Journal of African Law (2023), **67**, 205–224
doi:10.1017/S0021855323000062

RESEARCH ARTICLE

The Making of Uganda's Equal Opportunities Commission Act and Its Interpretation by the Commission

Jamil Ddamulira Mujuzi*

University of the Western Cape, Cape Town, South Africa
Email: jdmujuzi@uwc.ac.za

(Accepted 5 August 2022; first published online 31 March 2023)

Abstract

Article 32(3) of the Constitution of Uganda (1995) establishes the Equal Opportunities Commission; section 14 of the Equal Opportunities Commission Act provides for the functions of the Commission. These include ensuring that the laws, policies and customs of both public and private entities are not discriminatory and do not marginalize any person or deny him / her equal opportunities. The Commission has handled a few complaints dealing with discrimination, affirmative action, marginalization and impairment of equal opportunities. I rely on the drafting history of the Act, among other sources, to argue, inter alia, that the list of prohibited grounds of discrimination under the Act is exhaustive and that the Commission does not have jurisdiction to deal with complaints alleging discrimination on some grounds. I demonstrate that the Commission has been inconsistent in its definition of discrimination and in dealing with remedies where it has found instances of discrimination, marginalization or denial of opportunities. In some cases, the Commission has blurred the distinction between discrimination and marginalization.

Keywords: Uganda; equal opportunities; discrimination; Hansard; affirmative action; marginalization

Introduction

Article 32(3) of the Constitution of Uganda provides that "[t]here shall be a Commission called the Equal Opportunities Commission whose composition and functions shall be determined by an Act of Parliament". When the Constitution was adopted in 1995, it did not provide for the period in which the Commission had to be established. In 2005 the Constitution was amended to include article 32(4), which says that "[t]he Equal Opportunities Commission shall be established within one year after the coming into force of the Constitution (Amendment) Act, 2005". In 2007 Parliament enacted the Equal Opportunities Commission Act (the Act), which has five parts; Part III includes sections 14 and 15 and deals with the functions and powers of the Commission respectively. The main functions of the Commission are provided for in section 14(1) of the Act; these are:

> "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,

* Professor, Faculty of Law, University of the Western Cape.

> 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."

The Commission has held that section 14 of the Act provides for its core mandate.[1] Although the name of the Commission refers to equal opportunities, the drafting history of article 32 shows that its mandate goes beyond ensuring that marginalized people or groups of people get equal opportunities.[2] Section 23(1) of the Act provides that "[a] person may lodge a complaint relating to discrimination, marginalization or any act which undermines or impairs equal opportunities with the Commission". In other words, the Commission has the mandate to entertain a complaint dealing with one or more of the three issues of discrimination, marginalization or any act undermining or impairing equal opportunities. Other functions of the Commission are provided for in sections 14 (2), (3) and (4) of the Act. Since its establishment, the Commission has conducted various activities on the basis of section 14.[3] This article illustrates how the Commission has carried out its function(s) under section 14(4) of the Act, which provides that:

> "[T]he Commission may hear and determine complaints by any person against any action, practice, usage, plan, policy programme, tradition, culture or custom followed by any organ, body, business organization, institution or person which amounts to discrimination, marginalization or undermines equal opportunities."

Section 23 of the Act operationalizes section 14(4). It provides that:

> "(1) A person may lodge a complaint relating to discrimination, marginalization or any act which undermines or impairs equal opportunities with the Commission. (2) A complaint made under subsection (1) shall be in writing and signed by the complainant or complainants. (3) The Commission shall consider or hear the complaint within six months after receipt of the complaint."

The drafters of the Act unanimously agreed that section 23 was necessary as "a substantive clause dealing with lodging of complaints" because "the major responsibility of the commission is to sort out issues of marginalisation, either through their own research or complaints lodged with them".[4] On the basis of section 14(4), the Commission has received over 2,200 complaints alleging discrimination, marginalization or undermining of equal opportunities.[5] This article relies on the drafting history of the Act to argue, inter alia, that the list of the prohibited grounds of discrimination is exhaustive. Relying on contentious decisions from the Commission, I demonstrate that the Commission has been inconsistent with its definition of discrimination and in dealing with remedies where it has found instances of violations of the Act. In some cases, the Commission has blurred the distinction between discrimination and marginalization. The discussion starts with the issue of discrimination under the Constitution and the Act.

1 *Bwengye v Bishop Stuart University* (EOC/CR/020/2018) (17 July 2018) at 15.

2 Proceedings of the Constituent Assembly (1995) at 1996–97.

3 *Annual Report (2019/2020)* (September 2020, Equal Opportunities Commission), available at: <https://www.eoc.go.ug/sites/equalopportunities/files/publications/7th_annual_report_on_the_state_of_equal_opportunities.pdf> (last accessed 1 May 2022).

4 Hansard of the Eighth Parliament of Uganda (2006) at 1310.

5 Information I obtained from the Commission's Secretariat during my visit (October 2020) shows that it received the following complaints: 590 (2020/2021); 543 (2019/2020); 410 (2018/2019); 291 (2016/2017); 320 (2015/2016); 69 (2010–14). The majority of complaints have been resolved through settlements. Fewer than 20 complaints have been "contentious" (in which the Commission delivered "judgments"). I found only 13 judgments at the Commission; this article is partly written based on those judgments. The existence of few contentious decisions gives the Commission limited opportunities to develop jurisprudence on the Act.

https://doi.org/10.1017/S0021855323000062 Published online by Cambridge University Press

Defining "discrimination" under the Constitution and the Act

Article 21 of the Constitution provides for the right to freedom from discrimination. It states that:

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

Discrimination is defined in article 21(3) of the Constitution as follows:

> "For the purposes of this article, 'discriminate' means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability."

Before illustrating how the Commission has defined discrimination, I will briefly discuss how Ugandan courts have dealt with article 21; they have developed rich jurisprudence on it, which is beyond my scope to discuss here.[6] However, some relevant issues will be highlighted. The Constitutional Court has held that under article 21, equality and discrimination are two separate but related concepts.[7] The Court has also explained the circumstances in which the Constitution permits discrimination and that discrimination can be in law itself or in its purpose or effect.[8] In *Lwabayi Mudiba and Another v Attorney General*, the Court held that "discrimination is a very relative concept and the context of that discrimination is material for purposes of considering violation of Article 21".[9] However, courts have been inconsistent on whether the list of grounds under article 21(3) is exhaustive; there are cases in which the High Court and the Constitutional Court have held that this list is not comprehensive,[10] and others in which they have held that it is.[11] The Supreme Court, the highest court in Uganda, is also divided on this issue, but has held by majority that the list is exhaustive.[12]

Article 21(3) defines discrimination "for the purpose" of article 21. It could be argued that another definition for the purpose of another piece of legislation could be adopted by Parliament, otherwise the drafters of the Constitution would have preceded the definition under article 21(3) with words to the effect that "for the purpose of the Constitution or any law in Uganda, discrimination means…" Thus, section 1 of the Equal Opportunities Act defines discrimination differently from article 21(3) of the Constitution. It provides that:

> "'discrimination' means any act, omission, policy, law, rule, practice, distinction, condition, situation, exclusion or preference which, directly or indirectly, has the effect of nullifying or

6 For a discussion of this jurisprudence, see for example, M Ssenyonjo "Women's rights to equality and non-discrimination: Discriminatory family legislation in Uganda and the role of Uganda's Constitutional Court" (2007) 21/3 *International Journal of Law, Policy and the Family* 341; JD Mujuzi "The drafting history of the provision on the right to freedom from discrimination in the Ugandan Constitution with a focus on the grounds of sex, disability and sexual orientation" (2012) 12/1 *International Journal of Discrimination and the Law* 52.

