised to monitor Uganda’s compliance with international and regional conventions, treaties and other instruments to which Uganda is a signatory that relate to the functions and objects of the Commission.²⁶ These international and regional conventions in many cases represent “best practices” in the fields of human rights, and are a measure of the breadth and depth of international feeling on this subject. As a citizen of the world community, Uganda should be pleased to measure its own actions against these international and regional standards.

Section 15 of the Act enumerates the powers of the Commission. Broadly stated, they are the powers of a judicial tribunal. It may compel the attendance of witnesses. It may compel the production of documents. It may inspect and copy any material produced before it. It may compel witnesses to testify before it under oath. It has the authority to punish, with both fines and imprisonment, persons who fail to comply with its summons or who act in contempt of the Commission’s proceedings. In addition, it may recommend or order an institution, authority, body or person to adopt or to take particular steps which, in the opinion of the Commission, will promote equal opportunities. Then there is the six month rule. It provides that the Commission may recommend to any Minister or to any public body, public institution or public authority new legislation which is promoting equal opportunity. And, the Minister, public body, public institution or public authority shall implement the recommendation within six months from the date the recommendation

is made.

Section 15(6) identifies items the Commission shall not inquire into and these are: any matter which is pending before a court or judicial tribunal or is under investigation by another constitutional commission; a matter involving the relations or dealings between the Government of Uganda and the government of any foreign state or international organization; a matter relating to the exercise of the prerogative of mercy; or any matter involving behaviour which is considered to be immoral and socially harmful, or unacceptable, by the majority of the cultural and social communities in Uganda. The first three items are usual and understandable. It is only the fourth that seems out of place and that is indeed very unusual. Prof. Sylvia Tamale deals with the origins of this provision in an article that is reproduced later on in this magazine, and the dangers embedded in it are also examined further in other articles.

The Commission is to be funded by Parliament.²⁷ It is also eligible to receive grants, loans, donations or gifts from within or outside Uganda. There is no requirement on the Commission to disclose publicly the source of any funds coming in from outside Uganda. However, the Commission’s books of account are to be audited each year by the Auditor General, and the report of that audit is laid before Parliament and the public.²⁸ That report will identify all sources of funds provided to the Commission.

Although the regulations of procedure for the Commission have not been issued, some requirements

²⁴Above Section 14(2)(a)

²⁵Above Section 14(2)(b)

²⁶Above Section 14(2)(g)

have already been set by Parliament in the Act.²⁹ For example, any person may lodge a complaint with the Commission if the complaint relates to any act which undermines or impairs equal opportunities. The complaint must be signed by the person (or persons) lodging it. The Commission is required to hear or consider the complaint within six months from the date of filing. A person appearing before the Commission may be represented by counsel, and such counsel shall appear at the expense of the person engaging her or him. Witnesses summoned to appear before the Commission shall have the same privileges and immunities as if the person was appearing in a court of law. Witnesses summoned to appear before the Commission are entitled to be reimbursed at the same rate as witnesses appearing before the High Court in criminal proceedings. A person aggrieved by a settlement, recommendation or order of the Commission may appeal to the High Court within thirty days after the settlement, recommendation or order is communicated to him or her.

Until the Commission concludes making its rules of procedure, Parliament has authorised it to adopt rules applicable to proceedings in court.³⁰

The Act gives teeth to the Commission. It is an offence to hinder, obstruct or interfere with a Commission member participating in an inquiry or examination under the Act or with a person implementing an order of the Commission.³¹ Those offences carry a current penalty of 5,000,000 shillings, up to eighteen months in prison, or both such fine and such imprisonment.³²

A person who refuses to employ a victim, or who dismisses or threatens to prejudice a victim in the victim's employment, or who threatens or intimidates a victim by reason of the victim threatening to make a complaint to the Commission, or alleges that a victim has done an act contrary to the Act or which impairs equal opportunities, or that a victim has given or proposes to give testimony or information to the Commission also commits an offence.³³ The penalties in these cases are no different from those in the prior circumstances dealing with persons acting by or on behalf of the Commission.

That is the legal framework governing the Equal Opportunities Commission. Mandated by Uganda's Constitution, and with a framework provided by Parliament, the Commission has powers and functions, which, if used well, can make real impact in the lives of marginalised groups. The tribunal is yet to be set up but the Chairperson of the Commission is confident that if all goes as planned, the tribunal will be set up soon.³⁴

²⁷Above Section 16
²⁸Above Section 21(2)
²⁹Above Section 23 - 29
³⁰Above Section 30
³¹Above Section 31(1)
³²Above Section 31(2)
³³Above Section 31(3)

³⁴HRAPF interview with Ms. Ritah Matovu, Chairperson of the Equal Opportunities Commission, 28th March 2013.

REVIEW OF LEGISLATIVE HISTORY



Prof. Sylvia Tamale

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

By: Prof. Sylvia Tamale³⁵

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 marginalised 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. 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.'³⁶ 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."³⁷

The Ministry of Gender, Labour and Social Development and the Parliamentary Standing Committee on Equal Opportunities spearheaded the process of passing the bill. 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.³⁸

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.'

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]'

*Reproduced from Human Rights awareness and Promotion Forum 'Still no where to run' Exposing the Deception of Minority Under the Equal Opportunities Commission Act of Uganda. An Information Booklet 2010. pp. 21-23

³⁵The author is associate Professor of Law at Makerere University

³⁶The National Equal Opportunities Policy, p.10.

³⁷ibid. p. 30

³⁸Section(14)(1)

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.'

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

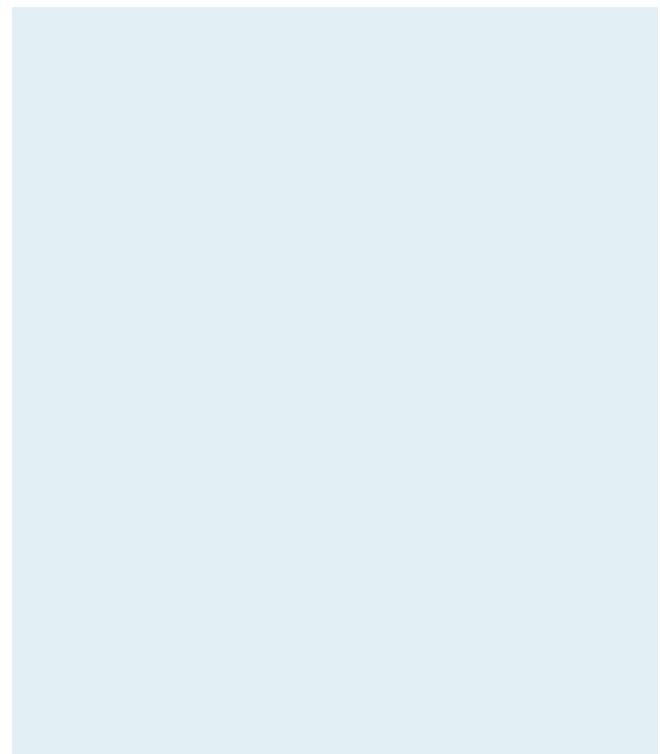
'Mr Chairman, I want to thank my honourable colleague for his concern for their ladies. We have already taken into account those kinds of concerns. What we are trying to do is to ensure that their ladies are not discriminated. If the code of dress is going to be the cause of their discrimination, then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

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.

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..."

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.

