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REGULATING CONFLICTS OF INTEREST: COULD DO BETTER?

by

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Summary

Conflicts of interest in public office, and how to regulate them, are issues all countries face. This paper evaluates the effectiveness of Ghana's current system for managing conflicts of interest. First, the legal framework, together with the mandate, independence and enforcement capacities of institutions charged with addressing conflicts of interest, are examined. Next, drawing on evidence, a case study approach is adopted to explore how oversight institutions have addressed issues of conflicts of interest with respect to senior public officers. Finally, reform proposals are put forward. The paper argues that Ghana's existing system for regulating conflicts of interest has been ineffective and done little to stem the perception of corruption. The paper concludes that real political commitment is needed to introduce a clear and effective framework for the management of conflicts of interest in public office.

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INTRODUCTION

In December 2004, BBC News published an article on its website titled "What if Blunkett were African?" The commentary centred on a conflict of interest saga involving David Blunkett, a former British Home Secretary. Over the course of an affair with a married woman, Blunkett, it was alleged, had abused his office by facilitating the visa application of his lover's nanny. Independent investigation into the matter uncovered an email to the former Home Secretary's office which suggested the application had been fast-tracked. The revelation of this piece of evidence led to Blunkett's resignation. What the BBC article sought to emphasize was that in most African countries, if a Minster had facilitated the visa application of an acquaintance, it would have been a non-story. Indeed, the consensus from an online debate on the article, which received comments from a diverse number of Africans, confirmed that in most parts of the continent a Minister would not have been censured. What explains this trend?

The Blunkett saga reveals that conflicts of interest among public officers have little to do with being 'African'. Rather, the consensus that it will not have received attention in an African setting raises questions about the durability of the framework for tackling conflict of interest. In the case of Ghana, even though the Constitution stipulates procedures to regulate ethical standards in public office, reported cases of unethical conduct - especially corrupt conflict of interest scenarios - have been rife. Conflict of interest can be defined as "a situation in which a public official has a private or other interest which [may] influence - or appear to influence - the impartial and objective performance of his or her official duties" (Reed 2008:7). A theoretical example will be the case where a government official sits on a public tender board that considers a bid by a company in which the official has ownership or a stake. Even if the government official does not utilise his or her public board position for private benefit, a conflict of interest situation still arises. This is because of the perception that the tender process may be influenced for personal gain. It has to be clarified that a conflict of interest situation does not necessarily imply corrupt behaviour - although in some cases it could trigger corruption. It is along this line that disclosure of interests has been used as a key anti-corruption mechanism and, also, as a tool to regulate potential conflict of interest scenarios.

The literature on conflict of interest regulations presents varied viewpoints. Scholars such as Ayee (1997:370) argue that, despite their noted shortcomings, ethical codes have, increasingly, been introduced in Africa "where unethical behaviour has been a hallmark of public service". On the other hand, Wamala (2008) emphasizes that anti-graft measures need to take into account socio-cultural issues and concerns which appear to overlook unethical behaviour such as corruption. Thompson (1992) however suggests that ethics regimes need to move beyond legislation and enforcement and incorporate a significant education element for government employees on their responsibility to act in the public interest.

This paper evaluates the effectiveness of Ghana's current system for managing conflicts of interest. The sections that follow will apply both a theoretical and an evidenced-based approach. First, the legal framework, together with the mandate, independence and enforcement capacities of institutions charged with addressing conflicts of interests, are examined. Next, drawing on evidence, a case study approach is adopted to explore how oversight institutions have addressed issues of conflicts of interest vis-à-vis incumbent elites. Finally, reform proposals are put forward.

LEGAL FRAMEWORK

> We are told the current practice [disclosure of interest] is that you fill in the form, you seal it, you give it to the Auditor-General and then they are locked to gather dust. If that is all the nation wants to do, then I am afraid we do not need to spend our hard earned resources for such an exercise.
>
> Felix Owusu-Adjapong (Member of Parliament, NPP Akim-Swedru) Parliamentary Debates, 18 March 1998.

Article 284 of the 1992 Constitution states that "a public officer shall not put himself in a position where his personal interest conflicts or is likely to conflict with the performance of the functions of his office." The Constitution together with the *Public Office Holders (Declaration of Assets and Disqualification) Act, 1998* (Act 550) also requires senior public officers to make a written declaration of their assets and liabilities before taking office, at the end of every four years and on completing their term of office.[1] Although these declaration documents are to be submitted to the Auditor-General, they remain sealed and are not verified thus creating a system of 'self certification'. In fact, there is little evidence of compliance.[2] The documents are only made available to a court, commission of enquiry or the Commission on Human Rights and Administrative Justice (CHRAJ) when requested as evidence in investigations.[3] Critics of Act 550 argue that due to its 'non-transparent' nature, conflict of interest situations involving senior public officers may not be easily recognised.

