Rethinking the Conflict of Interest Policy in Kenya

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Abstract: *Corruption in public service in Kenya has become a bad cancer. The recent increase in the number of corruption cases has not only been disturbing nationally but has also raised emotions globally. Despite the enactment and enforcement of several acts of parliament to address the issue of corruption, the problem has continued to grow deeper into the society. Government jobs and tenders have become the most lucrative and attractive spaces as they provide a window for a person to amass wealth faster. In the last two years, there has been public outcry by the members of public, the opposition arm of parliament, the civil societies, the diplomats, the rights activists' groups and the media who fear that a few individuals, families and tribes are the sole beneficiaries of the opportunities in the public service. The main problem involves hiring and awarding tenders to relatives, tribe-mates and friends of senior public officials, which amounts to corruption as a result conflict of interest. This paper analyzes the problem of conflict of interest in the African context, the gaps in the existing conflict of interest policy and further proposes how the public service can address this ethical issue. It mainly draws from secondary data, journal and readings, and examples of similar or closely related cases to build a solid model which can be adopted to address this ethical issue. It considers the cultural context of Kenya in which Ubuntu philosophy cannot be overlooked.*

1. INTRODUCTION

Corruption in public service in Kenya has become a bad cancer. The recent increase in the number of corruption cases has not only been disturbing nationally but has also raised emotions globally. Despite the enactment and enforcement of several acts of parliament to address the issue of corruption, the problem has continued to grow deeper into the society. Government jobs and tenders have become the most lucrative and attractive spaces as they provide a window for a person to amass wealth faster. In the last two years, there has been public outcry by the members of public, the opposition arm of parliament, the civil societies, the diplomats, the rights activists' groups and the media who fear that a few individuals, families and tribes are the sole beneficiaries of the opportunities in the public service. The main problem involves hiring and awarding tenders to relatives, tribe-mates and friends of senior public officials, which amounts to corruption as a result conflict of interest. This paper seeks to analyze the problem of conflict of interest in the African context, the gaps in the existing conflict of interest policy and further propose how the public service can address this ethical issue. It shall mainly

draw from the secondary data, journal and readings, and examples of similar or closely related cases to build a solid model which can be adopted to address this ethical issue. It shall also consider the cultural context of Kenya in which Ubuntu philosophy cannot be overlooked.

This paper shall try to define and analyze the problem of conflict of interest as in the public service the code of ethics and context, as well as other country's definitions. It shall also find the gaps that allow for this ethical issue and make recommendation to the government on how to manage the present and future conflict of interest in the public service.

2. DEFINING AND ANALYSIS OF THE CONFLICT OF INTEREST PROBLEM

Defining conflict of interest is becoming more complex yet very important in public service. According to OECD (2003) - A conflict of interest involves 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.

A conflict of interest can either be current or anticipated which can be described as actual, potential, apparent or perceived conflict of interest (OECD 2003 & State Government of Victoria 2009). This definition ensures that officials are not only careful at the present but also inculcate a culture of ethics in their official duties when engaging in future prospects.

The definition of conflict of interest can be better understood by first understanding its three main elements; conflict, interests and perceptions. Stark (2000) cited by Boyce and Davids (2009) refers interests as "encumbrances on a public officer in the performance of official duties". Normal human beings have different and multiple interests in a complex world. However, there are private interests that raise concern because more often than not, they interfere with the proper performance of a public officer's official duty. Stark (2013) refers to interests as "whatever it is that threatens to impair an individual's judgement". Interest may emanate from enmity or friendship and may have financial or non-financial benefits. State government of Victoria legislation (2009) points out that private interests not only include employee's personal interests but also the personal interests of individuals or groups who are closely associated with the public servant. Thus, definition of private interests goes beyond the public servant to incorporate the interests of their friends, enemies, relatives, community and any associated entities, registered or not.

Conflict on the other hand occurs when the judgement of an individual is deemed to have been impaired by a private interest (Stark 2013). Thus, if an interest does not impair the judgement of a public servant during his performance of official duty, then it does not raise any conflict. OECD (2003) notes that a conflict of interest is not corruption. But if inadequately managed, it can result to corruption. Thus, there is a possibility of a public servant to possess an interest that can affect his performance of public duties yet be a person of sufficient integrity if he denies it the capacity to impair his judgement (Stark 2013). Conflict of interest can be actual, apparent, potential or perceived. Actual conflict of interest is one where there exist real conflict of interest, potential conflict of interests is where an employee has interests that could conflict with his public duties, an apparent conflict of interest is where it appears that a public official has private interests that could influence the performance of their public duties but this is not in fact the case, and perceived conflict of interest is where a third party could form an opinion that a public official's private interests could influence the performance of their public duties at present or future (OECD 2003 & State Government of Victoria 2009). Either way,

conflict of interest can be very subtle yet it has the potential of becoming a major obstacle to effectiveness of public administration if not adequately addressed.

