

Conflict of Interest and Public Office in Kenya

By: **Prof. Tom Ojienda, SC*** and **Lydia Mwalimu Adude****

Abstract

A confluence of private interest and public interest in a public officer results in conflict of interest. For a proper discharge of public duties by public officers, conflict of interest must be managed and regulated for the good of the public. This article is majorly triggered and influenced by Kenya's Conflict of Interest Bill, 2019. It focuses on the management and regulation of conflict of interest of public officers in the discharge of their official duties in Kenya, as depicted in the Constitution of Kenya, 2010 and relevant statutes, such as the Public Officer Ethics Act, 2003 and the Leadership and Integrity Act, 2012. In doing so, the article entails a comparative study of the management and regulation of conflict of interest for public officers in South Africa, Canada and the United Kingdom to tease out the best practices in that regard.

1. Introduction

This article is majorly triggered and influenced by Kenya's Conflict of Interest Bill, 2019 (COI Bill, 2019). It focuses on the management and regulation of conflict of interest of public officers in the discharge of their official duties in Kenya, as depicted in the Constitution of Kenya, 2010 (the Constitution) and relevant statutes such as the Public Officer Ethics Act, 2003 (POEA, 2003),¹ and the Leadership and Integrity Act, 2012 (LIA,

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East African Lawyer, Issue No. 6 at pages 52-56; “Where Medicine Meets the Law: The Case of HIV/AIDS Prevention and Control Bill 2003” published in *The Advocate* at page 36-40; “The Advocates Disciplinary Process-Rethinking the Role of the Law Society” published in *The Lawyer*, Issue No. 78 at pages 15-16; “Ramifications of a Customs Union for East Africa” published in *The East African Lawyer*, Issue No. 4 at pages 17-25; “Gender Question: Creating Avenues to Promote Women Rights after the Defeat of the proposed Constitution” published in *the Moi University Journal* Vol. 1 2006 No.1, pages 82–92; “Of Mare Liberum and the Ever Creeping State Jurisdiction: Taking an Inventory of the Freedom of the Seas” published in *the Moi University Journal* Vol. 1 2006 No. 1, pages 105 – 131; “Legal and Ethical Issues Surrounding HIV and AIDS: Recommending Viable Policy and Legislative Interventions” published in *The East African Lawyer*, Issue No. 12 at pages 19-24; “Implementing the New Partnership for Africa’s Development (NEPAD): Evaluating the Efficiency of the African Peer Review Mechanism” published in *the Kenya Law Review*, 2007 Vol. 1, pages 81-119; “Protection and Restitution for Survivors of Sexual and Gender Based Violence: A case for Kenya” (with R. A. Ogwang and R. Aura) 90 Pages, ISSN:1812–1276; “Legal and Institutional Framework of the TJRC - Way Forward” published in *the Law Society of Kenya Journal* Vol. 6 2010 No. 1, pages 61 – 95; “A Critical Look at the Land Question in the New Constitution” published in *Nairobi Law Monthly*, Vol. 1, Issue No. 1 of 2010 at pages 76 – 81; “Access to Justice in the Era of COVID-19: Adaptations and Coping Mechanisms of the Legal Services Industry in Kenya’ (with Lydia Mwalimu Adude) published in *Journal of Conflict Management & Sustainable Development*, Vol. 6, Issue 2, 2021, ISBN: 978-9966-046-15-4, pages 1-46; “Criminal Liability of Corporate Entities and Public Officers: A Kenyan Perspective” (with Lydia Mwalimu Adude) published in *Journal of Conflict Management & Sustainable Development*, Vol. 6, Issue 2, 2021, ISBN: 978-9966-046-15-4, pages 117-212; “Changes to Civil Litigation and Mediation Practice Under the Mediation Bill, 2020: What of the Right of Access to Justice and the Independence of the Judiciary?” published in *Alternative Dispute Resolution Journal (CIArb-Kenya)*, Vol. 9, Issue 2, 2021, ISBN: 978-9966-046-14-7, pages 44-65; “Access to Justice: A Critique of the Small Claims Court in Kenya’ (with Lydia Mwalimu Adude) *Alternative Dispute Resolution Journal (CIArb-Kenya)*, Vol 9, Issue 2, 2021, ISBN: 978-9966-046-14-7, pages 170-201; and a book Chapter entitled “Land Law in the New Dispensation” in a book edited by P.L.O. Lumumba and Dr. Mbondenyi Maurice.

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v. Attorney General & 5 others (Advisory Opinion Reference No 2 of 2014); Speaker of the Senate & another v Attorney-General & 4 others [2013] eKLR; Lemanken Aramat v. Harun Meitamei Lempaka & 2 others [2014] eKLR; Cyprian Awiti & another v. Independent Electoral and Boundaries Commission & 2 others [2019] eKLR; Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 3 others; Martin Wanderi & 106 others v. Engineers Registration Board & 10 others [2018] eKLR; Moi v. Rosanna Pluda [2017] eKLR; Town Council of Awendo v. Nelson O. Onyango & 13 others, among many others which are available at www.proftomojiendaandassociates.com. Prof. Ojienda, SC can be reached through tomojienda@yahoo.com.

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2012)². In doing so, the article entails a comparative study of the management and regulation of conflict of interest in South Africa, Canada and the United Kingdom to tease out the best practices in that regard.

The Merriam-Webster dictionary defines ‘conflict of interest’ as ‘a conflict between the private interests and the official responsibilities of a person in a position of trust’.³ Private interest is also known as ‘self-interest’ and is defined by the Merriam-Webster Dictionary as ‘a concern for one's own advantage and well-being’ or ‘one's own interest or advantage’.⁴ Conflict of interest for a public officer entails a confluence of private interest and public interest. The Merriam-Webster dictionary defines ‘public interest’ as ‘the general welfare and rights of the public that are to be recognized, protected, and advanced’, ‘a specific public benefit or stake in something’, or ‘the concern or attention of the public’.⁵

Conflict of interest has equally been defined in the tenth edition of Black’s Law Dictionary as ‘**a real or seemingly incompatibility between one’s**

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¹ Act No 4 of 2003, Laws of Kenya (assented to on 30 April 2003 and came into force on 22 2003).

² Act No 19 of 2012, Laws of Kenya (assented to on 27 August 2012 and obtained the force of law the same day).

³ See

<<https://www.merriam-webster.com/dictionary/conflict%20of%20interest#h1>>.

See also OECD, ‘Managing Conflict of Interest in the Public Sector: A Toolkit’ <<https://www.oecd.org/gov/ethics/49107986.pdf>>.

⁴ See <<https://www.merriam-webster.com/dictionary/self-interest>>.

⁵ See <<https://www.merriam-webster.com/dictionary/interest#legalDictionary>>.

private interests and one's public or fiduciary duties.' In *Belvin Wanjiru Namu v National Police Service Commission & another*,⁶ Justice Mwita defined conflict of interest as:

[A] situation where an individual has interests or loyalties competing against each other. It involves dual relationships where person in a position in one relationship is in another competing relationship in another position such that the person has conflicting responsibilities.⁷

Accordingly, conflict of interest by public officers must be managed and properly regulated for the proper discharge of public duties and for the public good. This article is concerned about conflict of interest and public office in Kenya. That said, the management and regulation of conflict of interest in Kenya implicates those serving in public office and State office as both are constitutionally regarded as public officers.⁸ The Constitution defines 'public office' as 'an office in the national government, a county government or the public service,⁹ if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament', and a 'public officer' as: '(a) any State officer; or (b) any person, other than a State Officer, who holds a public office'. Under the Constitution, a 'State Officer' is a person holding a 'State office', which means any of the following offices:

- a) President;
- b) Deputy President;
- c) Cabinet Secretary;

⁶ [2019] eKLR, HC (Nairobi) Const and Human Rights Div, Pet No 96 of 2018.

⁷ *Belvin Wanjiru Namu v National Police Service Commission & another* [2019] eKLR, para 23.

⁸ Constitution of Kenya, 2010, art 260.

⁹ *Ibid* defines 'public service' as 'the collectivity of all individuals, other than State officers, performing a function within a State organ', and a 'State organ' as a commission, office, agency or other body established under the Constitution. See also article 1(3) of the Constitution as pertains to State organs in the national and county levels of government; and chapter thirteen of the Constitution in regards to the public service.

- d) Member of Parliament;
- e) Judges and Magistrates;
- f) member of a commission to which Chapter Fifteen of the Constitution applies (that is, a member of the Kenya National Human Rights and Equality Commission, the National Land Commission, the Independent Electoral and Boundaries Commission, the Parliamentary Service Commission, the Judicial Service Commission, the Commission on Revenue Allocation, the Public Service Commission, the Salaries and Remuneration Commission, the Teachers Service Commission, and the National Police Service Commission);¹⁰
- g) holder of an independent office to which Chapter Fifteen of the Constitution applies (that is, the Auditor-General, and the Controller of Budget);¹¹
- h) member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government;¹²
- i) Attorney-General;
- j) Director of Public Prosecutions;
- k) Secretary to the Cabinet;
- l) Principal Secretary;
- m) Chief of the Kenya Defence Forces;
- n) commander of a service of the Kenya Defence Forces;
- o) Director-General of the National Intelligence Service;
- p) Inspector-General, and the Deputy Inspectors-General, of the National Police Service; or
- q) an office established and designated as a State office by national legislation.

¹⁰ Ibid art 248(2).

¹¹ Ibid art 248(3).

¹² See chapter 11 of the Constitution of Kenya, 2010 as concerns devolved government.

2. The Current Legal Framework on Conflict of Interest and Public Office in Kenya

Currently, the legal framework for the management and resolution of conflict of interest for public officers can largely be drawn from the Constitution, POEA, 2003 and LIA, 2012. Other relevant legislation are the Penal Code,¹³ the Anti-Corruption and Economic Crimes Act, 2003,¹⁴ the Ethics and Anti-Corruption Commission Act, 2011,¹⁵ the Public Finance Management Act, 2012,¹⁶ and the Public Procurement and Asset Disposal Act, 2015.¹⁷

2.1 The Constitution of Kenya, 2010

As already highlighted above, the constitution has endeavoured to define what is meant by public office, public officer, public service, State office, State officer, and State organ.¹⁸ Constitutional provisions on conflict of interest and public office include articles 75, 76 and 77 in chapter six of the Constitution, particularly as concerns State officers. In a bid to regulate the conduct of State Officers, the Constitution stipulates that a State officer is to behave in a manner that avoids: any conflict between personal interests and public or official duties; compromising any public or official interest in favour of a personal interest; or demeaning the office the officer holds—whether in public or in his or her official life, or in his or her private life, or in association with other persons.¹⁹

The Constitution is also particular about the financial probity of State Officers. A gift or donation to a State officer on a public or official occasion

¹³ Cap 63, Laws of Kenya. See e.g., chapter XIII of the Penal Code, on miscellaneous offences against public authority. Section 127 of the Penal Code makes provision for the offence of frauds and breaches of trust by persons employed in the public service, in that; '(1) Any person employed in the public service who, in the discharge of the duties of his office, commits any fraud or breach of trust affecting the public, whether the fraud or breach of trust would have been criminal or not if committed against a private person, is guilty of a felony. (2) A person convicted of an offence under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years or to both.' Section 128 of the Penal Code entails offences by public officers.

¹⁴ Act No 3 of 2003, Laws of Kenya.

¹⁵ Act No 22 of 2011, Laws of Kenya.

¹⁶ Act No 18 of 2012, Laws of Kenya.

¹⁷ Act No 33 of 2015, Laws of Kenya.

¹⁸ Constitution of Kenya, 2010, art 260.

¹⁹ Ibid art 75(1).

is a gift or donation to the Republic of Kenya and is to be delivered to the State, unless exempted under an Act of Parliament.²⁰ Moreover, a State officer is not to maintain a bank account outside the country, except in accordance with an Act of Parliament, or seek or accept a personal loan or benefit in circumstances that compromise the integrity of the State officer.²¹

The Constitution also places restrictions on the activities of State Officers.²² A full-time State officer is not participate in any other gainful employment. Further, any appointed State officer is not to hold office in a political party. Furthermore, a retired State officer who is receiving a pension from public funds is not to hold - or be remunerated from public funds for - more than two concurrent remunerative positions as chairperson, director or employee of a company owned or controlled by the State or a State organ.

A person who contravenes the foregoing constitutional provisions under articles 75, 76 and 77 is to be subjected to disciplinary proceedings accordingly, and thereafter may be dismissed or removed from office and will be disqualified from holding any other State office subsequent to such dismissal or removal from State office.²³

2.2 Leadership and Integrity Act, 2012

LIA, 2012 contains provisions on conflict of interest concerning both State officers and public officers. The Act provides for a general leadership and integrity code,²⁴ and specific leadership and integrity Codes²⁵. Section 16 of the Act is particular to conflict of interest. The Act requires a State officer or a public officer to 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.²⁶ In that regard, a State officer or a public

²⁰ Ibid art 76(1).

²¹ Ibid art 76(2).

²² Ibid art 77.

²³ Ibid art 75(2) and (3).

²⁴ Leadership and Integrity Act, 2012, pt II.

²⁵ Ibid pt III.

²⁶ Ibid s 16(1). Under section 16(6) of the Act 'personal interest' refers not only to the interest of the State Officer of public officer, but also includes 'the interest of a spouse, child, business associate or agent or any other matter in which the State officer or public officer has a direct or indirect pecuniary or non-pecuniary interest.'

officer is not to hold shares or have any other interest in a corporation, partnership or other body, directly or through another person, if doing so would result in a conflict of the State officer's or public officer's personal interests and the officer's official duties.²⁷

As a result, a State officer or a public officer whose personal interests conflict with their official duties is to declare the personal interests to the subject public entity or the Ethics and Anti-Corruption Commission (EACC).²⁸ When personal interests are so declared, the subject public entity or EACC, as applicable, may issue directions on the appropriate action to be taken by the State officer or public officer to avoid the conflict of interest.²⁹ The State officer or public officer is to comply with the directions given and refrain from participating in any deliberations on the matter.

Moreover, a State officer or a public officer is not to award or influence the award of a public contract to himself or herself, the State officer's or public officer's spouse or child, a business associate or agent of the State officer or public officer, a corporation, private company, partnership or other body in which the State officer or a public officer has a substantial or controlling interest.³⁰ In addition, where a State officer or a public officer is present at a meeting where an issue which is likely to result in a conflict of interest is to be discussed, the officer is to declare the interest at the beginning of the meeting or before the issue is deliberated upon, and the declaration is to be recorded in the minutes of that meeting.³¹

²⁷ Ibid s 16(2).

²⁸ Ibid s 16(3).

²⁹ Ibid s 16(4).

³⁰ Ibid s 16(5).