Whilst the current asset declaration legislation, Act 550, was under consideration in Parliament, the House rejected proposals that would have allowed public access to disclosures. This is what prompted the statement noted in the quote above by Felix Owusu-Adjapong, who made the case for a transparent asset declaration system during the Parliamentary consideration of the legislation. There was stiff opposition to the introduction of a transparent system and the

[1] The public officers required to make asset declaration includes: the President, Vice-President, Ministers of State, Members of Parliament, Presidential Aides, District Chief Executives, Ambassadors, High Commissioners and Heads of State-owned Enterprises. It is important to note that both the Constitution and Act 550 do not clarify what conflict of interest entails.
[2] Ayee (1996:372) details enforcement problems associated with asset declaration with an example that, six months after the 1992 Constitution came into force, "three-quarters of senior public officers required to declare their assets had failed to do so."
[3] CHRAJ is charged by the Constitution to investigate complaints of contravention of the code of conduct for public officers, which includes conflict of interests.

Rawling-led NDC regime supported Parliament in rejecting such a structure. The then NDC Minister of Justice and Attorney-General, Obed Asamoah, echoed the views of most Members of Parliament when he argued that making the system transparent would be an invasion of privacy (Parliamentary Debates, 18 March 1998). The then Majority Leader in Parliament, J.H. Owusu-Acheampong, also attempted to rationalise why such a system was not practical by dramatically noting that "somebody can look at it [asset declaration] and go and organise thieves to steal the properties" (Parliamentary Debates, 18 March 1998).

What appeared inconsistent was that the Rawlings-led NDC government, which comprised former PNDC members, had previously promulgated a more stringent asset declaration system under the *Public and Political Party Office Holders (Declaration of Assets and Eligibility) Law 1992* (PNDC Law 280). Under this system, declarations were transparent, as the Auditor-General was required to publish the asset declared by public officers within 14 days of receiving the forms. While Act 550, which repealed the PNDC law appears at face value to be watered-down, the effect of Law 280 was generally viewed as flawed. This is because declarations were not verified and some senior public office appointees declared assets that portrayed them to be impoverished. For example, disclosures made by senior officials in 1992 and published in the *Ghana Gazette* (7 October 1992) led to considerable head-scratching. Key members of the PNDC made declarations, not including real estate, which they were widely known to hold. In one case, a senior member of the PNDC regime declared a radiogram among the significant assets owned. The bank balances declared by other long serving members of the regime amounted to less than one month's pension of a retired civil servant. There was, arguably, a general mood of public cynicism which was reflected in the private press; this may have been the reason why some Ministers later accepted that they had made mistakes on their submitted declaration forms.[4] Overall, the main lessons emerging from the preceding assets regime was that, despite its transparency component, the lack of verification undermined its credibility.

POLICY VS. PRACTICE

CHRAJ, as the key agent charged with investigating conflicts of interest in public office, provides us with some practical evidence. The Commission's reports, for example, offer an insight into conflict of interest situations in Ghana's local government system of District Assemblies (DAs) which have been manifested in contract and procurement fraud. In one case, CHRAJ reported that "an Assembly member", who was also the chairman of a DA finance and administration sub-committee, had formed a company that was executing contracts awarded by the Assembly (CHRAJ 1996a:51).[5] CHRAJ investigations uncovered that in the same month the company was established, it was awarded a construction contract in the electoral area of the

[4] *The Ghanaian Chronicle*, 26 October 1992 p.1.
[5] For unexplained reasons, the Commission did not name the DA or Assembly member in this case.

Assembly member in question. In its ruling on this matter, no disciplinary action was taken by CHRAJ; the Assembly member was only issued a warning. The Commission, however, stressed that "the practice of DA[s] awarding contracts to its own members did not augur well for the fair and smooth administration of the DA[s]" (CHRAJ 1996a:52). It is worth pointing out that similar conflict of interest cases are replicated at the national level.

Investigations conducted by the Serious Fraud Office (SFO) have also exposed various conflict of interest scenarios.[6] In one case, the evidence from SFO investigations revealed that a public relations firm contracted by the Divestiture Implementation Committee (DIC) was only a vehicle for siphoning funds from the divestiture office.[7] The DIC contracted Goldcity Communications Group Limited (Goldcity) in the year 2000, for advertising, public relations and research functions. But records from the Registrar-General's department indicated Goldcity was registered and incorporated as a limited liability company just before being awarded the DIC contract. Siegfried Sedziafa, a full-time employee at the DIC, also worked for Goldcity - and was a signatory to its accounts. Between August and December 2000, the divestiture office made several payments to Goldcity under the pretext of public relations expenses. The SFO (2002:16) lists the total amount paid to Goldcity in different currencies as:

US$705,031.25; £39,169.80; ¢3.11 billion (estimated).[8]

There is little evidence to suggest Goldcity undertook any divestiture related duties, yet numerous 'consultancy' and 'public relations' payments were made to it. Tracing these payments led investigators to DIC officials. A US$42,000 DIC 'consultancy payment' to Goldcity, for example, was traced to the bank account of EMEFS Construction Limited, an estate developer (SFO, 2002). Questioned on the transaction, the managing director of EMEFS acknowledged that his company had not rendered services to Goldcity. Instead, the amount was reported to be a part payment for a house at Community 14, Tema. The owner of this property was Sedziafa, the DIC/Goldcity employee. The SFO probe also revealed that Sedziafa used a similar method to misappropriate about ¢1.5 billion from the DIC through Goldcity. Sedziafa was subsequently charged with causing financial loss to the state. Even then, he could not be prosecuted as he jumped bail. Comparable conflict of interest situations, backed by evidence, have been recorded across the public sector, yet most of these allegations are not investigated.