3. CONFLICT OF INTEREST IN THE AFRICAN CULTURAL CONTEXT

Managing conflict of interest in any public service can be difficult and complex in public service. This is because, many functions of public service are carried out within broad realm of judgement and discretion on the part of individual public officials, while on the other hand, it is within this discretionary realm that individuals may have the greatest capacity to benefit private interests (Boyce & Davids 2009).

Of importance, also is that people's moral values are heavily informed by their cultural values. This becomes more complex in a socialistic society like Kenya in which the 'Ubuntu principle' typically characterized as a communitarian philosophy that emphasizes virtues such as compassion, tolerance and harmony (West 2013), is the basic philosophy of life through which morals are communicated to the community through actions, stories, proverbs and initiations. Mbiti (1995) best refers it to the "'I am because we are' philosophy where the two dimensions of 'I am' and 'We are' are observed and maintained for the survival of all". It affects all aspects including family and community support. Those who 'have' in the community are expected to support the other members of the community because all that they have belongs to the community and the community belongs to them. For instance, those in senior positions in government agencies are expected by their families and communities to use their influence to help those who are unemployed to get into employment.

In as much Ubuntu teaches that to be a human being is "to affirm one's humanity by recognizing the humanity of others" (West 2013), it is worth noting that presence of different tribes makes the principle even more complex and the 'I' and 'We' terminologies are normally made in reference to 'our' tribe or family in relation to the other tribe or family commonly referred to as 'them' or outsiders. Thus, people are loyal to their families/tribes and their teachings, and treat those from their families/tribes as insiders while others are treated as outsiders, they are supposed to act in such a way that develops their community and promote harmony. Metz (2007) in his analytical interpretation of the Ubuntu stipulates, "An action is right just in so far as it produces harmony and reduces discord; an act is wrong to the extent that it fails to develop the community". Harmony here is with reference to one's own people. West (2013) acknowledges that, in a society in which shared identity and good will are the primary moral considerations, preferential hiring or procurement policies by public officials in which they favor their families and friends may appear to be morally appropriate. Thus, the African communitarian way of life is a major contributing factor in the challenge facing the implementation of the conflict of interest policy in the public service of Kenya.

Although the Leadership and Integrity Act, 2012 which guides the way public servants should conduct themselves when in office and guides the formulation of codes of ethics of different government sectors does not comprehensively define conflict of interest, article 16 tries to interpret what the law would call or not call conflict of interest. Article 16(1-2) states;

(1) A State officer or a public officer shall use the best efforts to avoid being in a situation where personal interests conflict or appear to conflict with the State officer's or public officer's official duties.

(2) Without limiting the generality of subsection (1), a State officer or a public officer shall not hold shares or have any other interest in a corporation, partnership or other body,

directly or through another person, if holding those shares or having that interest would result in a conflict of the State officer's or public officer's personal interests and the officer's official duties (Government of Kenya 2012).

These clauses seem to refer to actual conflict of interest and do not seem to cover situations of potential, apparent or perceived conflict of interest. The clauses also seem to have a narrow perspective in terms of who, with reference only to family members, partnerships or companies. It leaves the possibility that conflict of interest can emanate from tribes, friends and even enemies. The complaints received by the anti-corruption body can be possible result of conflict of interest that is not completely or adequately covered by the law.