7 *Kikungwe and Another v Attorney General* [2021] UGCC 34 (4 March 2021) at 43.

8 Id at 44, 52.

9 *Lwabayi Mudiba and Another v Attorney General* [2021] UGCC 35 (4 February 2021) at 62.

10 *Legal Brains Trust Ltd v Attorney General and Another* [2014] UGHCCD 171 (5 December 2014); *Karokora v Attorney General* [2009] UGHC 162 (26 March 2009); *Uganda Law Society and Another v Attorney General* [2009] UGCC 1 (4 February 2009); *Behangana and Another v Attorney General* [2015] UGCA 6 (12 October 2015).

11 *Lwabayi Mudiba*, above at note 9 at 14; see also at 61, 63–64. See also *Kikungwe*, above at note 7 at 52.

12 *Madrama v Attorney General* [2019] UGSC 1 (14 February 2019).

https://doi.org/10.1017/S0021855323000062 Published online by Cambridge University Press

> impairing equal opportunities or marginalizing 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."

The following differences should be noted between the definitions of "discrimination" under article 21(3) of the Constitution and section 1 of the Act. Firstly, although the latter prohibits discrimination on the ground of health status, this is not provided for in the Constitution. In other words, although the Act prohibits discrimination on all the grounds in the Constitution, it adds one extra. The Constitution is the supreme law of Uganda, and another law which is inconsistent with it is null and void to the extent of its inconsistency (article 2 of the Constitution). However, the fact that section 1 of the Act provides one more additional ground against which a person may not be discriminated, compared to article 21(3), does not render section 1 unconstitutional. This is because the definition of discrimination under article 21(3) is "for the purposes" of that article.

It should also be remembered that article 45 of the Constitution provides that "[t]he rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned". The Supreme Court has held that article 45 "incorporates other human rights and freedoms although they may not be specifically mentioned in the Constitution".[13] Some of the international human rights treaties ratified by Uganda also prohibit discrimination on the ground of health status.[14] Thus Uganda is required to give effect to its international law obligations. However, in practice, as the discussion below illustrates, the Commission has relied on the definitions under article 21(3) of the Constitution and under section 1 of the Act.

Secondly, for an act or omission to amount to discrimination under section 1 of the Act, it has to have an "effect". In other words, the person alleging discrimination is required to prove the effect that the alleged discriminatory act had on them, and must prove one or more of the effects in section 1 of the Act. Thirdly, the definition under article 21(3) of the Constitution requires that the alleged perpetrator must perform an act – the act of giving "different treatment to different persons". However, the definition under the Act covers both acts and omissions.

Prohibited grounds of discrimination under the Act

An important question is whether the Commission can find that a person has been discriminated against on a ground which is not expressly mentioned in article 21(3) of the Constitution or section 1 of the Act. A strict interpretation of section 1 of the Act shows that the list of the prohibited grounds of discrimination is exhaustive. Otherwise, the legislators would have used words such as "include" or "such as". The drafting history of the Act shows that when the Minister for Gender (the Minister) introduced the bill to Parliament for its second reading, she said that the mandate of the Commission will "include things like equal pay for equal work of equal value and freedom from discrimination based on any attribute and affirmative action".[15] This implied that the bill was to prevent discrimination on any possible ground. However, this is not what the bill says; a closer examination of the drafting history reveals that the true intention of the legislators

13 *Busiku v Uganda* [2015] UGSC 3 (24 March 2015) at 27.

14 International Covenant on Civil and Political Rights (1996) (ICCPR), art 26; International Convenant on Economic, Social and Cultural Rights (1966) (ICESCR), art 2(2) (under "other status"); and African Charter on Human and People's Rights (1981), art 2. For a detailed discussion of these provisions, see S Farrior (ed) *Equality and Non-Discrimination under International Law* (vol 2, 2016, Routledge) and W Vandenhole *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (2005, Intersentia).

15 Hansard, above at note 4 at 1279.

https://doi.org/10.1017/S0021855323000062 Published online by Cambridge University Press

was to exclude some grounds by implication and others expressly. Initially, the bill had defined discrimination to mean

> "any act or omission including a policy, law, rule, practice, condition or situation which directly or indirectly gives different treatment to different persons attributable only or mainly to their respective descriptions by sex, age, race, colour, ethnic origin, tribe, birth, creed, religion, health status, social or economic standing, or political opinion or disability."[16]

That definition was replaced by the current one in the Act because it "include[s] all forms of discrimination for clarity".[17] This means that the definition in the Act includes all the prohibited grounds of discrimination and that any ground which is not mentioned was excluded deliberately or by implication. The drafting history of the Act shows that age and sexual orientation were deliberately excluded from the list of prohibited grounds of discrimination.[18]

It has been indicated above that the initial definition of discrimination in the bill included age as one of the grounds on which a person may not be discriminated against. However, this definition was replaced by a new one during the second reading of the bill. The new definition, which was meant to include all the prohibited grounds of discrimination, excluded age as one of those grounds – the legislators did not explain why this ground was dropped. However, there are other circumstances in which the Commission could consider the issue of age in the execution of its mandate, which would mean that it is not excluded entirely. When the Minister introduced the bill to Parliament for the second reading, she said that some of the purposes of the Act were:

> "to eliminate discrimination and inequalities against any individual or group of persons on the ground of sex, age, race, colour, ethnical origin, tribe, birth, 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, traditional custom for the purpose of redressing imbalances, which exist against them and to provide for other related matters."[19]

This submission was based on the definition of discrimination in the bill before it was replaced. This explains why the definition of discrimination in the Act does not prohibit discrimination on the ground of age. The issue of age also arose when the Speaker of Parliament asked the Minister the following question:

16 Equal Opportunities Commission Bill No 16 of 2006, clause 1.

17 Hansard, above at note 4 at 1294.

18 See ibid at 1307–08 for the reasons why the Commission should never entertain any complaint alleging discrimination on the ground of sexual orientation. The legislators agreed that people in same-sex relationships are not "minorities" within the meaning of the Act and should never invoke the Act to claim marginalization. Thus sec 15(6)(d) was included in the Act to prohibit the Commission from investigating "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". Sec 2 of the Act defines "sex" to mean "the natural state of being male or female". Hansard, above at note 4 at 1295, shows that Parliament agreed to expressly define the term "sex", otherwise "it might be deliberately misinterpreted to suit some peoples' interests" because "these days we have interest groups which are seeking to argue that it is permissible for a man to marry a man or a woman to marry a woman. This is unacceptable to the majority of Ugandans." Uganda has been criticized for discriminating against people on the ground of sexual orientation: Committee on the Elimination of Discrimination against Women, "Concluding observations on the combined eighth and ninth periodic reports of Uganda", CEDAW/C/UGA/CO/8-9 (1 March 2022), para 40(a); Committee on the Rights of Persons with Disabilities, "Concluding observations on the initial report of Uganda", CRPD/C/UGA/CO/1 (12 May 2016), para 8.

