Policy Brief

Constitutional Amendment Bill to the Article 26 of the Uganda Constitution: insights and challenges from field practice of land conflicts.

September, 2017

Summary

A constitutional amendment bill has been tabled before Parliament with the primary aim of overhauling the Constitutional Right to Protection from deprivation of property (Article 26). The alleged objective of the amendment is "*to resolve the current problem of delayed implementation of Government infrastructure and investment projects due to disputes arising out of the compulsory land acquisition process*."[1]

"Avocats Sans Frontières" (ASF) and Advocates for Natural Resources Governance and Development (ANARDE) are two partner Civil Society Organizations engaged in the promotion of social justice, Rule of Law and legal empowerment of Uganda citizens. In light of the lessons learnt in our on-going activities of legal assistance to communities affected by land deprivation, we anticipate that great challenges for the protection of constitutional rights will arise if the bill passes.

In practice, it will enshrine an unbalanced relation of power between the government and land owner citizens of Uganda. The amendment is likely to shatter production systems and social networks as well as to further deteriorate the socio economic situation of numerous Uganda citizens. The bill may also pile unsustainable pressure onto the Uganda judiciary as it makes retrospective litigation in courts the only avenue for protection of land owners' rights. As such, the bill would place the burden of the Country's development on citizens in lieu of the Government. This new process for compulsory land acquisition appears to be a questionable choice in light of all available options for accommodating the citizens' well-being and infrastructure projects.

[1] Uganda Gazette, No. 33, Volume CX, 8th June,2017, Bill No. 13 Constitution (Amendment) Bill 2017.

Consequences of the reform in light of the current state of land conflicts in Uganda

The bill seeks to amend provision of the constitution that relates to property rights and in particular land. It introduces a legal avenue for the Government to compulsorily take over a given land pending the deposit of the land's value in court. This compensation will be self determined by the Government through its Chief Government Valuer whereas disputes between the owner and the Government will be settled by the court after the land is seized. In effect the current constitutional right to fair, adequate and prior compensation before taking over the property will be no more.

As it stands now Article 26 of the constitution asserts the citizens' right to own property and also protects the citizens from illegitimate compulsory deprivation of property. Compulsory deprivation is only lawful where the acquisition is necessary for public use, national security, public order, public health or public morality. Besides such acquisition can only happen when there has been payment of prompt, fair and adequate compensation to the owner of the land. The proposed change in article 26 in its current form will weaken the citizens' right to own property as it empowers the State to take or acquire land without payment of prompt, fair and adequate compensation. The amendment reverses the principle that acquisition of land must be determined by a prior and adequate payment and instead promotes unilateral acquisition by the State. In case there is contestation on the value to be paid, the law gives the government the powers to take over the land first and argue about its value later. In effect, when the aggrieved party is challenging the value in court, he/she would have lost the property to government. The land being the primary source of income for most Ugandans, the challenging party would find itself in a weakened situation to litigate with the government. Therefore, this new framework will establish an unbalanced relation of power between the government and the citizens of Uganda. From ASF and ANARDE legal practice in land conflict cases, the following consequences are likely to occur:

a) In Uganda, the average processing time for a court case in first instance is 24 months whereas the processing time for a court case from the High Court through appellate process to the Supreme Court is around six years. Deprived land owners would have to wait between two and six years from the moment they are forced out their land to the moment the legality of the land acquisition is confirmed. By the time these land owners are established in their rights, they will have to rely on the bona fides of the Government to have deposited the fair amount of money with the court. Yet, as reminded by Members of Parliament (Legal & Parliamentary Affairs Committee), the Government is a "serial defaulter" on its payment. [2] People could spend years and years in legal files to obtain the fair compensation the Law grants them while the already worrying judicial backlog would increase exponentially. The amendment if passed shall escalate the current procedural

[2] Parliament Watch, July 25th 2017, Constitution Amendment Bill makes its debut in the Legal & Parliamentary Affairs Committee.

