

Anti-Corruption Commission, functions and effectiveness

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Its role between the Constitution and the Criminal Procedure

By Mut Turuk

September 13, 2012 - The purpose of this article is to answer some legal implications between Anti-Corruption Commission and the Ministry of Justice, and what I call the inconsistency of functions and powers between these two vital government's institutions. The role of the Commission and the Ministry of Justice in combating corruption is supposed to be directed toward achieving the goals of the Commission. However, as an observer it seems that, the Commission is in a cold war with the Ministry of Justice on prosecution powers "who or which institution has a right to prosecute". The Ministry of Justice through its Department of Public Prosecution (DPP) is exercising such powers in accordance with the Criminal Procedure Act, 2008 while the commission is watching taking only the role of awareness of the public through media. In some occasions, the Commission gives unjustified reasons that it had no prosecutions powers.

Such dilemma definitely will lead us to ask some questions that I believe the ordinary person or the people of South Sudan might ask whenever they hear their President talking of fighting and combating corruption, particularly, the recent statements that some officials had involved in embezzlement of public moneys worth \$4 billion United State Dollar. If such statements are true and correct, what are the grounds of conflict between the Ministry of Justice and Anti-Corruption Commission and what are the pros and cons of such conflict? What is the inconsistency between the provisions of the constitution, the Anti-Corruption Act, 2008 as well as the Criminal Procedure, 2008 and how can such inconsistency be solved? What is the role of the Judiciary in fighting corruption in the Country?. Before we discuss such questions it has been noted that some officials from the Commission in regard to discharging their powers and functions in term of prosecution powers, always put a blame and point their figures toward the Ministry of Justice to justify their failing to prosecute corruption cases.

Those who are interested in public issues might have heard such excuses from officials of the commission, saying that the Commission had no power to prosecute. Thus, it is like a person whose hands has been tied over and ask to fight his or her opponent and definitely, he or she would be defeated. If that is the case, what is the need for the existence of anti-corruption commission when it is not able to persecute?.

An excuse that the Anti-corruption Commission has no prosecution powers has no grounds and it is unjustifiable and unreasonable at the same time. Because such an excuse would have been reasonable and acceptable under the Interim Constitution of 2005 under which the Commission was only given mandate of investigation and send the final report to the Ministry of Legal Affairs and Constitutional Development by then which is now the Ministry of Justice. Yet, the questions may be asked how many cases involving corruption have been successfully investigated by the Commission and how many of them have been also successfully prosecuted by the Ministry of Justice under the previous constitution and how many persons are now serving their sentences.....!!!! I believe they are big questions that need big answers...!?!.

In accordance with Article 144 (b) of the current Transitional Constitution of 2011, It has been spelt out clearly that under article 144 (b), "..... Investigate and prosecute only cases of corruption". If that is the case, what make the Commission always complaints of having no prosecutions powers? Since the current Constitution was passed and assent to by the President, why the Commission did not file a petition before the Supreme Court requesting the court to declare exercising such prosecution powers by the Ministry of Justice and unconstitutional?.

In regard to the Anti-Corruption Commission Act, 2009, some questions may come up. For instance, what is the definition of corrupt act, or in other words, what acts constitute corrupt offences and what are those corrupt offences under the Anti-Corruption Commission Act, 2009. To answer these two questions one would need to read the Anti-Corruption Act of 2009 which is an act of parliament. Merely, in my opinion, it has nothing to do with fighting corruption and it seem that it was intended only for establishment of the Commission and not use as tool for fighting corruption. Hence, section 5 of the said Act is only giving a short interpretation of three definitions "advantage, corrupt practices and gratification" and it also refers to corruption sections under the Penal Code Act, 2008. Particularly, under chapter VIII or what the legislator termed as offences by or relating to public servant. This law which is meant to be used as a tool for fighting corruption in our Country is redundant. Yet, it was only designed and drafted for establishment of the Commission. Therefore, I would like to strongly appeal to our government and particularly the parliament to enact a new and strong legislation that can be more effective to be used for fighting corruption. That is the way for us to learn from other countries' experiences for fighting, eradication or minimizing of corruption this appeal goes to the parliament.

Certainly, it clear that we don't have effective law in place and therefore, our parliament must make sure that an effective law is enacted for fighting such disease called corruption. In that matter, it very vital that the parliament should be reminded

that it is under obligation to protect the public moneys by making effective laws that can be implemented by the Executive through the judiciary so that suspects are not escaping from justice. With our current situation, the Anti-Corruption Commission has power to prosecute, pursuant to what I previously mentioned under Article 144 (b) of the Constitution.

If any inconsistencies arise between provisions of any law in force and the Constitution it the principle that the provisions of the Constitution prevails to the extent of such inconsistency. Therefore, the commission has no excuse if it is willing to prosecute even if such prosecutions powers are mentioned under the Code of Criminal Procedure Act, 2008. Merely, that for an act to be an offence a substantial law must define such act that constitute an offence and a procedural law will define proceedings under which the action would be taken until the final verdict is reached by the competent court. Therefore, I believe it is not a practice to have a special law for procedure under which the corruption offences should be conducted by the Commission.