19 Hansard, above at note 4 at 1278.

https://doi.org/10.1017/S0021855323000062 Published online by Cambridge University Press

> "The equal opportunities [commission] aims at promoting equality of opportunities between all persons in Uganda irrespective of gender, age, physical ability and so forth. What explanation would be given, for instance, if there is an exercise of recruiting people to join UPDF [Uganda Peoples' Defence Forces], and somebody who does not want to continue school presents himself, or someone below the age of 18, say 12. Maybe he was fed well and therefore he is well built – (*Laughter*) – what explanation will you give for not taking him on? Because it says, irrespective of age, what explanation are you going to give for rejecting him?"[20]

To the above question, the Minister replied that Ugandan laws prohibited the employment of minors and that minors cannot join the army.[21] The above discussion implies that strictly speaking, a person cannot argue that the Act prohibits discrimination on the ground of age. There are three possible ways in which one can argue that the Commission has jurisdiction to entertain complaints alleging discrimination on the ground of age. Firstly, one could rely on the drafting history of the Act and argue that the exclusion of age as one of the prohibited grounds of discrimination was by mistake. Otherwise, the legislators would have justified its exclusion. Secondly, one would have to rely on article 45 of the Constitution and Uganda's international human rights obligations to justify why the Commission should find that discrimination on the ground of age is prohibited. The challenge is that the Supreme Court has held by majority that article 21(3) of the Constitution does not prohibit discrimination on the ground of age.[22] However, it can be argued that the decision of the Supreme Court was based on article 21(3) of the Constitution and not section 1 of the Act.

Thirdly, it can also be argued that the Commission is able to entertain a complaint alleging discrimination on the ground of age because the long title of the Act provides that one of Commission's mandates 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". This argument could be supported by one of the cardinal rules of legislative interpretation that legislation has to be read as a whole.[23] The Act also provides that the Commission will ensure that people have access to equal opportunities irrespective of many factors, including their age, and that affirmative action policies do not exclude people on the basis of their age.[24]

Some of the jurisprudence from the Commission creates the impression that it is only prepared to find that a person was discriminated against if s/he proves one of the grounds enumerated in the Act. For example, in *Tumwesigye v Mbabara Government*, the complainant alleged that the respondent's refusal to award him a tender amounted to discrimination against him because of his political opinion. One of the issues before the Commission was "whether the actions of the Respondent amount to discrimination of the Complainant on the grounds provided for" in the Act.[25] The Commission found that the evidence before it showed that the complainant had been discriminated against because of his political views.[26] For the Commission to find that a complainant has been discriminated against, s/he must prove a "specific act of discrimination" under the Act or the Constitution.[27] The jurisprudence of the Commission shows that it has found that people have been discriminated against on the enumerated grounds, i.e. ethnicity, tribe, race and colour of

20 Id at 1287.
21 Id.
22 *Madrama*, above at note 12.
23 *Ochieng v Adeya and Others* [2002] UGCA 6 (14 January 2002).
24 Secs 1 (definition of equal opportunities) and 14(1).
25 *Tumwesigye v Mbabara Government* (EOC/WR/018/2018) (20 June 2019) at 2.
26 See also *Obam v Kyambogo University* (EOC/CR/033/2018) (30 July 2019) at 2.
27 *Agaba and Others v Uganda Broadcasting Corporation* (EOC/CR/128/2016) (19 January 2018) at 3.

https://doi.org/10.1017/S0021855323000062 Published online by Cambridge University Press

the skin, religion, sex, and political opinion.[28] However, the Commission has also found that some people have been discriminated against on grounds which are not expressly mentioned in the Act, for example on the ground of age.[29]

The Commission has referred to international instruments to highlight the fact that some of the prohibited grounds of discrimination under section 1 of the Act and article 21 of the Constitution are also provided for in international human rights law. For example, in *Bwengye v Bishop Stuart University*, the Commission held that by prohibiting the complainant from standing for election for a guild position because he did not belong to the Anglican faith, the respondent had discriminated against the complainant on the basis of his religion, contrary to section 1 of the Act, article 21 of the Constitution, article 2 of the International Covenant on Civil and Political Rights (ICCPR), article 2 of the International Convenant on Economic, Social and Cultural Rights (ICESCR), article 2 of the Universal Declaration of Human Rights and article 2 of the African Charter on Human and Peoples' Rights.[30] The Commission observed that it had relied on article 2 of the ICESCR because it was "domesticated in Article 21(1) of the Constitution" of Uganda.[31] In this case, the Commission's reference to these international instruments is understandable because, like section 1 of the Act and article 21 of the Constitution, they also prohibit discrimination on the ground of religion. However, the Commission should bear in mind that some of the grounds prohibited in these international instruments – including language, other opinion and national origin, which are included in article 2 of both the ICCPR and the ICESCR – are not included in section 1 of the Act. Therefore, should a person allege that they have been discriminated against on these grounds, the Commission would have to explain why it has relied on such a ground when the drafting history of Act suggests that the legislators intended for the list to be exhaustive. The argument that the Commission advanced in this case, that the ICESCR or any other treaty it referred to had been domesticated in Uganda under article 21 of the Constitution, is not convincing, because article 21 does not include all the grounds enumerated in article 2 of the ICESCR. So the Commission would have to look for another reason to support its reliance on these treaties.

The Commission has also found that people have been discriminated against without explaining the ground of discrimination. For example, in *Mukanga v Umeme Ltd*, the respondent erected electric poles and wires on the complainant's compound, which made it impossible for him to finish the construction of his house. One of the issues before the Commission was "whether the actions of the respondent amounted to marginalisation or discrimination of the Applicant on the basis of disability, age, gender, ethnicity or any other classification".[32] After outlining the facts, which showed that the main reason why the respondent erected the poles on the complainant's land was because he was away for work in another part of the country, the Commission held that the respondent's conduct amounted to "the unequal treatment and blatant discrimination of the complainant".[33] However, the Commission does not explain the ground on which the complainant was discriminated against. There are other instances where the Commission has not been clear on the exact ground of discrimination. For example, in *Acaye v Bank of Uganda and Guarantee Trust Bank*, the applicant's employment was terminated by the respondents; the evidence before the Commission showed that this termination was based on his tribal or ethnic background. The Commission found that "[t]ermination of the complainant's employment therefore can rightly

28 Ethnicity: *Acaye v Bank of Uganda and Guarantee Trust Bank* (EOC/CR/072/2015) (23 April 2018). Tribe: *Banyabindi Community of Kasese v AG & Kasese District Local Government* (EOC/WR/014/2017) (14 August 2019). Race and skin colour: *Yasin v Attorney General* (EOC/REF NO.EOR/CR/010/2016) (2 June 2017). Religion: *Bwengye*, above at note 1. Sex: *Lugemwa v Busulwa* (EOC/LS/076/2014) (9 August 2017). Political opinion: *Tumwesigye*, above at note 25.

29 *Initiative for Social and Economic Rights v AG* (EOC/CR/038/2017) (14 June 2019).

30 *Bwengye*, above at note 1 at 3–4.

31 Id at 4.

32 *Mukanga v Umeme Ltd* (EOC/CR/073/2015) (25 May 2019) at 4.

33 Id at 5.

https://doi.org/10.1017/S0021855323000062 Published online by Cambridge University Press

be construed to have been triggered by tribal or ethnic considerations especially in the circumstances that utterers of the discriminatory statements were not produced before this tribunal to deny the allegations attributed to them".[34] It is thus not clear whether the termination was based on the complainant's tribal or ethnic background or both; it could be that it was based on both. These being two separate but closely related grounds under both article 21 of the Constitution and section 1 of the Act, one would have expected the Commission to explain which of the two was applicable or whether both of them were.[35] There are also instances in which the complainants do not specify the grounds upon which they were allegedly discriminated against, and the Commission does not explain the ground(s) in question when concluding that the complainants were not discriminated against.[36]

The Commission's definition of "discrimination"

