

The Efficacy of Legal Reforms in Managing Conflict of Interest: Law as a Tool for Handling Conflict of Interest and Corruption

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Abstract: *Managing conflict of interest in the public sector has been and will always be a concern for governments the world over. This is accentuated for several African countries which continue to rank highly on the corruption and bribery indices. Corruption is closely connected to the issue of conflict of interest and consequently, it is important to seek best practices in place to deal effectively with conflict of interest in the public sector. Various tools and legal instruments have been developed by regional and global organizations with the singular aim of aiding their member states to review and modernise their conflict of interest policies. Some African states have either adopted these instruments as forming part of their municipal law or legislated laws on conflict of interest. This article examines the role played by law in defining and regulating conflict of interest and how conflict of interest affects the public sector in Africa. It focuses on how law can be deployed effectively as a tool of establishing governance structures that maintain a culture that minimizes and manages the occurrence of conflict of interest.*

Keywords: *Conflict of Interest, Public Service, Governance, Accountability, Ethics and Integrity*

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I. Introduction and background

Edmund Burke, in a speech given on 3rd November 1774, declared himself to be a Member of Parliament (MP) rather than a Member of Bristol, the constituency which he represented. This declaration points out a key aspect of the competing and conflicting interests that public servants must juggle with. Managing conflict of interest in any public service is undoubtedly an arduous and complex task. These interests could be personal, tribal, local, national and even international. Burke's position was that if the interests or opinions of the local community that elected an MP should conflict with the real good of the nation, then the MP should distance himself from any endeavour to give any effect to those local interests or opinions. Burke asserted that the idea of blindly and implicitly voting or arguing for the interests of constituents without the MP following the dictates of his judgement and conscience was alien to the laws and constitution of England.¹

¹ Burke E, 'He is not a Member of Bristol but he is a Member of Parliament', in MacArthur B (ed), *The Penguin book of historic speeches*, Penguin Books, London, 1774, 114-116.

Despite Burke's clarity of mind on how to manage conflict of interest, he ended up neglecting his constituents and he lost his seat in parliament six years later. This true story clearly points to the difficulties of resolving conflict of interest for purposes of accountable governance. It may seem that Burke's conflict related only to national versus local interests, but a deeper analysis will reveal a personal interest in the form of an MP's desire to remain popular for purposes of a subsequent re-election. Burke clearly chose to sacrifice this personal interest in order to serve the interest of his country or what could be termed today as the common good. He did this by anchoring his discretion on the 'dictates of his judgement and conscience' which manifests the link between conflict of interest and personal ethics. From Burke's example, it is clear that the conflict that arises between legitimate personal interest, like the desire to be re-elected, and public interest can be resolved through personal ethical choices guided by the dictates of judgement and conscience. If it is not adequately addressed, it would be a major obstacle to effectiveness of public administration.

The paramount role of the public servant's judgement and conscience in resolving conflict of interest was highlighted by Boyce and Davids in their assertion that many functions of public service are carried out within a broad realm of judgment and discretion on the part of individual public officials.² According to Boyce and Davids, it is within the discretionary realm of public service that individuals may have the greatest capacity to illicitly benefit private interests. Conflict of interest occurs when the judgment of an individual in discretionary matters is deemed to have been impaired by a private interest. The corollary of this is that if an interest does not impair the judgment of a public servant during his performance of official duty, then it does not raise any conflict.

Conflict of interest is greatly intertwined with ethics and integrity primarily owing to the nature of discretionary powers bestowed upon public officials. Ethical behaviour presupposes that a public servant may have an interest that could affect his/her performance of public duties yet refrain himself or herself from allowing that interest to colour his judgement in exercising the discretionary power. Integrity portends the capacity of the official to ring-fence his judgment in public affairs from partiality and extraneous influence.

However, since not every public official may have solid ethical principles like the ones espoused by Edmund Burke, and given the difficulty in resolving

² Boyce G and Davids C, 'Conflict of interest in policing and the public sector' 5(11) *Public Management Review*, 2009, 601-640.

conflict of interest, there is a need for clear guidelines and policies that should be implemented uniformly and equally within the rule of law ideal. This article examines the role of law in defining and regulating the core issues on conflict of interest and how it affects public service delivery in Africa. The article focuses on how law can be effectively used as a tool to establish culture and governance structures that minimise and manage the occurrence of conflict of interest.

The legal framework examined in this article stems from international law obligations regarding corruption and conflict of interest and how Kenya, South Africa, Nigeria, Egypt and Congo (selected countries from the five sub-regions of Africa) have domesticated those obligations in their municipal law. The select countries also serve as comparators and lessons drawn from each are highlighted to showcase the efficacy of measures adopted in dealing with conflict of interest. Additionally, the article includes a case study on the implementation of a particular policy in Kenya aimed at dealing with money laundering and terrorism but which in other jurisdictions has been employed effectively to deal with conflict of interest. The case study relates to Kenya's 2020 regulations requiring declaration of beneficial ownership in registered private companies. It is wondered why Kenya did not take the extra step to use this regulation to deal with conflict of interest that arise when those companies enter into government contracts as proxies of public officials who are their beneficial owners. The corporate entities are normally used by public officials to conceal conflict of interest and not even the device of piercing the veil of incorporation reveals the real personalities behind the concerned corporations.