³¹ Ibid s 16(7) and (8). See also section 16(9) and (10) of the Act and regulation 11 of the Leadership and Integrity Regulations, 2015, in regards to declarations by a Member of Parliament or a Member of a County Assembly in debates, proceedings and transactions where they have a direct pecuniary interest or benefit, except debates, proceedings and transactions in Parliament under article 116(3) and (4) of the Constitution for an Act of Parliament that confers pecuniary interest on members of Parliament, and interests that Members of Parliament have as members of the public. The Clerk of the Senate, the National Assembly and the county assembly is to keep a register of conflicts of interest, which is to be open to the public.

Every public entity is to open and maintain a Register of Conflicts of Interest in which State officers or public officers are to register the particulars of their registrable interests, that is, details on the nature and extent of the conflict of interest, and the entries in the register are to be continuously updated as the officers notify the public entity or EACC of any changes in the registrable interests, within one month of the occurrence of each change.³² The Register of Conflicts of Interest is to be kept for five years after the last entry in each volume of the register.³³

In *Belvin Wanjiru Namu v National Police Service Commission & another*,³⁴ Justice Mwita interpreted section 16 of LIA, 2012 as follows:

Section 16 of the Leadership and Integrity Act on conflict of interest is to the effect that a public officer should use the best efforts to avoid being in a situation where personal interest conflicts with the officer's official duties. In that case, conflict of interest would arise where a person finds oneself confronted by two different interests so that serving one interest would be against the other. For there to be conflict of interest in the petitioner's case, her participation in the business while at the same time performing duties as a police officer should be shown to have been inconsistent, incompatible and prejudicial to her official duties.³⁵

Part III of the Leadership and Integrity Regulations, 2015³⁶ reinforces the provisions of the Act on conflict of interest and equally imposes upon on a State officer or a public officer a duty to declare conflict of interest—personal interest, pecuniary interest, proprietary interest, personal relationships or business relationships. A State officer or a public officer is to declare a personal interest, in the prescribed form, to the public entity

³² Leadership and Integrity Act, 2012, s 16(11) and (12). The second schedule of the Act includes interests which are also considered registrable interests. See also regulations 12 and 13 of the Leadership and Integrity Regulations, 2015.

³³ Leadership and Integrity Act, 2012, s 16(13) and (14).

³⁴ [2019] eKLR, HC (Nairobi) Const and Human Rights Div, Pet No 96 of 2018.

³⁵ *Belvin Wanjiru Namu v National Police Service Commission & another* [2019] eKLR, para 24.

³⁶ Legal Notice No 13 of 2015.

where he or she is employed, if that personal interest conflicts with the officer's official duties.³⁷

Per the Regulations, the Register of Conflicts of Interest to be opened and maintained by a public entity is to include the following information: the name and address of the State officer or the public officer; registrable interest; nature of the conflict of interest; date the conflict of interest is declared; directions given by the commission or public entity to the officer making the declaration; date of entry in the register; and signature of the officer giving directions on behalf of the Commission or the public entity.³⁸ The Register of Conflicts of Interest, which is kept in the custody of the accounting officer of the public entity or his or her nominee, is open for public inspection upon application.³⁹

2.3 Public Officer Ethics Act, 2003

POEA, 2003 is an Act of Parliament that generally advances the ethics of public officers and in that regard provides for a general code of conduct and ethics for public officers,⁴⁰ specific codes of conduct and ethics for specified public officers,⁴¹ and the Public Service Code of Conduct and Ethics, 2016, which is applicable to public officers who are subject to the Public Service Commission.⁴² POEA, 2003 also requires public officers to make certain

³⁷ Leadership and Integrity Regulations, 2015, reg 10. See Form C in the schedule of the Leadership and Integrity Regulations, 2015 for the Declaration of Conflict of Interest Form.

³⁸ Ibid reg 12. See Form E in the schedule of the Leadership and Integrity Regulations, 2015 for the Register of Conflict of Interest form.

³⁹ Ibid reg 13. See Form F in the schedule of the Leadership and Integrity Regulations, 2015 for the Application for Inspection of the Register of Conflict of Interest form.

⁴⁰ POEA, 2003, pt III, ss 7-25.

⁴¹ Ibid pt II, ss 5 and 6.

⁴² Under section 2 of POEA, 2003, a 'public officer' is 'any officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any of the following— (a) the Government or any department, service or undertaking of the Government; (b) the National Assembly or the Parliamentary Service; (c) a local authority; (d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by

financial declarations to ward off instances of conflict of interest.⁴³ Section 12 of POEA, 2003, a single section of the said Act, makes specific provision for conflict of interest, and provides as follows:

(1) A public officer shall use his best efforts to avoid being in a position in which his personal interests conflict with his official duties.

(2) Without limiting the generality of subsection (1), 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 the public officer's personal interests conflicting with his official duties.

(3) A public officer whose personal interests conflict with his official duties shall—

(a) declare the personal interests to his superior or other appropriate body and comply with any directions to avoid the conflict; and

(b) refrain from participating in any deliberations with respect to the matter.

(4) Notwithstanding any directions to the contrary under subsection (3)(a), a public officer shall not award a contract, or influence the award of a contract, to—

(a) himself;

(b) a spouse or relative;

(c) a business associate; or

(d) a corporation, partnership or other body in which the officer has an interest.

(5) The regulations may govern when the personal interests of a public officer conflict with his official duties for the purposes of this section.

rates, taxes or charges in pursuance of any such law; (e) a co-operative society established under the Co-operative Societies Act (No. 12 of 1997): Provided that this Act shall apply to an officer of a co-operative society within the meaning of that Act; (f) a public university; (g) any other body prescribed by regulation for the purposes of this paragraph.⁷

⁴³ POEA, 2003, pt IV, ss 26-34.

3. The Proposed Legal Framework under the Conflict of Interest Bill, 2019

The Conflict of Interest Bill, 2019 (COI Bill, 2019) is for an Act of Parliament to provide for the management and regulation of conflict of interest for public officials in the discharge of their official duties. The COI Bill, 2019 is intended to apply to public officials.⁴⁴ Under the Bill, a ‘public official’ means:

- (a) a person engaged in any capacity in the delivery of government programmes or services whether for remuneration or not;
- (b) a person who renders a public service, whether appointed or elected, including state officers, public officers, temporary staff, consultants and volunteers;
- (c) a person who renders a service of public nature which includes provision of services in the following institutions—
 - (i) a Cooperative Society; (ii) a Retirement Benefit Scheme;
 - (iii) a Public Private Partnership; or (iv) a Strategic Public Utility;⁴⁵ or

⁴⁴ Ibid cl 4.

⁴⁵ Under clause 2 of the Conflict of Interest Bill, 2019 a ‘strategic public utility’ means: ‘(a) a body in which the government owns majority shares; (b) a state corporation within the meaning of the State Corporations Act; (c) a body that receives, uses, administers or manages a Government fund, whether in form of a grant, loan or government guaranteed loan; or (d) any undertaking that supplies an essential service to the public or a section of the public as a monopoly.’ Under section 2 of the State Corporations Act (Cap 446) a ‘state corporation’ means: ‘ (a) a state corporation established under section 3; (b) a body corporate established before or after the commencement of this Act by or under an Act of Parliament or other written law but not—(i) the Permanent Secretary to the Treasury incorporated under the Permanent Secretary to the Treasury (Incorporation) Act (Cap. 101) [Now, Cabinet Secretary to the Treasury (Incorporation) Act (Cap 101)]; (ii) a local authority established under the Local Government Act (Cap. 265); (iii) a co-operative society established under the Co-operative Societies Act (Cap. 490) [Repealed by Cooperative Societies Act, No. 12 of 1997]; (iv) a building society established in accordance with the Building Societies Act (Cap. 489); (v) a company incorporated under the Companies Act (Cap. 486) [Repealed by the Companies Act, No. 17 of 2015] which is not wholly owned or controlled by the Government or by a state corporation; (vi) the Central Bank of Kenya established under the Central Bank of Kenya Act (Cap. 491); (...) (c) a bank or a financial institution licensed

(d) a person who renders a service involving the collection or administration of a levy, fee or funds authorized by legislation.⁴⁶

In essence, the intended legislation will apply to all persons engaged in the public service, whether on a full-time or part-time basis, or on a permanent or temporary basis.

The Bill is dedicated entirely to conflict of interest for public officials and is divided into five parts: part I encompasses the preliminary provisions stipulating the necessary definitions, the objects, and application of the intended legislation; part II provides for the administration of the intended legislation, that is, the Commission responsible for the implementation and enforcement of the legislation; part III outlines the conflict of interest rules relevant to public service; part IV provides for the compliance measures, which entail the methods for managing and resolving conflict of interest for public officials; and part V constitutes general provisions, including penalties for violation of the intended legislation.

COI Bill, 2019 is aimed to: promote objectivity and impartiality in decision making by public officials; ensure that the integrity of a public official in decision-making is not compromised by the public official's private interests; enhance public confidence in delivery of public services; provide a framework for the regulation and management of real, apparent or potential conflict between public interest and private interest; and provide an institutional framework for the management of conflict of interest.⁴⁷

It is noteworthy that Kenya is not the first country to seek to enact legislation to manage and regulate conflict of interest, as countries all over the globe equally have in place conflict of interest legislation, either as self-standing legislation or as part of the public ethics general regulations, or policies that pertain to public office holders generally. This article aims to evaluate the

under the Banking Act (Cap. 488) or other company incorporated under the Companies Act (Cap. 486) [Repealed by the Companies Act, No. 17 of 2015], the whole or the controlling majority of the shares or stock of which is owned by the Government or by another state corporation;(d) a subsidiary of a state corporation.'

⁴⁶ Conflict of Interest Bill, 2019, cl 2.

⁴⁷ Ibid cl 3.

COI Bill, 2019 through a comparative lens, that is, by looking at similar legislation or policies in other countries and through jurisprudence emanating from Kenyan Courts. The aim is to interrogate the likely impact of the intended legislation, flag up any flaws in the Bill, and propose amendments to the Bill accordingly.

3.1 The Impact of the Bill

The COI Bill, 2019, should it become law as it is, will impact on public officials in a number of ways which are highlighted below.

3.1.1 When a conflict of interest will be considered to arise

Under the COI Bill, 2019, a public official will be considered to be in a conflict of interest if the official:

- (a) exercises an official power, duty or function that provides an opportunity to further the official's private interests or those of the official's relatives or friends or to improperly further another person's interests;
- (b) is in a situation where the official's private interests can reasonably be perceived to impair or influence the official's ability to act objectively in the performance of an official duty; or
- (c) has private interests that could conflict with the official's duties in future.⁴⁸

However, merely having a conflict of interest does not necessarily translate into impropriety, misconduct or corruption on the part of the public official. As already indicated above, Justice Mwita in his interpretation of section 16 of LIA, 2012 in *Belvin Wanjiru Namu v National Police Service Commission & another*,⁴⁹ stated that it has to be proven that the public official's

⁴⁸ Ibid cl 8.

⁴⁹ [2019] eKLR, HC (Nairobi) Const and Human Rights Div, Pet No 96 of 2018. In this case, the Petitioner, Belvin Wanjiru Namu, a member of the Kenya Police Service who had been vetted on 9 June 2016, sued the National Police Service Commission and the National Police Service following a finding that she was unfit to serve in the National Police Service. The reason for failing the vetting was that the Petitioner was involved in a matatu business (she was a director of a family company that ran a matatu business) which the National Police Service Commission

participation in the private endeavour while at the same time performing their official duties is inconsistent, incompatible and prejudicial to their official duties.⁵⁰ Justice Mwita went on to express himself as follows:

A conflict of interest that should constitute unsuitability to serve should, in my view, consist a situation of Self-dealing in which someone in a position of responsibility has outside conflicting interest and acts in his/her own interest rather than the interest of the public. In other words, there should be evidence that the person actually acted in favour of the self-interest as opposed to public interest.⁵¹

Moreover, the occurrence of the conflict of interest must be ‘clear and manifest’⁵² and should not be merely presumptive as the court found it to be in this particular instance:

Although the petitioner was involved in traffic duties, there was no evidence at all that her position allowed the company’s vehicles receive preferential treatment or that they did not comply with the law. Being a traffic officer is not a permanent engagement. One may act as a traffic officer one day and perform different duties another day. The question of conflict must be clear and not presumptive. The fact that the petitioner is a police officer could not disentitle her family from engaging in business. She could have been given an option to resign from the directorship or leave the Service in the absence of direct acts

considered to be in conflict with her duties as a police officer. In its verdict, the National Police Service Commission stated that; ‘The Commission observes that there exists a direct conflict of interest where a police officer operates a matatus business. It is likely that the matatus will not be subjected to the consequences arising from breach of traffic rules and regulations.’ See paragraphs 16-22 of the decision.

⁵⁰ *Belvin Wanjiru Namu v National Police Service Commission & another* [2019] eKLR, para 24. See also paragraphs 25-27, 29 and 31 of the decision.

⁵¹ *Ibid* para 28.

⁵² *Ibid* para 31.

of conflict. It was too harsh in my view, to terminate her service on grounds of perception.⁵³

3.1.2 The duty of public officials to avoid conflict of interest

COI Bill, 2019 provides a range of rules regarding the various aspects of conflict of interest in relation to public office and imposes penal sanctions upon contravention of any of those rules. Under the intended legislation, there will be a general duty on public officials to take reasonable steps to avoid any conflict of interest, real, apparent or potential, between their private interests and their official duties, and to disclose details of any private interests in conflict with their public duties.⁵⁴ Besides, where a public official makes a decision or participates in a decision-making process where the public official knows or reasonably should know that the exercise of their official power, duty or function would give rise to a conflict of interest, this will be tantamount to the commission of an offence.⁵⁵

In addition, the intended legislation will prohibit public officials from using their official powers, duties or functions to give special treatment or advantage to any person, beyond what is allowed by law or written policy.⁵⁶ A public official who contravenes this provision will have committed an offence. Further, the intended legislation will bar public officials from using, whether directly or indirectly, official information obtained in the course of performing their official duties to improperly pursue or seek to pursue theirs or another person's private interests.⁵⁷ If not, the public official will equally have committed an offence. Besides, it will be an offence for a public official to use his position to influence the decision of another person or another public official, so as to further theirs or another person's private interests.⁵⁸

In particular, Members of Parliament (MPs), both from the National Assembly and the Senate, and Members of County Assemblies (MCAs) will be under obligation to declare any conflicts of interest in relation to their

⁵³ Ibid para 33.

⁵⁴ Conflict of Interest Bill, 2019, cl 9.

⁵⁵ Ibid cl 10.

⁵⁶ Ibid cl 12. Article 27 of the Constitution on equality and freedom from discrimination would prove useful in the interpretation and implementation of this provision.

⁵⁷ Conflict of Interest Bill, 2019, cl 13.