Although the Act defines "discrimination", the Commission's jurisprudence shows that it has been inconsistent regarding the definition of this word. In some cases, it has relied exclusively on the definition of discrimination under the Act.[37] However, in others it has relied on both the definition under the Act and from other sources. In cases where it has relied on definitions from other sources, it has also been inconsistent with regards to these sources. Its jurisprudence shows that it has relied on the definition(s) of discrimination in the Act, in the Constitution and in case law,[38] in the Act and in case law (including foreign case law),[39] and in the Act and under article 21 of the Constitution.[40] In cases where it has referred to more than one definition, it has either indicated which one it has relied on for the purpose of deciding the complaint before it or has not made any indication.[41] In my view, since the Act defines discrimination, there is no need for the Commission to cite or rely on other definitions. If it chooses to cite other definitions in addition to that in the Act, it should restrict itself to the definition under article 21 of the Constitution. It should not rely on definitions under Ugandan case law unless these comply with the definition under article 21(3) of the Constitution, because different judges have adopted different definitions.[42]

In some cases, the Commission did not define discrimination, although it found that the complainant was or was not discriminated against.[43] As mentioned, in some cases when the Commission refers to more than one definition of discrimination, it does not explain which of those it has relied on for the purposes of the facts before it. This is understandable if the complainant alleges that s/he was discriminated against on a ground which is prohibited in both or all the definitions relied on. However, the situation remains unclear when the alleged ground is not provided for in any of the definitions being used. For example, in *Initiative for Social and Economic Rights v AG*, the Commission found that the government's policy of excluding the complainants from the social security scheme may amount to discrimination against them, presumably on the ground of age (as older persons), but it did not explain which definition it used that prohibits discrimination on this ground.[44]

34 *Acaye*, above at note 28 at 9.
35 Id at 12 (the Commission appears to have settled on ethnicity).
36 *Agaba*, above at note 27; *Ajiga Tom & 98 Others v Arua District Local Government* (EOC/NR/008/2019) (18 May 2022).
37 *Banyabindi*, above at note 28.
38 *Initiative*, above at note 29 at 11; *Acaye*, above at note 28.
39 *Yasin*, above at note 28 at 5, 7–8; *Ajiga*, above at note 36 at 4–5.
40 *Bwengye*, above at note 1 at 4; *Agaba*, above at note 27 at 2; *Lugemwa*, above at note 28 at 4.
41 For the former: *Acaye*, above at note 28 at 9 (the Commission relied on the definition under art 21 of the Constitution). For the latter: *Initiative*, above at note 29; *Agaba*, above at note 27.
42 J Mujuzi "Discrimination on the ground of age in Uganda: Analysing *Madrama Izama v Attorney General* (Constitutional Appeal No. 01 of 2016) [2019] UGSC 1 (14 February 2019)" (2021) 29/4 *African Journal of International and Comparative Law* 654.
43 *Mukanga*, above at note 32 at 5; *Obam*, above at note 26.
44 *Initiative*, above at note 29.

https://doi.org/10.1017/S0021855323000062 Published online by Cambridge University Press

Establishing discrimination

The Act does not provide that discrimination can only be found when the alleged conduct or omission was deliberate or negligent. However, the Commission has held that for conduct to amount to discrimination, it does have to be deliberate, ie "clear or intended", or negligent.[45] For example, in *Banyabindi Community of Kasese v AG & Kasese District Local Government*, the Commission found that the government had settled other communities from which it had taken land but had not done so in the case of the complainant community. The Commission held that "there was unequal treatment when the Government failed or neglected to resettle the complainants".[46] This implies that the Commission will find that a policy is discriminatory if it was deliberate or negligent; what matters is that it had one of the effects contemplated under section 1 of the Act. The Commission held that "for discrimination to suffice there should be special or preferential treatment given to different person(s) in exclusion of others".[47]

Apart from the alleged act being deliberate or negligent, the Commission appears to have set other criteria against which to assess whether the discriminatory conduct is justifiable. For example, in *Bwengye v Bishop Stuart University*, the complainant argued that the University's Guild Constitution, which prohibited non-Anglican students from standing for some student leadership positions, was discriminatory on the basis of religion. The University argued that this was "positive discrimination", as it ensured that the University's objective of promoting the Anglican faith was achieved.[48] The Commission held that the Guild Constitution was discriminatory on the basis of religion and should be amended, because "excluding these [non-Anglican] groups amounts to dangerous and unconscionable discrimination" and that "the discrimination complained about is unjustified, wrongful and simply premised on prejudice against the non-Anglican students".[49] The Commission added that the respondent failed to adduce evidence to show that "[t]he discrimination is intended to benefit the Anglican students who may have faced discrimination in accessing the guild leadership, or suffered a disadvantage in the past, hence the positive discrimination in their favour".[50] In other words, the discrimination in question was "unjustifiable, illegal and unconstitutional".[51]

A combined reading of the Commission's jurisprudence shows that it will find that discrimination is justifiable if it has a legitimate constitutional objective to serve. For example, it should be aimed at addressing a historical imbalance. The burden is on the respondent to convince the Commission of why it should hold that the discriminatory act or policy is not contrary to the Act or the Constitution. As mentioned above, for conduct to amount to discrimination under the Act, it has to have an effect. The Commission has thus found that conduct will only amount to discrimination if it is deliberate and has the effect of marginalizing the complainant, or that it has the effect of depriving the complainant of their land or excluding them from employment or education.[52]

Marginalization

One of the functions of the Commission is receiving complaints alleging marginalization. Section 1 of the Act defines marginalization to mean "depriving a person or a group of persons of opportunities for living a respectable and reasonable life as provided in the Constitution". It is important to

45 Id at 15; *Tumwesigye*, above at note 25 at 4; *Agaba*, above at note 27 at 6.
46 *Banyabindi*, above at note 28 at 16.
47 *Agaba*, above at note 27 at 3.
48 *Bwengye*, above at note 1 at 3.
49 Id at 11 and 14.
50 Id at 14.
51 Id at 16. See also *Ajiga*, above at note 36 at 8.
52 *Initiative*, above at note 29 at 15; *Banyabindi*, above at note 28.

https://doi.org/10.1017/S0021855323000062 Published online by Cambridge University Press

draw a distinction between marginalization as one of the effects of discrimination on the one hand (in the definition of discrimination under section 1 of the Act) and marginalization as a stand-alone complaint (in the definition of marginalization under the same section). Marginalization as an effect of discrimination is only applicable in cases where a section of society was affected; in other words, it does not apply to individuals. Put differently, in this case, marginalization can only be found if there was discrimination. However, both individuals and groups (including a society or a section of society) can allege marginalization and / or discrimination as separate grounds. In this case, there is no need for discrimination to be proved for the Commission to find marginalization.

For a conduct or omission to amount to marginalization, it has to deprive "a person or a group of persons of opportunities for living a respectable and reasonable life as provided in the Constitution". In other words, the complainant(s) has to prove two things: deprivation of opportunities, and that those opportunities are essential or required for the complainant(s) to live "a respectable and reasonable life". It is not enough that the deprivation has prevented the complainant from living a respectable *or* reasonable life; the use of the word "and" implies that both elements must be proved. However, the challenge is that the Constitution does not include a provision which provides for a respectable and reasonable life. In order to overcome this dilemma, the Commission has found that a violation of human rights amounts to marginalization. These rights have included the right to work, to property and to freedom from discrimination in employment and education.[53] As the Act does not define or describe "respectable and reasonable life", the Commission has relied on the dictionary to define these terms.[54] The test of whether the life in question is respectable and reasonable is a subjective one; what is respectable and reasonable depends, inter alia, on the personal circumstances of the complainant(s).

