

# **AN ANALYSIS OF THE ANTI-CORRUPTION (AMENDMENT) BILL No. 7 of 2013**

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## **1. Introduction**

On 7<sup>th</sup> July 2015, the Parliament of Uganda passed into law the Anti-Corruption (Amendment) Bill 2013—a private members bill, initiated by Hon. John Simbwa. The purpose of the Bill is to amend the principal Act (The Anti- Corruption Act, 2009) to among other things, provide for the mandatory confiscation of property of persons convicted of corruption or corruption-related offences and to vest such confiscated property with the Government of Uganda.

This paper critically examines the new amendments taking into consideration the fact that the amendments were triggered by the failure of government to recover in real terms monies lost to theft. It interrogates the practicability of these amendments highlighting any conflicting issues arising therefrom and concludes by making recommendations.

## **2. The Anti-Corruption Legal and Policy Regime in Uganda**

The Anti-Corruption legal and policy framework in Uganda comprises both domestic legislation and International Conventions to which Uganda is signatory. At the international level, Uganda is signatory to the African Union Convention on Preventing and Combating Corruption as well as the United Nations Convention against Corruption, both of which the country ratified in 2004.

At the domestic level, the principal law is The Anti- Corruption Act 6 of 2009 which establishes criminal responsibility for corruption and corruption-related offences. With a commencement date of 25<sup>th</sup> August 2009, the Anti-Corruption Act,2009 effectively repealed and replaced the Prevention of Corruption Act Cap 121 (a 1970s law), and also modified anti-corruption provisions in the Penal Code Act Cap 120 and the Leadership Code Act, 2002. The Act is complemented in its fight against corruption by several other laws such as the Whistleblowers Protection Act, 2010, the Public Procurement and Disposal of Public Assets Act, 2003 among others as well as the Code of Conduct and Ethics for Uganda Public Service, which sets out general standards of behavior for public officers in the Uganda public service.

## **3. The Anti-Corruption Act 2009**

With a stated purpose of preventing corruption in the private and public sector, this Act has a tough fight to contend with. Corruption in Uganda is widespread and has become one of the greatest obstacles to the country's economic development. Corruption-related challenges in the country stem from a weak separation between public and private spheres. (Maira Martini (2013), pg 2) Indeed in almost all cases, economic gain is the major motivation for engaging in

corruption (Vincent Wagona (2007) Pg 133). It therefore comes as no surprise that, the amendment Act targets the proceeds of corruption.

This paper observes an interesting endeavor by the Act to fuse criminal and civil proceedings in two instances- first under Sections 6 and 7 on diversion of public resources and then under S. 35, on principal-agent compensation. To place this observation in context, this paper will borrow the words of the Justices of the Constitutional Court in the case of Nestor Machumbi Gasasira v. Uganda (on pg 14) where it was stated that “it is fairly settled law that criminal and civil proceedings are distinct from one another...the remedies offered to victims of crimes through criminal proceedings do nothing to get them back to the state in which they were, before the crime was committed...” In essence, the Anti-Corruption Act 2009 is a piece of criminal legislation. It classifies certain acts and omissions as offences, and then sets out the punishment for each such offence- usually a fine, jail term or both. In all fairness, none of these be said to put victims of corruption in the state they were in before the act of corruption was committed. It is such defects in the current law that the amendment is intended to cure.

That notwithstanding, in the particular instance of “diversion of public funds,” the Act introduces the aspect of compensation, meaning that over and above the fine and jail term, a person convicted of the offence of diversion of public funds must compensate the victims of their corruption (the aggrieved party) by paying “such sum as is considered just by the Court, having regard to the loss suffered by the aggrieved party.” The Act goes ahead to stress that where [an anti-corruption] Court has ordered compensation, it is deemed to be a Decree under civil laws and the same can in fact be executed like any other Decree issued by a Civil Court. The strength of this particular fusion of criminal and civil proceedings under the Act is yet to be tested in a real-life case.

The requirement for a convict to compensate his/her victim is repeated in Section 35. Here, a principal who suffers loss as a result of corruption by his/her agent may be compensated by the said agent upon conviction. The compensation may be paid out of any sums standing to the credit of the agent or out of any property which was acquired directly by any gratification obtained by the agent. [emphasis mine] Where the property is not money, it may be sold and the proceeds of the sale paid to the principal. Any balances left over are handed back to the agent.

A matter of contention is the provision to return the balances to the agent. This seems to be a typical case of the law taking away the direct proceeds of corruption from a perpetrator with one hand and then returning the same with the other, all in one breath- which goes against the spirit of the Act. The Act may have to be streamlined in this respect.

#### **4. The Anti-Corruption (Amendment) Bill, 2013**

This bill was enacted at a time when cases of corruption were rising and various convicted corrupt officials not heavily punished, despite the existing laws. It also came at a time when donor countries had suspended aid to Uganda citing corruption in various government departments.

The mover of the Bill- Hon. John Simbwa is quoted as saying “We need to handle corruption with an iron hand” (Rukiya Makuma, 2012). By this he meant that there was a need to make corruption “a very risky venture” such that where a person was convicted for corruption, the state had powers to confiscate the convict’s properties and get back the money that was lost under control of the convict. (Mary Karugaba and Moses Walubiri, 2013) Uganda is said to lose over 510 billion Ugandan shillings (\$258.6 million) a year due to corruption. (Allard K. Lowenstein-Human Rights Watch Report 2013 pg.14)

A few introductory paragraphs from the Bill itself are reproduced verbatim below:

The proposal to amend the Anti-Corruption Act, 2009 is intended to ensure that the government or any other company or organisation recovers the loss, if any caused by a person, convicted of an offence under this Act.