II. Defining conflict of interest

The Organisation for Economic Cooperation and Development (OECD) defines a conflict of interest to involve a conflict between the public duty and private interests of a public official, in which the public official has private capacity interests which would improperly influence the performance of their official duties and responsibilities. Conflict of interest is not corruption, but if inadequately managed, conflict of interest can result to corruption.³

Conflict of interest was traditionally defined in corporate law to refer to situations whereby the personal interests of an agent conflict with those of the

³ OECD, *Managing conflict of interest in the public sector, A toolkit*, 2003.

principal. The 'no conflict of interest' rule is based on the fact that directors of companies occupy a trustee-like position, and they should not be allowed to abuse that trust.⁴ Although the clear discussion on conflict of interest arose in the context of company law, its meaning and importance is extendable to the public sector whereby a sovereign people is the principal while the public servants are the agents. Besides, there are several government agencies which operate in the style of state-owned corporations and are therefore directly governed by the 'no conflict of interest' provisions in company law. When the 'no conflict of interest' rule is applied to government itself, the conflict is epitomized as the clash between individual interests and societal interests: between individual good and the common good. Consequently, anything that may harm the common good whilst favouring an individual or a sub-group in a society would amount to a conflict of interest.

A. Examples of situations involving conflict of interest

Persons vested with discretionary power or who occupy positions of trust whether in the public or private sector will of necessity find themselves faced with conflicting interests. Instances abound in which a person may find his interests clashing with those of the people he is required to protect or of the society at large. Many of the situations of conflicts of interest are quite easy to identify and concern whether the relevant person is vested with a modicum of vigilance and good faith. However, there are a few situations which are very subtle and which are not easily identifiable owing to the complexity of the issue and perhaps the cultural background. Whatever the case, it should be made clear that any person who is entrusted with information, authority or discretionary powers ought to take all the necessary steps to ensure that they do not place themselves in a situation in which their judgment is likely to be biased or compromised. Elegido argues that there are strong reasons to avoid being in situations of potential conflict of interest which always tend to arise for persons endowed with discretionary authority or power.⁵ Such persons could be managers who have to solve the ethical problem of conflict of interest whenever there is a conflict between their personal interests and official responsibility.

⁴ Davies P, *Gower and Davies' principles of modern company*, 7th ed, Sweet and Maxwell, London, 2003, 393.

⁵ Elegido J, *Fundamentals of business ethics: A developing country perspective*, Spectrum Books Limited, Ibadan, 2004, 316-325.

Elegido further identifies and discusses various examples of conflict of interest in business which could be analogously applied to the public sector especially in the case of state-owned corporations which also conduct business transactions.

The following real and hypothetical situations serve to exemplify situations of conflict of interest.

a) Grounds for a judge to recuse from a case

In *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others*, the Supreme Court of Kenya cited the following as the most common examples of grounds for the recusal or disqualification of a judge hearing matters in court: ‘*where the judicial officer is a party; or related to a party; or is a material witness; or has a financial interest in the outcome of the case; or had previously acted as counsel for a party*’.⁶

b) Non-monetary interests in a case before the court

In *Re Pinochet*, the United Kingdom House of Lords reversed its earlier decision that Senator Pinochet enjoyed no immunity from arrest as a former head of State on the ground that one of the Lords in the panel that arrived at that decision had connections to Amnesty International (AI). AI had been allowed to intervene in Pinochet’s appeal and argued against his case. The judge in question was Lord Hoffman who happened to have been the Chairperson of the AI’s Charity Limited and besides, his wife, Lady Hoffman, worked as a programme assistant for the AI itself. Lord Hoffman was not a member of AI. The House of Lords decided that this connection between Lord Hoffman and AI (which was even allowed to make submissions in the appeal and be represented by a Queen’s Council) was solid ground for the previous decision to be reversed on ground that Lord Hoffman had a non-pecuniary interest in the matter. Lord Hutton observed that the connections between Hoffman and AI ‘were so strong that public confidence in the integrity of the administration of justice would be shaken if his decision were allowed to stand as it gave rise to a real apprehension or danger of bias’.⁷

c) Interest in Government Contracts

⁶ *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* (2013) eKLR.

⁷ *Re Pinochet* (1999), The United Kingdom House of Lords.