Consider a case where a public official has an idea that public jobs are being advertised and has actual insider information of eligibility criteria. If the officer informs his relative or neighbor who is qualified of the position and leaks some interview tips to him, at the same time he is in the interview panel, then there exists an actual conflict of interest. If the relative came to know about the positions through the local paper, made an application without knowledge that the public officer is in the interviewing panel, then there exists a potential conflict of interests which if not addressed before hand could push the public servant into an actual conflict of interest especially when the temptation of the relative getting the position overrides his official duty requirements. There will always be an escape route when the law is open to manipulation by the public servant. A public servant could easily argue that such conflicts or coincidences will often occur, then they let it pass hoping to put more safeguards in the future. This could happen in job offers or contracts procurement. Atkinson & Fulton (2013) argues that leaving the regulations open and conceiving ethical lapses as the product of ill-conceived processes and then requiring that all other future procedures contain additional safeguards will create unhelpful redundancy and contribute to a web of rules. Thus, conflict of interest ought to be addressed exhaustively by developing an effective conflict of interest policy that fosters public confidence in the integrity of government institutions and agencies and the integrity of its officials and public decision making (OECD 2003). Public institutions ought to "engender a moral intensity based ethic paradigm … which must promote a standard of behavior and decision making objectively assessable given situational moral intensity, influencing a leader's moral judgement, intentions and subsequent behavior" (Tomescu & Popescu 2013). Failure to do this makes government officials not only "break, ignore or subvert public procedures, but also reframe the outcomes so that public objectives and personal interests conveniently converge" (Atkinson & Fulton 2013). There is also a danger of accepting the situation as part of the process which slowly makes conflict of interest understandable and justifiable in the public sector. When a public sector gets into this stage, then the conflict of interests amounts to corruption especially when it is very deliberate and there is high level of tolerance within the service. The officials also collude with one another in the same practice by making 'do me, I do you' deals where when a department is employing or awarding contracts, one considers her colleagues friends or relatives and when it is the turn of the other department, then the rewarded employee should pay back by taking in people from the rewarder's side. This becomes a complex and subtle problem to deal with because deals are struck outside office and there is no evidence that there was collusion or that employee is involved.

4. POLICY RECOMMENDATIONS: ADVICE TO THE GOVERNMENT

From the analysis above, the minister has three ethical issues to deal with which are all related or emanating from conflict of interest. He has conflict of interest itself to deal with, cultural and moral definitions of ethics, and corrupt officials.

From the description in Leadership and Integrity Act (2012), conflict of interest is only defined or addressed as actual, where there exists a real conflict of interests. There are no safeguards that could help prevent future occurrence of conflict of interests whether anticipated or perceived. There is therefore need for the government to expand the definitions of conflict of interest and add in some other definitions like potential, apparent and perceived conflict of interests and also put in measures how to address these types. This will help in fostering public confidence in the integrity of the government agencies, its officials and public decision making (OECD 2003 & State Government of Victoria 2009). The government should first come up with the core principles for managing conflict of interest which includes; serving the public interest, supporting transparency and scrutiny, promoting individual responsibility and personal example and engendering organizational culture which is intolerant of conflict of interest (OECD 2003). Second, the ministry should develop a policy framework of reference in defining, identifying, managing and resolving conflict of interest situations in place of work, and set clear rules on what is expected of a public official in situations of conflict of interest (ibid). This framework should take into account the African cultural practices which conflict with the definitions.

Thirdly, and most important is the implementation of the policy framework. The commitment of the executive, the officials and other stakeholders is paramount to effective implementation. Partnerships need to be created not only with employees but also with the public and civil society to ensure wide and proper understanding of the policy within the public circles. This is because, it is one thing for the employee to implement but it is another thing to deal with the expectations of the community. The communities need to understand that their demands risk their person losing his/her position, which is against the Ubuntu philosophy. They also need to understand the Ubuntu philosophy need to be exercised to all other human beings not the human beings they associate with or they have common ties. This is because Ubuntu philosophy advocate for harmony, inclusiveness and tolerance which may be used to apply to all people in Kenya. Treating all as equal and insiders not only ensure harmony but also inclusiveness (West 2014). Giving it this approach may yield greater results in having a public that understands the impact of conflict of interest and hence be the first to enforce the conflict of interest policy.

Fourthly, the government needs to have all the officials mentioned adversely re-investigated, and where there is actual corruption, they are charged in accordance to the law. All the current un-awarded tenders and job offers should be recalled and the jobs and tenders re-advertised again. The government at this level should require all employees in the affected ministry declare their conflict of interest in accordance to the definitions of the new conflict of interest policy framework. Safeguards need to be put in place to ensure that confidential information will not be accessed and used by any officials to gain personal advantage. This way, the ministry will not only strengthen the adherence of public officials to ideals of legitimacy but will also foster public confidence in the integrity of government institutions, officials and decision making (OECD 2003). The public loses confidence in the government if there seem to be no action being taken against such cases of corruption whether real or perceived. The vice versa produces positive results.

5. CONCLUSION

This paper has defined the problem of conflict of interests, analyzed the problem from Kenyan policy and African cultural context. The paper concludes with advice provided to the government on how to address the problem of conflict of interest given the cultural dynamics

of Kenya. Key point to note is that conflict of interest can take different adaptations depending on the cultural context of the public officials. There is therefore need for every government to study its culture to inform the policy makers of the anticipated forms of conflict of interests and how they can be addressed using contextualized practices. This way there is not only harmony among the stakeholders but the rule of law is also upheld.

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