The above case studies, which are only meant to provide an insight into the issue under

[6] In September 2010, the SFO became the Economic and Organised Crimes Office (EOCO).
[7] The functions of the DIC include preparing state enterprises for divestiture, and overseeing the process of tendering, sale negotiations and payment associated with the process.
[8] Converting into a single currency, the payments to Goldcity were approximately US$1.4 million in total.

discussion, reveal how the absence of a robust monitoring mechanism constrains the effectiveness of the current regime. Further, they also illustrate how conflicts of interest may trigger corruption.[9] An enforced code of conduct remains fundamental to maintaining ethical standards in public office. Reform proposals may have to include a significant ethics education component, and a combination of monitoring and verification of public officers' interests. These key elements are missing from the Ghanaian regulatory framework. It is in this light that the next section outlines issues to consider in the area of ethics reform.

REFORM PROPOSALS

First, ethics education needs to be given primary consideration as a key tool in limiting conflict of interest scenarios. In fact there is a paucity of guiding principles for public officials, and CHRAJ attempted to fill this void by drafting a set of conflict of interest guidelines. Nonetheless, the Commission's proposals are neither binding nor far-reaching. Educating officials so that they have a clear understanding of ethics regimes and recognize the interests to declare remains essential. The evidence from recent high profile cases suggests senior public officers who have taken key decisions on sale of prime government real estate have been, apparently, confused on the conflict of interest implications their actions to acquire the same properties may entail.

While there are potentially numerous conflict of interest situations which cannot be covered by even the most comprehensive guidelines, there is a strong case for inculcating an ethical culture among public sector workers to make them aware of the standards expected of them. Ethics education needs to include all public sector workers - not only the category of public officers listed in Chapter 24 of the Constitution and Act 550.[10]

Education in this area should extend to guidelines on gifts public servants may or may not receive over the course of their official duties. Political parties may also have to consider tightening their ethics codes and hold their members to account, as part of the broad effort towards enhancing integrity in public office.

To support with the reforms in this area, the establishment of a government ethics bureau may be necessary. This unit can take on a proactive role by conducting orientation programmes on codes of conduct for public office holders, in addition to serving as an outfit where advice on asset declaration compliance can be sought.

[9] The case studies are only intended to demonstrate conflict of interest situations in public office and are by no means a selective indictment of the institutions cited.

[10] Reed (2008) makes the recommendation that code of conduct should form part of public sector officials' contractual obligation in order to limit the need for passing legislation.

Second, handing CHRAJ the responsibility for monitoring and verifying the asset declaration process may be necessary. In this regard, adequately resourcing CHRAJ with the capacity to carry out this task will be essential. A system must also be put in place to ensure a continuous process of disclosure - at least every six months - of all interests, gifts or favours received after the initial declaration has been made. Monitoring disclosures made by members of Tender Boards, especially at the district level, need to be given urgency, as this remains an area rife with conflict of interest.

Finally, excluding senior public officers from specific post-government employment, for a stated time period, may be essential. This is a necessary requirement to limit conflict of interest scenarios which may involve ex public sector employees exploiting strategic knowledge gained whilst in public service for private gain.

On the whole, a well-informed and enforceable code of conduct can help check potential conflicts of interest situations, and recriminations over illicit asset ownership which remain a hallmark of Ghanaian politics.

CONCLUSION

This paper attempted to evaluate Ghana's regime for regulating conflicts of interest in public office. The uncomfortable truth is that the current system has been ineffective and done little to stem the perception of corruption**.** This owes much to the synthesis of a weak disclosure framework and the lack of monitoring mechanisms. Reforms in this area need to acknowledge the fact that conflict of interest situations cannot be prevented. Thus, providing guidance on ethical standards and sensitization on codes of conduct will be key tools in managing unethical conduct in public office.

Ghana could do better in terms of regulating conflicts of interests in public office. What is required is a clear and effective framework. Enforcement measures, which entail verification of disclosures and monitoring compliance with the aim of making public officers accountable, are crucial. Yet, despite the protestations of good governance by successive governments, calls for change have not gained traction where it matters most - by securing political commitment. Reforms are long overdue. In Ghana’s interest, we hope that policy makers will reflect on the above proposals with urgency.

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