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 marginalised groups



BY ADRIAN JJUUKO*

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*

“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”⁴⁰

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 Section of the law is unconstitutional for it discriminates against minorities. That the law is self-defeating and that it is not congruent 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 groups⁴¹, the Equal Opportunities Commission has been set up.⁴² 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 gender, age, disability or any other reason created by history, tradition or custom for the purpose of redressing imbalances which exist against them”.⁴³

The Government first developed a policy- the Equal Opportunities Policy⁴⁴ --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 Uganda.⁴⁵

Below, we analyze the effect of Section 15(6)(d) on minorities and more especially women.

The Commission under the Act

The Commission as established under the Act has the powers of a tribunal. Broadly expressed, under Section 15 these powers if used effectively, can eliminate discrimination.⁴⁶

However, there is a hitch. Section 15(6) deals with matters that the Commission may not investigate. Other powers in Section 15(6) are usual. 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

Above all, Section 15(6)(d) defeats the aim of the Constitution, and of the Act itself, and of the National Equal Opportunities Policy, 2007.⁴⁷

Section 15 (6)(d) means that the perceptions of the majority of what is acceptable and moral will guide the

* Reproduced from Human Rights awareness and Promotion Forum ' Still no where to run' Exposing the Deception of Minority Under the Equal Opportunities Commission Act of Uganda. An Information Booklet 2010. pp. 24-28

*The author is a human rights lawyer and the Executive Director of Human Rights Awareness and Promotion Forum-Uganda (HRAPF). This analysis was originally published in 2010, and has been updated to April, 2013

⁴⁰See Anne R. Edwards; Sex/gender, sexism and criminal justice; some theoretical considerations, 165(1989)

⁴¹UWONET was one of the leaders in this struggle

⁴²This Commission is the last of all commissions provided for by the Constitution to be set up. It is provided for under article 32(3) of the 1995 constitution of the Republic of Uganda, as amended in 2005.

⁴³Quoted from the long title of the Equal Opportunities Commission Act, 2007.

⁴⁴The Republic of Uganda; The National Equal Opportunities Policy, July 2006.

⁴⁵Para 1:3 deals with the causes of discrimination and includes it.

⁴⁶Section 15(1)-(7)

operation of the Commission that was set up to handle matters that arise out of discrimination of the minority by the majority!

That means that if someone brings a complaint of discrimination which is based on a cultural custom opposed by a majority of the cultural and social communities of Uganda, then the Commission may not even investigate that complaint!⁴⁸

Whatever “socially harmful” means, it, together with “immoral” and “unacceptable” are meant to defeat the aim of the Act.

When the Commission is set up, will it have any matters to investigate at all? Almost all matters that affect minorities are looked at by the majority as socially unacceptable, immoral and destructive to the patriarchal social fabric.

If so, the Commission will be totally irrelevant to the people it is supposed to help.⁴⁹ They, on the other hand, will continue to be overborne and exploited by their more numerous (read ‘powerful’) brethren.

No guidance is provided in the Act as to what is meant by “cultural and social communities” in Uganda. Does it refer to ethnic groups or to social clubs or both? The case of *Salvatori Abuki and Another v. Attorney General* (Constitutional Court case 2 of 1997), a statute was found “void for being vague and ambiguous”. Given the defects found in Section 15(6)(d) of the Equal Opportunities Commission Act, 2007, that Section too should be found void for being vague and ambiguous.

A gendered analysis of Section 15(6)(d) shows that it further entrenches patriarchy while the Act sought to do away with it. This is very ironic. Most of the practices that stand in the way of, for example, women’s full realization of their potential are deeply embedded within the moral customs and practices of the majority of the social and cultural communities in Uganda. Women at work, women in the market, women in politics⁵¹, women eating specific foods, women talking, women sitting in the same class for the same qualifications and 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 if society’s views are sought as to what should be done, the majority would regard such women as immoral, grossly obscene and assert that their practices are harmful to the social and economic fabric of society.

So, if the Commission cannot protect women from discrimination against them, 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!

Subjecting the jurisdiction of a human rights tribunal to the limits and prejudices of customary law and practices

is puzzling. One wonders where the two meet. Issues of morality are rarely compatible with human rights; the former deals with society while the latter is concerned with individuals.⁵² The Commission is supposed to realize the human rights of women, but it cannot do so if it has to put the interests of the majority before the individual woman. It is society that violates individual’s rights. Uganda has ratified the World’s major human rights instruments. Among them is CEDAW⁵³ which in Articles 2 and 3 of the Convention, directs states to do away with exploitive and restrictive practices on women. Still, with Section 15(6)(d) remaining part of the Equal Opportunities Commission Act, it is the woman who loses; her rights will continue to be violated in full view of the Commission set up to help her.

Section 15(6) (d) violates the Constitution of Uganda, the Act itself, and the Equal Opportunities Policy. Section 15(6) (d) is unconstitutional. The Constitution of Uganda is the supreme law of the land⁵⁴. Article 2(2) states: “If any other law or any 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”.

As Section 15(6) (d) is inconsistent with the Constitution as the supreme law of the land, Section 15(6)(d) is void. Article 32 of the Constitution requires the State to take 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 which exist against them”.⁵⁵

⁴⁷Officially 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 operation of the constitutional provisions and from which the Act was developed.

⁴⁸Tuhaise supra suggests that in general society; these complaints do not attract attention.

⁴⁹According to Percy Ntuhaise; Gender roles and sexual inequality; domestic labour and the burden of housewives in Uganda; EAJPHR vol.2, 1999 p 146. “The ideology of traditional gender roles has been further strengthened and institutionalised by the state through its laws and policies, and its general tolerance of systems and beliefs that reflect such and ideology.”

⁵⁰Read ‘powerful’

⁵¹See generally Sylvia Tamale; When hens begin to crow; Gender and parliamentary politics in Uganda, Fountain Uganda, 1999.

⁵²The African states are clamoring with a theory of cultural relativism today to observe such practices.

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 provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realize their full potential.⁵⁶

Most fundamental is Article 33(6). It asserts that "Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status are prohibited by this Constitution".

Article 21 of the Constitution provides for equal treatment and freedom from discrimination. It leads the roster of human rights set forth in Chapter Four of the Constitution. Yet, Section 15(6)(d), as discussed above, does not permit the Commission to provide "equal treatment". Nor does it permit the Commission to inquire into circumstances of discrimination. The provision cannot stand constitutional scrutiny. As such, it is void to extent of the inconsistency.

Both the Equal Opportunities Commission Act and the National Equal Opportunities Policy emphasize that discrimination based on customs and practices is one of the root causes of discrimination. The long title of the Act⁵⁷ reflects this, as does Section 1 in defining 'discrimination'. Section 14(1) sets out the functions of the Commission. The Commission is directed, in robust and clear terms, "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." (Emphasis added)

So, Section 15(6)(d) is inconsistent with the very Act of which it is a part. And, this inconsistency will disadvantage 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 other things, "cultural...background"⁵⁸

All in all, Section 15(6)(d) is not an acceptable provision, if the rights of minorities especially women are to be protected. Nothing good will come from the Commission if it insists on following the views and interests of the domineering majority. It will fail in its duties to protect 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 limits its jurisdictional reach only to topics acceptable to an undefined "majority of the cultural

and social communities in Uganda". Morality per se is not a bad concept, but those aspects that make it oppressive, 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 led to the discrimination in the first place. Uganda should avoid falling into such traps.

Section 15 (6)(d) as it stands cannot protect minorities. Especially, it cannot protect the women of Uganda. Women in Uganda have been and continue to be suppressed under the patriarchal moral system. They are not to talk or be seen in public, their sphere is the domestic sphere. Is this how our Constitution intended women to be? If no step is taken, this is how our mothers and sisters will remain.

Whatever the reason was for Section 15(6)(d), its effect is the biggest consideration. It 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 discriminates, 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.

