cultural rights in Uganda

A brief overview

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Uganda has ratified almost all the major regional and international instruments that protect economic, social and cultural rights (ESCRs). However, a reading of the Constitution of Uganda, 1995, and other laws shows that the rights have not been domesticated fully.

During the drafting of the Constitution, the Constitutional Commission was of the view that not all rights (referring to ESCRs) were amenable to judicial review. Consequently, only a few ESCRs were included in the Bill of Rights. These include the right to join or form trade unions, the right to strike, the protection of children from exploitation, and the equal treatment of men and women in employment, remuneration, economic opportunities and social development. The rest were incorporated as national objectives

and directive principles of state policy (NODPSPs), which are non-justiciable. The Constitution makes it very clear, though, that these principles are supposed to guide the state in applying or interpreting the Constitution or any other law and in making and implementing any policy or legislation.

To the extent that these principles can be used "in applying or interpreting the Constitution or any other law", they are justiciable. This position is strengthened by the 2005 amendment to the Constitution introducing article 8A. This article provides as follows:

> **8A National interest**
>
> (1) Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directives of state policy.
>
> (2) Parliament shall make relevant laws for purposes of giving full effect to clause (1) of this article.

This provision gives a very clear indication that the country is bound by the NODPSPs. Not only can they form part of human rights jurisprudence through interpretation, they may also be enforced through legislation.

This paper examines how the ESCRs have been enforced in Uganda. But first, a brief overview of the structure of the courts is provided.

Structure of the courts

The Supreme Court is the most superior and final court of appeal in Uganda. It is followed by the Court of Appeal, which also sits as the Constitutional Court. Below the Court of Appeal is the High Court, which has unlimited original jurisdiction in all matters. It also has appellate jurisdiction in respect of appeals from subordinate courts. In addition to the formal courts, Uganda has a unique system of local courts, called Local Council Courts, structured in accordance with a decentralised system of governance. Generally, these courts have jurisdiction in matters of a civil nature governed by customary law and those arising from by-laws and ordinances made under the Local Governments Act, Cap 243 Laws of Uganda, 2000.

Enforcement of ESCRs

Context

The Ugandan legal system has been very slow in responding to social problems. In spite of the changing social, economic and political context, the law has always lagged behind. This could be attributed to the many years of political instability during which Parliament and legislative processes were replaced with military proclamations. Nonetheless, the last two decades have witnessed relative stability and a continuous legislative process, exemplified by the promulgation of the 1995 Constitution. This period has seen the revision of a number of laws, even though many old laws remain on the statute book.

In the same context, evidence suggests that the government has failed to uphold the independence of the judiciary and has, in fact, sidelined it. It has failed to provide adequate resources in terms of logistics, finances and personnel. This is in addition to deliberate verbal assaults on the independence and integrity of the judiciary. For example, between 2004 and 2006, the government openly defied courts and on more than one occasion raided the sacrosanct premises of the High Court to try to rearrest suspects released on bail.

Another contextual factor relates to the expenses of litigation. Litigation in Uganda is very expensive, as is probably the case globally. This is caused by a shortage of legal skills, and delays in the delivery of justice resulting in part from the resource constraints in the judiciary. During the constitution-making process, many people expressed the view that justice had almost become a commodity to be bought and sold. Moreover, the ignorance of the majority of people regarding the law and their legal rights, coupled with the complexity of the judicial processes, has alienated the general populace from the courts.

It should be noted that the environment within which civil society organisations (CSOs) operate is also very constraining. CSOs are discouraged by the government, as well as by international financial institutions, from engaging in activities that are politically sensitive (Dicklitch, 1998: 10). CSOs also do not receive any financial support from the government, which, worse still, often expresses outright opposition to their activities.

The judiciary

The judiciary has begun to produce more pragmatic judgments and, generally speaking, is cultivating fertile ground for judicial activism. This has encouraged a number of CSOs and activists to seize the opportunity and bring to court cases challenging violations of environmental standards, for instance.

Litigation has also been encouraged by the provisions of article 50 of the Constitution, which

entitles any person who claims that a fundamental or other right or freedom guaranteed by the Constitution has been infringed or threatened to apply to a competent court for redress. Under this section, a person or organisation may also bring an action in respect of a violation of another person's or group's human rights. This provision has opened the gates to litigation, particularly public interest litigation (Tumwine-Mukubwa, 1999: 106).