Kenya's Independence Constitution at Article 41 provided for the disqualification of candidates from seeking parliamentary election on several grounds including being in a situation of conflict of interest with regard to government contracts. The relevant section of the article provided for the disqualification of an aspirant where 'subject to such exceptions and limitations as may be prescribed by Parliament, the aspirant has any such interest in any such government contract as may be so prescribed'.⁸

d) Use of confidential information for private gain

This is a very subtle issue which often arises in situations where a person in a position of trust is vested with confidential information. The duty of confidentiality entails not just safeguarding disclosure but also desisting from using such information for private gain without the express authorization of the principal. Public servants hold a lot of secret information which could be used for personal gain. For instance, in public projects involving compulsory acquisition of land, public servants know well in advance which parcels of land will be acquired and they may use that information to acquire the parcels from ignorant citizens at a depressed price and then seek compensation at unjustifiably elevated or inflated values once the public project kicks off. The checklist below provided by OECD may serve to demonstrate how insider information could be used to foster conflict of interest.⁹

- i. Has the organisation defined a policy and administrative procedure for ensuring that inside information, especially privileged information which is obtained in confidence from private citizens or other officials in the course of official duties, is kept secure and is not misused by staff of the organisation? In particular:
 - Commercially sensitive business information.
 - Taxation and regulatory information.
 - Personally sensitive information.
 - Law enforcement and prosecution information.
 - Government economic policy and financial management information.
- ii. Is all staff made aware of the existence of policy and procedure?

⁸ Article 41, *Constitution of Kenya* (1963).

⁹ OECD, *Managing conflict of interest in the public sector, A toolkit*, 2003, 28.

- iii. Are all managers made aware of their various responsibilities to enforce the policy?

e) Promoting and increasing the salary of a related party

Wolfowitz was a President at the World Bank from 2005 to 2007. He recommended a new assignment and a higher salary for his girlfriend who happened to have been an employee of the World Bank even before he was appointed President. In addition, she was particularly qualified for the job. He suffered the consequences of not avoiding this situation of conflict of interest and after pressure was mounted, he resigned. The fact that his intentions might have been very good or that an independent board would still have recommended his girlfriend for the position in question did not matter. More details on this case may be found in Michela Wrong's 'It's Our Turn to Eat'.¹⁰

B. The duty to avoid conflict of interest

As previously stated, conflict of interest has been widely applied in corporate law with respect to the fiduciary duties of the directors. At common law, the duty to avoid conflict of interest was considered to be the most important duty of a director.¹¹ The law has for long grappled with the phenomena of conflict of interest in both private and public governance. The law forbids it in no uncertain terms as was crisply expressed by Lord Cranworth in *Aberdeen Railway Company v Blaikie Brothers*, 1854. The learned judge expressed the duty to avoid conflict of interest as follows:

A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is rule of universal application that no one, having duties to discharge, shall be allowed to enter into engagements in which he has or can have, a personal interest conflicting or which possibly may conflict, with the interests of those he is bound to protect.¹²

However, despite the clarity in law, social phenomena and context seem to favour the existence of conflict of interest. In a world where people believe in networking and achieving their goals by means of well-established

¹⁰ Wrong M, *It's our turn to eat*, Harper Collins Publishers, London, 2009, 272-273.

¹¹ Davies P, *Gower and Davies' principles of modern company*, 392.

¹² *Aberdeen Railway Co v Blaikie Brothers* (1854), The United Kingdom House of Lords.

connections, it is an onerous task to uphold the duty to avoid conflict of interest. This is best described by Michela Wrong in her work entitled 'It's Our Turn to Eat' in which she describes the role of tribe and ethnic preferences in the politics and governance of Kenya. In chapter four of that book, Michela clearly shows that tribalism plays a major role in the distribution of resources and privileges such as positions in government.¹³ Consequently, if a person's claim to public office is tribal, it then becomes very difficult for such an appointee to exercise power independently or in accordance with the principles of professional competence and efficiency. In such situations the public servants find themselves having to manage the expectations of 'their people' i.e., relations, friends, and their tribesmen which in the final analysis engenders conflict of interest. Favouring people on the basis of tribal connections then becomes the norm and the cabal of tribalism just complicates the question of conflict of interest further as it takes away the leeway to exercise discretion in good faith.

Given that society is an organic whole, composed of persons rather than individuals, wouldn't a proposal to ensure independence in professional relations sound utopian? One could even argue that after recruiting some independent persons, they will eventually form friendships which will give rise to favouritism and hence conflict of interest in the future. Looking at the issue from this angle, it would seem that the proposal to avoid conflict of interest is purely theoretical given that everyone has relations: human beings are by nature gregarious.

The social nature of human beings should however not be used as an excuse for not effectively dealing with conflict of interest. Conflict of interest does exist even within family set ups and for harmony to exist family heads must solve them. They mainly do so through certain principles espoused in a culture of values and virtues. In public service it might be necessary to consider virtue-based approaches in running institutions and solving the problems posed by conflict of interest. The corruption fighters stress on incentives and various controls which are external to the person instead of fostering virtues and values that belong to the internal forum of the person. If the virtues and values are well fostered, they provide the real and most effective internal control. The transformative 2010 Constitution of Kenya has made strides in this regard under Article 10 (1c) as it requires public servants to inculcate certain values and principles whenever they make or implement public policy decisions.¹⁴ National

¹³ Wrong M, *It's our turn to eat*, Harper Collins Publishers, London, 2009.