⁵³Convention on the Elimination of All Forms of Discrimination Against Women, Adopted by the General Assembly of the United Nations, 1979.

⁵⁴Article 2(1) of the 1995 Constitution, as amended

⁵⁵Article 32(1)

⁵⁶Article 32(2)

⁵⁷Already Quoted

⁵⁸See foreword by the Minister of Labour, Gender and Social Development.

⁵⁹www.wikipedia.org/wiki/equal-employment-opportunity-commission.html



Jay Jacobson



Adrian Jjuuko

THE CONSTITUTION OF UGANDA AND PROTECTION OF MARGINALISED GROUPS

By Jay Jacobson and Adrian Jjuuko

Uganda's Constitution is the supreme law of the land.⁶⁰ Adopted in 1995, it emanates from the people of Uganda. It begins with a ringing declaration of the source of all power in Uganda: "We The People of Uganda".

The Constitution provides a list of National Objectives and Directive Principles of State Policy. In that list is important guidance for Ugandans. Under Clause V(i), the State shall guarantee and respect institutions charged with responsibility for protecting and promoting human rights by providing those institutions with adequate resources to function effectively. And, under Clause V(ii), the State will guarantee and respect the independence of NGOs which protect and promote human rights.

But, the constitutional protections are broader. Chapter Four of the Constitution sets forth sections that may well be admired elsewhere in the world as setting a standard for a clear definition of human rights. Article 20 is entitled "Fundamental

and Other Human Rights and Freedoms". Consistent with the opening phrase of the Constitution, Article 20(1) makes it very clear: "Fundamental rights and freedoms of the individual are inherent and are not granted by the State." And Article 20(2) is equally unequivocal: "...rights and freedoms of the individual and groups...shall be respected, upheld and promoted by all organs and agencies of government and by all persons." Ugandans are justly proud of the protections written into their basic document. Article 21(1) makes "equal protection of the law" a constitutional determination. So that there is not much room for argument, Article 21(2) provides that 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." And just in case someone is careless in reading the Constitution, Article 21(3) gives us a formidable, comprehensive definition of "discriminate" as giving '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.'

The constitutional provisions roll on. There is protection of the right to life (Article 22), and the protection of personal liberty (Article 23). There is respect for human dignity and protection from inhuman treatment (Article 24), and protection from slavery, servitude and forced labour (Article 25). Ugandans have protection from deprivation of property (Article 26), and rights to privacy of person, home and of other property (Article 27). Ugandans enjoy political protections: Article 28 assures a right to a fair hearing, and Article 29 protects freedom of conscience, expression, movement, press, religion, association and assembly. A right to an education is assured by Article 30, and a right to a family is equally assured by Article 31.

The Constitution then takes a bold step. Going beyond the traditional

⁶⁰Article 2 of the Constitution of the Republic of Uganda

protections mentioned above, it gives real meaning to another part of its Preamble. "Committed to building a better future ...through a... Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice, and progress", the Constitution provides for "Affirmative Action for Marginalized Groups". Article 32(1) provides that: "Notwithstanding anything in this Constitution, the State shall take affirmative action in favour of groups marginalised 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."

And just to be sure that nobody misses the point, Article 32(3) of the Constitution says: "There shall be a commission called the Equal Opportunities Commission whose composition and functions shall be determined by an Act of Parliament." (Emphasis added). The above analysis shows that the scheme of protection of minorities in the Constitution goes beyond formal equality into substantive equality. The Equal Opportunities Commission is the icing on the cake. It makes the constitutional protection more achievable and realistic.

Article 36 provides for the protection of minorities. It provides that '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.' This is a very empowering provision: it ensures that the views of minorities are heard, and heard from them.

Article 38 protects civic rights. Under Article 38(2), every Ugandan has a right to participate in peaceful

activities to influence the policies of government through civic organisations. The language used in this Article is all inclusive and does not discriminate against any category of persons. Therefore, this provision allows for the formation of civil society organisations working on issues of minority rights, and allows them a platform to engage.

Article 43 is the general limitation on rights. It provides that in the enjoyment of the rights and freedoms prescribed in Chapter 4 of the Constitution, 'no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.' It thus applies to all rights in the Constitution except for those non derogable rights listed under Article 44.⁶¹

'Public interest' is usually amorphous and thus easily amendable, but 'public interest' cannot be used to justify political persecution; detention without trial; and 'any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter (Four) beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.' What is 'acceptable and demonstrably justifiable in a free and democratic society' has been judicially considered in the case of *Charles Onyango Obbo v Attorney General*,⁶² where Mulenga JSC stated that

'The provision in clause (2) (c) clearly presupposes the existence of universal democratic values and principles, to which every

democratic society adheres. It also underscores the fact that by her Constitution, Uganda is a democratic state committed to adhere to those values and principles, and therefore, to that set standard.'

Therefore, flowing from this interpretation, rights can only be limited where such limitations would be justified in democratic societies elsewhere. Non discrimination and equality being key components of the bills of rights of all democratic states, it would be difficult to justify a limitation on a right solely based on any of the protected grounds and grounds that are analogous to those protected.

Perhaps one of the outstanding provisions of the Constitution is Article 45 which provides that '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.' means that the catalogue of rights that Ugandans are entitled to is not closed. This open-ended (and open-minded) constitutional declaration is very meaningful to minority groups, as usually their initiatives are opposed on the grounds that such and such a right is not specifically guaranteed in the Constitution.

Generally, the catalogue of rights listed in the Constitution applies to 'all Ugandans', 'all persons' or 'every one'. The language in Article 45 is therefore all inclusive; it does not single out any person for exclusion.

⁶¹Freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to fair hearing; and the right to an order of habeas corpus.

⁶²Constitutional Appeal No 2 of 2002 (Supreme Court of Uganda)

This position has been held to be true in cases involving sexual minorities. In the case of *Kasha Jacqueline, Pepe Onziema & David Kato Vs Giles Muhame and The Rolling Stone Publication Ltd*,⁶³ the High Court of Uganda affirmed that the rights in the Constitution apply equally to everyone regardless of their sexual orientation. His Worship held that the publication by the newspaper of the applicants "photographs and calling for them to be hanged" was a violation of their rights to dignity and privacy, and could not be justified on the basis that they were homosexuals or suspected homosexuals. In the earlier case of *Victor Mukasa & Yvonne Oyo Vs Attorney General*⁶⁴ the High Court had also held that breaking into the house of a suspected lesbian, taking away documents located there, and improperly touching the person of one of the suspects was a violation of the constitutional right to privacy. This violation existed regardless of the real or suspected sexual orientation of the suspect. These two decisions concerned suspected LGBTI persons, but they go a long way to show the breadth of protection that the Constitution affords even to the most marginalised of groups.

The Constitution does not merely stop at providing for the normative rights. It affords at least two modes of enforcement. Under Article 50(1) '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.' Article 50(2) does away with the restrictive

rules of locus standi and allows any person or organisation to bring an action against the violation of another person's or group's human rights. Interpreting this provision, Mukasa J stated that 'From the wording of clause (2) above any concerned person or organisation may bring a public interest action on behalf of groups or individual members in the country even if that group or individual is not aware that his fundamental rights or freedoms are being violated'.⁶⁵ The Justice's interpretation is very important for marginalised persons, as they are usually voiceless and often impoverished; thus, non-governmental organisations (NGOs) and other persons can bring such actions on their behalf.