Article 45 opens up the space for generous interpretation of the provisions of the Constitution and for the use of international human rights law to bolster the Bill of Rights.

A number of decisions have been handed down on article 50. For example, in *British American Tobacco* (BAT) *v The Environment Action Network* (TEAN) Civil Application 27/2003, the High Court, inspired by the South African Constitution, held:

> It is elementary that "persons", "organizations" and "groups of persons" can be read in Article 50(2) of the Constitution to include "public interest litigants", as well as all the litigants listed down in (a) to (e) of Section 38 of the South African Constitution. In fact, the only difference between the South African provision (i.e. Section 38) and our provision (under Article 50(2)) is that the former is detailed and the latter is not. That is my considered view based on the reality that there are in our society persons and groups of persons whose interest is not the same as the interest of those who Lord Diplock referred to as "spirited" persons or groups of persons who may feel obliged to represent them i.e. those persons or groups of persons acting in the public interest.

Such progressive decisions are also reflected in the approach to the interpretation of the Bill of Rights. Article 2 makes the Constitution the supreme law of Uganda, binding on all authorities and persons. The Constitution prevails over any other law or custom that is inconsistent with it. Article 45 states that the rights expressly recognised in the Constitution do not exclude those rights which are not specifically recognised. This opens up the space for generous interpretation of the provisions of the Constitution and for the use of international human rights law to bolster the Bill of Rights.

The Constitution also contains a general limitation under which any limitation of rights and freedoms must be acceptable and demonstrably justifiable in a free and democratic society (article 43).

Ugandan courts have emphasised that the Constitution requires different methods of interpretation from those employed for construing ordinary statutes. For example, in the case of *Attorney General v Major General Tinyefuza* Constitutional Appeal No 1 of 1997, the Supreme Court cited with approval a number of authorities from other jurisdictions that emphasise the unique status of a constitution.

The Constitutional Court has also stressed that the Constitution must be read as a whole and that no particular provision should be read in isolation or destroy another (see *Paul Kafero and Another v The Electoral Commission & Another* Constitutional Petition No 22 of 2006).

Furthermore, a number of cases show that some judges are prepared to read socio-economic rights into certain civil and political rights by drawing from the NODPSPs. The Constitutional Court in *Salvatori Abuki and Another v Attorney General* Constitutional Case No 2 of 1997, for instance, interpreted the right to human dignity and the prohibition of inhuman treatment to include elements of ESCRs. The petitioners had been convicted of practising witchcraft and being in possession of articles for witchcraft, contrary to the provisions of the Witchcraft Act, Cap 108 Laws of Uganda, 1964 (now Cap 124 Laws of Uganda 2000). As a result, they were sentenced to 22 and 36 months of imprisonment respectively and banished from their homes for ten years after serving their sentences. In the Constitutional Court, it was argued for the petitioners that the Witchcraft Act infringed various articles of the Constitution, including 21(1) (freedom from discrimination on religious grounds, among others), 24 (human dignity and protection from inhuman treatment), 26 (protection of property rights), 28 (right to a fair hearing) and 29 (freedom of movement).

Interestingly, it was argued on behalf of the petitioners that the banishment was inhumane, cruel and degrading as it deprived them of their livelihood. Justice Tabaro responded by quoting from the South African case of *S v Makwanyane* 1995 (6) *BCLR* 665 (CC) and emphasising the African value of *ubuntu*, a concept which embodies "humanness,

social justice and fairness and permeates fundamental human rights". In conclusion, he held that banishment constituted a violation of the right to dignity and of the notion of *ubuntu*, in that it would have had the effect of reducing the petitioners to beggars. In a very proactive manner, Justice Egonda-Ntende drew on an Indian case and the NODPSPs to hold that banishment would threaten the right to life or lead to the loss of life through deprivation of shelter, food and essential sustenance.

Conclusion

The constitutionalisation of ESCRs in many countries and their judicial enforcement even where they have not been constitutionalised have elevated these rights to justiciable status. The Ugandan Constitution protects ESCRs in a limited fashion. In spite of this, some cases demonstrate that the existing constitutional provisions may be interpreted innovatively to boost the protection of these rights. This notwithstanding, the courts still have a long way to go in developing remedies for the redress of violations of the fundamental rights.

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