¹⁴ Article 10 (1) (c), *Constitution of Kenya* (2010).

values outlined in Article 10 (2b) such as equality, non-discrimination, integrity and transparency have the capacity to minimize the impact of conflict of interest.¹⁵

The other factor that makes it difficult to deal with conflict of interest in Africa is lack of enforcement of various rules and mechanisms in place to deal with the problem. Several countries that have requirements for wealth declarations, lifestyle audits, registers of gifts and conflict of interest tend to lack the political will power to enforce. The laws in some instances are very elaborate but the problem persists hence leading to the question whether law is an efficacious tool.

III. The incidence of law in resolving conflict of interest: Lessons from select countries of the sub-regions of Africa

Law has been described as an instrument of social control and, according to Mbote and Akech, it establishes rules and procedures which allow for equal treatment of human beings and thereby ensures legitimate and fair sharing of scarce natural resources.¹⁶ This role of law could therefore effectively deal with conflict of interest in the public sector which, if left unchecked, could lead to the unequitable distribution of resources, opportunities and privileges. This is not to mean that law is the only available tool to deal with the problem of conflict of interest. It must be complimented with other tools such as culture, education etc. Legal provisions abound in both international and municipal law aimed at dealing with this issue and in the discussion that follows, it will be necessary to gauge the efficacy of those provisions.

It is worthwhile to note that conflicts of interest are naturally occurring owing to the fact that people tend to occupy more than one social role. This social-phenomena means that while all due effort may be made by proposed statutes, the incidence of conflict of interest cannot be fully eliminated. Furthermore, there is also a definite likelihood that a conflict may exist but not compromise the integrity of those expected to safeguard the public good. The

¹⁵ Article 10 (1c), *Constitution of Kenya* (2010).

¹⁶ Mbote P and Akech M, *Kenya justice sector and the rule of law*, Open Society Initiative for Eastern Africa, Nairobi, 2011, 21.

mark of exceptional legislative instruments is their ability to make provisions that curb corruption arising from deliberately sought loopholes present in situations that result in conflict of interest.¹⁷

The international community has recognized the dangers posed by conflict of interest, in both the public and the private sectors, and has placed provisions on the prevention and management of conflict of interest in both regional and global legal instruments binding state parties. The United Nations Convention against Corruption (UNCAC) is one such global instrument.¹⁸

Article 7(4) of the UNCAC requires each State Party, in accordance with the fundamental principles of its domestic law, to endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflict of interest. Specifically, Article 8(5) of the UNCAC requires each State Party to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.

Article 12 (1) of the UNCAC also requires each State Party to take measures, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate, and dissuasive civil, administrative or criminal penalties for failure to comply with such measures. Article 12 (2) provides some measures to achieve this which include: imposition of restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure.¹⁹

It is an onerous task to implement obligations arising from international law but all is not lost as Quentin Reed proposes that developing countries can seek donor assistance to design and implement systems of integrity aimed at dealing with the issue of conflict of interest. Further to this, the National Democratic Institute and the Council of Europe have in the past assisted

¹⁷ Reed Q, 'Sitting on the fence: Conflicts of interest and how to regulate them' *Anti-Corruption Resource Centre*, 2008, 7.

¹⁸ Article 12 (1), *United Nations Convention Against Corruption*, UNGA 58/4 of 30 October 2003.

¹⁹ Article 12 (2 e), *United Nations Convention Against Corruption*, UNGA 58/4 of 30 October 2003.

developing countries to develop laws and policies on conflict of interest and to train specific agencies on how to implement codes of conduct and laws on conflict of interest. African countries that benefited from such donor assistance include Namibia and South Africa.²⁰ Quentin Reed further suggests three clear interventions that the international donor community could engage in to help developing countries deal with conflict of interest:

- i. Assist with basic civil service reform, e.g., to ensure that civil servants receive a sufficient remuneration to make conflict of interest regulation possible,
- ii. Capacity building for the civil service regulatory body to enable supervision and enforcement of codes of conduct and conflict of interest regulations,
- iii. Training NGOs or journalists to read and monitor public officials' declarations of interests.²¹

These interventions could go a long way in ensuring that UN member states domesticate UNCAC in a meaningful and effective way. The sections that follow study how the selected countries from the five subregions of Africa have domesticated the provisions of UNCAC described above. This domestication is seen in the light of local law and policies that establish, maintain, and strengthen systems that promote transparency and prevent conflict of interest in the public sector.

A. Kenya's transformative 2010 Constitution

In East Africa, Kenya has signed and ratified the United Nations Convention Against Corruption UNCAC.²² The Constitution of Kenya provides for the general rules of international law and any treaty or convention ratified by Kenya to form part of the law of Kenya under the Constitution.²³ Since Kenya ratified the UNCAC, its provisions are automatically incorporated into its municipal law.

²⁰ Reed Q, 'Sitting on the fence: Conflicts of interest and how to regulate them' *Anti-Corruption Resource Centre*, 2008, 26-27.

²¹ Reed Q, 'Sitting on the fence: Conflicts of interest and how to regulate them' *Anti-Corruption Resource Centre*, 2008, 27.

²² UNODC, <https://www.unodc.org/unodc/en/corruption/ratification-status.html> on 30th August 2021.