[The second avenue is to petition the Constitutional Court where the matter involves interpretation of the Constitution. Under Article 137\(3\) of the Constitution:](#)

"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 allows Ugandans to challenge laws and actions of any person or authority that are in contravention of, or inconsistent with the Constitution. In *Ismail Serugo Vs. Kcc & Attorney*

*General*⁶⁶ the Supreme Court held that cases involving violations of human rights could be brought to the Constitutional Court under Article 137(3) where they involved interpretation of the Constitution. Mulenga JSC also emphasised that the right to present a constitutional petition was not vested only in the person

[The Constitution of the Republic of Uganda offers broad protection against discrimination. It is the supreme law of the land, and it leaves no space for discrimination. All other laws of Uganda must either align to it or be void and a nullity to the extent of the inconsistency.](#)

who suffered the injury but also in any other person, and as such public interest litigation was also envisaged under Article 137(3). The petition challenging Section 15(6)(d) of the Equal Opportunities Commission Act was thus brought under Article 137(3).

Finally, the Constitution establishes the Uganda Human Rights Commission, whose functions include: to investigate, at its own initiative or on a complaint made by any person or group of persons against the violation of any human right; to recommend to Parliament effective measures to promote human rights, including provision of compensation to victims of violations of human rights or their families; and to monitor the Government's compliance with international treaties and convention obligations on human rights. The Commission has the powers of a court to issue summons or other orders requiring

⁶³High Court Miscellaneous Cause No. 163 of 2010

⁶⁴[Misc. Cause No. 247 of 2006 (HC), Unreported]

⁶⁵Greenwatch - vs- Attorney General and National Environment Management Authority Misc. Application No. 140 of 2002

⁶⁶[Constitutional Appeal No. 2 pf 1998]

the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission; to question any person in respect of any subject matter under investigation before the Commission; to require any person to disclose any information within his or her knowledge

relevant to any investigation by the Commission; and to commit persons for contempt of its orders. Where the Human Rights Commission finds an infringement of a right, it may order: the release of a detained or restricted person; payment of compensation; or any other legal remedy or redress. Therefore marginalised groups can also go the Uganda Human Rights

Commission to enforce their rights.

The Constitution of the Republic of Uganda offers broad protection against discrimination. It is the supreme law of the land, and it leaves no space for discrimination. All other laws of Uganda must either align to it or be void and a null to the extent of the inconsistency.

SECTION 15(6)(D) OF UGANDA'S EQUAL OPPORTUNITIES COMMISSION ACT 2007: IS IT CONSISTENT WITH THE STATE'S OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW?

By Adrian Jjuuko
October 2013

Introduction

In 2007, Uganda passed the Equal Opportunities Commission Act. The Act provides for the Equal Opportunities Commission. The Commission is one of those originally provided for under the 1995 Constitution,¹ but it was formally established by a Constitutional Amendment in 2005 and the amendment also set the timeframe within which the law providing for its functions should be enacted.² Of all the ten constitutional commissions, it was the last to be established.³ Before the Act was passed, the Ministry of Gender, Labour and Social Development adopted the National Equal Opportunities Policy, 2007 (the Policy).⁴ The Policy is a progressive document that seeks to realise equal opportunities and affirmative action for marginalised groups. It recognises that cultural practices are among the greatest factors inhibiting the enjoyment of equal opportunities in Uganda.⁵

1 Article 32(2) of the Constitution required parliament put in place laws providing for affirmative action including laws establishing an equal opportunities commission.

2 Article 32(2) was amended to require parliament to pass the law establishing the Equal Opportunities Commission within one year after the coming into force of the amendment. See, the constitutional Amendment Act, 2005, Section 11.

3 And even then, it was only established after much advocacy and lobbying by women rights organisations and other groups.

4 Officially cited as The Republic of Uganda: 'The National Equal Opportunities Policy; Equitable Development for Sustainable Creation of Wealth' July 2006, which sets the framework for the operation of the constitutional provisions and from which the Act was developed.

5 Para 1:3 deals with the causes of discrimination and

Building on the Constitution, the policy enunciated the key principles of non-discrimination, equal opportunities and affirmative action.⁶ The Act as originally drafted followed the spirit of the policy and the Constitution. It provided the purpose of the Commission as 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 marginalised 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.'⁷ The Commission has the powers of a tribunal.⁸ It can investigate matters involving denial of equal opportunities or affirmative action and recommend any remedies. It has the powers of a court, and its decisions are

includes it.

6 Article 32(1) of the Constitution deals with affirmative action for groups marginalised groups. It requires the state to 'take affirmative action in favour of groups marginalised 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 32 was amended to clearly show that laws, customs and traditions that are against the dignity, welfare and interests of women and other marginalised groups or which undermine their status are prohibited. It also specifically established the Equal Opportunities Commission and required parliament to make a law providing for its functions within one year if the amendment coming into force. It also required parliament to enact other laws giving effect to the article. See Constitutional Amendment Act, above, Section 11.

7 The Equal Opportunities Commission Act, 2007, long title.

8 Section 15(1)-(7).

enforceable. Used effectively, these powers can eliminate discrimination.

The only major downside of the Act is Section 15(6)(d) which was not part of the original draft but rather inserted during the course of the second reading in parliament. The provision stops the Commission from investigating matters that involve behaviour considered to be 'immoral and socially harmful,' or 'unacceptable, by the majority of the cultural and social communities in Uganda'. Its inclusion was justified on the basis that '... 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.'⁹

Therefore the need to exclude 'homosexuals and the like' from accessing the Commission by subjecting the matters to be investigated to what the majority regards as moral or socially acceptable, the provision in a single stroke, undermined what international law, the Constitution,

9 Parliamentary Hansards, December 12, 2006. Quoted in S. Tamale 'Giving with one hand and taking away with the other: The Ugandan Equal Opportunities Commission (EOC) Act, 2007 in Human Rights Awareness and Promotion Forum 'Still no where to run: Exposing the deception of minority Rights under the Equal Opportunities Commission Act of Uganda' 2010, 21-23.

the Policy and the rest of the provisions of the Act sought to achieve- equal opportunities and affirmative action for marginalised groups.¹⁰

This article examines Section 15(6) (d) in light of Uganda's obligations under international law. It restricts itself to only those instruments that Uganda is a state party to. The instruments are divided into two: international instruments and regional instruments.

International Human Rights Instruments

Non discrimination, equality before the law and equal protection of the law are some of the key and basic principles in the international human rights system today.¹¹ All international human rights instruments provide for equality and non-discrimination. Uganda is a state party to key international human rights instruments that require equality and non discrimination, and as such it is bound to respect, protect and promote the rights enshrined in such instruments. These instruments are:

The Universal Declaration of Human Rights, 1948 (UDHR)

Though not a binding legal instrument but a general declaration of basic human rights, the UDHR has achieved international respect and some of its provisions are part of International Customary Law.¹² Article 1 declares that all 'human beings are born free and equal in dignity and rights.' Article 2 provides that everyone is entitled to the rights

set out in the Declaration 'without distinction of any kind.' Examples of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' are given. Article 7 provides for equality before the law and all are entitled to such protection from equal protection against discrimination. Article 8 provides for the right to an effective remedy by the competent national tribunals for violation of the rights protected in the Declaration. Article 10 also entitles everyone to a fair hearing before an impartial tribunal in determination of that person's rights or obligations. All these provisions clearly underscore the importance of non discrimination and equality for all, a thing that Section 15(6) (d) seeks to erode by subjecting matters to be investigated by the EOC to behaviours that the majority considers socially acceptable. Also by stopping the Commission from investigating such matters, the provision denies the affected groups the right to an effective remedy when violations of the right to equality take place.

