

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

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“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”¹

Abstract

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

Introduction

After a very long struggle by various human rights activists and groups², the Equal Opportunities Commission has been set up.³ 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”*.⁴

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¹ See Anne R. Edwards; Sex/gender, sexism and criminal justice; some theoretical considerations, 165 (1989)

² UWONET was one of the leaders in this struggle.

³ This commission is the last of all commissions provided for by the constitution to be set up. It is provided for under Article 32(2) of the 1995 constitution and it was supposed to be set up within two years.

⁴ Quoted from the long title to the Equal Opportunities Commission Act 2007.

The Government first developed a policy- the Equal Opportunities Policy⁵ 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 Uganda⁶.

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

The commission under the Act

The commission as established under the Act has the powers of a tribunal under Section 15 which are widely expressed, and which if put in effect can effectively eliminate discrimination.⁷

However there is a hitch in section 15(6) which deals with matters that the commission may not investigate. Others are usual but what is unusual is found in section 15(6)(d).

For purposes of clarity, let us reproduce it;

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

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

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

A gendered analysis

This provision above all defeats the aim of the constitution, the Act itself and the National Equal Opportunities Policy, 2007⁸.

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

That in case some one brings up a complaint of discrimination which is based on a cultural custom or norm or on a moral issue then that cannot be investigated by the commission⁹.

⁵ The republic of Uganda; The national equal opportunities Policy, July 2006

⁶ Para 1:3 deals with the causes of discrimination and includes it.

⁷ Section 15(1)-(7)

⁸ Officially cited as The Republic of Uganda; The National Equal Opportunities Policy; Equitable Development for sustainable Creation of wealth, July 2007, which sets the framework for the operationalisation of the constitutional provisions and from which the Act was developed.

⁹ Tuhaire supra suggests that in general society; these complaints do not attract attention.

The other term that the Act uses is “socially harmful”. Whatever this term means, it together with ‘immorality’ and ‘unacceptability’ are meant to defeat the aim of the Act. It is thus highly doubtful that if the commission is set up, it will have any matters to investigate at all for almost all matters that affect minorities are looked at by the majority as socially unacceptable, immoral and destructive to the patriarchal social fabric. This will render the commission totally irrelevant to the people it is supposed to help¹⁰. They on the other hand will continue to be overborne and exploited on the whims of their more numerous¹¹ brethren.

A gendered analysis of this provision shows that the government is rather further entrenching patriarchy yet is sought to deal away with it. This is the irony of the year. Most of the practices that stand in the way of for example women’s full realization of their full potential are deeply embedded within the moral customs and practices of the majority. Women at work, women in the market, women in politics¹², women eating specific foods, women talking, women sitting in the same class for the same qualifications etc are all unacceptable in the traditional conservative social rubric. All women without exception who have made it in all those fields are rebels. Society simply tolerates them but otherwise if society’s views are sought as to what should be done, the majority would regard such women as immoral, grossly obscene and that their practices are harmful to the social economic rubric of society.

So, if the commission will not protect women from such practices then it is as good as dead. The projected effect of this is that women will remain under the yoke of patriarchy with no rescue by a body set up to rescue them!

Still, the subjection of the operation of a human rights tribunal to the motifs of customary law, and practices is mind boggling. One wonders where the two meet. Issues of Morality are rarely compatible with human rights, since the former deals with

¹⁰ According to Percy Ntuhaise; Gender roles and sexual inequality; domestic labour and the burden of housewives in Uganda; EAJPHR vol. 2, 1999 pp 146

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

¹¹ Read powerful

¹² See generally Sylvia Tamale; When hens begin to crow; Gender and parliamentary politics in Uganda, Fountain Uganda, 1999.

society yet the latter is concerned with individuals¹³. The Commission is supposed to realise the human rights of women, but it cannot if it has to put the majority before the individual woman. It is society that violates individual's rights. Uganda ratified the major human rights instruments including the CEDAW which enjoins states to deal away with exploitative and restrictive practices on women. This is a violation of international law. Still, it is the woman sufferer that loses and her rights will continue being violated in the full view of the commission set up to help her.

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

Section 15(6)d is unconstitutional. The 1995 constitution of Uganda is the supreme law of the land¹⁴. Under article 2(2), "if any other law or any other custom is inconsistent with any of the provisions of this constitution, the constitution shall prevail, and that other law or custom shall, to the extent of its inconsistency be void".

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

Article 32 provides for affirmative action in favour of "*groups marginalized on the basis of gender, age, disability or any other reasons created by history. Tradition or custom, for the purpose of redressing imbalances that exist against them*"¹⁵.

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 realise their full potential.¹⁶

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

¹³ The African states are clamoring for a theory of cultural relativism today to observe such practices.

¹⁴ Article 2(1) of the 1995 constitution as amended.

¹⁵ Article 32(1)

¹⁶ Article 32(2)

The provision is against Article 21 which provides for equal treatment, and a host of other incidental provisions. So, the provision cannot stand constitutional scrutiny, and thus it is void to the extent of its inconsistency¹⁷

For the act and the policy, they both emphasise discrimination based on customs and practices as one of the root causes of imbalances. The Long title of the Act¹⁸ reflects this, as does Section 1 while defining discrimination. Section 14(1) is also cognizant of this fact. So, the offending provision defeats the spirit and even the letter of The Equal opportunities Act of which it is a component! This inconsistency will work to the disadvantage of the very populations that the Act is meant to protect.

For the Equal opportunities Policy, Section 15(6)d is also in violation of it since the policy aims at redressing imbalances caused by among others, “cultural...background”¹⁹

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

Best practices elsewhere;

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

¹⁷ Article 2(2)

¹⁸ Already quoted

¹⁹ See foreword by the Minister of labour, Gender and Social development.

commissions in place. The most visible one is the Equal Employment Opportunities commission²⁰. Of course provisions like our Section 15(6) d do not surface.

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

Conclusion

Section 15(6)d is out of touch with reality. It cannot and it can never guarantee the rights of minorities if it still insists on majority rule. Morality per se is not a bad concept, but those aspects that make it oppressive as a concept need to be weeded out.

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

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

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

²⁰ www.wikipedia.org/wiki/equal-employment-opportunity-commission.html