²³ Article 2 (4)-2(5), *Constitution of Kenya* (2010).

Further, the 2010 Constitution of Kenya dedicates the entire chapter six to providing how public officials are to be refined for office in terms of leadership and integrity. The constitution pronounces that some of the guiding principles of leadership include objectivity and impartiality.²⁴ It further demands that selfless service based solely on public interest be demonstrated by the declaration of any personal interests that may conflict with public duties. The conduct of state officers should also be impeccable. They are specifically called upon under Article 75 to avoid any behaviour that would constitute a conflict between their personal interests and those of their official duties.²⁵ Contravention of this provision on conflict of interest may lead to the officer being subjected to the disciplinary procedure for the relevant office with the possibility of being dismissed or otherwise removed from office if found culpable.

To enforce Chapter 6 on leadership and integrity, Article 79 of the 2010 Constitution mandated parliament to establish an independent ethics and anti-corruption commission. The Ethics and Anti-Corruption Commission (EACC) has been at the forefront of championing the fight against corruption. There are multiple statutes such as the recently proposed Conflict of Interest Bill that guide the EACC in fulfilling its mandate.²⁶ Section 3 of the proposed Conflict of Interest Bill states that the Bill is specifically targeted towards providing for the management of conflict of interest by public officials in the discharge of their duties.

B. Egypt: State law prohibiting conflict of interest

Egypt signed UNCAC on 9th December 2003 and ratified it on 25th February 2005.²⁷ Under Article 93 of the 2014 Constitution, it seems that Egypt adopts the monist model when it comes to domesticating treaties on human rights which would imply that treaties on other matters would be adopted based on a dualist model.²⁸ Consequently, since UNCAC is not a treaty on human rights, it would require a domestication process by its House of Representatives.

²⁴ Article 73, *Constitution of Kenya* (2010).

²⁵ Article 75, *Constitution of Kenya* (2010).

²⁶For a list, see Ethics and Anti-Corruption Commission, Legislation <https://eacc.go.ke/default/downloads-page/legislation/> on 31st May 2021.

²⁷ UNODC, <https://www.unodc.org/unodc/en/corruption/ratification-status.html> on 30th August 2021.

²⁸ Article 93, *Constitution of Egypt* (2014).

The 2014 Constitution of Egypt has some clauses that directly tackle the issue of conflict of interest and corruption which indicates that the provisions of UNCAC are being taken into account whether by design or by default. Specifically, Article 109 restricts the economic activity of the members of the House of Representatives by forbidding them from engaging in any dealings concerning property with the state, state agencies or public companies. The Article expressly forbids this whether in person or through an intermediary. Further, members of the House are forbidden from concluding any contracts with the government as vendors, contractors, or suppliers. If such transactions happen, the Article declares them null and void.²⁹ With regards to the Prime Minister, Article 166 makes similar provisions.³⁰ However, with respect to the President, Article 145 makes a similar proviso forbidding the president from such dealings throughout the term in office but it incorporates an extra restriction in the following terms:

The president *may not engage* throughout the presidential term, whether in person or through an intermediary, in an independent profession or commercial, financial or industrial activity.³¹

This extra proviso is however a weak one given that it employs the term ‘may not engage’ meaning that the President has the discretion to engage or not to engage in such activities which ultimately provides a basis for potential conflict of interest.

Article 218 of the Constitution of Egypt explicitly deals with the Fight Against Corruption and it declares that the law identifies the competent control bodies and organizations which commit to coordinate with one another in combating corruption, enhancing the values of integrity and transparency in order to ensure sound performance of public functions and preserve public funds among other functions.

Egypt has a law on the regulation and prohibition of conflict of interest.³² It seems that this law was proposed in the year 2011 and the draft law contained sixteen clauses to ‘govern and monitor private interests’. According to Hafez,

²⁹ Article 109, *Constitution of Egypt* (2014).

³⁰ Article 166, *Constitution of Egypt* (2014).

³¹ Article 145, *Constitution of Egypt* (2014).

³² CAC Conference Room Paper No. 15, *Review of implementation of the United Nations Convention against corruption*, 18 November, 2019, 4.

the draft law suggested classifying conflict into either absolute or relative with the cabinet having the mandate to apply the classification on case-by-case basis.³³ If it is absolute, divestment would be the remedy and if it is relative conflict of interest, then the remedy would be disclosure. Since members of the cabinet were to be bound by this law, leaving its implementation to the cabinet would lead to a conflict of interest.

Egypt also established a Sub-Coordinating Committee For Prevention and Combating of Corruption whose objectives include strengthening domestic cooperation in the fight against corruption. In its 2019 Report, the Committee indicates that this objective sets out to improve the approaches to conflict of interest. The report points out that the lack of a deeper understanding on how to legislate on sensitive issues such as conflict of interest played a key role in the failure in previously stunted frameworks purposed to mitigate the issue.³⁴

The anti-corruption strategy in correcting its errors aims at activating mechanisms to ensure that there is no conflict of interest in government agencies. This is through the commissioning of government organizations that have a unit to enforce laws and address conflict of interest within government agencies.³⁵

Despite these measures, Hafez was sceptical that the law prohibiting conflict of interest would have any impact given that corruption was deeply ingrained in Egypt and therefore the new law would end up being one more law beset by lax enforcement.³⁶ The new law must be accompanied by structures and systems that ensure enforcement.