The International Covenant of Civil and Political Rights, 1966 (ICCPR)

The ICCPR is the primary binding international human rights instrument that sets out civil and political rights. It provides for the right to equality before the law and to equal protection of the law under Article 26. It requires states to prohibit any discrimination on grounds such as 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' The inclusion of the term 'other status' suggests that the grounds are open and may be added to by the Human Rights Committee (HRC).¹³ Indeed

it did so in *Gueye v France*¹⁴ when it held that though nationality was not listed, it is a protected ground. In *Toonen v Australia*,¹⁵ the HRC included sexual orientation under sex.

The Human Rights Committee found that all legislation must respect Article 26 even when there was no obligation on the state to enact them.¹⁶ So since the state decided to enact the Equal Opportunities Act, it must not contain discriminatory provisions. By excluding the investigation of cases involving behaviour regarded by the majority as immoral behaviour, which behaviour may be attributed to the innate characteristics of persons belonging to a particular group, the state would be allowing discrimination. Taboos, myths, stereotypes, and customs usually proscribe behaviour and anyone acting contrary may be easily regarded as immoral or the behaviour regarded as socially unacceptable. For example a woman talking back to a man may be regarded as immoral and socially unacceptable in the majority of cultures in Uganda, but the Commission cannot investigate any repercussions resulting out of such a matter. This promotes discrimination and inequality, and would go contrary to Article 26.

In addition to article 26, Article 2 requires states to ensure that all persons enjoy the rights protected without discrimination on any other above grounds, while Article 3 requires states to ensure the equal rights of men and women to enjoy the rights protected in the covenant.

Article 27 protects religious, linguistic and cultural minorities to practice

¹⁰ S Tamale, above.

¹¹ See for example Human Rights Committee 'General Comment no 18: Non Discrimination' 1989, Para 1.

¹² For example see generally, H Hannum 'The UDHR in National and International Law' *Health and Human Rights*, Vol. 3, No. 2, Fiftieth Anniversary of the Universal Declaration of Human Rights (1998), 144-158.

¹³ See Human Rights Committee above, Para 11.

¹⁴ *Gueye v France*, Communication No. 196/1983.

¹⁵ *Toonen v Australia*, Communication No. 488/1992.

¹⁶ *Broeks v the Netherlands*, No. 172/1984, para 12.

their religion, speak their language or practice their culture. Such groups are at risk of these rights being violated if the majority is allowed to determine which behavior is socially acceptable or moral. Usually practices that are different from one's own may be regarded as unacceptable and immoral, and if protection is given to the majority rather than the minority, there is a huge danger of the rights of minority groups being violated without recourse to the EOC for redress. For example some tribes in Uganda prefer minimal covering and largely move around naked, something regarded as immoral and unacceptable by almost the rest of the tribes, yet Section 15(6) (d) suggests discriminatory conduct against such groups shall not be investigated by the Commission. This is in violation of Articles 2,3 and 26 of the ICCPR.

The International Covenant on Social, Economic and Cultural Rights, 1966 (ICESCR)

Adopted at the same time with the ICCPR, the ICESCR deals with Social, economic and Cultural Rights. Article 2(2) provides that the rights protected in the ICESCR are to be enjoyed without discrimination, while Article 3 provides for the equal rights of men and women in the enjoyment of the rights set out in the covenant. Article 2(2) is a cross cutting provision that applies to all the rights.¹⁷

The rights protected include the right to work;¹⁸ protection of the family, which is regarded as the natural and fundamental group unit of society. Marriage is to be entered into with the consent of both parties.¹⁹

17 Committee on Economic, Social and Cultural Rights (CESCR) 'Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)' General Comment 20. Para.7.

18 ICESCR, article 6

19 **Article 10**

The protection of the family is to ensure that children are cared for and educated, and not to entrench harmful and discriminatory practices. Article 15(1)(a) recognises the right of everyone to take part in cultural life, and indeed it can be inferred from the spirit of the Covenant that only that part of cultural life that is not harmful or discriminatory is protected.

Therefore, Section 15(6)(d) which limits investigation of cases concerning minorities to only those that do not involve behaviour that is considered by the majority of the social groupings as immoral or socially unacceptable has no place in the scheme of the ICESCR.

International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (CERD)

The Convention seeks to end racism, apartheid and such practices that promote discrimination on the basis of race, colour, descent or national or ethnic origin. States are thus under an obligation to end such discrimination.²⁰ Racial segregation and apartheid are specifically condemned.²¹

A wide array of civil and political rights are guaranteed in article 5 including equality before the law without distinction as to race.²² Persons of different races usually have different sets of values and in places where the majority of the cultural groupings are of one race as the case is for Uganda, there is more need for protection of racial minorities, and thus using the EOC to ensure non discrimination would be a welcome development. However, Section 15(6)(d) would seem to close this channel where the behaviour

20 CERD, Article 2

21 Article 3

22 Article 5(a)

that led to the act of discrimination or denial of opportunity is one that the majority consider immoral or socially unacceptable. This violates the state's obligations under the CERD.

The Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW)

The CEDAW is a special instrument in that it addresses the rights of women, and goes beyond requiring the states to put in place laws.²³ Harmful social and cultural patterns of conduct are specifically pointed out as one of the hindrances against the equality of women with men and the state is supposed to modify these with a view of achieving their elimination.²⁴

The CEDAW also among other rights provides for the right to equal access to employment,²⁵ access to health care services including family planning,²⁶ equality before the law including the right to conclude contracts and administer property,²⁷ rights in marriage including free choice of partner, decision on the number and spacing of children, and rights regarding guardianship of children,²⁸ among other rights. All these rights stand in contrast to traditional customs and practices. In many communities in Uganda, women are supposed to be subordinate to their husbands, and as such they are excluded from ownership of property, have no say on how many children to have, and usually have no say in who is their partner, or when to have sex or not. They are supposed to bear all these quietly. Any opposition is regarded as unacceptable and in some cases as immoral behaviour. Therefore, if the Commission is stopped

23 CEDAW, Article 2

24 Above, article 5

25 Article 11

26 Article 12(1)

27 Article 15

28 Article 16

from investigating cases involving behaviour where a woman opposes harmful cultural norms and practices, the whole intention of establishing the commission is lost, and the state will not be living up to its obligations under the CEDAW.

The state is supposed to take special temporary measures to redress imbalances and this shall not be regarded as discrimination.²⁹ As such putting in place the EOC is a welcome development more so as it is aimed at promoting affirmative action for among others women. However, the provision that takes away access to the EOC on the basis of what the majority consider moral or socially acceptable goes against the spirit of the CEDAW.

The Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT)

Article 16 of the CAT requires states to prevent and punish acts that constitute inhuman and degrading treatment or punishment in which a public official participates or is connected.

Banishment from a village is one example of such treatment, and this is very common in Uganda where people whose behaviour is considered immoral or unacceptable for example persons suspected of being witches,³⁰ sex workers or LGBTI persons³¹ are ordered to move away from the village. Under Section 15(6)(d) the Equal Opportunities Commission may not investigate such expulsions since the majority regard such conduct as immoral or unacceptable. This would go contrary to the CAT.

²⁹ Article 4

³⁰ *Salvatori ABuki v Attorney General*, Constitutional Case No. 2 of 1997

³¹ Data on such cases on file with author.