⁵⁸ Ibid cl 14.

participation in proceedings or debates in Parliament or County Assemblies, or Committees of Parliament or County Assemblies; including the transactions and communications which MPs or MCAs have with their colleagues or other public officials.⁵⁹ Upon declaring such conflicts of interest, the MP or MCA will be prohibited from participating in any proceedings or debates in respect of such declarations, or using any information obtained by the MP or MCA in the discharge of their official powers, duties or functions to advance their private interests. Otherwise, the MP or MCA will have committed an offence.

Nonetheless, all this is not new. For example, paragraph 6 of the Code of Conduct for Members of Parliament provided for in section 37(3) and the Fourth Schedule to the Parliamentary Powers and Privileges Act, 2017⁶⁰ requires MPs to register their financial and non-financial interests as they relate to their parliamentary actions, and states that:

- (1) Members of the House shall—
 - (a) register with the relevant Speaker all financial and non-financial interests that may reasonably influence their parliamentary actions;
 - (b) before contributing to debate in the House or its Committees, or communicating with State Officers or other public servants, declare any relevant interest in the context of parliamentary debate or the matter under discussion; and
 - (c) observe any rules agreed of the House in respect of financial support for Members or the facilities of the House.

⁵⁹ Ibid cl 11. This is subject to article 116(3) and (4) of the Constitution of Kenya, 2010 as concerns debates, proceedings and transactions in Parliament for an Act of Parliament that confers pecuniary interest on Members of Parliament, and interests that Members of Parliament have as members of the public.

⁶⁰ Act No 29 of 2017, Laws of Kenya.

- (2) A relevant interest is an interest that may be seen by a reasonable member of the public to influence the way in which a Member discharges his or her parliamentary duties.
- (3) Members shall ensure that registered interests are accurate and updated within one month of any change in particulars.

Paragraph 4 of the Code of Conduct for Members of Parliament also requires that in the conduct of their parliamentary duties, MPs are to act in the public interest, and any conflict between their personal interest and the public interest is to be resolved in favour of the public interest.

COI Bill, 2019 also prohibits public officials from conspiring with other public officials to conceal conflict of interest. Under the Bill, it will be an offence for a public official to enter into an arrangement with a public official of another public entity in furtherance of an action which would amount to or be reasonably perceived to conceal a conflict of interest.⁶¹

3.1.3 Restrictions on outside employment and other gainful employment by public officials

The intended legislation will limit outside engagements by public officials. Under the Bill, ‘offers of outside employment’ means ‘offers of future engagements or benefits by an entity other than the current employer.’⁶² A public official will be expected not to allow himself or herself to be influenced in the exercise of an official power, duty or function by plans for or offers of outside employment.⁶³ In that regard, a public official will be required to disclose in writing to the appointing authority, the accounting officer, or the equivalent, any offers of outside employment that could place the public official in a situation of conflict of interest, within seven days of receiving the offer.⁶⁴

Moreover, a public official who accepts an offer of outside employment will have to disclose that in writing to the Ethics and Anti-Corruption

⁶¹ Conflict of Interest Bill, 2019, cl 22.

⁶² Ibid cl 15(3).

⁶³ Ibid cl 15(1)(a).

⁶⁴ Ibid cl 15(1)(b).

Commission (EACC) as well as to the appointing authority, within seven days of such acceptance, or they will have committed an offence.⁶⁵

Alongside restrictions on offers of outside employment, the intended legislation will impose restrictions on public officials as concerns their engagement in other gainful employment. A public official would not be allowed to engage in any other gainful employment which: is inherently incompatible with the duties of the public official; results in the impairment of the judgment of the public official in the execution of official duties; results in conflict of interest; or the official is mandated to regulate or exercise oversight.⁶⁶

In addition, public officials engaged on a full-time basis will not be allowed to participate in any other employment that amounts to: holding another salaried office; privately practicing the same profession for which the official is engaged; acting as a paid arbitrator or consultant; holding an honorary public position; or engaging in such employment during official working hours.⁶⁷ In this case, if the Bill is enacted into law as it is, this provision will have unprecedented impact on the engagement of professionals in public service as it requires their total and undivided dedication to public office only.

Nonetheless, the restrictions concerning offers of outside employment and on participation in other gainful employment by public officials are not entirely new concepts in law either.⁶⁸ Currently, under the Constitution of Kenya, 2010 and LIA, 2012, the restriction on participation in other gainful employment applies to both State officers and public officers. Article 77(1) of the Constitution provides that ‘A full-time State officer shall not

⁶⁵ Ibid cl 15(2).

⁶⁶ Ibid cl 23(1).

⁶⁷ Ibid cl 23(2).

⁶⁸ See e.g., section 27 of the Leadership and Integrity Act, 2012, which imposes restrictions on offers of future employment in relation to State Officers and provides that; ‘(1) A State officer shall not allow himself or herself to be influenced in the performance of their duties by plans or expectations for or offers of future employment or benefits. (2) A State officer shall disclose, in writing, to the public entity and the Commission, all offers of future employment or benefits that could place the State officer in a situation of conflict of interest.’

participate in any other gainful employment,’⁶⁹ while article 80(c) of the Constitution states that, ‘Parliament shall enact legislation (...) providing for the application of [Chapter Six of the Constitution], with the necessary modifications, to public officers’; hence the application of LIA, 2012 to both State officers and public officers.

Moreover, section 26(2) of LIA, 2012 provides for the grounds for restricting a State officer or public officer from participating in other gainful employment;⁷⁰ grounds which are conspicuously similar to clause 23(1)(a-c) of COI Bill, 2019. In that regard, the Bill introduces the fourth ground, that public officials are restricted from participating in other gainful employment where ‘the official is mandated to regulate or exercise oversight.’⁷¹

Courts have also interpreted the parameters around participation in other gainful employment by MPs that is, Members of the Senate and those of the National Assembly, in a number of cases.⁷² Recently, in *Office of the*

⁶⁹ Leadership and Integrity Act, 2012, s 26(1).

⁷⁰ Section 26(2) of the Leadership and Integrity Act, 2012 defines ‘gainful employment’ to mean ‘work that a person can pursue and perform for money or other form of compensation or remuneration which is inherently incompatible with the responsibilities of the State office or which results in the impairment of the judgement of the State officer in the execution of the functions of the State office or results in a conflict of interest in terms of section 16.’

⁷¹ Conflict of Interest Bill, 2019, cl 23(1)(d).

⁷² See e.g., *Office of the Director of Public Prosecutions v James Aggrey Bob Orengo; Daniel Ogwoka Manduku & 2 others (Interested Parties)* [2021] eKLR, HC (Mombasa) Const and Human Rights Div, Const Pet No 204 of 2019; *Philomena Mbeti Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party)* [2018] eKLR HC (Nairobi) Const and Human Rights Div, Const Pet No 295 of 2018 (*Mwilu case*); *Regine Bhutt v Haroon Bhutt & another* [2015] eKLR, HC (Mombasa) Civil Suit No 8 of 2014 (OS) (*Bhutt case*); *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR, HC (Nairobi) Const and Human Rights Div, Pet No 628 of 2014 (Consolidated with Pet No 630 of 2014 and Pet No 12 of 2015); *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another* [2015] eKLR, HC (Nairobi) Const and Human Rights Div, Pet Nos 628 and 630 of 2014; *John Okelo Nagafwa v The Independent Electoral & Boundaries Commission & 2 others* [2013] eKLR, HC (Busia) Election Pet No 3 of 2013 (*Nagafwa case*); and *Samuel Muigai Ng'ang'a v The Minister for Justice, National Cohesion & Constitutional*

Director of Public Prosecutions v James Aggrey Bob Orengo,⁷³ the court was called upon to determine whether there existed a conflict of interest by virtue of Hon Senator James Aggrey Bob Orengo, Senator for Siaya, representing the Petitioner as their advocate in the matter therein, and if the continued appearance of the Senator or any other State officer in the proceedings was against the spirit of chapter 6 of the Constitution of Kenya, 2010. Relying on sections 16 and 26 of LIA, 2012 and articles 75 and 77 of the Constitution, Justice Ogola found that:

Senator Orengo cannot be said to be a full time State officer given that there exists no employer-employee relationship between Senators, Members of Parliament and the executive. As such Members of Parliament are at liberty to engage in gainful employment in as long as the nature of the gainful employment is not inherently incompatible with their duties and/or functions as State Officers. The Constitution also accepts that some state officers may be engaged on part-time rather than full time basis and the Constitution allows this category to participate in any other gainful employment.⁷⁴

However, applying the said provisions of LIA, 2012 and the Constitution of Kenya, 2010 to the case at hand, Justice Ogola found and held that the continued representation of the petitioner by the Senator raised issues of conflict of interest *vis-à-vis* his official duties as a Senator and member of the Justice, Legal Affairs and Human Rights Committee of the Senate:

The upshot to this application is this; there is no bar to Senator Orengo, or indeed to any other Member of Parliament from engaging in gainful employment. However, in pursuit of such gain, members of parliament must strictly operate within the law and the Constitution. (...)

Affairs & another [2013] eKLR, HC (Nairobi) Const and Human Rights Div, Pet No 354 of 2012 (*Ng'ang'a case*).

⁷³ [2021] eKLR, HC (Mombasa) Const and Human Rights Div, Const Pet No 204 of 2019.

⁷⁴ *Office of the Director of Public Prosecutions v James Aggrey Bob Orengo; Daniel Ogwoka Manduku & 2 others (Interested Parties)* [2021] eKLR, para 46.

Determining what is a personal interest will not always be easy, and will often be made on a case by case basis. The absurdity in the matter herein is as follows; it was alleged, and not refuted by the Respondent that on 28/8/2020, the Respondent herein Senator James Orengo appeared at the Milimani Chief Magistrate's Court being driven in his official government registered Motor Vehicle GKB 178E, Toyota Prado grey in color registered under the ownership of the National Assembly. The Senator emerged from his official motor vehicle and proceed to the Court and appeared on behalf of the Petitioner herein. Granted that the Senator is entitled to pursue private gain, what perception does the public get when the accused person who is charged with economic crimes and/or corruption, has as his counsel, a Senator, a State Officer, driven to Court in his official motor vehicle bought for him by the public. He is driven by a driver employed to drive him by the government, and then in Court he submits with the authority of a Senator. In my view, it does not require any taxing of the mind to find a glaring perception of conflict of interest. To the accused person he has the Senator as his advocate; driven to Court in a State motor vehicle; chauffeured by a State provided driver; and the vehicle fueled by the State. To the accused, despite facing grave charges of economic crimes, his defence appears to have the blessings of the State. To the counsel, the unsaid story to the accused is that the accused has the best counsel, who appears to have State support, and therefore the accused needs not unduly worry since he is in good hands; to the public tax payer, he or she is confused, stands a-kimbo and wonders where the world is going: Why has the accused been charged when he is to be represented by a State Officer who arrives in Court using state resources?

I must emphasize that none of the above perceptions is bad or is unlawful. But all of them create scenarios of possible conflict of interest, at least in perception. It is the duty of this Court to interpret the Constitution wholesomely and in a manner to bring out the mischief intended to be cured by the Constitution. The

Sections of the law quoted above, together with the Articles of the Constitution cited, leave no doubt that State Officers, ever when free to pursue employment for private gain, must avoid scenarios in which they are either conflicted, or in which they create perception of conflict of interest.

In this petition, the Petitioner seeks orders to stop investigations and possible arrest over allegations of corruption, or economic crimes. Senator Orengo is the lead counsel for the Petitioner. Although Senator Orengo has not been said to have arrived in this Court in the manner and style he is alleged to have done in Milimani Court while representing the same client in criminal charges, the perceptions on conflict of interest I have described in relation to the Milimani Court appearance are applicable. It is not in doubt in my mind that if the foregoing Articles of the Constitution and Statute Law are applied to their natural end, it is inescapable to conclude that there exists conflict of interest in Senator Orengo representing the Petitioner herein.

This perception is highlighted by the fact that the Petitioner may at one time be summoned to appear before a Committee of Senate to answer to some of the matters the Petitioner is being investigated on. Should this happen Senator Orengo will be in attendance. Even if he recuses himself from the Committee, that alone will not alley the perception of conflict of interest, or put bluntly, the perception that the Petitioner has friends in the Senate. This would be very unfortunate. In interpreting the Constitution, a literal interpretation approach, which avoids all doubts and rhymes with the spirit of the Constitution takes priority.

Accordingly therefore, it is the finding hereof that the continued representation of the 1st Interested Party by the Respondent or any other State Officer is against the spirit of chapter 6 of the Constitution of Kenya, for failure to conform to the mandatory provisions of Section 26 of the Leadership and Integrity Act.

I allow the Notice of Motion dated 10/1/2020 and I direct that the 1st Interested Party/Petitioner herein be and is hereby at liberty to engage the services of another advocate other than

Senator James Orengo, S.C., to represent him in the proceedings herein.⁷⁵

Earlier, in *Philomena Mbeti Mwilu v Director of Public Prosecutions & 3 others (Mwilu case)*,⁷⁶ the Director of Public Prosecutions (DPP), the 1st Respondent, sought orders to disqualify Senior Counsel Hon James Orengo, the Senator for Siaya County, and Senior Counsel Hon Okong'o Omogeni, the Senator for Nyamira County, from representing the petitioner in the petition as well as in criminal proceedings before the Chief Magistrate's Court and all related matters.⁷⁷ The two Senior Counsel were both members of the Senate's Committee on Justice, Legal Affairs and Human Rights. It was said that the two Senior Counsel did not excuse themselves from the proceedings of the Senate Committee when the issue of the appointment of Queen's Counsel Mr Khawar Qureshi, who was to act as special prosecutor for the DPP in the prosecution of the Petitioner for criminal charges, came up.⁷⁸ The DPP argued that there was a conflict of interest in the concurrent participation of the two Senior Counsel in the Senate Committee while representing the Petitioner in the petition and in the criminal proceedings. In considering the question whether such a conflict of interest had been demonstrated in the proceedings, the High Court (Omondi, Ngugi, Tuiyott, Musyoka and Mwita JJ) stated as follows:

A conflict of interest means a situation where a person finds himself or herself confronted by two different interests so that serving one interest would be against the other interest. The definition of conflict of interest in Black's Law Dictionary, 10th Edition, that is applicable in this matter, is that 'conflict of interest is a real or seeming incompatibility between one's private interest and one's public or fiduciary duties.'

For there to be conflict of interest, therefore, the participation of the two Senior Counsel in the Senate Committee, and their role as counsel for the petitioner in this matter, or any other related

⁷⁵ Ibid paras 55-62.

⁷⁶ *Philomena Mbeti Mwilu v Director of Public Prosecutions & 3 others*; Stanley Muluvi Kiima (Interested Party) [2018] eKLR, HC (Nairobi) Const and Human Rights Div, Const Pet No 295 of 2018 (*Mwilu case*).