C. Nigeria: Interests in Procurement Law

In the fifth schedule, Part I of the 1999 Constitution of the Federal Republic of Nigeria, there is a provision for a code of conduct for public officials

³³ Hafez T, 'Draft law targets conflict of interest' Business Monthly, October 2011 <https://www.amcham.org.eg/publications/business-Monthly/issues/190/october-2011/2743/draft-law-targets-conflict-of-interest> on 8 March 2022.

³⁴ *Egyptian National Anti-Corruption Strategy*, The Sub-Coordinating Committee for Prevention and Combating of Corruption Cairo, 2019.

³⁵ *Egyptian National Anti-Corruption Strategy*, The Sub-Coordinating Committee for Prevention and Combating of Corruption Cairo, 2019.

³⁶ Hafez T, 'Draft law targets conflict of interest' Business Monthly, October 2011 <https://www.amcham.org.eg/publications/business-Monthly/issues/190/october-2011/2743/draft-law-targets-conflict-of-interest> on 8 March 2022.

which states that public officers should not put themselves in positions where their personal interests conflict with their duties and responsibilities. Besides this constitutional provision, there are statutes that prohibit conflict of interest and obligate leaders to disclose where dealings are likely to compromise their proper execution of office. The principal statute dealing with this issue is the 2007 Public Procurement Act which outlines a code of conduct at section 57. The section details what constitutes conflict of interest in public procurement and provides measures to be taken to mitigate it.³⁷ In defining conflict of interest, this provision includes the misuse of confidential information to confer unfair advantage to certain parties in the procurement process. There are grave penalties where a public officer is found to have committed offences due to conflict of interest. These include prison sentences and fines. Despite the elaborate legal provisions, Okunrinboye opines that though the country has sufficient measures enshrined in statutes, implementation has been deficient. The politically charged climate works on 'favours': a practice that has stunted efforts to combat fraudulent activities arising from conflict of interest.³⁸ Conflict of interest need to be concretely addressed. In his article, Okunrinboye reveals that the issue of corruption is prevalent in Nigeria due to the lack of enforcement of proposed schemes aimed at mitigating the vice. He expounds that conflict of interest is prevalent with different manifestations: those in public service receive gifts and are compromised in convoluted political plays. He suggests that to mitigate the vice there needs to be a mechanism that targets the leaders, correcting their malicious behaviour by enforcing punitive measures.

D. South Africa: A layered statutory approach

The 1996 South Africa Constitution states that, public officials are not to act in any way that is inconsistent with their office or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests.³⁹ Conflict of interest is considered to arise when private and personal interests contradict the obligations that arise from being in public office. The Local Government: Municipal Finance Management Act of 2003 mandates the compulsory disclosure of any conflict of interest prospective

³⁷ Section 57, *Public Procurement Act* (2007).

³⁸ Okunrinboye O, 'Nigeria: A conflict of interest' *The Guardian Nigeria*, 23 June 2017 <https://guardian.ng/opinion/nigeria-a-conflict-of-interest/> on 8 March 2022.

³⁹ Article 96, *Constitution of South Africa* (1996).

contractors may have in specific tenders and the exclusion of such prospective contractors from bidding in those tenders.⁴⁰

The Prevention and Combating of Corrupt Activities Act makes it an offence for public officials to hold a private interest in any contract, agreement or investment emanating from or connected with the public body in which he or she is employed.⁴¹ In light of the fact that not all conflict of interest poses a threat to the objectivity of those in public office, exceptions are made. The code of conduct for public servants sets out to help public officials discern and avoid instances that would compromise their execution of office, especially those arising from conflict of interest.⁴²

Additionally, the Executive Members Ethics Act of 1988 makes further stipulations as to how conflict of interest is to be handled by those in public office. The statute specifies that cabinet members are prohibited from exposing themselves to any situation that involves a risk of conflict. Section 2 of this statute further creates a duty to disclose all financial interests when assuming office. Section 3 mandates the public protector, a role provided for under article 181 of the 1996 constitution, with the task of investigating any breaches to the code of ethics set out in the statute since such breaches constitute engagements contradicting public interest.

E. The Democratic Republic of Congo

In Central Africa, the Democratic Republic of Congo has only acceded to the UNCAC.⁴³ Under the Constitution of Congo Articles 96 & 97, the functions of the President of the Republic and Member of Government, are incompatible with the exercise of any other elective office, any public, civil or military employment and any professional activity and any responsibility within a political party. The only exceptions to this requirement for a member of government, as stipulated under Article 97, are agricultural, manual, cultural, educational and scientific activities.⁴⁴

⁴⁰ Section 112 (1) (j), *Municipal Finance Management Act* (2003).

⁴¹ Section 17, *Prevention and Combating of Corrupt Activities Act* (2004).