For the Commission to find marginalization, the complainant must explain how the alleged deprivation of opportunity prevented him / her from living a respectable and reasonable life. For example, in *Acaye v Bank of Uganda and Guarantee Trust Bank*, the Commission held that terminating the complainant's employment on the basis of his ethnicity amounted to "marginalisation because of loss of opportunities to support his family to live a respectable, decent and reasonable life".[55] It is not clear why the Commission added the word "decent" in this decision; section 1 of the Act mentions only two grounds, reasonable and respectable. Likewise, in *Mukanga v Umeme Ltd*, the Commission found that the respondent's action of erecting electric poles and wires on the complainant's land rendered the complainant and his family "homeless and deprived [them] of opportunities to live a reasonable and respectable life".[56] Although section 1 of the Act defines marginalization, in some of its jurisprudence the Commission has relied on both the Act and dictionaries to define this term.[57] This creates the impression that the Commission does not find the definition in the Act sufficient; otherwise, one would not expect it to refer to a dictionary to define a term which is defined in the Act.

Equal opportunities

One of the Commission's mandates is to promote equal opportunities. Section 1 of the Act defines equal opportunities as:

53 Work: *Acaye*, above at note 28 at 12. See also *Guarantee Trust Bank (U) Limited v Acaye* [2020] UGHCCD 190 (22 July 2020), para 39. Property: *Mukanga*, above at note 32. Employment and education: *Banyabindi*, above at note 28.

54 Id at 4.

55 *Acaye*, above at note 28 at 12.

56 *Mukanga*, above at note 32 at 7. In *Ajiga*, above at note 36 at 9, where the respondent failed to promote the applicants although they met all the requirements for promotion, the Commission held that "the acts of the Respondent denied the complainants the opportunity of living a reasonable and respectable life as provided for in the constitution and therefore amounts to marginalization".

57 Id at 7; *Banyabindi*, above at note 28 at 3.

https://doi.org/10.1017/S0021855323000062 Published online by Cambridge University Press

> "having the same treatment or consideration in the enjoyment of rights and freedoms, attainment of access to social services, education, employment and physical environment or the participation in social, cultural and political activities regardless of sex, age, race, colour, ethnic origin, tribe, birth, creed, religion, health status, social or economic standing, political opinion or disability."

The drafting history of the Act shows that the legislators were of the view that equal opportunities had to be available at all levels of government, in both private and public sectors and in families.[58] Because some legislators wanted to know the distinction between equal opportunities and affirmative action, one legislator clarified that "equal opportunity is about the best for the job, while affirmative action is positive discrimination".[59] Another legislator clarified the distinction between equal opportunities and equal benefits by submitting that:

> "equal opportunities do not mean equal benefits. The former means you are subjected to a particular set of standard of criteria regardless of your background. You may be demented, but you should have a chance to compete. Let the criteria throw you out. You may not have the required qualifications but the criteria will throw you out. You are eligible to compete. So, it is something else that will throw you out but the right to compete should be guaranteed."[60]

When some legislators argued that requiring people to ensure equal opportunities at the family level would make it impossible for parents to discipline their errant children,[61] the Minister explained that:

> "[w]hen we talk about equal opportunities, we are referring to access to all who qualify. In a family, parents are at a different level. If you are promoting equal opportunities starting at the family level, the two parents should access equal opportunities first of all. And the children at their level as children, should also access equal opportunities We have seen cases when resources are scarce, where girls are withdrawn from schools in favour of educating boys, where girls are married off at a tender age to raise money to take boys to school. This is the equal opportunities we are talking about. If there is no money, let there be collective suffering between the girls and the boys without discrimination. If there is money, let all of them enjoy it equally."[62]

Under section 23(1) of the Act, "[a] person may lodge a complaint relating to … any act which undermines or impairs equal opportunities with the Commission". For a person to allege that an act has impaired or undermined equal opportunities, the victim's complaint must refer to one of the grounds mentioned in the definition of equal opportunities under section 1 of the Act. The complaint has to relate to "any act which undermines or impairs equal opportunities", but the Act is silent on the issue of whether a complaint can be lodged alleging that an omission impairs or undermines equal opportunities. It could thus be argued that the Commission has no jurisdiction to entertain such a complaint. This argument could be strengthened by the view that had the drafters of the Act wanted to include omission in section 23(1), nothing would have prevented them from doing so, especially since they included omission in the definition of discrimination. However, it could also be argued that section 2 of the Interpretation Act provides that "'act' used

58 Hansard, above at note 4 at 1284–88.
59 Id at 1289, 1299 and 1300.
60 Id at 1290 (Mr Ruhindi).
61 Id at 1288.
62 Id at 1290.

https://doi.org/10.1017/S0021855323000062 Published online by Cambridge University Press

with reference to an offence or civil wrong includes a series of acts, and words which refer to acts done extend to illegal omissions". Therefore, if an omission is illegal, it falls under the mandate of the Commission.

The drafting history of the Act does not show that there was any debate on the exclusion of "omission" from the definition of "equal opportunities" and also from section 23(1) of the Act. I argue that the legislators never intended to deliberately bar the Commission from entertaining complaints alleging that an omission undermined or impaired equal opportunities. Jurisprudence from the Commission shows that it has found some acts to have undermined or impaired equal opportunities; these have included terminating a person's employment on the basis of his ethnicity and prohibiting non-Anglican students from competing for some guild offices.[63] However, the Commission has also created the impression that discrimination is the same thing as impairing or nullifying equal opportunities. For example, in *Bwengye v Bishop Stuart University*, the Commission held that "the provisions of the Respondent's Guild Constitution are discriminatory and / or amount to impairing of equal opportunities".[64] Likewise, in *Initiative for Social and Economic Rights v AG*, in which the government excluded elderly persons staying in some parts of the country from benefiting from its pilot social security scheme, the Commission held that:

> "With the proposed roll out plan, not all older persons shall benefit from the social security scheme thereby denying them equal opportunities with those already benefiting from the scheme … [F]ailure by the government to roll out the SAGE [social security] Program may amount to discrimination."[65]

In *Acaye v Bank of Uganda and Guarantee Trust Bank*, the Commission held that the respondent's act amounted to "discrimination and breach of equal opportunities".[66] In this case, the Commission does not blur the distinction between discrimination on the one hand and equal opportunities on the other. The approach in this case is preferable to the one in *Bwengye v Bishop Stuart University* because in the Act, the two concepts, although related, are distinct.

Affirmative action

One of the Commission's functions is to promote affirmative action; this requires the examination of the issue of affirmative action in Uganda in detail. Article 32(1) of the Constitution 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."

Under article 32(1), the duty is imposed on the state to take affirmative action measures. This could explain why Clause 22 of the Equal Opportunities Commission Bill provided that:

> "(1) In accordance with articles 21 and 32 of the Constitution, the Commission shall ensure that all Government policies, laws, plans, programs are compliant with equal opportunities and affirmative action in favour of groups marginalized on the basis of sex, race, colour, ethnic origin, tribe, creed or religion, or social or economic standing; political opinion or disability,

63 *Acaye*, above at note 28; *Bwengye*, above at note 1.
64 Id at 9.
65 *Initiative*, above at note 29 at 11–12.
66 *Acaye*, above at note 28 at 11.

https://doi.org/10.1017/S0021855323000062 Published online by Cambridge University Press

> gender, age, or any other reason created by history, tradition, or custom, for [the] purpose of redressing imbalances which exist.
> (2) Where any policy does not meet the requirement referred to in subsection (1), the Commission may make such recommendation to the responsible Minister as is necessary to enforce compliance of the same and copy such recommendation to Parliament."

However, the above clause was replaced by the current section 14(1) of the Act, which empowers the Commission to monitor, evaluate and ensure that the policies of the government and non-state actors, and in particular "private businesses and enterprises; non-governmental organizations, and social and cultural communities", are compliant with affirmative action. The drafting history of the Act shows that Clause 22 was deleted from the Act because it duplicated the activities mentioned under section 14. The legislators do not explain why the obligation to implement affirmative action is also imposed on private companies or organizations.[67] The drafting history of the Act also shows that the Commission was established as the "particular government" body "mandated to evaluate" the government's "deliberate policy" on affirmative action.[68] In other words, the Commission was established as "a national custodian of affirmative action and equity".[69] Before discussing whether the drafters of the Act were justified in imposing the obligation to take affirmative action measures on private companies and organizations, it is important to illustrate the drafting history of article 32 of the Constitution.