⁷⁷ *Mwilu case* para 55.

⁷⁸ Ibid paras 56, 61 and 67.

matter, must be inconsistent or incompatible, bearing in mind the information they receive or that may come to their knowledge during the exercise of their oversight role over the 1st respondent and which may be prejudicial to the course of justice.

There is no dispute that Mr. Orenge and Mr. Omogeni (SC), are members of the Senate and sit in the Senate Committee of Justice Legal Affairs and Human Rights Committee. They were in that Committee on the material day when the 1st respondent appeared before the Committee as Senators and members of the Committee. Any matters that were discussed in the Senate Committee were discussed in their presence by virtue of their position as members of the Committee.

It is contended by the 1st respondent that the two miscondacted themselves by failing to disclose that they had a personal interest in the matter under discussion. What we need to consider is whether their failure to make that disclosure by itself warrants us to make a finding that a conflict of interest arises from their representing the petitioner in the matters before court.⁷⁹

In the *Mwilu case*, the High Court found that there was no conflict of interest:

We have considered the discussions of the day as captured in the Hansard, and what is clear from the proceedings of that day is that the issues that were discussed were general in nature and did not go into specifics that would be prejudicial to the hearing of this petition. We have not seen evidence of discussion relating to the petition before this court or the case before the Chief Magistrate's Court to give an impression that the merits of this petition or that case were indeed discussed.

In our view, a party alleging a conflict of interest bears the burden of presenting clear evidence that the person said to be acting in conflict of interest is acting in a manner prejudicial to the interests of the other party. In this case, the facts placed before us do not in any way satisfy us that the conduct of the

⁷⁹ Ibid paras 69-72.

two Senior Counsel would amount to a conflict of interest in so far as this petition or related matters are concerned. From the record of proceedings before the Committee, the information that was given to the Committee by the 1st respondent related to the appointment of Mr. Qureshi, QC. It did not touch on or have any bearing on the merits of this petition or any other matter involving the petitioner.

We therefore find the application by the 1st respondent to be without merit.⁸⁰

In *Regine Bhutt v Haroon Bhutt & another (Bhutt case)*,⁸¹ where the Defendants objected to the appearance of Hon Peter Kaluma, Member of the National Assembly for Homa Bay Town Constituency, as the lead counsel for the Plaintiff, Justice Muriithi held that:

[T]he court allows the Honourable Member of Parliament to appear in the matter and act for the Plaintiff, whether as lead counsel or as part of his legal team, provided that the Advocate/Member of Parliament in writing undertakes that he shall not charge nor receive any payment for his services to the plaintiff and that he shall not seek, in the event that costs are awarded to the plaintiff, any certification for costs for two counsel as provided under Rule 59 of the Advocates' (Remuneration) Order.⁸²

In essence, Justice Muriithi expressed the view that a full-time Member of Parliament who, being an advocate, decides to engage in private legal practice can only undertake pro bono or public interest litigation in order to avoid unjust enrichment on his or her part as a public official.

In another case, *John Okelo Nagafwa v The Independent Electoral & Boundaries Commission & 2 others (Nagafwa case)*,⁸³ the Petitioner alleged that Hon James Aggrey Bob Orendo (SC), the Senator for Siaya County, had

⁸⁰ Ibid paras 76-78.

⁸¹ [2015] eKLR, HC (Mombasa) Civil Suit No 8 of 2014 (OS) (*Bhutt case*).

⁸² *Bhutt case* para 20.

⁸³ [2013] eKLR, HC (Busia) Election Pet No 3 of 2013 (*Nagafwa case*).

compromised the political neutrality of his office by appearing as counsel for the 3rd Respondent, Paul Otuoma Nyongesa; the Petitioner alleged that the 3rd Respondent's response to the Petition was incurably defective, having been signed by an unqualified person and/or a full-time State officer, and argued that Hon Orenge (SC) by acting as counsel in the matter and by signing pleadings, was contravening the provisions of article 77(1) of the Constitution and section 26(1) of LIA, 2012. In addressing the question whether a Senator, as a full-time State Officer (as assumed by the Court), could engage in other gainful employment, Justice Tuiyott was of the view that;

Read together, Section 26(1) and 26(2) [of LIA, 2012] permits a full time State officer to pursue other work (other than his State duties) for money or other form of compensation or remuneration provided that work or its pursuit is:- (i) not inherently incompatible with the responsibilities of the State office, or (ii) does not result in the impairment of the judgement of the State officer in execution of the functions of the State office, or (iii) does not result in a conflict of interest in terms of Section 16 of The Act.⁸⁴

Per Justice Tuiyott's interpretation of section 26 of LIA, 2012 above, a State officer is permitted to engage in any other gainful employment, whether for monetary or non-monetary compensation, provided that none of the grounds under section 26(2) of LIA, 2012 arises. Justice Tuiyott went on to state that it was upon the party that alleges that any of the grounds under section 26(2) of LIA, 2012 existed to demonstrate so.⁸⁵ In this case, the Petitioner argued that Hon Orenge's participation as counsel in the matter would keep him away from his office as a Senator and as such prevent him from fully engaging himself in the Senate. In that regard, having considered the role of a Senator as set out under article 96 of the Constitution and the work-hours for the Senator's engagement in parliamentary business as stipulated in the

⁸⁴ *Nagafwa case* para 24.

⁸⁵ *Ibid* para 25.

Standing Orders of the Senate,⁸⁶ Justice Tuiyott expressed himself in the manner that:

Evidently, the work of a Member of the Senate involves both Parliamentary and non-Parliamentary business. The work-hours for Parliamentary business are regulated by the Standing Orders of the House. This Court has looked up those Standing Orders and in particular Standing Order 30.1 which provides:- '(i) unless the Speaker for the convenience of the Senate otherwise directs, the Senate shall meet at 9.00 a.m on Wednesday and at 2.30 p.m on Tuesday, Wednesday and Thursday, but more than one sitting may be directed during the same day.' It seems that even if a Member of Senate was to be involved in other business of the House (e.g. Committees), Parliamentary business may not engage a Member fully from Monday to Friday, 8.00 a.m to 5.00p.m. In respect to non-Parliamentary business, this Court was unable to find any regulation governing the work-hours.⁸⁷

Justice Tuiyott thus went on to find that in the matter at hand, the existence of a conflict of interest had not been demonstrated:

The Petitioner has not persuaded this Court that Hon Orenge has used up public time in preparing for and participating in this Election Petition. No evidence has been shown to this Court to demonstrate that Counsel's conduct this far is inherently incompatible or fundamentally in conflict with his role as a Member of The Senate.⁸⁸

It is worth noting that all the foregoing cases are High Court cases and what is clear from the analysis is that the alleged existence of a conflict of interest

⁸⁶ See Standing Order 31 of the Standing Orders of the Senate <<http://www.parliament.go.ke/sites/default/files/2018-08/Senate%20Standing%20Orders%20%28final%29.pdf>>; See also Standing Order 30.1 of the Standing Orders of the National Assembly <<http://www.parliament.go.ke/sites/default/files/2018-09/The%20National%20Assembly-4th%20Edition.pdf>>

⁸⁷ *Nagafwa case* para 26

⁸⁸ *Ibid* para 27.

must be demonstrated on a case-by-case basis, and the determination of the court is dependent on the circumstances of the case under consideration as weighed against the applicable constitutional and statutory provisions.

3.1.4 Restrictions on gifts and other benefits to public officials

COI Bill, 2019 intends to limit the receipt of gifts and other benefits by public officials and their families in a personal capacity.⁸⁹ Clause 16(1) of the Bill stipulates that, '[a] public official or a member of the public official's family shall not accept any gift or other advantage, including from a trust or foundation, that may influence the public official's judgment in the exercise of an official power, duty or function.'

On the other hand, public officials would be able to receive gifts and other benefits in an official capacity. Even so, there are restrictions as any such gift would only be acceptable if: it is received as a normal expression of courtesy or protocol, or is within the customary standards that normally accompany the public official's position; is not monetary; or does not exceed such value as may be prescribed by the EACC.⁹⁰ Moreover, the acceptance of any such gift would be followed by a declaration of such acceptance.⁹¹

In any case, contravention of clause 16(1) and (3) of the Bill would be tantamount to the commission of an offence.⁹² In that regard, every public entity will be required to maintain a register of gifts received by public officials serving in the public entity, a register of gifts given by the public

⁸⁹ The Conflict of Interest Bill, 2019 does not define what a gift and other benefits means. However, the Canadian Conflict of Interest Act defines its equivalent, that is, 'gifts or other advantage' which under section 2 of the Act means: '(a) an amount of money if there is no obligation to repay it; and (b) a service or property, or the use of property or money that is provided without charge or at less than its commercial value.'

⁹⁰ Conflict of Interest Bill, 2019, cl 16(2).

⁹¹ Ibid cl 16(3) stipulates that, 'If a public official or a member of the official's family accepts any gift or benefit, the public official shall, within forty-eight hours of resumption of duty, make a declaration of such acceptance, giving sufficient detail on the nature of the gift or other advantage accepted, the donor and the circumstances under which it was accepted.'

⁹² Ibid cl 16(4).

entity to public officials, and a register of donations received by the public entity for a specific cause.⁹³

Complementary treatment of public officials, such as offers for travel, holiday, hospitality, training, scholarship or medical treatment will also be limited under the intended legislation. Under clause 18(1) of the Bill, a public official or a member of his family will be prohibited from accepting an offer for complementary treatment for any purpose, unless the complimentary treatment offered is required in his capacity as a public official or in exceptional circumstances. On the contrary, a public official or member of the official's family who accepts any complimentary treatment will be required, within forty eight hours of resumption of duty, to make a declaration of such acceptance in the prescribed form, giving sufficient detail on the nature of the treatment accepted, the donor and the circumstances under which it was accepted. Contravention of clause 18 of the Bill would equally be tantamount to the commission of an offence.

3.1.5 Restrictions on contracts between public officials and public entities

COI Bill, 2019 aims to restrict public officials from contracting with public entities and from influencing the grant of public contracts in furtherance of their private interests. Under the intended legislation, a public official would not be party to a contract for the supply of goods, works and services with any public entity.⁹⁴ Further, a public official would not, in the exercise of his or her official power, duty or function, award or influence the award of a contract in which the official has private interests.⁹⁵ Furthermore, a public official would be restricted from having an interest in a partnership, private company or any other legal entity that is a party to a contract with a public entity under which the partnership, private company or any other legal entity receives a benefit.⁹⁶ Contravention of the foregoing would amount to the commission of an offence.

⁹³ Ibid cl 17.

⁹⁴ Ibid cl 19(1).

⁹⁵ Ibid cl 19(2).

⁹⁶ Ibid cl 20.

3.1.6 Restriction of appointed public officials from participating in political activities

COI Bill, 2019 calls for political neutrality of appointed public officials in the duration of their public service engagement. An appointed public official will not engage in any political activity that may compromise or be seen to compromise the political neutrality of their office.⁹⁷ In that regard, an appointed public official will not be allowed to act as an agent for, nor further the interests of a political party or a candidate in an election, nor manifest support for or opposition to any political party or candidate in an election.⁹⁸ Contravention of this provision will be tantamount to the commission of an offence.⁹⁹

But, this is equally not new as the political neutrality requirement is currently embodied in section 23 of LIA, 2012.¹⁰⁰ Moreover, in the *Nagafwa case*, the Petitioner argued that by representing a party in an election petition, Hon James Orendo, the Senator for Siaya County, would be compromising the political neutrality of his office. However, Justice Tuiyott held that the political neutrality requirement did not apply to elected public officials but only applied to appointed public officials:

I would not agree. Section 23 of The Act is a provision on political neutrality expected of appointed State officers. Hon Orendo holds an elective position. Elected Members of Senate are politicians. The provisions of Section 23 do not apply to them. So, even if it was to be assumed that by representing the 3rd Respondent Hon Orendo is pursuing a political agenda that would not be inimical to his office as a Member of Senate.¹⁰¹

⁹⁷ Ibid cl 25(1).

⁹⁸ Ibid cl 25(2).

⁹⁹ Ibid cl 25(3).

¹⁰⁰ Section 23 of the Leadership and Integrity Act, 2012 states that; ‘(1) An appointed State officer, other than a Cabinet Secretary or a member of a County executive committee shall not, in the performance of their duties—(a) act as an agent for, or further the interests of a political party or candidate in an election; or (b) manifest support for or opposition to any political party or candidate in an election. (2) An appointed State officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections.’

¹⁰¹ *Nagafwa case* para 28.

3.1.7 Restriction of public officials from taking part in public collections

COI Bill, 2019, if enacted as is, will restrict public officials from participating in public collections or fundraisers, otherwise known as *Harambees*. A public official would not be allowed to solicit for contributions from the public except for national disasters gazetted as such by the President and allowing for a public collection for that purpose.¹⁰² A public official would also not be allowed to participate in collection of funds from the public, either as a collector or promoter, in a way that reflects adversely on that public official's integrity, impartiality or interferes with the performance of the official's duties nor use official social media platforms or his place of work as a venue for soliciting or collecting funds. Likewise, a public official would not be allowed to use his official position to solicit funds or coerce any person to contribute towards a private fund collection. Contravention of these requirements would amount to the commission of an offence.

3.1.8 Restriction of public officials from participating in recruitments

COI Bill, 2019 also aims to make it an offence for a public official to participate in or influence a recruitment and selection process in which the official has a private interest, or canvass for a candidate in a recruitment and selection process in which the official has a private interest.¹⁰³ However, this does not apply to the recruitment of personal staff permitted to the public official.¹⁰⁴

3.1.9 Restriction on post-employment engagements by public officials

COI Bill, 2019, if enacted into law as is, will also impose restrictions on post-employment engagements by public officials.¹⁰⁵ A former public official would not:

¹⁰² Conflict of Interest Bill, 2019, cl 26.

¹⁰³ Ibid cl 21.

¹⁰⁴ Ibid cl 21(2).

¹⁰⁵ Ibid cls 45-48. See also section 28 of the Leadership and Integrity Act, 2012, a current provision of law imposing post-employment restrictions on State officers and states that, 'A former State officer shall not be engaged by or act for a person or entity in a matter in which the officer was originally engaged in as a State officer, for at least two years after leaving the State office.'