irregularities and worsen current delays in paying the awarded amounts.

b) The compensation should be fair and just at prevailing fair market price; the price that a willing but unpressured buyer would pay a willing but unpressured seller for the property under ordinary circumstances with both parties fully informed of the property's good and bad features. But the amendment shall leave government with all leeway to determine the value of the expropriated property without involving the owner. The bill chooses to solve the difficult problem of land acquisition by promoting forceful procedures instead of seeking to facilitate and control the negotiation processes.

c) In the socio-economic context of Uganda, Property is life, the right to property is the corner stone of human dignity, as the Supreme Court put it "it can in no way depends on another man's courtesy".[3] Research in Uganda has established that facing a complex problem leads to loss of income and increase of stress for the aggrieved party whereas land conflicts are among the most difficult problems to solve for Uganda citizens.[4] The resort to retrospective litigation in lieu of preliminary negotiation in land acquisition will put a great stress on the affected segments of the population.

"The Right to Property can in no way depend on another man's courtesy", Uganda Supreme Court, 2004

[3] Uganda, Supreme Court, Constitutional Appeal No. 1 of 2004, between Phillip Karugaba and the Attorney General of Uganda.
[4] HILL, 2016, Justice Needs in Uganda.

Recommendations

The proposed amendment affects the very substance of the constitutional right to own property in Uganda. This bill is the latest development in a series of governmental attempts to do away with the principle of prior compensation in compulsory land acquisition. Yet, while ruling on a prior attempt from the Government, the Supreme Court has upheld the constitutionality of the payment of a just and fair compensation prior to compulsory acquisition of property in its decision "*Advocates for Natural resources, Irumba Asumani & Peter Magelah Vs Attorney General of Uganda & Uganda National Roads Authority*" of 2012.[5]

This amendment also carries great challenges for the judicial system as it would only feed a judicial backlog already identified by the Judiciary as the major obstacle to the adequate administration of Justice in Uganda. In effect, the bill places the burden of the judiciary's weaknesses on individual litigants, rather than solving the identified delays. The government is underplaying other options to fast track the current challenges: harmonizing and controlling the process for land value determination, increasing the means of the Ugandan Judiciary to carry out expertise processes (surface, land titles etc), securing the land tenure, clarifying the notion of and sensitizing the population about the concept of public necessity, only to mention a few. These options would contribute a great deal to a more efficient process for land management; contrary to

[5] The Republic Of Uganda In The Constitutional Court Of Uganda, Constitutional Petition No. 40 of 2013, November 2013.

the proposed amendment they wouldn't do so at the expense of people's rights.

In a country where a majority of the population lives off the land, this priority given by the government to forceful acquisitions could have far-reaching and potentially disastrous consequences on the social and economic fabric. It is very likely that most vulnerable segments of the population would be impacted the most as the new regime makes litigation the sole avenue for citizens to claim their rights. These cases will require the parties to allocate time and money to the case while deprived of their means of livelihood. Most vulnerable people simply won't be able to keep.

In public interest, any amendment to the current land regime should rather seek to accommodate the execution of government projects and the well-being of project affected communities. Too often, infrastructure projects end up impoverishing neighboring communities thereby working against their initial goal of fostering development of the country.

ASF and ANARDE hope that the government will favor sustainable and harmless ways of speeding up its infrastructure projects. Should the bill pass, efforts from civil society will be needed to build up the resilience of affected individuals and communities. Affected population will require tangible and accessible legal support to uphold their own rights. Our organizations will boost their current efforts in legal empowerment and promotion of access to Justice for most vulnerable people in the Albertine Graben and Karamoja region.

Contacts

- Mr. Romain Ravet
  Country Director for ASF in Uganda
  rravet@asf.be
  0200905686
- Mr. Frank Tumusiime
  Coordinator for ANARDE
  frank.tumusiime@anarde.org
  anargde@gmail.com