Article 32(1) was included in the Constitution to ensure that Uganda complies with its international human rights obligations. In its report, the Constitutional Commission referred to the International Convention on the Elimination of all Forms of Racial Discrimination, and observed, inter alia, that:

> "States are also required to ensure that no group or individual discriminates against others. Affirmative action is acceptable as a temporary measure to help disadvantaged groups to advance their development to achieve equality in all spheres. Action of this kind must not, however, be institutionalised so as to create permanent separate rights for different racial or social groups."[70]

The issue of affirmative action was raised especially in the submissions on the rights of women, and the Constitutional Commission reported that:

> "[T]here has been a consensus on the overwhelming need for total abolition of any discrimination against women in the new Constitution and laws, and inclusion of provision on the basic rights of women. A majority of views on the subject have also strongly supported positive or affirmative action which offers special concessions and advantages to women in order to minimise the long standing imbalance between the sexes. The positive or affirmative policy should exist as long as society is convinced that the imbalance has not yet been adequately minimised."[71]

Affirmative action was therefore meant to be temporary and was based on Uganda's international human rights obligations.[72] Against that background, the Constitutional Commission recommended that the new Constitution should provide for affirmative action for women, people with

67 Hansard, above at note 4 at 1309.
68 Id at 1279.
69 Ibid.
70 Report of the Uganda Constitutional Commission (1993), para 7.42.
71 Id, para 7.139.
72 Id, paras 7.101(e) and 7.140 (c).

https://doi.org/10.1017/S0021855323000062 Published online by Cambridge University Press

disabilities and minorities.[73] The minorities in question were "cultural, religious, political or economic".[74] The Constitutional Commission included these recommendations in clauses 23(3) and 61(3) of the draft constitution which formed part of its report.[75]

The draft constitution was discussed at the Constituent Assembly, the mandate of which was to promulgate the new Constitution. The proceedings of the Constituent Assembly show that previous governments had also put in place measures to protect the rights of women.[76] They also show that even before the Constitution was adopted, the government had adopted affirmative action measures for women (to participate in social, political and economic affairs),[77] for girls (requiring fewer points than boys to join universities)[78] and for the rural population.[79] However, the delegates were concerned that affirmative action was "only benefitting the elite".[80] Some delegates argued that the government had to continue with affirmative action measures for more girls to join universities,[81] to empower women "to come into public life", such as becoming Members of Parliament,[82] and for the elimination of all discriminatory cultural practices against women.[83] There should also be action for girls in primary and secondary schools, for children generally and for people with disabilities.[84] Affirmative action was necessary "because it is not possible to achieve equality between men and women by merely prohibiting discrimination. In order to rectify the inequalities which exist, measures need to be taken which give women advantages in many areas."[85] One delegate supported "women's liberation and endorse[d] affirmative action until such a time that the victims of sexist discrimination have been sufficiently redressed".[86] In other words, affirmative action measures did not have to be permanent, but were temporary.[87]

There was consensus that affirmative action was not supposed to be permanent for each of the marginalized groups.[88] Put differently, "affirmative action by its nature is temporary and in fact, should just die when that group has stabilized or reached a level where society believes that at least it has sort of caught up with the other groups".[89] However, the proposal that a provision should be included in the Constitution to stipulate the timeframe within which the necessity or otherwise of affirmative action measures had to be reviewed was rejected by the majority of the delegates and was withdrawn.[90] This proposal was to the effect that the constitutional provision on affirmative action should be reviewed after two parliamentary terms to assess whether it was still necessary, and that if the review established that it was not, then affirmative action had to be stopped.[91] However, this proposal was opposed for several reasons, including that affirmative action

73 Id, paras 7.141(d), 7.141(c) and 7.151(e).
74 Id, para 7.151 (a).
75 Clause 23(3) provides that "[t]he State shall take affirmative action to enhance the economic status of disadvantaged groups, including women, the youth, orphans and people with disability". Clause 61(3) provides that "[w]omen shall have the right to affirmative action for the purpose of redressing the imbalance created by history and traditional customs".
76 Proceedings, above at note 2 at 1613 (Mrs Egunyu).
77 Id at 1378 (Dr Musana), 1423 (Mrs Lagada), 1458 (Mr Tigwezire), 1478 (Mr Kajura), 1484 (Mrs Byanyima) and 1525 (Mrs Mukwaya).
78 Id at 1423.
79 Id at 4887.
80 Id at 1378 (Dr Musana) and 1526 (Mrs Mukwaya).
81 Id at 1378 (Dr Musana).
82 Id at 5481 (Dr Besigye), 1418 (Dr Rugunda) and 1471 (Mrs Kalema).
83 Id at 1638 (Mr Kavuma).
84 Id at 1423 (Mrs Lagada), 1500 (Dr Ssemwogerere) and 585 (Prof Nsibambi).
85 Id at 484 (Mrs Byanyima).
86 Id at 1627 (Col. Otafiire).
87 Id at 1211 (Mrs Mwesigye).
88 Id at 5420–23, 3468–73.
89 Id at 3469 (Mrs Mwesigye).
90 Id at 3468–79.
91 Id at 5419–20 (Dr Besigye) and 5421 (Dr Kiyonga).

https://doi.org/10.1017/S0021855323000062 Published online by Cambridge University Press

was meant to ensure that "disadvantaged groups", especially women, continue to benefit from democracy (by being in Parliament) and that other constitutional provisions which dealt with parliamentary representation for special interest groups, such as the army and young people, were not subject to review.[92]

Most of the delegates discussed affirmative action as a means to uplift the standards of women.[93] A few talked about other marginalized groups,[94] which prompted some delegates to clarify that affirmative action was meant to benefit all marginalized groups, as opposed to women only.[95] It was explained that:

> "The Article [32] itself seeks the right of affirmative action for various groups. When we say marginalised on the basis of gender, here we mean women and girls. We are talking about our history, our cultures that have discriminated against a girl child and the woman. On age, again we are talking about discrimination to people on the basis of their age. They could be the youth, they could be the aged, they could be the very young. Disability, that is self-explanatory. Other reasons created by history, here this could include minorities who for reasons of our history have been discriminated against. It could be our colonial history, it could even be our Independence history, groups that have been discriminated against. The Clause is also open for the future so that even other groups that could become disadvantaged in future could seek redress through this Article by invoking this particular clause."[96]

It was clarified that the list of marginalized groups mentioned in the Constitution is not exhaustive.[97] It is the duty of Parliament to decide which group, in addition to those mentioned in article 32 of the Constitution, should be classified as marginalized for the purpose of affirmative action. Parliament can also decide to remove a group from the list of marginalized groups if it is of the view that the group no longer requires affirmative action.[98] However, women were singled out as the most marginalized;[99] therefore a specific provision, article 33(5), was included in the Constitution to deal with affirmative action for women. This is because:

> "as women specifically, although they are included in the gender [sic], but women as a specific group has suffered the imbalances caused by tradition, by custom and all these other factors. And therefore, they are suffering, they are disadvantaged in my opinion and in [the] opinion of so many other people. This should be look[ed] at specifically so that although we have passed this general provision, since this is a Chapter talking about women's rights we could also specifically talk about the affirmative action for women. Because even when you look at all these other categories of the disadvantaged, if you take the disabled, you will find that a disabled woman is more disadvantaged than a disabled man. If you take the minority, it is still the same thing. So that the disadvantage of a woman involves all the social, economic and political strata and in my opinion, we should retain this Article for purposes of emphasis, for a group that has suffered much more than the rest of the disadvantaged groups."[100]