- (a) act for or on behalf of any person in connection with any specific proceeding, transaction, negotiation or case to which the State is a party and with respect to which the former public official had acted for, or provided advice to the State;
- (b) be engaged by or act for or against his former employer for at least two years after ceasing to be a public official;
- (c) use information obtained in his official capacity and which is not available to the public to further the interests of another person or entity; or
- (d) accept appointment to a board of directors of, or employment with, a private entity with which he had significant official dealings, either directly or through private affiliations, during the period of two years immediately preceding the termination of his service.¹⁰⁶

Also, unless officially called upon, a former public official will be prohibited from representing, vouching for or defending any public entity on behalf of a person or an entity outside the public service with which the former official had significant official dealings, during the period of two years immediately preceding the termination of service.¹⁰⁷ This restriction applies whether the engagement is remunerated or not. However, a former public official may apply for exemption on the grounds that:

- (a) the former public official was not a senior member of the State organ;
- (b) the former public official's functions did not include the handling of files of a political or sensitive nature, such as confidential cabinet documents;
- (c) the former public official had little influence, visibility or decision-making power in the office of a State organ; and
- (d) by virtue of the official's expertise in public service.¹⁰⁸

¹⁰⁶ Conflict of Interest Bill, 2019, cl 45.

¹⁰⁷ Ibid cl 46.

¹⁰⁸ Ibid cl 47.

A former public official who contravenes the provisions on post-employment restrictions will have committed an offence. In addition, if EACC establishes that a former public official is not complying with the post-employment restrictions, EACC will be allowed to order any current public official not to have any official dealings with the former public official.¹⁰⁹

3.2 Compliance Measures

Under COI Bill, 2019, there are various means of compliance with the intended legislation towards the management and control of conflict of interest, which entail recusals, financial declarations, and divestment of assets by public officials. Firstly, the intended legislation will require public officials to recuse themselves from discussions, proceedings, debates, transactions, votes or decisions in which they have a conflict of interest.¹¹⁰ Upon recusing themselves, the recusal shall be recorded in the minutes of the transaction in question. The public official will also be required to file a declaration of the recusal with the employer and EACC, within sixty days after the day on which the recusal took place, providing sufficient details on the conflict of interest that was avoided.¹¹¹

Secondly, if the intended legislation comes into force, it will be a mandatory requirement for public officials to make financial declarations, that is, a declaration of their income, assets and liabilities, to the EACC at the beginning, in the duration of, and the conclusion of their public service.¹¹² This would also include a financial declaration for the public official's spouse(s) and dependent children under the age of eighteen years. The timelines for the financial declarations are: one, an initial declaration within thirty days of becoming a public officer, as concerns the year immediately preceding their appointment; two, a periodical declaration every two years in the duration of the public service engagement; and a final declaration within thirty days of ceasing to be a public officer.¹¹³ The financial

¹⁰⁹ Ibid cl 48.

¹¹⁰ Ibid cl 27(1).

¹¹¹ Ibid cl 27(2).

¹¹² Ibid cl 28.

¹¹³ Ibid cl 29 makes provision for the timelines for the declarations as follows; '(1) A public official shall, within thirty days of appointment as a public official, submit an initial declaration relating to the financial affairs of the public official for the

declarations will be accessible to the public upon application to EACC and will be retained by EACC for at least five years after a person ceases to be a public official.¹¹⁴

The periodical and final financial declarations will entail a disclosure of information on any material changes in, or affecting any of the categories of income, assets or liabilities in the schedule of mandatory declarations that have occurred within the two-year period prior to the declaration.¹¹⁵ Such material change would entail:

- (a) at least twenty five percent increase or decrease in the value of an income, asset or liability;
- (b) the disposal or acquisition of an asset or liability;
- (c) changes in marital status;
- (d) appointment or changes in directorships;
- (e) changes in membership in companies or partnerships and other legal entities howsoever established; or
- (f) changes in membership in social associations, societies, clubs, foundations or trusts.¹¹⁶

Likewise, the requirements on financial declarations by public officers under the Bill are not new. Part IV of POEA, 2003, particularly sections 26 and 27 of the Act, currently requires public officers to submit to the Commission responsible for the public officer an initial financial declaration within thirty

period of one year prior to appointment as a public official. (2) Every public official shall, once every two years within the period of service, submit a declaration relating to the affairs of the public official as at 1st of November of the declaration year, and such declaration shall be made within the month of December next following. (3) A public official shall, within thirty days after ceasing to be a public official, submit a final declaration relating to the financial affairs of the public official as at the date the official ceased to be a public official.’

¹¹⁴ Ibid cls 32 and 33.

¹¹⁵ Ibid cl 28(3). Pursuant to clause 30 of the Bill, the public official will include in the declarations special disclosures of all benefits that the public official, any member of their family, or any partnership or private corporation in which the public official or a member of their family has an interest or is entitled to receive as a result of a contract with a public entity.

¹¹⁶ Ibid cl 28(4).

days of becoming a public officer, periodic declarations every two years, and a final declaration within thirty days of ceasing to be a public officer.¹¹⁷

Thirdly, under the intended legislation, a public official shall within ninety days after the day of appointment or in the course of employment divest any private interest that would place them in a conflict of interest situation, by selling them in an arm's-length transaction or by placing them in a blind trust.¹¹⁸ The requirements for the blind trust will be such that:

- (a) the assets to be placed in trust shall be registered to the trustee unless they are in a registered retirement savings plan account;
- (b) the public official shall not have any power of management or control over the trust assets;
- (c) the trustee shall not seek or accept any instruction or advice from the public official concerning the management or the administration of the assets;
- (d) the assets placed in the trust shall be listed in a schedule attached to the instrument or contract establishing the trust;
- (e) the term of any trust shall be for as long as the public official who establishes the trust continues to hold the office, or until the trust assets are depleted;
- (f) the trustee shall deliver the trust assets to the public official when the trust is terminated;
- (g) the trustee shall not provide information about the trust, including its composition, to the public official, except for information that is required by law to be filed by the public official and periodic reports on the overall value of the trust;
- (h) the public official may receive any income earned by the trust, and add to or withdraw from the capital funds in the trust;

¹¹⁷ See also Public Service Commission of Kenya, 'Guidelines on Declaration of Income, Assets and Liabilities', 29 May 2009 <https://www.publicservice.go.ke/images/guidelines/Wealth_Declaration_Guidelines.pdf>.

¹¹⁸ Conflict of Interest Bill, 2019, cls 36-44

- (i) the trustee shall be at arm's length from the public official and the Commission is to be satisfied that an arm's length relationship exists;
- (j) the trustee may be—
 - (i) the public trustee;
 - (ii) a registered trustee; or
 - (iii) a listed company or a subsidiary wholly owned by a listed company, including a trust company or investment company, that is qualified to perform the duties of a trustee; or
- (k) the trustee shall provide the Commission, on every anniversary of the trust, with a written annual report verifying the accuracy, nature and market value of the trust, a reconciliation of the trust property, the net income of the trust for the year preceding, and the fees of the trustee, if any.¹¹⁹

Conversely, three categories of assets are expressly excluded from divestment: one, the assets in a registered retirement savings plan account;¹²⁰ two, the assets that have been given as security to a lending institution;¹²¹ and three, the assets that are of such minimal value that they do not pose any risk of conflict of interest in relation to the public official's duties and responsibilities.¹²²

3.3 Penalties for Non-Compliance under the Bill

3.3.1 Compliance Orders

Under COI Bill, 2019, EACC may issue orders to any public official to undertake a compliance measure under the intended legislation, that is, a recusal, financial declaration, or divestments of private interests.¹²³ Thereafter, the public official will be required to provide the EACC with a Report on Compliance with the Orders of the Commission.¹²⁴ The Report

¹¹⁹ Ibid cl 38.

¹²⁰ Ibid cl 38(1)(a).

¹²¹ Ibid cl 41.

¹²² Ibid cl 42.

¹²³ Ibid cl 43.

¹²⁴ Ibid cl 44.

will contain details on: the asset or private interest of the public official in issue and the method used to divest the private interest(s); the process to be put in place by the reporting public official to effect a recusal where one is necessary; and the matter and the order, and the steps taken to comply with the compliance order(s) of the Commission.

3.3.2 Temporary vacation of office to allow for investigations

COI Bill, 2019 has defined ‘temporary vacation of office’ to mean ‘temporary withdrawal or deprivation of powers and privileges of an office including, participating in decision making, voting, supervising, drawing of facilitative allowances and benefits linked to the office or function.’¹²⁵ If the Bill is enacted into law as is, a public official who is under investigation for alleged violation of the intended legislation will temporarily vacate office for ninety days, in order to facilitate investigations.¹²⁶

Temporary vacation of office will happen following EACC’s recommendation to the appointing authority, where there are reasonable grounds to suspect that the public official is likely to interfere with evidence, witnesses, or the investigation itself through concealing, altering, destroying or removing records, documents or evidence, or intimidating or threatening witnesses.¹²⁷ In case a public official refuses to vacate office within seven days of receipt of the notice to temporarily vacate office, EACC will be empowered to make an *ex parte* application to the High Court for orders to compel the public official to temporarily vacate office.¹²⁸

The provisions on temporary vacation of office by public officials who are being investigated, however, raises a number of issues, such as:

- (a) the effect of the temporary vacation of office on the public official’s powers, duties and functions;
- (b) when the temporary vacation of office should occur;
- (c) the length of the temporary vacation of office;

¹²⁵ Ibid cl 34(3).

¹²⁶ Ibid cl 34(1).

¹²⁷ Ibid cl 34(2).

¹²⁸ Ibid cl 34(4).

- (d) the suspect's participation in the EACC deliberations on whether the temporary vacation of office should be recommended to the appointing authority or not; and
- (e) the requirement that the application by the EACC to the High Court is to be made *ex parte*.

The temporary vacation of office concerns the conduct of investigations by EACC but is not for an ongoing trial, especially where charges have not yet been preferred regarding the contravention of the provisions of the intended legislation. This smells of malice, especially due to the lack of provision of opportunity for the suspect to participate in the EACC deliberations to determine the suspect's likelihood to interfere with evidence, witnesses or the investigations. Since the intended legislation adopts a punitive approach, it would be prudent to allow only for temporary vacation of office where criminal charges have been preferred against the public official and a trial is ongoing. Also, the application by EACC to the High Court to compel the public official to go on temporary vacation of office should be made *inter partes*, to allow participation by the suspect as the person greatly affected by the order.¹²⁹

Regarding the effect of the temporary vacation of office on the powers, duties and functions of a public official, the public officials suspected of violating the provisions of the intended legislation should merely be barred from physically accessing the office without supervision, as this in itself is sufficient to prevent any interference with evidence, witnesses and the investigation. However, the effect of such temporary vacation of office on the powers, duties and functions of the public official is subject to the constitutional provisions in that regard and any other written laws specific to the public office involved, as is the length of the temporary vacation of office.¹³⁰ As such, there is need to rework the definition and provisions on 'temporary vacation of office' under the Bill.

¹²⁹ See generally *Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others* [2019] eKLR; and *Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others* [2016] eKLR.

¹³⁰ Consider the impact of section 62 of the Anti-Corruption and Economic Crimes Act, 2003 (Act No 3 of 2003) on suspension of State officers and public officers from office, if charged with corruption or economic crime; and the reasoning of the

3.3.3 Penal Sanctions

COI Bill, 2019 adopts punitive measures for violation of the various provisions of the intended legislation by criminalizing such violations, as already highlighted in the various parts above. In that regard, the general penalty, where a public official commits an offence for which no penalty has been specifically provided for, is a fine not exceeding five million shillings or a term of imprisonment not exceeding four years, or both, upon conviction.¹³¹

3.4 Effects of the Bill on Existing Legislation

3.4.1 Repeal of the Public Officer Ethics Act, 2003 (POEA, 2003)¹³²

COI Bill, 2019, if enacted into law, will repeal POEA, 2003 which currently applies to public officers, as already highlighted above. Section 2 of POEA defines a ‘public officer’ as:

[A]ny officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any of the following—

- (a) the Government or any department, service or undertaking of the Government;
- (b) the National Assembly or the Parliamentary Service;
- (c) a local authority;
- (d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law;

Court of Appeal (Musinga, Kairu & Murgor JJA) in *Ferninand Ndung'u Waititu Babayao v Republic* [2019] eKLR, at paras 38-49.

¹³¹ Conflict of Interest Bill, 2019, cl 49.

¹³² Act No 4 of 2003, Laws of Kenya.

- (e) a co-operative society established under the Co-operative Societies Act (No. 12 of 1997):
Provided that this Act shall apply to an officer of a co-operative society within the meaning of that Act;
- (f) a public university;
- (g) any other body prescribed by regulation for the purposes of this paragraph.

Besides, under article 260 of the Constitution of Kenya, 2010, a ‘public office’ means ‘an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament’; ‘public officer’ means ‘(a) any State officer; or (b) any person, other than a State Officer, who holds a public office’; and ‘public service’ means ‘the collectivity of all individuals, other than State officers, performing a function within a State organ.’

Unlike POEA, 2003, the intended Conflict of Interest Act will be more expansive because of the broad definition of ‘public official’ adopted under clause 2 of COI Bill, 2019. Also, unlike POEA, 2003, the intended Conflict of Interest Act is not pegged solely on the public entity involved, but on the service being performed, that is public or government services or programmes.

The major drawback of repealing POEA, 2003, however, is that POEA, 2003 has been a general legislation covering various aspects of the ethics of public officers, conflict of interest included.¹³³ On the other hand, the intended Conflict of Interest Act is a special legislation focused solely on conflict of interest in relation to public service, hence leaving out other aspects of ethics in the public service such as professionalism, among others.

3.4.2 Amendments to LIA, 2012 and ACECA, 2003

COI Bill, 2019 proposes amendments to the Leadership and Integrity Act, 2012 (LIA, 2012),¹³⁴ and the Anti-Corruption and Economic Crimes Act,

¹³³ See Public Officer Ethics Act, 2003, pt II.

¹³⁴ Act No 19 of 2012, Laws of Kenya.

2003¹³⁵ (ACECA, 2003).¹³⁶ Nonetheless, the Bill is not expressive of the particular amendments at this point in time.

3.5 Implementation and Enforcement of the Intended Legislation

COI Bill, 2019 tasks the Ethics and Anti-Corruption Commission (EACC), established under the Ethics and Anti-Corruption Commission Act, 2011,¹³⁷ with the implementation and enforcement of the intended Conflict of Interest Act.¹³⁸ The functions of EACC in that regard will entail to:

- (a) administer and manage conflict of interest under the Act for all public officials;
- (b) develop an effective system for reporting allegations of violations of the conflict of interest laws;
- (c) develop standards and promote best practices for the management of the conflict of interest;
- (d) develop administrative procedures for the management of conflict of interest;
- (e) receive and process requests related to management of conflict of interest;
- (f) conduct inquiries on matters of conflict of interest and make recommendations to the relevant bodies;
- (g) recommend appropriate sanctions to be taken against public officials for violation of obligations under the Act;
- (h) provide advisory opinions on conflict of interest on its own volition or on request by any person;
- (i) conduct public awareness on the management of conflict of interest;
- (j) analyse, seek for clarification and verify conflict of interest disclosures; and
- (k) institute proceedings for forfeiture of undeclared and unexplained assets.¹³⁹

¹³⁵ Act No 3 of 2003, Laws of Kenya.