The Convention on the Rights of the Child, 1989 (CRC)

The CRC puts protection of children at its centre, and the state is under obligation to protect the rights of the child.³² The rights protected include the right to freedom from torture, inhuman and degrading treatment, the right to express their opinions, and the right to associate among others. The state is supposed to ensure that these rights apply without discrimination of any kind. In all cases the best interests of the child is the primary consideration. Nevertheless because of their vulnerability, children are often subjected to beatings, are not allowed to talk when elders are talking, and are largely suppressed. Demanding for many of the things that the CRC regards as children's rights would indeed be considered socially unacceptable by the majority of the groups in Uganda, and thus the Commission may be stopped from investigating matters arising out of such conduct. This is a violation of the CRC and especially Article 4.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, (Migrant Workers Convention) 1990

Uganda is a state party to the Convention. The Convention defines a migrant worker as a person 'who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.'³³ The state is under an obligation to ensure that such workers enjoy all the rights protected in the Convention without discrimination. The rights relevant

³² Article 4

³³ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 2(1)

to equal opportunities include: the right to freedom from torture, cruel or inhuman treatment;³⁴ freedom of thought, conscience and religion;³⁵ freedom of expression;³⁶ right to privacy; equality before the courts and tribunals;³⁷ and the right to culture.³⁸ The enjoyment of such rights indeed involves conduct or behaviour that may be different from what the majority of the social and cultural groupings subscribe to and thus may be easily classified as immoral or unacceptable in the country, and yet according to Section 15(6)(d), the EOC does not have to investigate such matters of discrimination. This is indeed contrary to many provisions of the Convention especially Article 7.

The Convention on the Rights of People Living with Disabilities, 2006 (CRPD)

The CRPD is intended to address the treatment of Persons with Disabilities (PWDs) as second rate citizens.³⁹ It seeks to address the multiple tiers of discrimination affecting PWDs incumbent in most societies.⁴⁰ Uganda is a state party.

The Convention is based on the principles of: Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; Non-discrimination; Full and effective participation and inclusion in society; Respect for difference and acceptance of persons with disabilities human diversity and humanity; Equality of opportunity; Accessibility; Equality between men and women; and respect for the evolving capacities of children with disabilities and the right of children with disabilities to preserve their

³⁴ Article 11

³⁵ Article 12

³⁶ Article 13(2)

³⁷ Article 18(1)

³⁸ Article 31

³⁹ CRPD, Preamble, Para k

⁴⁰ Above, para p

identities.⁴¹

States are under an obligation to put in place legislation as well as other measures to promote the full realisation of the rights in the CRPD. In particular laws, customs or practices that constitute discrimination against PWDs should be modified or abolished.⁴²

Article 5 provides for equality before the law.⁴³ All persons are entitled to equal protection of the law without discrimination. Women and children with disabilities require special protection.⁴⁴ Article 13 protects the right to access to justice including ensuring reasonable accommodation for PWDs to be able to access justice.⁴⁵ They are also protected from torture, inhuman and degrading treatment as well as abuse, violence and exploitation.⁴⁶ Freedom of expression,⁴⁷ privacy,⁴⁸ respect for home and family⁴⁹ among others are also protected.

PWDS are usually treated as second rate citizens by most communities due to ignorance about disabilities and also due to their vulnerability. As such they are restricted from a number of things and various taboos and customs exist to further exclude them. Therefore standing up against these taboos and fighting against discrimination may in itself be seen as immoral or socially unacceptable and thus the Commission would have no authority to investigate matters arising out of such behaviour. This exclusion is denial of access to justice and also violates the state's obligations under the CRPD.

Regional Instruments

41 Above, article 3
42 Article, 4(1)(b)
43 Article 5
44 Articles 7 and 8.
45 Article 13
46 Articles 15 and 16 respectively.
47 Article 21
48 Article 22
49 Article 23

African Charter on Human and Peoples Rights, 1981 (African Charter)

The African Charter is the basic instrument in the African Human Rights system. Uganda is a state party to the Charter. The Charter provides for a wide range of rights covering both civil and political rights as well as Social Economic Rights. These include: the right to equality before the law and equal protection of the law;⁵⁰ right to dignity including freedom from inhuman and degrading treatment;⁵¹ right to be heard by competent national tribunals;⁵² and freedom of conscience and religion.⁵³ These rights are to be enjoyed by every individual without discrimination.⁵⁴

Perhaps more than any other instrument, the African Charter also recognises the right to family and imposes a duty on the state to assist the family, which is the custodian of morals and traditional values recognised by the community, as well as protection of women and children from discrimination.⁵⁵ This provision indeed protects those African values that are positive including protecting of marginalised groups. It cannot be said to allow discriminatory practices. As such women, children and other marginalised groups are supposed to access the established tribunals for redress when they have been the subject of discrimination or denied opportunities on the basis of their being part of such a marginalised group. In this sense, Section 15(6) (d) cannot be said to be authorised under Article 18.

The Charter also recognised the rights of peoples. Peoples' rights are

50 African Charter, Article 3
51 Article 5
52 Article 7
53 Article 8
54 African Charter, Article 2
55 Article 18

group rights rather than individuals rights. The first of these is that all peoples are equal and they are entitled to enjoy the same rights.⁵⁶ This implies that different cultural groups are equal, and therefore it would be wrong to subject minority groups to majority views and preferences, which Section 15(6) (d) purports to do. Peoples also have the right to their economic, social and cultural development with regard to their development and identity, and as such cannot be subjected to another peoples.⁵⁷

The much criticised concept of duties also has relevance to non discrimination and protection of marginalised groups. For example Article 29 makes it a duty of every individual to respect and consider other persons without discrimination and with tolerance. This duty empathises the need for mutual respect and understanding rather than a blanket trumping of the view of minority groups by the majority. The individual duty to serve and preserve the family as well as to respect one's parents⁵⁸ cannot also be read in isolation of the provision on the rights of the family. It is about the positive aspects and values of the family rather than the negative aspects that may promote discrimination.

Therefore, Section 15(6)(d) has no place in the framework of the African Charter

African Charter on the Rights and Welfare of the Child, 1990 (African Children's Charter)

The African Children's Charter recognises that children especially children in Africa continue to suffer discrimination and violations of their basic rights due to their vulnerability as children.⁵⁹

56 Above article 19
57 Above, article 22
58 Above, article 29(1)
59 African Children's Charter, preamble

Article 1(1) requires states to adopt such legislative and other measures as are necessary to give effect to the provisions of the Charter. Any custom, tradition, religious or cultural practice that is inconsistent with the provisions of the Charter is discouraged to the extent of its inconsistency.⁶⁰ The rights protected apply to all children without discrimination.⁶¹ The best interests of the children is the primary consideration in all matters concerning the child⁶².

Article 7 provides for the right to freedom of expression; article 9 for the right to freedom of thought, conscience and religion; article 10 to the right to privacy; article 12 to the right to leisure; article 13 provides for special measures for children with disabilities; article 15 prohibits child labour; while article 16 prohibits child torture and abuse. All these rights seem to run contrary to what African traditions and culture regard as moral or socially acceptable for children, since decisions concerning children are largely left to parents, children are usually beaten and subjected to child labour and they are not supposed to complain. Section 15(6)(d) instead goes contra to the Charter provisions by stopping the Commission from involving matters that involve such conduct by children.

Article 18 protects the family, as the basic and natural unit of a society. However in light of the spirit of the Charter, the family protected is one where children enjoy their rights as enshrined in the Charter. Article 21 makes this clearer when it prohibits all cultural and social practices that are harmful to children. In particular child marriages are prohibited.⁶³

Normally children resisting such practices would be regarded as immoral or socially unacceptable. Therefore, Section 15(6)(d) cannot stand in light of the provisions of the African Children's charter as it runs contrary to it.