⁴² Chapter 2, *Public Service Regulations* (1999).

⁴³ UNODC: <https://www.unodc.org/unodc/en/corruption/ratification-status.html> on 30 August 2021.

⁴⁴ Article 96 and 97, *Constitution of the Congo* (2006).

Article 98 of the Constitution further requires that during their terms in office, the President of the Republic and the Members of the Government may not by themselves or through a third person purchase, acquire in any other manner or lease an asset which belongs to the State, the provinces or the decentralized entities.⁴⁵ They may not be a party, either directly or indirectly, to public contracts for the benefit of administrations or institutions in which the central authority, the provinces or the decentralized administrative entities have an interest.

Under Article 99 of the Constitution, the President and the members of Government are required both before their accession to office and on the expiration of their tenure, to submit to the Constitutional Court a written declaration of their family fortune, listing their movable assets, including company shares and interests, obligations, other assets, bank accounts, their immovable assets, including undeveloped lands, woods, plantations and agricultural lands, mines and other immovable property, by indicating the relevant title. It is peculiar that under the Constitution, the family fortune includes the property of the spouse in accordance with the relevant rules on matrimonial property, of the children who have not yet reached maturity and of the children, even those who have already attained maturity, for which the couple is responsible. If such information is not received within a period of thirty days, the relevant person is deemed to have resigned from office. In case the office holder fails to declare or makes a fraudulent declaration or there is discovered unjustified enrichment, the matter is referred within thirty days from the expiry of the functions to the Constitutional Court or the Court of Cassation (Cour de Cassation), as the case may be.

While Congo has only acceded to the UNCAC, it has endeavoured to secure provisions dealing with conflict of interest in its Constitution. It is however interesting to note that while in other countries, for example Kenya, the provisions on conflicts of interest are blanket for all state officials, in Congo the provisions are specific to the President and Members of Government only.

F. A mini-case study: Disclosure of beneficial ownership of companies in Kenya

Disclosure of beneficial ownership is a robust tool for addressing corruption and conflict of interest in the public sector. In the extractives sector,

⁴⁵ Article 98, *Constitution of the Congo* (2006).

it seems to be legally entrenched in several countries although its implementation leaves a lot to be desired. A briefing by the Natural Resource Governance Institute (NRGI) found out that about 25 mining and oil laws of natural resource-rich countries ‘contain prohibitions on government officials or their close associates – often called ‘politically exposed persons’ (PEPs) – from holding interests in companies applying for extractives licenses, but none required regulators to actually check whether or not such PEP interests existed as part of screening license applications’.⁴⁶

The mechanism of declaration of beneficial ownership has its genesis in the requirements of the Financial Action Task Force (FATF) on International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation. FATF recommends that Member States should take measures to prevent the misuse of legal persons for money laundering or terrorist financing. Member States should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. In particular, member states that have legal persons that are able to issue bearer shares or bearer share warrants, or which allow nominee shareholders or nominee directors, should take effective measures to ensure that they are not misused for money laundering or terrorist financing.

Informed by this recommendation, section 93A of Kenya’s Companies Act, 2015 was introduced in July 2019, through the Statute Law (Miscellaneous Amendments) Act. This provision requires all private companies to disclose their beneficial ownership to the registrar of companies. Section 3 (1) of the Companies Act defines a beneficial owner as ‘the natural person who ultimately owns or controls a legal person or arrangements or the natural person on whose behalf a transaction is conducted and includes those persons who exercise ultimate effective control over a legal person or arrangement’.⁴⁷

The impact of the establishment of a beneficial ownership register to the fight against corruption has been positive in other jurisdictions with Beneficial

⁴⁶ Westenberg and Sayne, ‘Beneficial Ownership Screening: Practical Measures to Reduce Corruption Risks in Extractives Licensing’ Natural Resource Governance Institute (NRGI) Briefing, 2018, 17.

⁴⁷ Section 3(1), *Companies Act* (2015).

Ownership declaration requirements contributing to resolution of issues of conflict of interest and tracing illicit financial flows.⁴⁸

In the recent, past public officers in Kenya have hidden behind the corporate veil of companies and used companies to trade with the government without disclosing conflict of interest. These companies are wholly or substantially owned by them or by their close allies and relations. The corporate veil of companies has been used to hide conflict of interest and tenders have been awarded to companies that were owned by persons who have a conflict of interest because the beneficial ownership of the company was unknown. This was also aided by the fact that persons held shares in companies through proxies. Therefore, it was not easy to establish the true beneficial ownership.

It is anticipated that the declaration of beneficial ownership will increase transparency and resolve issues of conflict of interest and illicit financial flows. However, the challenge that faces the declaration of beneficial ownership in Kenya is that it is fully dependent on self- declaration. The only incentive that exists is the imposition of a fine to any company that fails to update its beneficial ownership status.

Further, the accuracy of the information provided by the companies ought to be verified in order to ascertain its credibility. Companies may fail to disclose their real beneficial ownership therefore curtailing the achievement of the desired results. Secondly, the information on beneficial ownership is not accessible to the public as stipulated under Rule 5 of the 2019 Companies Beneficial Ownership Regulations. This means that if you perform a search on a company, you are only able to access details of its shareholding and not details of its beneficial owners.