¹³⁶ Conflict of Interest Bill, 2019, cl 58.

¹³⁷ Act No 22 of 2011, Laws of Kenya.

¹³⁸ Conflict of Interest Bill, 2019 cl 5.

¹³⁹ *Ibid* cl 6.

In enforcing the intended Act, EACC will equally be empowered to summon witnesses to give evidence orally, or in writing, under oath or affirmation, or even to produce any evidence or exhibits that EACC considers necessary; including requesting for external professional assistance or advice.¹⁴⁰

Conversely, the Bill empowers EACC to delegate its powers of administration of the intended Conflict of Interest Act to any person or body which will then be deemed to be the Commission responsible for administration and management of conflict of interest in respect of a class of public officials specified by EACC.¹⁴¹ But, the said delegatory power of EACC should be subjected to the Constitution and other written laws for it to work.

In marked contrast, currently under POEA, 2003, the implementation and enforcement of POEA, 2003 has been left to the responsible Commission for each public officer, with the Committee of the National Assembly responsible for the ethics of members being responsible for: one, members of the National Assembly, the President, the Speaker and the Attorney-General; two, members of the Electoral Commission and the Public Service Commission; three, the Budget Controller and Auditor-General; and four, Directors and Assistant Directors of the Kenya Anti-Corruption Commission (now, EACC).¹⁴²

¹⁴⁰ Ibid cl 7(1) and (2).

¹⁴¹ Ibid cl 7(3).

¹⁴² Section 3 of the Public Officer Ethics Act, 2003 provides as follows, as concerns the determination of the responsible Commission;

(1) This section determines what body is the responsible Commission for a public officer for the purposes of this Act.

(2) The committee of the National Assembly responsible for the ethics of members is the responsible Commission for—

(a) members of the National Assembly including, for greater certainty, the President, the Speaker and the Attorney-General;

(b) members of the Electoral Commission and the Public Service Commission; and

(c) the Controller and Auditor-General;

(d) Directors and Assistant Directors of the Kenya Anti-Corruption Commission.

(3) The Public Service Commission is the responsible Commission for the public officers in respect of which it exercises disciplinary control and for the public officers described in paragraphs (d) and (e) of section 107(4) of the Constitution and for public officers who are officers, employees or members of state corporations that are public bodies.

This means that with the repeal of POEA, 2003, EACC officials will be exercising an oversight role over themselves. As such, there is need to specify under the Bill who will be exercising an oversight role over EACC officials as concerns conflict of interest. Also, bringing all public officials under the roof and eye of EACC is equivalent to digressing into the realm of bodies with special mandates over certain classes of public officials. For instance, the Judicial Service Commission is specifically responsible as concerns the conduct of judges, magistrates and other judicial officers and staff.¹⁴³ As such, it is imperative to rectify this before the Bill is enacted into law.

Another new aspect introduced by COI Bill, 2019 is the Register of Conflicts of Interest which will contain the particulars of a public official's registrable interests, state the nature and extent of a conflict of interest, and will be open for public inspection.¹⁴⁴ On the other hand, the maintenance of the same does not fall under the mandate of EACC as the Bill charges the accounting officer

(4) The Judicial Service Commission is the responsible Commission for judges, magistrates and the public officers in respect of which it exercises disciplinary control.

(5) The Parliamentary Service Commission is the responsible Commission for the public officers in respect of which it exercises disciplinary control.

(6) The Electoral Commission is the responsible Commission for councillors of local authorities.

(7) The Teachers Service Commission established under the Teachers Service Commission Act (Cap. 212) is the responsible Commission for teachers registered under that Act.

(8) The Defence Council established under the Armed Forces Act (Cap. 199) is the responsible Commission for members of the armed forces, within the meaning of that Act.

(9) The National Security Intelligence Council established under the National Security Intelligence Service Act, 1998 (No. 11 of 1998) is the responsible Commission for members of the National Security Intelligence Service established under that Act.

(9A) The Witness Protection Advisory Board established under the Witness Protection Act, 2003 shall be the responsible commission for the members of the Witness Protection Agency established under that Act.

¹⁴³ See Constitution of Kenya, 2010, arts 168 and 172(1)(c).

¹⁴⁴ Conflict of Interest Bill, 2019, cl 24. See also sections 36 and 37 of the Public Officer Ethics Act, 2003 on publication of disciplinary action taken against public officers who contravene the provisions of the Public Officer Ethics Act, 2003.

of the responsible public entity with maintaining the register of conflicts of interest in the prescribed manner. This would mean having multiple registers of conflicts interest owing to the numerous public entities currently in existence.

Moreover, unlike POEA, 2003, the Attorney General would be responsible for coming up with regulations for the better carrying out of the provisions of the intended conflict of interest legislation.¹⁴⁵

4. The Management and Regulation of Conflict of Interest in other Jurisdictions

4.1 South Africa

In South Africa, conflict of interest among public officials has been addressed by the Constitution, as the supreme law of the land, and relevant statute. Section 195(1) of the Constitution of the Republic of South Africa, 1996¹⁴⁶ sets out the basic values and principles that govern public administration and stipulates that services must be provided impartially, fairly, equitably and without bias, and that public administration must be accountable. The values and principles of public administration apply to administration in every sphere of government, organs of state and public enterprises.¹⁴⁷

Section 30 of the Public Service Act, 1994 (PSA, 1994)¹⁴⁸ provides that employees in the public sector are not to perform remunerative work outside

¹⁴⁵ See Conflict of Interest Bill, 2019, cl 55; and Section 42 of the Public Officer Ethics Act, 2003.

¹⁴⁶ As adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly of South Africa; approved by the Constitutional Court (CC) on 4 December 1996 and came into force on 4 February 1997. See <<https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1>>. Chapter 10 of the Constitution of the Republic of South Africa, 1996 is dedicated to public administration.

¹⁴⁷ Constitution of the Republic of South Africa, s 195(2).

¹⁴⁸ Proclamation 103 published in Government Gazette (GG) No 15791 of 3 June 1994. See

<<http://www.dpsa.gov.za/dpsa2g/documents/acts®ulations/psact1994/PublicServiceAct.pdf>>.

their public employment except with the written permission of the executive authority of the department.¹⁴⁹ Even so, the said executive authority must take into account whether the outside work could reasonably be expected to interfere with or impede the effective performance of the employee's functions in the department or contravene the Code of Conduct for Public Servants provided for in section 41(1) (b)(v) of PSA, 1994.

The Public Service Regulations, 2016¹⁵⁰ also make further provisions as pertains to conflict of interest among public officials. Under the Regulations, incidences of conflict of interest are generally referred to an independent panel for review; the panel is constituted on ad hoc basis as applicable to the various classes of public officials.¹⁵¹ The Regulations require all members of senior management service (SMS) level, employees on grade 13 or above, to minimise conflicts of interest and to put public interest first in the performance of their functions.¹⁵² Members of SMS are required to disclose their financial interests to their executive authorities by 30 April each year.¹⁵³ The financial interests to be disclosed are:

- (a) Shares, loan accounts or any other form of equity in a registered private or public companies and other corporate entities recognised by law: (i) The number, nature and nominal value of shares of any type in any public or private company and its name; and (ii) other forms of equity, loan accounts, and any other financial interests owned by an individual or held in any other corporate entity and its name.

¹⁴⁹ Under section 1 of the Public Service Act, 1994, 'department' means 'a national department, a national government component, the Office of a Premier, a provincial department or a provincial government component'.

¹⁵⁰ Came into force on 1 August 2016. See <[http://www.dpsa.gov.za/dpsa2g/documents/acts®ulations/regulations2016/Public%20Service%20Regulations,%202016%20\(effective%201%20August%202016\).pdf](http://www.dpsa.gov.za/dpsa2g/documents/acts®ulations/regulations2016/Public%20Service%20Regulations,%202016%20(effective%201%20August%202016).pdf)>.

¹⁵¹ See Public Service Regulations, 2016 (SA), reg 7.

¹⁵² See Ibid reg 91.

¹⁵³ See Ibid regs 16-19.

- (b) Income-generating assets: (i) A description of the income-generating asset; (ii) the nature of the income; and (iii) the amount or value of income received.
- (c) Trusts: (i) The name of the trust, trust reference or registration number as provided by the Master of the High Court, and the region where the trust is registered; (ii) the purpose of the trust, and your interest or role in the trust; and (iii) the benefits or remuneration received (these include fees charged for services rendered).
- (d) Directorships and partnerships: (i) The name, type and nature of business activity of the corporate entity or partnership; and (ii) if applicable, the amount of any remuneration received for such directorship or partnership.
- (e) Remunerated work outside the employee's employment in her or his department: (i) The type of work; (ii) the name, type and nature of business activity of the employer; (iii) the amount of the remuneration received for such work; and (iv) proof of compliance with section 30 of the Act must be attached.
- (f) Consultancies and retainerships: (i) The nature of the consultancy or retainership of any kind; (ii) the name, type and nature of business activity of the client concerned; and (iii) the value of any benefits received for such consultancy or retainership.
- (g) Sponsorships: (i) The source and description of direct financial sponsorship or assistance; (ii) the relationship between the sponsor and the employee; (iii) the relationship between the sponsor and the department; and (iv) the value of the sponsorship or assistance.
- (h) Gifts and hospitality from a source, other than a family member: (i) A description, value and source of a gift; (ii) the relationship between the giver and the employee; (iii) the relationship between the giver and the department; and (iv) a description and the value of any hospitality intended as a gift in kind.
- (i) Ownership and other interests in immovable property: (i) A description and extent of the land or property; (ii) the area

- in which it is situated; (iii) the purchase price, date of purchase and the outstanding bond on the property; and (iv) the estimated market value of the property.
- (j) Vehicles: (i) A description (make and model) of the vehicle; (ii) the registration number of the vehicle; and (iii) the purchase price, date of purchase and the outstanding amount owing on the vehicle.¹⁵⁴

Regulation 21 highlights the procedure for managing and eradicating conflict of interest for members of SMS and designated employees who are not members of SMS. As concerns members of SMS, executive authorities are required to send the financial disclosure forms to the Public Service Commission (PSC) each year.¹⁵⁵ The PSC must assess the financial disclosures for potential conflict of interest. Declaration in a register of interests provides a permanent mechanism to allow for the declaration in advance of potential conflict of interest. As a result, PSC has played an increasingly important role in building ethical conduct in the public service in South Africa, which has led to a process of compiling a register of interests for members of SMS to help identify and manage potential conflicts of interest.

On the other hand, conflicts of interest by designated employees who are not members of SMS are dealt with by the heads of department who indulge the affected employees on the appropriate steps to remove the conflict of interest and take disciplinary action in case of non-compliance, and make annual reports to the Minister for Public Service and Administration in that regard.¹⁵⁶

The mechanisms of ad hoc financial disclosures and declaration in a register of interests complement each other. However, public access to financial declaration forms and the register of interests is limited, subject to a court order requiring disclosure.¹⁵⁷

¹⁵⁴ Ibid reg 19.

¹⁵⁵ Ibid reg 21(1).

¹⁵⁶ Ibid reg 21(2).

¹⁵⁷ Ibid reg 20.

In addition, the Prevention and Combatting of Corrupt Activities Act, 2004¹⁵⁸ (PRECCA, 2004) prohibits members of public bodies from holding private interests in contracts, agreements or investments with that body, that is, any public officer who acquires a private interest in a contract, agreement or investment connected with the public body is guilty of an offence.¹⁵⁹ Exceptions to this offence include: where the public officer's conditions of employment do not prohibit him or her from such holdings; where the public official's interest is as a shareholder of a listed company; where the contract, agreement or investment is awarded through a tender process and the official's contract of employment does not prohibit this and the tender process is independent.

Moreover, conflict of interest among public officials in South Africa is regulated through laws relating to public procurement and the rules and regulations made thereunder. These include: one, regulations pursuant to the Public Finance Management Act, 1999¹⁶⁰ (PFMA Regulations),¹⁶¹ which creates a framework for supply chain management applicable to national and provincial departments and trading entities, constitutional institutions, and public entities; two, regulations pursuant to the Local Government: Municipal Finance Management Act, 2003¹⁶² (MFMA Regulations), applicable to the municipalities and institutions in the local government sphere, in particular the Municipal Supply Chain Management Regulations;¹⁶³ and three, schedules 1 and 2 of the Local Government: Municipal Systems Act, 2000,¹⁶⁴ which provide for Codes of Conduct for

¹⁵⁸ Act No 12 of 2004 (SA). See

<https://www.gov.za/sites/default/files/gcis_document/201409/a12-04.pdf>.

¹⁵⁹ PRECCA, 2004, s 17. See also section 12 of the Act.

¹⁶⁰ Act No 1 of 1999 (SA), assented to on 2 March 1999 and came into force on 1 April 2020. See <<http://www.treasury.gov.za/legislation/pfma/act.pdf>>.

¹⁶¹ See

<https://www.gov.za/sites/default/files/gcis_document/201409/257670.pdf>, See e.g., PMFA reg 8(3).

¹⁶² Act No 56 of 2003 (SA). See

<https://www.gov.za/sites/default/files/gcis_document/201409/a56-03.pdf>.

¹⁶³ Gazette No 27636, 30 May 2005. See

<<http://mfma.treasury.gov.za/RegulationsandGazettes/Gazette27636/Pages/default.aspx>>. See e.g., regulations 21(c), 44 and 46(2).

¹⁶⁴ Act No 32 of 2000 (SA). See

<https://www.gov.za/sites/default/files/gcis_document/201409/a32-000.pdf>.

Councillors and Municipal Staff Members, respectively, and their corresponding obligations as pertains to the management of conflicts of interest.

Incidences of conflict of interest may also take a criminal prosecution angle as seen in the South African case of *S v Yengeni*.¹⁶⁵ The case concerned contraventions of the conflict of interest regulations specified under the Parliamentary Code of Conduct in regard to financial interests of members of Parliament, adopted in Parliament on 21 May 1996. The Code provided *inter alia* that generally no person bound by the Code was to place himself or herself in a position which conflicts with his or her responsibilities as a public representative in Parliament, nor take any improper benefit, profits or advantage from the office of the member. The Code required Members of Parliament to register certain interests which raised conflicts of interest. In this case, the Appellant, a former member of Parliament, was the chairperson of the Parliamentary Joint Standing Committee on Defence. He received a discount of 47% on a new Mercedes Benz 4x4 motor vehicle (intended to be introduced into the South African market) from one Woerfel, employed by Daimler-Chrysler AG, a company connected with the manufacture of Mercedes Benz motor vehicles and also a shareholder of a potential supplier of military equipment, namely ADS.