Protocol to the African Charter on the Rights of Women in Africa, 2000 Building on Article 18 of the African Charter, as well as the CEDAW and other international instruments, the African Women's Protocol introduces an African approach to women's rights.⁶⁴ It requires states to eliminate all forms of discrimination against women through legislative and other measures. States also commit to modify the social and cultural patterns of conduct of men and women to achieve the elimination of harmful cultural and traditional practices.⁶⁵ Dignity of women is protected under article 3, and article 4 protects women from all forms of exploitation and cruel, inhuman or degrading treatment or punishment. Violence against women including unwanted or forced sex is also prohibited whether in public or private.⁶⁶ Article 5 focuses on harmful traditional practices which negatively affects the rights of women and calls for their elimination. Equal rights in marriage are provided for including setting the minimum age for marriage at eighteen years, and that entry into marriage requires the consent of both parties. All these protections are because of common cultural and traditional practices that subject women to men, and allow perpetual sexual servitude for women, child marriages and marital rape. A woman opposing these would be regarded as doing something that is unheard of or unacceptable, and yet Section 15(6)(d) prevents the EOC from investigating matters that may

involve such conduct. It certainly goes against these provisions of the African Women's Protocol.

Women also have equal rights to protection before and under the law as men, and existing discriminatory laws and practices are supposed to be reformed.⁶⁷ Women are supposed to have equal access to economic opportunities, and also the value of women's work in the domestic sphere should be recognised.⁶⁸

Perhaps the most outstanding provision of the African Women's Protocol is Article 14 which is the first international human rights law provision to recognise the right to medical abortion in particular circumstances including rape, incest, sexual assault and where the continued pregnancy 'endangers the mental and physical health of the mother or the life of the mother or the foetus'.⁶⁹ Uganda has a reservation on this provision and so it does not bind it, however the message that the Convention sends is clear. Access to family planning, the right to control their fertility, the right to choose to have children or how to space them, the right to self protection against sexually transmitted infections and HIV/AIDS as well as the right to be informed of their health status and that of their partners especially in cases of HIV are all recognised. All these provisions closely concern sexuality where women were hitherto not allowed to exercise discretion or choice, and certainly go against many of the set customs and traditions in the majority of African communities. Section 15(6)(d) cannot stand in light of these provisions.

Article 17 encourages positive cultural contexts where women are

60 African Children's Charter, Article 1(3)

61 Article 3

62 Article 4(1)

63 Article 18(2)

64 African Women's Protocol, preamble

65 Above, article 2(2)

66 Above, article 4(2)

67 Above, article 8

68 Above, article 13

69 above, article 14(2)(c)

involved in their determination. Widows are protected from inhuman and degrading treatment and they are automatic guardians of their children in case of the death of the husband, and they have the right to remarry a person of their choice. Women are supposed to have the same entitlement to inheritance as men.⁷⁰ Elderly women, women with disabilities, and women in distress are entitled to special protection.⁷¹ This is because of their vulnerable status which others may easily exploit. As such women who before suffered double stigma and discrimination are given a voice by the Charter.

All these provisions are not in line with what was standard practice in most of the African traditional societies where men dominated and where widows could be inherited and had no rights in the children. Complaining or going against such norms and practices would be regarded as unacceptable and indeed if Section 15(6)(d) is to stand, such women could not access the EOC for redress.

70 Above, article 21

71 Above, articles 22-24

Conclusion

Section 15(6)(d) stands in utter defiance of the provisions of various international and regional instruments which guarantee the equality of everyone, and which protect the rights of marginalised groups including women, children and persons with disabilities. Having such a provision on the law books leaves Uganda in violation of the obligations to respect, fulfil and protect the rights in the various instruments. The provision being in a law that seeks to promote equal opportunities and affirmative action in order to redress past imbalances starkly stands out against all international instruments providing for the same, that indeed it has no place on the law books of a country that is a state party to such international instruments. Uganda ought to repeal this provision forthwith if it is to live up to its obligations under international law.

USING THE COURTS TO FIGHT DISCRIMINATION AGAINST MINORITIES IN UGANDA: THE CASE OF JJUUKO ADRIAN V. ATTORNEY GENERAL OF UGANDA

By Adrian Jjuuko

The petition

Jjuuko Adrian v. Attorney General of Uganda, Constitutional Petition No. 1 of 2009 was filed on 5th January 2009. It challenges the constitutionality of section 15(6)(d) of the Equal Opportunities Commission Act 2007. Oral arguments in the petition were heard by the Constitutional Court of Uganda on 3rd October 2011. The ruling, which has been pending since then, is awaited from the Constitutional Court of Uganda⁶⁷. The case challenges the constitutionality of Section 15(6)(d) of the Equal Opportunities Commission Act of Uganda.

The Petition was filed under the Constitution and under Rule 3 of the Constitutional Court (Petitions and References) Rules S.I 91/05.

Background to the petition

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 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”⁶⁸

The Commission has the powers of a tribunal under Section 15. Broadly expressed, the Commission has powers to investigate and provide a remedy on matters under its jurisdiction. These powers, if effectively used, can eliminate discrimination against minority groups.⁶⁹

However, Section 15(6) which deals

with matters that the Commission may not investigate is quite problematic. Whereas the provisions of Section 15(6) a-c are acceptable, Section 15(6)(d) is strange and poses challenges. The provision provides that:

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. Nor does it define or explain terms like “immoral” or “unacceptable”. Nor does it define who or what the “cultural and social communities in Uganda” are. However, a peek 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 realize that Section 15 (6)(d) has the unfortunate effect of excluding every minority group. The Commission set up to help minorities instead denies them access for redress.

With Section 15(6)(d), the Commission effectively locked them out.

The legal basis of the petition

Article 137(3) of the Constitution of the Republic of Uganda, 1995 provides that:

(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 promotes public interest litigation but it specifically

* Reproduced from Human Rights awareness and Promotion Forum’ Still no where to run’ Exposing the Deception of Minority Under the Equal Opportunities Commission Act of Uganda. An Information Booklet 2010. pp. 29-34

⁶⁷The constitutional court is the court of first instance for constitutional matters in Uganda. Ap appeals from its decisions go to the Supreme Court.

⁶⁸Quoted from the long title to the Equal Opportunities Commission Act No. ...2007.

⁶⁹Section 15(1)-(7)

applies to matters that call for the interpretation of the Constitution. The Ugandan Constitution allows any spirited person or organization, even if that person is not affected by a law, to bring a case against the violation of the rights of another person or persons.

The petition is also grounded in Article 2 of the Constitution. That Article provides that the Constitution is the supreme law of Uganda and that any law that is inconsistent with it, is void to the extent of its inconsistency.

The Constitutional Court (Petitions and References) Rules provide that the matter must be brought by way of petition.

The petition is based on Article 21 of the Constitution, the right to freedom from discrimination.

The legal issues for determination

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 directs the Government to respect, uphold and preserve the fundamental rights of the person enshrined in Chapter Four of the Constitution?
3. Whether Section 15(6)(d) of the Equal Opportunities Commission Act is inconsistent with 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 of the Constitution which protects the rights of minorities to participate in decision making processes?

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; and
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; and
3. Costs of the suit

Current status of the Petition

The petition is still pending ruling. Efforts have been made by the petitioner and HRAPF to follow up

on the ruling. On 23rd January 2013, in response to the last letter sent to the Court requesting information on the delivery of the ruling, the Registrar of the Constitutional Court wrote in part that,

'I regret the delay in delivering the said ruling attributed to the busy schedule of this court and acute human resource shortage. However I am reliably informed that the ruling is being prepared and is expected to be delivered soon.'

Hopes are thus high that the ruling may be delivered soon.

Current actions around the petition

While judgment is being awaited, HRAPF continues to explore ways through which minorities can learn about and access the Equal Opportunities Commission. Efforts are also being made to inform people about the gist and basis of the case and what winning or losing the case might mean for marginalised groups.