92 Id at 5420 (Mr Ruhemba) and 5421 (Mrs Kazibwe).
93 Id at 650, 668, 669, 802, 820–21, 852, 895 (women and children), 1211, 1291, 1309, 1324, 4151, 4378, 4393–94 and 5428–31.
94 Id at 640 (marginalized groups generally), 925, 994, 1190, 4432, 4433 and 4709 (women, children, youth, workers, the family, people with disabilities, the elderly), 1070 (ethnic minorities), 1265–66 (marginalized districts in areas of communication, education, health, water and power supply) and 3473 (all groups mentioned in art 32).
95 Id at 558 (Mr Mazima).
96 Id at 1995 (Ms Byanyima).
97 Id at 3471 (Dr Kaberuka). See also 2081–87.
98 Id at 3718–20.
99 Id at 3704–17.
100 Id at 2014 (Mrs Mwesigye).

https://doi.org/10.1017/S0021855323000062 Published online by Cambridge University Press

The drafting history of articles 32 and 33 shows that, much as affirmative action was meant to cover previously marginalized groups, one group, that of women, was more marginalized than others. This history also shows that with one exception, all the submissions were to the effect that it is the duty of the state to take affirmative action. The one exception was when it was suggested that companies owned by foreign nationals also had to take affirmative action measures and equip Ugandans with the skills of running those companies.[101] This background is important in order to understand what is required of the Commission when dealing with its mandate of ensuring that the government and the private sector take affirmative action measures in favour of the marginalized groups.

Much as the drafting history of article 32 shows that it is the duty of the state to take affirmative action measures, the Equal Opportunities Act extends this obligation to non-state actors. Thus, under section 14(1) of the Act, the Commission has the mandate

> "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."

Neither the Constitution nor the Act defines affirmative action.[102] However, a combined reading of article 32 and its drafting history along with section 14 of the Act and its drafting history shows that affirmative action is only applicable to groups. In other words, the state is not under a duty to take affirmative action measures for individual persons unless these persons form part of a marginalized group. Unlike in the case of discrimination, where it could be argued that the list of the prohibited grounds of discrimination is exhaustive, the list of groups for which affirmative action measures may be taken is open. The drafting history of article 32 of the Constitution shows that Parliament can amend that list. However, it has to be shown that the group in question has been "marginalized" on any of the grounds mentioned in the Act.

The above debates on article 32 also show that delegates were of the view that the duty was on the state to take affirmative action measures.[103] Therefore the constitutionality of section 14 of the Act, which imposes this obligation on private companies and individuals, could be challenged. That notwithstanding, the jurisprudence of the Commission shows that it has dealt with the issue of affirmative action in complaints brought against the government. For example, in *Banyabindi Community of Kasese v AG & Kasese District Local Government*, the Commission ordered the respondent to take affirmative action "to address the historical imbalances that the complainants have suffered by according them fair competition and including qualified Banyabindi in the District and Central government placement in the public service."[104] In *Yasin v Attorney General*, the Commission held that it does not have the power to order the government to adopt affirmative action for political appointments because this is an "[e]xecutive prerogative of the President which must be exercised in the best interest of all Ugandans".[105] The jurisprudence of the Commission suggests that it will not find a private institution to have discriminated against the complainant if the measures it adopted amount to positive discrimination (affirmative action). For example, in *Bwengye v Bishop Stuart*

101 Id at 5716 (Mr Rwabita).

102 For the definition, see *United Organisation for Batwa Development in Uganda and Others v AG and Others* [2021] UGCC 25 (19 August 2021) at 17–18.

103 For some affirmative action measures, see G Odaga "Affirmative action and women in Uganda's public university education" (2022) 35 *Higher Education Policy* 1.

104 *Banyabindi*, above at note 28 at 17.

105 *Yasin*, above at note 28 at 13.

https://doi.org/10.1017/S0021855323000062 Published online by Cambridge University Press

University, the Commission found that the respondent's policy of excluding non-Anglican students from competing for some student leadership positions was discriminatory and unconstitutional because there was no evidence to show that "[t]he discrimination is intended to benefit the Anglican students who may have faced discrimination in accessing the guild leadership, or suffered a disadvantage in the past, hence the positive discrimination in their favour".[106] As the respondent is a private university in Uganda, this conclusion shows that the Commission also expects private institutions to adopt affirmative action measures.

Locus standi and complaints before the Commission

Any person who alleges that s/he has been discriminated against, marginalized or denied an equal opportunity can file a complaint before the Commission under section 23 of the Act. Section 1 defines a person as including "any individual, firm, company, association, partnership or body of persons, whether incorporated or not". This means both natural and juristic (legal) persons have a right to file complaints before the Commission. However, not all provisions of the Act are applicable to juristic persons; for example, the state is not required to take affirmative action measures for the benefit of juristic persons. Likewise, juristic persons cannot allege discrimination on some grounds (such as race, ethnicity and tribe), and also cannot allege that they have been marginalized. This is because they cannot prove that they have been deprived of "opportunities for living a respectable and reasonable life as provided in the Constitution".

However, both the Act and the Equal Opportunities Commission Regulations (2013) are silent on how a juristic person can file a complaint before the Commission, and in particular, on which person is supposed to sign the complaint on behalf of the juristic person. The jurisprudence of the Commission shows that it has blurred the distinction between natural persons (as directors of juristic persons) on the one hand and juristic persons on the other. For example, in *Tumwesigye v Mbabara Government*, two firms, both owned by the applicant, won a government tender; government officials refused to sign the relevant tender contract because the owner of the firms, the complainant, was a member of an opposition political party.[107] Based on the evidence before it, the Commission held that the "[d]enial to conclude the Framework Contract process [by the respondent] was a deliberate move to deny FREEDOM GARDENS RENDEZVOUS [one of the complainant's firms] an opportunity to offer its services to the Respondent and therefore discriminatory within the definition of section 1 of the Equal Opportunities Commissions Act 2007."[108] In awarding the complainant damages against the respondent, the Commission considered the fact that the respondent's refusal to sign the contract "clearly denied the complainant any business" and that the complainant experienced "emotional, physical and financial strains" as a result.[109] It is evident that, strictly speaking, it is the complainant's firm which was denied the tender opportunity. However, this distinction was blurred. There is a need for the Commission's Regulations to be amended to clarify the circumstances in which a juristic person can lodge a complaint before the Commission. The commissioners should also bear in mind that there is a difference between a juristic person and its directors. Otherwise, the Commission will end up not remedying the wrongs suffered by the juristic persons, as happened in the case of *Tumwesigye v Mbabara Government*.

Remedies by the Commission

The powers of the Commission relating to remedies are found in section 15(4) of the Act, which provides that:

106 *Bwengye*, above at note 1 at 14.
107 *Tumwesigye*, above at note 25 at 2.
108 Id at 4.
109 Id at 5 and 6.

https://doi.org/10.1017/S0021855323000062 Published online by Cambridge University Press

> "In the discharge of its functions, the Commission may (a) refer any matter to any other institution, body, tribunal or authority which, in the opinion of the Commission can best handle that matter; (b) recommend to or order any institution, body, authority or person to adopt or take particular steps or action which, in the opinion of the Commission will promote equal opportunities; (c) recommend to any Minister, institution, body or authority to adopt a new legislation which is promoting equal opportunity, and the institution, body, authority, person or Minister shall implement or cause the implementation of the recommendation within six months from the date of communication of the recommendation."