The Appellant did not disclose the private interest in the Parliamentary record of benefits despite it being a registrable interest. The information on the benefit became public knowledge and the Appellant made misrepresentations in an attempt to conceal his actions. Criminal proceedings were preferred against the Appellant and he pleaded guilty to charges of fraud on the basis of a plea and sentence agreement which promised a lenient sentence. He appealed his conviction, claiming that failure to make disclosures to Parliament was not tantamount to fraud, and the four-years imprisonment sentence imposed on him, which he considered to be harsh. The Court faulted his arguments against his conviction, especially as it was based on his clear and unequivocal plea of guilt. Regarding his sentence, the Appellant argued against the trial court's disregard of the plea and sentence agreement, and also argued that his

¹⁶⁵ (A1079/03) [2005] ZAGPHC 117 (11 November 2005) <<http://www.saflii.org/za/cases/ZAGPHC/2005/117.html>>.

resignation from Parliament should have been taken into account as a mitigating factor. The Court dismissed the appeal stating that:

In terms of section 105A(7)(b)(i) [of the Criminal Procedure Act, 1977] the trial court has the power to enquire into all relevant circumstances relating to the sentence proposed in the agreement. This power should be exercised whenever a proposed sentence appears to be too lenient in the light of the relevant offence the accused is convicted of.

In the present case, a non-custodial sentence for the crime of which the appellant is guilty would be flagrantly inappropriate, given the aggravating features we have pointed out above. Certain misdirections are said to have occurred during the sentencing process in the regional court. Even if this were so, the imposition of an appropriate sentence was not affected thereby.

It was urged upon us that the fact that the appellant had resigned from Parliament should be taken into account as a mitigating factor. This argument is a fallacy. The removal of a corrupt or dishonest official or elected office bearer from the position of trust occupied and abused by her or by him is not a punishment and it is inappropriate to take such removal from office into account as a mitigating circumstance. The removal from an office of trust of a person who has, by dishonesty and greed, demonstrated that she or he is unfit to hold such office, is a natural consequence of such unfitness. The immediate and permanent removal from an office of trust should follow in every case of a crime involving an element of dishonesty as a matter of law and of public policy. This principle has long been recognised in our law in the case of an attorney who has misappropriated trust funds and of a company director or a trustee who has been convicted of a crime of which dishonesty is an element.¹⁶⁶

¹⁶⁶ Ibid paras 72-74.

From the foregoing, it is clear that similar to the current state of the law in Kenya, South Africa does not have a specific conflict of interest legislation in force. But, like Kenya, South Africa addresses conflict of interest among public officials through general legislation regarding ethics in public office, public procurement, and anti-corruption and criminal statutes.

4.2 Canada

Unlike Kenya and South Africa, Canada has in place a Conflict of Interest Act (the Act).¹⁶⁷ The purpose of the Act is to:

- (a) establish clear conflict of interest and post-employment rules for public office holders;
- (b) minimize the possibility of conflicts arising between the private interests and public duties of public office holders and provide for the resolution of those conflicts in the public interest should they arise;
- (c) provide the Conflict of Interest and Ethics Commissioner with the mandate to determine the measures necessary to avoid conflicts of interest and to determine whether a contravention of this Act has occurred;
- (d) encourage experienced and competent persons to seek and accept public office; and
- (e) facilitate interchange between the private and public sector.¹⁶⁸

Under the Act, a 'public office holder' means

- (a) a minister of the Crown, a minister of state or a parliamentary secretary;
- (a.1) the Chief Electoral Officer;
- (b) a member of ministerial staff;
- (c) a ministerial adviser;
- (d) a Governor in Council appointee, other than the following persons, namely,

¹⁶⁷ Enacted by section 2 of chapter 9 of the Statutes of Canada, 2006, in force on 9 July 2007 (SC 2006, c 9, s 2) <<https://laws-lois.justice.gc.ca/PDF/C-36.65.pdf>>. Canada's Conflict of Interest Act was assented to on 12 December 2006.

¹⁶⁸ Conflict of Interest Act (CA), s 3.

- (i) a lieutenant governor,
- (ii) officers and staff of the Senate, House of Commons and Library of Parliament,
- (iii) a person appointed or employed under the Public Service Employment Act who is a head of mission as defined in subsection 15(1) of the Department of Foreign Affairs, Trade and Development Act,
- (iv) a judge who receives a salary under the Judges Act,
- (v) a military judge within the meaning of subsection 2(1) of the National Defence Act,
- (vi) a Deputy Commissioner of the Royal Canadian Mounted Police, and
- (vii) a member of the National Security and Intelligence Committee of Parliamentarians;
- (d.01) the Parliamentary Budget Officer;
- (d.1) a ministerial appointee whose appointment is approved by the Governor in Council; and
- (e) a person or a member of a class of persons if the person or class of persons is designated under subsection 62.1(1) or 62.2(1).¹⁶⁹

The Act also defines a ‘public sector entity’ to mean ‘a department or agency of the Government of Canada, a Crown corporation established by or under an Act of Parliament or any other entity to which the Governor in Council may appoint a person, but does not include the Senate or the House of Commons.’ The Act also demarcates ‘reporting public officer holders’, and this means a public officer holder who is:

- (a) a minister of the Crown, minister of state or parliamentary secretary;
- (a.1) the Chief Electoral Officer;
- (b) a member of ministerial staff who works on average 15 hours or more a week;
- (c) a ministerial adviser;

¹⁶⁹ Ibid s 2.

- (d) a Governor in Council appointee, or a ministerial appointee whose appointment is approved by the Governor in Council, who exercises his or her official duties and functions on a part-time basis but receives an annual salary and benefits;
- (e) a Governor in Council appointee, or a ministerial appointee whose appointment is approved by the Governor in Council, who exercises his or her official duties and functions on a full-time basis;
- (e.1) the Parliamentary Budget Officer; or
- (f) a person or a member of a class of persons if the person or class of persons is designated under subsection 62.1(2) or 62.2(2).¹⁷⁰

The Act is implemented and enforced by the Conflict of Interest and Ethics Commissioner (the Commissioner) appointed under section 81 of the Parliament of Canada Act.¹⁷¹ Under the Act, a public officer holder is in a conflict of interest ‘when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person’s private interests.’¹⁷² The Act therefore imposes a general duty on public office holders to arrange their private affairs in a manner that prevents them from being in a conflict of interest.¹⁷³ The Act then proceeds to impose a number of conflict of interest rules that target specific issues that affect public office holders, such as decision making by public office holders, preferential treatment, use of insider information, use of public influence, receipt of gifts or other advantages (especially those that have a value of \$1,000 or more), contracts with public sector entities, offers of outside employment, participation in political activities, and participation in fundraisers.¹⁷⁴

Regarding offers of outside employment, the Conflict of Interest Act prohibits a public office holder from allowing himself or herself to be

¹⁷⁰ Ibid.

¹⁷¹ RSC, 1985, c P-1. See <<https://laws-lois.justice.gc.ca/eng/acts/p-1/>>; and the Canadian Office of the Conflict of Interest and Ethics Commissioner <<https://ciec-ccie.parl.gc.ca/en/Pages/default.aspx>>.

¹⁷² Conflict of Interest Act (CA), s 4.

¹⁷³ Ibid s 5.

¹⁷⁴ See Ibid pt 1, ss 6-19.

influenced in the exercise of an official power, duty or function by plans for, or offers of, outside employment.¹⁷⁵ Moreover, section 15 of the Act provides that, except as required in the exercise of their official powers, duties and functions, reporting public office holders are prohibited from: one, engaging in employment or the practice of a profession; two, managing or operating a business or commercial activity; continuing as, or becoming, a director or officer in a corporation or an organization; holding office in a union or professional association; serving as a paid consultant; or being an active partner in a partnership. It is interesting how this would work in the Kenyan context without incorporating the needed exceptions!

That said, section 15 of Canada's Conflict of Interest Act does provide exceptions to the foregoing general rule, which is similar to the current position in Kenya. For instance, a reporting public office holder may engage in employment or the practice of a profession in order to retain any licensing or professional qualifications or standards of technical proficiency necessary for the purpose of maintaining their employment opportunities or ability to practice their profession on leaving public office. But, only if the reporting public office holder does not receive any remuneration, and the Commissioner is of the opinion that it is not incompatible with the reporting public office holder's duties as a public office holder. Participation of a reporting public office holder as a director or officer in a corporation or an organization is also subject to the Commissioner's satisfaction that it is not incompatible with the reporting public office holder's duties as a public office holder. In any case, nothing in section 15 of the Act prohibits or restricts a reporting public office holder from engaging in political activities.

The Act puts in place a number of compliance measures as a means to manage and address the occurrence of conflict of interest among public office holders. Such compliance measures include recusals,¹⁷⁶ confidential disclosures (of assets, liabilities, benefits from contracts, gifts, and offers of and acceptances of outside employment),¹⁷⁷ public declarations (of recusals,

¹⁷⁵ Ibid s 10.

¹⁷⁶ Ibid s 21.

¹⁷⁷ Ibid ss 22-24.

certain assets, liabilities, outside employment activities, gifts, and travel),¹⁷⁸ and divestment upon appointment.¹⁷⁹

The Commissioner enforces the Act by imposing administrative monetary penalties,¹⁸⁰ issuing compliance orders,¹⁸¹ and launching formal investigations of possible contraventions of the Act.¹⁸² Administrative monetary penalties of up to \$500¹⁸³ will be issued for failures by public office holders to meet the reporting deadlines stipulated under the Act, such as confidential report filings, disclosures of material changes to the initial confidential report, firm offers of outside employment and their acceptance, and public declarations of gifts and recusals.¹⁸⁴ Upon issuance of such penalties, the Commissioner is required to make public the nature of the violation, the name of the public office holder and the amount of the penalty, through its addition in the public registry.¹⁸⁵

Nevertheless, the Commissioner can only investigate possible contraventions of the Act but he is not empowered to impose sanctions under the Conflict of Interest Code for Members of the House of Commons (the

¹⁷⁸ Ibid s 25.

¹⁷⁹ Ibid s 27.

¹⁸⁰ Ibid s 52.

¹⁸¹ Such compliance orders are provided for under section 30 of the Conflict of Interest Act (CA) and would require the public office holder to take any compliance measure, including an order to submit documents for the mandatory annual review of the information contained in the public office holder's confidential report, to cease prohibited outside activities, to divest controlled assets, or to refrain from seeking to influence a decision through a recusal. <<https://ciec-ccie.parl.gc.ca/en/investigations-enquetes/Pages/CompOrders-Ordonnances.aspx>>.

¹⁸² See Conflict of Interest Act, pt 4. See also <<https://ciec-ccie.parl.gc.ca/en/About-APropos/Pages/Enforcing-Appliquer.aspx>>; <<https://ciec-ccie.parl.gc.ca/en/investigations-enquetes/Pages/InvestReport-RapportEnquete.aspx>>

¹⁸³ The maximum penalty of \$500 is set with a view to encourage compliance rather than punishment per section 52 as read with section 53(3)(a) of the Conflict of Interest Act (CA).

¹⁸⁴ See <<https://ciec-ccie.parl.gc.ca/en/investigations-enquetes/Pages/Penalties-Penalites.aspx>>; <<https://ciec-ccie.parl.gc.ca/en/investigations-enquetes/Pages/AMPRegime-RegimePenalites.aspx>>.

¹⁸⁵ See Conflict of Interest Act (CA), ss 51 and 53.

Code),¹⁸⁶ which does not create penalties.¹⁸⁷ However, the Commissioner may recommend sanctions in his investigation reports when he finds the Code has been contravened.¹⁸⁸

As pertains to independence, the Office of the Conflict of Interest and Ethics Commissioner is solely responsible to Parliament and not to the federal government of Canada or an individual minister, and is part of the parliamentary infrastructure.¹⁸⁹ Moreover, the Commissioner is an Officer of Parliament and reports directly to Parliament rather than through a minister of the federal government.¹⁹⁰

However, addressing conflict of interest in Canada may also take a criminal angle in the nature of the offence of breach of trust by a public officer.¹⁹¹ This was the case in *R v Boulanger*,¹⁹² where the Supreme Court of Canada held that the offence of breach of trust by a public officer is established where the Crown proves beyond a reasonable doubt that: (1) the accused is an official; (2) the accused was acting in connection with the duties of his or her office; (3) the accused breached the standard of responsibility and conduct demanded of him or her by the nature of the office; (4) the accused's conduct represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust; and (5) the accused acted with the intention to use his or her public office for a purpose other than the public good, for example, a dishonest, partial, corrupt, or oppressive purpose.¹⁹³

¹⁸⁶ <<https://www.ourcommons.ca/About/StandingOrders/appa1-e.htm>>

¹⁸⁷ <<https://ciec-ccie.parl.gc.ca/en/About-APropos/Pages/Enforcing-Appliquer.aspx>>

¹⁸⁸ <<https://ciec-ccie.parl.gc.ca/en/About-APropos/Pages/Enforcing-Appliquer.aspx>>

¹⁸⁹ See Parliament of Canada Act, ss 85-87. <<https://ciec-ccie.parl.gc.ca/en/About-APropos/Pages/Independence-Independence.aspx>>.

¹⁹⁰ See Parliament of Canada Act, s 90.

¹⁹¹ Criminal Code, RSC 1985, c C-46, s 122
<<https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html>>.

¹⁹² [2006] 2 SCR 49, 2006 SCC 32 (CanLII)
<<https://www.canlii.org/en/ca/scc/doc/2006/2006scc32/2006scc32.html>>.

¹⁹³ Ibid para 58.

4.3 The United Kingdom (UK)¹⁹⁴

In the UK, conflicts of interest by public officials, especially Members of Parliament, are addressed by encouraging transparency rather than creating numerous restrictions or regulations on the activities of the parliamentarians.¹⁹⁵ As such, parliamentarians can engage in outside employment or remunerated activity, but they have to disclose their private interests in writing under a registration system provided for and make ad hoc oral declarations of any conflicts of interest at the onset of parliamentary proceedings. The registers on written private interests and of oral declarations on conflicts of interests are both available for public inspection. Paid advocacy or the receiving of financial inducement for parliamentary influence is also banned under specific rules.¹⁹⁶

In the UK, parliamentarians also serve as ministers and the Ministerial Code helps them to manage their private interests, constituency interests and ministry interests.¹⁹⁷ The Ministerial Code is enforced by the Prime Minister. Following their appointment to each new public office, Ministers have to provide their Permanent Secretary with a full list in writing of all private interests which might give rise to conflict, including the interests of their spouse or partner and close family which might give rise to conflict.¹⁹⁸ Thereafter, the Minister will, where necessary, meet the Permanent Secretary and the Independent Adviser on Ministers' Interests to agree on how to handle the conflict(s) of interest.¹⁹⁹ The Minister is required to record in

¹⁹⁴ See e.g., Council of Europe's Group of States Against Corruption (GRECO), 'Fifth Evaluation Round, Preventing Corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies: Evaluation Report, United Kingdom' (adopted by GRECO at its 78th Plenary Meeting at Strasbourg on 4-8 December, 2017) pp 24-33 and 46-49 <<https://rm.coe.int/fifth-evaluation-round-preventing-corruption-and-promoting-integrity-i/168088ea4c>>.