However, it is important to note that in jurisdictions where beneficial ownership registers have been introduced with success, for example in the UK, the information on the register is made freely available to the public under an open data licence; this means that the data can be accessed and used by members of the public without any restrictions. Publishing the registry as open data also allows journalists or civil society organisations to analyse the database as a whole, rather than just viewing each company individually, which increases transparency and reduces the risk of conflict of interest.

⁴⁸ United Nations office on drugs and crime (UNDOC), *Report of the international expert group meeting on beneficial ownership transparency*, 2017 https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf on May 2021.

IV. Conclusions

It is a pity that many people who are entrusted with discretionary powers are more oft than not hard put to identify and deal with situations of conflict of interest. Such persons may get caught up in scandals which they could have avoided if they knew that a certain situation would give rise to a conflict of duty and personal interest. Public officials need ethical training aimed at equipping them with the sixth sense to detect potential conflict of interest as well as a bag of tools to enable them avoid such situations or at least know how to manage them.

The most appropriate remedy is to avoid situations of conflict since public officers are leaders and once they are caught up in questionable situations they risk losing their moral authority which is necessary for good leadership. Their juniors are likely to lose confidence in them and may lower their esteem for them. If this happens, the leaders would find it very difficult to direct the workforce towards achieving the goals of the public entity or organ.

There are other solutions which are not always fool proof and generally the leader should only have recourse to them as a last option. These solutions may be used where the conflict is already in play i.e., it cannot be avoided. One such solution is to disqualify oneself from the panel of decision makers where a conflict of interest exists or is likely to arise. However, this option may not be available for persons holding senior positions since the panel of decision makers may be composed of people who are junior in rank. Such people may then feel antagonized if, for instance, they have to return a negative verdict in the case of an applicant who is related to a senior public officer in government. For instance, consider a situation whereby the wife of the director general of a government agency runs a consultancy firm which bids for a contract from the agency. If some junior employees are to evaluate the bid, they may find it particularly difficult to report to the director general if they conclude that the consultancy firm run by his wife is not competent or up to scratch. We can therefore conclude that in such a case, the wife of the director general would be well advised to keep out of any deals/transactions with the company run by her spouse.

In the final analysis, one may pose the question: how then do we help those who are close to us without getting entangled in situations of conflict of interest? The first solution is to be enterprising and create opportunities using personal resources. Such opportunities may then be availed to those people

whom one feels are close to him/her or can confide in. In family businesses, the issue of conflict of interest with relation to employment opportunities does not arise. Therefore, a public officer may use a family business to assist relatives while ensuring that the family enterprise does not get involved in government contracts.

Where the job in question can be done by any person (where no particular skill set is required) then the problem of conflict of interest is minimized but not eliminated. People may still be scandalized if a particular class of junior staff is composed largely of people from a particular ethnic group or are the friends of a senior employee.

Values and principles of governance, like the ones outlined in the 2010 Constitution of Kenya, would serve a great role in this issue if well inculcated in the lives of public officers. Values such as social justice, equality and non-discrimination are at the core of the repertoire of tools available to an individual public servant to resolve and avoid conflict of interest. Public officers are employed to act only in the interest of those who employ them (the general public) and it will be inappropriate for them to make decisions whose sole purpose is to advance some personal or parochial motive. Once employed, the person must give the employer what is due to them.

Recommendations

This chapter has shown that there is no shortage of law on the issue of conflict of interest in different regions of the African continent. However, what is lacking is fair, efficient and equitable implementation of that law. This lack of implementation has led to the pervasiveness of conflict of interest which indeed breed corruption and subvert public welfare. Novel solutions within the legal frameworks are necessary to concretise workable ways of dealing with conflict of interest.

Since law operates within a social, economic, and political context, it would be necessary to map out the various stakeholders involved with conflict of interest and design systems and incentives geared towards achieving the purposes of the law. Some of the stakeholders are international organisations such as the UN, the World Bank and the IMF which more often than not finance various development projects in Africa. Their involvement is likely to bear fruit whenever they, for instance, require African Countries to implement certain policies or conditions of lending or of financial aid. Conditions for funding and

donor aid could target the elimination of situations of conflict of interest. In countries with devolved governments, the structures in place to bring accountability between the national and the devolved units could also go a long way in resolving the issue of conflict of interest.

Bilateral relations between developed and developing countries through diplomatic missions have also served to raise awareness on this issue and ultimately seek more accountability regarding government contracts.

The declarations of wealth and of beneficial ownership in companies should also be availed on public websites as is the case in the United Kingdom. Publicity of such data will serve as a check on public officers who may be tempted to entertain and profit from situations of conflict of interest. For the Public to make optimal use of such information, there is a need to enhance the capacity of the citizenry through enlarged access to basic and tertiary education. This makes civic education more palatable and with time it could create a populace that has the capacity to hold government officials accountable and this will lead to a reduction in cases of conflict of interest.