We can therefore observe that under section 15(4)(a), the Commission can refer any matter to another institution which can best handle the matter. On the basis of this provision, the Commission has, for example, referred matters to the Ministry of Gender and to courts.[110] Under section 15(4)(b), the Commission has the powers to "recommend to or order any institution, body, authority or person to adopt or take particular steps or action which, in the opinion of the Commission will promote equal opportunities". There is a difference between a recommendation and an order: a recommendation implies that the steps or actions suggested by the Commission are not binding. In other words, the recipient of the recommendation may choose to implement or ignore it. However, in the case of an order, the actions or steps ordered by the Commission must be taken. This distinction is supported by a combined reading of sections 15(4)(a) and 31 (3)(d) of the Act. The latter provides that it is an offence for any person to contravene or refuse to "implement any order or settlement made by the Commission". The settlement being referred to here is the one under section 14(3) of the Act, one of the alternative dispute mechanisms. The binding nature of orders could explain why, in many of the complaints it has decided, the Commission has made orders against the respondents.[111] However, there are also instances where the Commission has not clarified whether it has made an order or a recommendation.[112] There are also cases where the Commission's orders are not directed to any person or entity, which could make their implementation difficult or impossible.[113] A strict interpretation of section 15(4)(a) means that the Commission can only make an order or recommendation for the purpose of promoting equal opportunities. This leaves out the other core functions of Commission: preventing marginalization, promoting affirmative action and preventing discrimination. In order to avoid an absurdity, the Act should be read as a whole, and this means that the Commission's orders and recommendations should extend to all the functions of the Commission.

Under section 15(4)(b), the Commission can "recommend" to any of the bodies enumerated therein to make legislation for the purpose of promoting equal opportunities, and such a recommendation "shall" be implemented within six months. Unlike under section 15(4)(a), where recommendations are not binding, a recommendation made under section 15(4)(b) is binding. Therefore, it should not be construed as a recommendation; it is an order. Failure to implement it should be punishable under section 31(3)(d).

Neither the Act (section 15(4)) nor the Regulations (Regulation 23) expressly empower the Commission to award damages to a complainant. However, there are instances where the Commission has awarded damages where it has found that the complainants were discriminated against, marginalized or denied equal opportunities; these have included general and special damages.[114] The Commission will only award special damages in cases where the complainant

110 Annual Report (2020/2021) (Equal Opportunities Commission) at xxv, available at: <https://mglsd.go.ug/wp-content/uploads/2021/09/ANNUAL-REPORT-2021-23_09_2021-FINAL-pdf-2222222222222222222.pdf> (last accessed 12 February 2023).

111 *Banyabindi*, above at note 28 at 16–17; *Yasin*, above at note 28 at 13–14; *Bwengye*, above at note 1 at 17–18.

112 *Tumwesigye*, above at note 25; *Initiative*, above at note 29.

113 *Mukanga*, above at note 32.

114 *Tumwesigye*, above at note 25; *Mukanga*, above at note 32; *Acaye*, above at note 28; *Lugemwa*, above at note 28.

https://doi.org/10.1017/S0021855323000062 Published online by Cambridge University Press

has proved them.[115] In *Mugenzi Mugerwa v Byaruhanga Edward*, the Commission held that the respondent had encroached on most of the applicant's land, which "worsened her health" for several years, "hence denying her the right to live a reasonable and respectable life as per the Constitution".[116] However, the Commission declined to award the applicant general damages because she "still remained with a portion of land for her livelihood and did not … suffer extreme marginalization to justify award of general damages".[117] This was the first time the Commission invoked the requirement of "extreme marginalization", which is not provided for under the Act, as a prerequisite for awarding general damages. The Commission does not explain the criteria that should be used to determine what amounts to "extreme marginalization".

Since neither the Act nor the Regulations expressly empower the Commission to award damages, it would be a good idea for the Commission to explain the basis for its power to do so.[118] Similarly, the Commission has ordered the Ministry of Internal Affairs to grant citizenship to a complainant.[119] It has also declared a custom null and void; for example, in *Lugemwa v Busulwa*, the Commission held that "the custom which prevents women who are married in a clan other than their own, from passing on property to their children is discriminatory and we hereby prohibit the same".[120] The Commission has also declared an employment contract illegal and has stated that some provisions of the Guild Constitution are contrary to a university's constitution, the national constitution and Uganda's international human rights obligations.[121] It has also granted a permanent injuction against the respondent who was encroaching on the applicant's land.[122] The challenge is that the Commission does not explain which statutory provisions empower it to make these declarations.[123]

The Commission has been inconsistent in the approaches it has taken to ensure that its recommendations or orders are implemented. It has adopted two approaches: the first is to require the respondent to report to the Commission, within a stipulated timeframe, on the measures it has taken to give effect to the Commission's orders or recommendations. The reporting period has ranged between three and twelve months.[124] The second approach is the opposite of the first: the Commission does not order the respondents to report on the measures taken.[125] In my view, the first approach is the best one; it gives the Commission an opportunity to assess whether or not the respondent is complying with its orders.

115 *Mukanga*, above at note 32. See also *Ajiga*, above at note 36 at 10–11, where the Commission explained the purpose of general damages.

116 *Mugenzi Mugerwa v Byaruhanga Edward* (EOC/WR/0451/2020) (3 October 2022) at 8.

117 Id at 9.

118 In *Guarantee Trust Bank*, above at note 53, para 58, it was argued, inter alia, that the Commission does not have the mandate to make monetary awards. In dismissing this submission, the High Court held that "[t]o deny the Commission authority to make monetary awards would lead to duplicity of proceedings as the complainant would have to seek such redress from courts of law leading to duplicity of forums for resolving one dispute. It could not have been the intention of the legislature to create a tribunal to determine complaints against discriminatory treatment and then withhold the power to grant effective remedies."

119 *Yasin*, above at note 28 at 13.

120 *Lugemwa*, above at note 28 at 6.

121 *Bwengye*, above at note 1.

122 *Mugenzi*, above at note 116.

123 In *Guarantee Trust* Bank, above at note 53, para 60, the High Court held that "[t]he Commission's jurisdiction was limited to incidences in Section 14(4) of the EOC Act and it erred in law when it digressed into determining liability for breach of contract of employment which is determined under the Employment Act and outside the jurisdiction of the Commission".

124 *Bwengye*, above at note 1; *Initiative*, above at note 29; *Banyabindi*, above at note 28.

125 *Acaye*, above at note 28; *Tumwesigye*, above at note 25; *Ajiga*, above at note 36; *Mugenzi*, above at note 116.

https://doi.org/10.1017/S0021855323000062 Published online by Cambridge University Press

Conclusion

I have discussed the functions and powers of the Commission when dealing with marginalization, equal opportunities and discrimination. I have also demonstrated, inter alia, that the drafting history of the Act shows that the legislators excluded age from the prohibited grounds of discrimination. However, there are still ways in which the Commission can protect the right to freedom from discrimination on the basis of age. I have also highlighted some of the questionable ways in which the Commission has dealt with the issues of marginalization, discrimination and equal opportunities. The Commission should be consistent in its definition of discrimination and the approaches it adopts to ensure that its orders are implemented. It should also explain the legal basis for awarding damages. I argue that the introduction of the concept of "extreme marginalization" without clear criteria to determine what it amounts to is likely to lead to inconsistent jurisprudence from the Commission on the issue of awarding general damages.

Competing interests. None

Cite this article: Mujuzi JD (2023). The Making of Uganda's Equal Opportunities Commission Act and Its Interpretation by the Commission. *Journal of African Law* **67**, 205–224. https://doi.org/10.1017/S0021855323000062