¹⁹⁵ Council of Europe's Group of States Against Corruption (GRECO), 'Fourth Evaluation Round, Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors: Evaluation Report, United Kingdom' (Adopted at GRECO's 57th Plenary Meeting (Strasbourg, 15-19 October, 2012), p 2.

¹⁹⁶ Ibid.

¹⁹⁷ See UK Ministerial Code, pp 14-19

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826920/August-2019-MINISTERIAL-CODE-FINAL-FORMATTED-2.pdf>

¹⁹⁸ Ibid s 7.3.

¹⁹⁹ Ibid s 7.4.

writing the action taken to manage the conflicts of interest(s) and provide the Permanent Secretary and the independent adviser on Ministers' interests with a copy of that record;²⁰⁰ but in case the Minister retains a private interest, they have to disclose that to their Ministerial colleagues if discussions on public business affect the interest in any way and the Minister is to remain detached from the consideration of that business.²⁰¹ Moreover, while personal information that Ministers disclose remain confidential, a statement covering the relevant Ministers' interests will be published twice annually.²⁰²

The Permanent Secretary and the Independent Adviser on Minister's Interests also advises Ministers on how to manage conflicts of interests involving their private financial interests.²⁰³ This includes advice on when to dispose of the financial interest, alternative ways to manage the conflict of interest, when to retain the financial interests, and when to cease holding the public office. Civil servants are also bound to avoid situations of conflicts of interest and are guided by the Civil Service Code in that regard.

In essence, different countries have made commendable steps, through legislation or policies, or values and principles, to manage and resolve conflicts of interest among public officials, as depicted in Kenya, South Africa, Canada and the UK. What works, however, is debatable and is dependent on many other factors, such as the independence of the judiciary, the independence of the ethics and crime investigators and prosecutors, political will in terms of accountability and enforcement, and individual and institutional incentive to comply with the conflict of interest policy and legal frame work in place. For instance, in the case of South Africa, a strict and harsh legislative framework has proved unworkable and an attempt to shift to the promotion of integrity through values and principles, norms and standards seems more imperative.²⁰⁴

²⁰⁰ Ibid s 7.6.

²⁰¹ Ibid s 7.5.

²⁰² Ibid.

²⁰³ Ibid s 7.7-7.9.

²⁰⁴ See e.g., Modimowabarwa Hendrick Kanyane, 'Conflict of Interest in South Africa: A Comparative Case Study' (2006).

5. Flaws in the Conflict of Interest Bill, 2019

From the discourse above, I have highlighted some drawbacks in the Bill, especially as pertains to temporary vacation of office by public officials in order to allow for EACC investigations, and the sole empowerment of EACC with the implementation and enforcement of the intended legislation. Nonetheless, from an independent study of the Bill and the comparative study on conflicts of interest among public officers in South Africa, Canada, France and the United Kingdom, the other flaw that exists in the Bill as it is now is the lack of vital definitions.

The interpretation clause of COI Bill, 2019, clause 2, fails to define what ‘a conflict of interest’ means. On the other hand, article 2 of the French Act No 2013-907 of 11 October 2013 on transparency in public life defines a ‘conflict of interest’ as ‘any situation that causes interference between a public interest and public or private interests, which could influence or appear to influence the independent, impartial and objective performance of a duty.’²⁰⁵ The French definition of conflict of interest envisages not only a conflict between public interests and private interests but also a conflict between public interests themselves. However, an analysis of the intended Kenyan Conflict of Interest Act reveals that the focus of the intended legislation will be on conflict between the public interest and private interests of public officials.²⁰⁶ Although Kenya would not be alone in failing to define a conflict of interest,²⁰⁷ a definition would be helpful in the interpretation of the same, in setting the necessary parameters, and in ensuring certainty and transparency in what constitutes a conflict of interest.

The Bill equally does not define what constitutes or does not constitute ‘private interest’. According to the Canadian Conflict of Interest Act,²⁰⁸ which does not say what private interest is but rather what it is not, ‘private

²⁰⁵ Act No 2013-907 of 11 October 2013 on Transparency in Public Life.

²⁰⁶ See e.g., clause 3(2)(b) and (d) of the Bill.

²⁰⁷ See e.g., ‘The Conflict of Public Interests, a French Exception’, High Authority for Transparency in Public Life, 21 December, 2017) <https://www.hatvp.fr/english_news/the-conflict-of-public-interests-a-french-exception/>.

²⁰⁸ Conflict of Interest Act, S C 2006, c 9, s 2 (Enacted by section 2 of chapter 9 of the Statutes of Canada, 2006, in force on 9 July, 2007, Last amended on 6 October, 2017) <<https://laws-lois.justice.gc.ca/PDF/C-36.65.pdf>>.

interest does not include an interest in a decision or matter (a) that is of general application; (b) that affects a public office holder as one of a broad class of persons; or (c) that concerns the remuneration or benefits received by virtue of being a public office holder.²⁰⁹

The Bill also does not define ‘family’. On the contrary, the Canadian Conflict Interest Act defines both ‘family’ and ‘relatives’ for purposes of the Act. ‘Family’ means a public office holder’s spouse or common-law partner, and his or her dependent children and the dependent children of his or her spouse or common-law partner.²¹⁰ ‘Relatives’ mean ‘Persons who are related to a public office holder by birth, marriage, common-law partnership, adoption or affinity are the public office holder’s relatives for the purposes of [the] Act unless the Commissioner determines, either generally or in relation to a particular public office holder, that it is not necessary for the purposes of [the] Act that a person or a class of persons be considered a relative of a public office holder.’²¹¹

Accordingly, there is need to define the vital aspects of the intended legislation as applicable to conflicts of interest, particularly for purposes of certainty of law.

6. Conclusion

The intended Conflict of Interest Act has been fronted to have effects only on advocates or counsel who are serving in the public service, particularly the Members of Parliament. However, should the intended legislation come into force, all public officials in professional practice and business, whether in the Executive,²¹² the Judiciary, Parliament, parastatals and other public entities will be affected. In particular, as much as the public interest seems to be served best when all public officials are restricted as concerns outside

²⁰⁹ Ibid s 2(1).

²¹⁰ Ibid s 2(2).

²¹¹ Ibid s 2(3).

²¹² See e.g., United States Office of Government Ethics, ‘Outside Employment Limitations’ (26 February 2016)

<<https://www.oge.gov/Web/oge.nsf/Resources/Outside+Employment+Limitations>>; for the applicability of conflict of interest rules on the Federal Executive branch employees in the United States of America, especially as concerns outside employment.

professional practice or other gainful employment, the public interest of having qualified and competent professionals in the public service is equally undermined.

In any case, the management of conflict of interest as coined in both the current scattered provisions of law and the intended Conflict of Interest Act is not a blanket restriction as pertains to the various aspects of conflicts of interest. On the contrary, the proper management of conflict of interest entails a case-by-case approach, whenever a real or apparent conflict of interest is said to or perceived to arise. Accordingly, as the jurisprudence on the issue of conflicts of interest indicates, the person who alleges a conflict of interest on the part of a public official must demonstrate the occurrence of the same in any particular case.²¹³ Otherwise, unqualified restrictions in public service engagement on the grounds of conflict of interest would give rise to hesitations by professionals before choosing to participate in and offer their competence and expertise in the public service, as was witnessed in the *Ng'ang'a case* above.²¹⁴

Ideally, certain aspects of the conflict of interest rules may not apply equally and in like manner to all public officials, hence there is need to modify some of the rules, especially those regarding restrictions on other gainful employment by public officials. Such modifications would entail taking into account the public entity involved, the different areas of risk for conflicts of interest for that public entity, and the nature of employment of the public official involved as relates to the areas of risk for conflicts of interest in the

²¹³ See n 72.

²¹⁴ *Samuel Muigai Ng'ang'a v The Minister for Justice, National Cohesion & Constitutional Affairs & another* [2013] eKLR, HC (Nairobi) Const and Human Rights Div, Pet No 354 of 2012 (*Ng'ang'a case*), para 2 (See n 72).

respective public entity.²¹⁵ That said, although enacting a conflict of interest legislation seems proper and necessary, the primary goal should be to build the capacity of public officials to be able to identify a conflict of interest and how to balance their public duties and their private interests for the public benefit.

In view of the above, the following specific recommendations to improve the COI Bill, 2019 are vital:

1. Amendments to clause 2 of the Bill –

- a) Incorporate the vital definitions that are missing, which are definitions of ‘conflict of interest’, ‘private interest’, ‘family’, and ‘relatives’;
- b) The definition of ‘registrable interests’ is tied to what is set out in the Second Schedule of the intended Act yet the said schedule does not exist as at now, hence there is need to incorporate the Second Schedule to the Bill to allow for public scrutiny;
- c) The phrase ‘gainful employment’ should be adjusted to ‘other gainful employment’ or ‘outside employment’ to capture the fact that the kind of employment referred to is an additional employment to the public engagement by the public official;
- d) The activities that connote the ‘other gainful employment’ should be those provided for under clause 23(1) of the Bill and not clause 22(1) of the Bill;
- e) Redefine ‘Commission’ to mean ‘the Commission or appointing authority responsible for the public official’ in line with the view above that conflict of interest areas arise differently for every

²¹⁵ See e.g., USLegal.Com, ‘Outside Employment Policies Public Employer Law and Legal Definition’ <<https://definitions.uslegal.com/o/outside-employment-policies-public-employer/>> which indicates that outside employment limitations for Federal employees in the United States of America is determined by the job classification of the employee, such that whereas some federal employees may not engage in outside employment or may require approval before undertaking outside employment, some other federal employees, such as special government employees, generally do not require approval before undertaking outside employment (for example, special government employees appointed to perform temporary duties on a full-time or intermittent basis, with or without compensation, for no more than 130 days of any period of 365 consecutive days.)

public entity hence can best be managed by the responsible commission or appointing authority that the public official reports to;

- f) Rather than adopting the definition of ‘unexplained assets’ under the Anti-Corruption and Economic Crimes Act, which is basically tied to corruption or economic crimes’ investigations, there is need to define the same in the context of the intended Conflict of Interest Act.

2. Amendments to part II of the Bill (clauses 5-7 of the Bill) –

- a) Part II of the Bill needs to be adjusted accordingly to remove the administration of the intended act (in terms of enforcement and implementation) from the sole ambit of EACC. The administration of the intended Act should be left to the Commission or appointing authority for the public office involved. For example, the Judicial Service Commission should administer the conflict of interest rules pertaining to judges, magistrates and other judicial officers and staff, as stipulated under the Constitution and the Judicial Service Act, 2011 (Act No 1 of 2011).
- b) The Bill should also specify who will be exercising an oversight role over EACC officials as concerns conflicts of interest.

3. Amendments to clause 23 of the Bill –

- a) Since clause 23(3) of the Bill makes reference to the fact that public officials are generally permitted to engage in other gainful employment that is permitted under the Act, clause 23(1) of the Bill should be amended to reflect this general rule. The reworked clause 23(1) of the Bill could read in part, ‘A public official may engage in any other gainful employment unless it is’
- b) In order not to disincentivize professionals from engaging in public service because of the risk of closing and losing their professional practice, clause 23(2) of the Bill is not necessary except as concerns engagement in such other gainful employment during official working hours of the public engagement. As such, clause 23(2)(a-d) should be deleted from

the intended Act while clause 23(2)(e) is retained but subjected to the official hours as defined by the regulations, orders or policies of the affected public office. The alternative is to create job classifications and apply the restrictions on other gainful employment as necessitated by the functions of each public office as has been done for Federal employees in the US.

- c) Amend clause 23(4) of the Bill to remove the need for permission from the appointing authority for a public official to engage in other gainful employment. What is required is for the affected public official to disclose the other gainful employment that they are engaged in and any conflicts of interest that may arise in relation to their public engagement.

4. Amendments to clause 34 of the Bill –

- a) Adjust clause 34(1) of the Bill to make temporary vacation of office apply only where charges have been preferred against a public official for contravention of the provisions of the intended Act;
- b) Adjust clause 34(2) of the Bill to allow the Commission to provide the affected public official with notice to show cause why they should not be subjected to temporary vacation of office and commit not to interfere with evidence, witnesses, and the investigations;
- c) Adjust the definition of ‘temporary vacation of office’ under clause 34(3) of the Bill to be subject to the Constitution and other written laws as concerns the effects of the same on the powers and other aspects that pertain to the public office involved; and
- d) Adjust clause 34(4) of the Bill to make the subject application *inter partes* so as to allow the affected public official to participate in the process, being the person most affected by the recommendation for temporary vacation of office.

5. Amendment to clause 53 of the Bill –

- a) Clause 53 of the Bill protects EACC officials from personal liability, both in civil and criminal proceedings, for actions taken in ‘good faith’ pursuant to the intended Act, but there is need to define what ‘good faith’ means in the context of the intended Act. As undefined

as ‘good faith’ is now under the Bill, it is very general and open to numerous interpretations despite the grave impact of the intended legislation on public officials.

6. Amendment to clause 54 of the Bill –

- a) Clause 54 of the Bill provides that ‘[e]very reporting entity shall file returns with the Commission once every quarter in the prescribed manner.’ As it is, this provision is unclear as neither clause 2 nor clause 54 of the Bill define what a ‘reporting entity’ means and the annual returns to be filed by such reporting entities are equally unclear, hence there is need to amend the Bill in that regard to clear the ambiguity.

7. Amendments to Clauses 56 and 57 of the Bill –

- a) The intended Conflict of Interest Act has a narrow and special focus on conflicts of interest, leaving out other aspects of ethics in the public service which are well covered under POEA, 2003. Therefore, the best move in this case should be to repeal or amend specific aspects of POEA, 2003 that only relate to conflicts of interest, and preserve POEA, 2003 as concerns the other aspects of ethics in the public service that the Bill has left out.
- b) The alternative option would be to amend POEA, 2003 to broaden the coverage of conflicts of interest therein rather than enacting a Conflict of Interest Act, as the Bill affects public officers in any case.

8. Amendment to Clause 58 of the Bill –

- a) More clarification is required as concerns the specific amendments to be made to LIA, 2012 and ACECA, 2003 which ideally should be set out clearly under the Bill. zzzzzz