The Commission should seek ruling of unconstitutionality of some relating provisions of the Criminal Procedure Act that are inconsistency with the Constitution. Otherwise, the Commission should exercise its prosecution powers without waiting for what they are demanding to be "a special corruption criminal procedure". Thus, anti-corruption commission should start recruiting legal personnel and equip them with necessary prosecution skills to prosecute all corruption offences throughout the Country. It must seize the opportunity of what we may call a political will from the government and particularly Mr. President for his backing for combating corruption.

For expedition of trying cases of corruption, the Judiciary must establish a Corruption Division Court as a specialized court for trying cases of corruption. This Division should be headed by a high court judge accompany with number of judges who are specially trained on how to expedite the process of trying corruption offence with integrity that may allow them to apply the law without fear of favor, and with the principle of equality before the court of law regardless of suspect's status whether of being a government official of their social status or other categories. As the Commission is now struggling or preparing to table a bill before the parliament that might meet the public expectations to the international standards of drafting effective corruption law. One would like to have some contributions in that proposed bill in term of technical aspect of drafting of the bill; such proposed contributions might assist us to produce the bill that may meet the minimum international standards of drafting such legislation. For instance, there is supposed to start with leading provisions and that is what is known in drafting as long title beside short title of the bill.

The long title should be to provide for the more effectual prevention of corruption, clear definition of acts that constitute corruption, what are the corrupt transactions with agents, corrupt a procuring withdrawal of tenders, bribery of member of public body, what is the penalty to be imposed in addition to any other punishment, how a principal may recover amount of secret gift, acceptor of gratification to be guilty notwithstanding that purpose not carried out , etc, presumption of corruption in certain cases for example when it approved that any gratification has been paid or given to or received by a person employed by a public body , by or from a person or agent of a person who has or seeks to have any dealing with public body . In that regard, such gratification case, should be deemed to have been paid or given and received corruptly and an inducement or reward unless the contrary is proved.

ADMISSION OF EVIDENCE IN TRIAL

In a stage of trial, the fact that an accused person is in possession for which he or she cannot satisfactorily account of pecuniary resources or property disproportionate to his or her known sources of income, or that he or she had, at or about the time of the alleged offence should be considered by the court as evidence of pecuniary sources or property. Evidence of accomplice, such evidence should not be regarded by the court as being unworthy of credit.

SPECIAL POWERS OF INVESTIGATION TO DPP

To have effectual fight special powers of investigation must be given to the Director of Public Prosecution as an exception in some cases where the Commission may not be able to have its own prosecutors or if satisfied that there are reasonable grounds for suspecting that an offence under such proposed bill has been committed by any person.

The court also must have power to restrict disposal of assets or bank accounts of accused, etc., Payment of compensation out of resources of convicted person must be provided.

The proposed bill must also provide powers of orders of search and seizure to the commission, DPP or judge of 1st grade, as the case may be, particularly where the commission may not be able to provide its prosecutors.

DUTY TO PROVIDE INFORMATION

Giving information whenever requested whether by a police or special investigator must be provided by the bill as obligation and legally bound, penalty must be provided by the bill where any person makes an obstruction of search, ets, as well as powers to obtain information in the course of any investigation or proceedings into or relating to an offence by any person employed by any public body.

DEFENCE OF CUSTOM

The bill should consider evidence and defence of custom as inadmissible in regard to gratification given a customary, any profession, trade, vocation, or calling or in the course of any particular business transactions.

DUTY TO ARREST

The bill must provide duty to arrest any person employed by a public body to whom any gratification is corruptly given or offer to arrest the person who gives or offers the gratification to him or her and take over the person so arrested to the nearest police station. However, failing to do so without reasonable excuses the bill should provide that such person be held criminally responsible.

PROTECTION OF INFORMERS

Any successful fight to prevent corruption need to have a good network of informer .Therefore, the bill must provide provisions for protection of informer as well as penalty for giving false information respectively.

DISQUALIFICATION AND PROTECTION OF PERSONS ACTING PURSUANT TO THE BILL

To give an additional for long term punishment even when a convicted person is released after servicing his or her sentence in prison, such person should be disqualified to hold any office for period not less than ten years in or under a public office as well as providing a strong protection of persons acting in pursuant of such proposed bill should provide for provisions for invalidity of appointment as bar for prosecution. In other words, if somebody is appointed wrongly in a public body he or she should be barred from being prosecuted if he or she commits an offence under such proposed bill. The bill also should provide very clear provisions to spell out prosecution powers of offences and it would be very much better that such prosecution powers be given to both Commission and Director of Public Prosecutor in regard to where it may be appropriate to such two institutions.

The bill also should provide powers to the Chairperson of the Commission powers to appoint special investigators whenever desirable for the purpose of any investigation if such investigator possesses any necessary special skill or experience to be a special investigator.

To avoid any doubt or ambiguity in term of exercising powers under such bill, the bill should provide provisions the prosecutions powers should be vested upon the chairperson of the Commission and his or her power, duty, or function conferred or imposed by such bill should be executed by his or her deputy.

JURISDICTION

As the bill is dealing with special and serious offence that are affecting the public, the bill should spell out that the jurisdiction to try offences under such proposed bill to be exercised by High Court or County Court of 1st grade judge.

Finally, the short title or citation of the proposed bill is supposed to be "The Prevention of Corruption Bill, 2012".

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