Next steps

The ruling for the case has not yet been delivered, but there is hope that it may be delivered soon. The next steps will be determined depending on the outcome of the petition. If the ruling goes against Mr. Jjuuko, there is a possibility of appeal to the Supreme Court of Uganda. If the Constitutional Court ruling supports Mr. Jjuuko's petition, the Attorney General may decide to appeal the decision. If the ruling supports the petition filed by Mr. Jjuuko and no appeal arises from the Attorney General within the stipulated time, then the danger posed by Section 15(6)(d) would be past.

WOMEN'S DAY PRESS STATEMENT

CELEBRATING THE ESTABLISHMENT OF THE EQUAL OPPORTUNITIES COMMISSION AND CALLING FOR THE REALISATION OF EQUAL OPPORTUNITIES FOR ALL

Human Rights Awareness and Promotion Forum (HRAPF) joins the rest of the world to commemorate the International Women's Day 2013. The day calls for a celebration of the gains made so far in realising substantive equality for women and also provides a great opportunity to highlight the remaining challenges that still make substantive equality for women a daunting task. This year's theme is, "A promise is a promise: Time for action to end violence against women."

The world has made significant leaps and bounds in the formal protection of women and their rights. The adoption of the International Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) was a great landmark in the history of humanity. For the first time a binding international instrument laid down obligations for states to fulfil, respect and protect the rights of women. It also called for special measures to address imbalances. The Protocol to the African Charter on the Rights

of Women (Maputo Protocol) declared the commitment of African states to realise substantive equality for African women. Uganda has ratified both instruments, and this is indeed commendable.

At the domestic level, the Constitution of the Republic of Uganda promotes and protects women's rights, and even provides for affirmative action in order to achieve substantive equality, which led to the enactment of the Equal Opportunities Commission Act in 2007. The Act established the Equal Opportunities Commission which is mandated to "eliminate discrimination and inequalities against any individual ...and take affirmative action in favour of groups marginalised on the basis of sex, gender, age, disability or any other reason created by history, tradition or custom for the purpose of redressing imbalances which exist against them." To achieve its functions, the Equal Opportunities Commission (EOC) is given powers of a court to investigate

'any act, circumstance, conduct, omission, programme, activity or practice which seems to amount to or constitute discrimination, marginalisation or to otherwise undermine equal opportunities'.

With these wide-ranging powers, the Commission has a huge potential to dramatically change the landscape of Ugandan equality law. However, the ability of the EOC to achieve its objectives may be curtailed by Section 15(6) (d) of the Act which prevents the Commission from investigating matters involving behaviour that is regarded 'immoral and socially harmful' or 'unacceptable' by the majority of the cultural groupings and social communities in Uganda.

HRAPF believes that apart from being unconstitutional, this provision defeats the objects and purpose of setting up the Commission. Imbalances created by culture and history are based on the majority's conceptualisation of what is 'moral' or 'acceptable.' For

example, in some of our communities it is regarded as 'moral' and 'socially acceptable' for women to not to complain about domestic violence. Furthermore, who determines what is moral and which test the Commission should apply to determine what the 'majority of the cultural groupings and social communities in Uganda' consider immoral, socially harmful and unacceptable? The case of Jjuuko Adrian

v. Attorney-General has been filed to challenge the constitutionality of this provision as contravening our constitutional provisions on equality. HRAPF calls for a review of section 15(6)(d) which blatantly undermines equality, legitimises patriarchal perceptions, and condones violence against women. Most violence meted out against women is a consequence of the

absence of equal opportunities which creates imbalances against women.

As we celebrate Women's Day it is worth remembering those women and other marginalised groups who cannot access justice or fair treatment around the world because they are considered social outcasts. Equal opportunities belong to all.

Taking Human Rights to All

HRAPF

ABOUT HUMAN RIGHTS AWARENESS AND PROMOTION FORUM (HRAPF)

LEGAL STATUS

Human Rights Awareness and Promotion Forum (HRAPF) is an independent, not for profit, non-partisan, non-governmental organization in Uganda. Formed in 2008, registered as an NGO later that year, and established under the Companies Act as a company limited by guarantee in 2010, HRAPF is specifically interested in human rights awareness and in advocacy to further that interest. It works with like-minded organizations and institutions. It uses legal and policy analysis, legal research and documentation, and strategic litigation to further its ends.

VISION:

A society where the human rights of all persons including marginalised groups are valued and respected.

MISSION:

To promote respect and observance of human rights of marginalised groups through legal and legislative advocacy, research and documentation, legal and human rights awareness, capacity building and partnerships.

SLOGAN:

'Taking Human Rights to all'

ORGANISATIONAL OBJECTIVES:

1. To sensitise Ugandans on the international and national human rights regime in order to promote a culture of respect for human rights of marginalised groups.
2. To undertake research and document human rights abuses suffered by marginalised groups for appropriate remedial action
3. To influence legal and policy developments in Uganda to ensure compliance with human rights principles.
4. To offer legal assistance to marginalised groups in order to enhance access to justice.
5. To share information and best practices on the rights of marginalised groups in order to strengthen the human rights movement in Uganda.
6. To network and collaborate with key strategic partners, government, communities and individuals at a national, regional and international level.
7. To build a strong and vibrant human rights organisation.

VALUES:

1. Non -discrimination
2. Equal opportunity
3. Justice
4. Practical Approach
5. Team work

PROGRAMS

HRAPF under its five year strategic plan 2013- 2017, works through the following programs to achieve its aims and objectives.

Access to Justice Program

The objective of this program is 'To promote sustainable access to justice for marginalised groups in Uganda specifically; sexual minorities, poor women and children living with HIV/AIDS and poor men and women and the elderly.'

It focuses on: criminal justice, land justice, family justice (HIV/AIDS related) and Sexual and gender based violence. The program employs: legal assistance, strategic interest litigation, research and documentation, legal and human rights education and information, education and communication material development and legal aid advocacy to achieve its objectives.

Legislative Advocacy and Networking Program

The objective of this program is 'To work with like minded organisations and institutions to advocate and influence the adoption of policies and legislation that promote equality and non-discrimination in order to prevent discrimination of marginalised groups.'

Under this program, HRAPF undertakes advocacy to influence legislative reform of laws/proposed bills such as: the Anti-Homosexuality Bill, 2009, the HIV/AIDS Prevention and Control Bill, 2010, the Equal Opportunities Commission Act, 2007, Sexual Offences Bill, the Public Order Management Bill, 2009, the Legal Aid Bill, among others.

The program employs: legal and policy analysis, legal research and documentation, strategic interest litigation and partnerships to achieve its objectives.

Organisational Development and Capacity Building Program as described below:

The Objective of this program is to create the appropriate institutional structures and organisational framework for the efficient and effective implementation of the Program activities and realisation of the Program Goal.

It focuses on five priority areas: Policy Development; Human Resource Management and Development; Strengthening Governance Structures & Building membership; Strengthening HRAPF's Monitoring and Evaluation Systems and; Increasing Resources for Increased Needs.

ORGANISATIONAL STRUCTURE

The General Assembly

This is the supreme policy making body of the organisation. It is made up of all members. Currently HRAPF has 50 members. Membership is open to all persons interested in human rights awareness, promotion and advocacy.

The Board of Directors (BOD)

The BOD is responsible for the day to day running of the organisation. The BOD is composed of seven members, The Chairperson who is a co-opted member, the Vice Chairperson, the Secretary General, the Treasurer, two other members and the Executive Director as ex-officio.

The Secretariat

This is the implementing body of the Organisation. It is headed by the Executive Director, and is currently made up of 17 staff members and three volunteers.