The Bill also seeks to vest the confiscated property of the convicted person with Government and management of this property shall be by the public trustee...

Currently, the law gives court discretion to order for confiscation of property of a convicted person “derived directly or indirectly from the act of corruption.” However due to the nature of offences under the Anti-Corruption Act, it is very difficult to prove that a particular property was derived directly or indirectly from an act of corruption. This creates a lacuna in the law given that securing a conviction does not necessarily guarantee that the convicted person will make good the loss occasioned to the government or any other organisation.”

It is very evident that the Bill calls for a convicted person to make good the loss occasioned by their corruption. How? This is intended to be achieved through the confiscation of a convicted person’s property, and subsequently vesting the same with government—more specifically the office of the public trustee. Currently, the Public Trustee is the Administrator General (Appointed under Statutory Instrument 161-1, Laws of Uganda). The Administrator General is charged with

the liaison of the affairs of the estates of deceased persons in Uganda and in all truth has more than its fair share of practical challenges already.

On the other hand, the office of the Public Trustee is governed by the Public Trustees Act Cap 161. The Anti-Corruption Amendment Bill seeks to modify this Act to widen the powers and duties of the Public Trustee. However, this modification may not yield much in practical terms, since the Public Trustee is in fact barred from accepting any trust which involves the management or carrying on of any business. (Section 4 (5) of the Public Trustees Act and Rule 12 (1) of Statutory Instrument 161-2, Laws of Uganda.) Given that the proceeds of corruption are often ploughed into the private businesses, this is a serious shortcoming which needs to be addressed by opening the doors for the Public Trustee to handle such affairs. This short coming is likely to negatively impact the effectiveness with which government or even private companies and organizations can recover the proceeds of corruption.

The Bill also calls for the mandatory confiscation of the property of convicted persons over and above the usual jail and fine sentences. Confiscation is defined in the Principal Act as the forfeiture and where applicable, permanent deprivation of property by order of Court. The language of the Bill is that upon making a conviction, “the Court shall make an Order confiscating the property owned by the convicted person or the interest owned by the convicted person in the property.” This applies to property gained within a period of 10 years before the conviction. It does not apply to ALL of the property of the convicted person irrespective of when the convict obtained it.

However, the proposal to confiscate a convicted person’s property presupposes that the property is already known at the point of trial and subsequent conviction. This may be feasible for public officers who are under obligation to declare their incomes, assets and liabilities under the Leadership Code Act, 2002. But, it may prove more difficult for persons who have no such obligations. Should they then be compelled to declare all their assets and liabilities at the point of being charged with a corruption offence and would this not be a violation of their right to privacy? This shortcoming creates a gap which may allow particularly ingenious suspects even during the trial, to re-arrange their affairs to detach themselves from the proceeds of their corruption through the creation of complex special purpose vehicles and business arrangements which may not involve their family members; after all, there is a growing realization that the assets of family members are the next check-stop after the accused in corruption investigations. Vincent Wagona (pg 135) observes that most corruption cases involve complicated patterns of fraud. The people who get involved in acts of corruption are well educated. They are the specialists in their areas of training and work.

It is true that there are provisions in the Principal Act for the issuance of Restraining Orders to restrain an accused from disposing of his/her property before or during trial but a Court has to be

moved to issue such Order. In practical terms, it means that an authorized officer under the Act has to draft the Application, file it in Court, wait for it to be given a hearing date, attend Court for the hearing and wait for a ruling to be delivered in the same. It is often not a single day's job. Moreover that officer has to show Court that the accused derived a benefit directly or indirectly from the property in issue. This standard itself is parallel to the observation in the Bill that it is very difficult to prove that a particular property was derived directly or indirectly from an act of corruption.

It therefore should be noted that Confiscation Orders move hand in hand with Confiscation Notices. The principal Act requires a Court which has issued a Confiscation Order to issue a notice of sixty days to persons to whom the confiscation Order relates. The Act does not specify the purpose of a confiscation notice and the author speculates that it is probably intended to create room for the Court to hear any objections relating to the confiscated property. If in fact this is the case, then the timing of the Confiscation Notice should be queried because it comes right after conviction and sentencing. The rules of law dictate that at this point in time, a Court is *functus officio* (it has discharged its duty) and cannot rescind or vary the sentence. It is suggested that it is better to allow for the hearing of any objections before sentencing.

#### **5. Recommendations.**

- i. In order to meet the stated objective of anti-corruption laws to recover the proceeds of corruption, the Public Trustees Act should be overhauled to remove the current restrictions placed on the Public Trustee.
- ii. Additionally, a specific department adequately staffed with properly trained persons should be set up within the office of the Public Trustee to manage property recovered from the proceeds of corruption.
- iii. To eliminate the possibility of a Court re-opening its decision after it has been passed, the law on Confiscation Orders and Confiscation Notices should be streamlined to ensure that Notices are issued and any objections disposed before sentencing.

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