LEGAL FRAMEWORKS OF ANTI-CORRUPTION AND PUBLIC SERVICE ETHICS IN AFRICA: An Appraisal of Options, Strategies and Challenges

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Introduction

• Public service reforms agenda
  - innovation, modernisation, performance, results
• Ethical standards in public life
• Efficiency & effectiveness
• Global best (shared) practices
• Options and strategies
• Implementation issues/Challenges
• Discipline, transparency, accountability and openness in public services and public life
Focus

• Basic instruments that define the framework for the fight against corruption and promotion of public service ethics
• Basic texts, highlighting areas of emerging trends and patterns
• Policy options and choices that have driven the previous and current efforts, noting their relative strengths and weaknesses
• Implementation strategies
• Defects and shortcomings
• Suggestions for Improvements
The Scourge of Corruption

• Reforms as a policy issues in contemporary public sector administration
• Reforms for ethics and good Governance
• Corruption as a threat to reform agenda
• Corruption “a malignant cancer”
• - destroys the economy
• - destroys the society
• - retards progress and development
Corruption?

• No precise definition
• “A social, legal, and political concept laden with ambiguity and bristling with controversy”
• Global phenomenon
• Public and private
• Political and bureaucratic
• Nonetheless, ubiquitous!
The Umbilical Cord

• Anti-corruption linked to public service ethics
• Ethics and professionalism
• Transparency & accountability
• Efficiency & effectiveness
• Performance
• Results
• Improved service delivery
• Development
Responses to Corruption and Maladministration

• Initial – criminal/penal laws/codes
• Constitutional
• Legislative
• Institutional
• Policy
• Administrative
• Legal

FRAMEWORKS : Laws, institutions, policies
Levels of Activities

• National
• Regional
• Continental
• Global/International
• Governmental
• Non-governmental
Relevant Actors

- Governments
- Bilateral/multi-lateral agreements
- International Organisations
- NGOs
- CSOs
- CBOs
- Individuals
Scope of Anti-corruption Laws

• Create norms of behaviour in government-citizens relationships
• Seek to enhance the status of government in the eyes of the citizens
• Create monitoring and enforcement institutions
• Ban/regulate receipt of gifts and other benefits by public officials
Still on Scope

- Conflicts of interests and nepotism in employment and award of contracts
- Taking and receiving of bribes
- Inflation of contracts
- Secret commissions on public procurement
- Illicit enrichment/illicit wealth
- Unaccountable assets
- Non-disclosure of ill-gotten wealth
- Election expenses of candidates for public offices
- Funding of political parties
Public Service Ethical Codes

• Incorporate anti-corruption, but ..... more:
  • - non-criminal
  • - moral
  • - regulation of conduct
  • - more voluntary obligations
Global Frameworks (the UN)

• United Nations Convention Against Corruption (UNCAC)
• Approved by the UNGA in October 2003
• Launched - Merida, Mexico on 9\textsuperscript{th} Dec 2003
• UN Anti-Corruption Day - 9\textsuperscript{th} December
• Came into force only on 14\textsuperscript{th} December 2005
• Has 140 signatories and 91 ratifications.
Global Frameworks (Ethics)

• UN Resolution 51/59 of 12 December 1996 on Action Against Corruption, incorporating an International Code of Conduct for Public Officials, with emphasis on:
  • Principles of trust, efficiency, effectiveness, integrity, fairness and impartiality in the performance of public duties
  • Avoidance conflict of interest
  • Disclosure of assets
  • Non-acceptance of gifts
  • Confidentiality of information
  • Avoidance of political activities that may impair public confidence in the service.
UNCAC Obligations

• Create appropriate policy guides and standards for preventing corruption in both the public and private sectors

• Criminalise a range of offences with appropriate sanctions

• Cooperate/collaborate with each other for mutual enforcement assistance, in such areas as sharing of information and intelligence, investigations, assets recovery, extradition as well as financial and technical assistance to poor countries in meeting their obligations under the Convention.
Implementation Mechanism

• Conference of State Parties, serves as the implementation and monitoring unit for compliance with the provisions of the Convention

• 1<sup>st</sup> Conference of State Parties, poorly attended by African countries, held in Amman, Jordan, 10-14 December 2006

• 2<sup>nd</sup> Nusa Dua, Indonesia, 28 January-1 February 2008

• 3<sup>rd</sup> Doha, Qatar, 9-13 November 2009
Significance of UNCAC

• Global coverage
• Comprehensive provisions (8 Chps, 71 Articles)
• Focus - prevention, detection and sanction
• Extension to private sector corruption
• Liability of companies and other legal personalities
• Recognition of longer periods of limitations for bringing prosecutions
• Rights of victims of corrupt practices to initiate legal proceedings established
Deficiencies

• Requirements on transparency in funding of political parties/candidates not mandatory
• - a serious lacunae – TI
Continental Frameworks (AU)

- The AU Convention on Preventing and Combating Corruption
- Signed Maputo, Mozambique, on 11\textsuperscript{th} July 2003
- Came into force on 5\textsuperscript{th} August 2006
- Mechanism for cooperation and collaboration among African state parties, as well as non-governmental and civil society organisations.
Scope of the AU Convention

• Bribery (domestic and international)
• Diversion/misappropriation of public funds
• Trading in influence
• Illicit enrichment
• Money laundering and concealment of property
• Both the public and the private sectors.
Scope ...

- Funding of political parties and election candidates
- Declaration of assets by public officials
- Restrictions on immunity for public officials
- Freedom of access to information (Art 12). Other preventive measures provided for include establishment of codes of conduct for public officers, freedom of access to information, whistleblower protection, procurement standards, accounting standards, civil society involvement, and creation and strengthening of anti-graft independent bodies.
State Obligations

- Mandatory assets declaration
- Restrictions on immunity for public officials
- Freedom of access to information
- Establishment of codes of conduct for public officers
- Whistleblower protection
- Procurement and accounting standards
- Civil society involvement
- Creation and independence of anti-graft independent bodies
- Adopt of “measures on prevention, criminalisation, regional cooperation, mutual legal assistance and recovery of assets”
Enforcement Mechanisms

• Advisory Board on Corruption assigned the duties of monitoring and reporting implementation progress

• Each signatory state to establishment some mechanisms for monitoring and enforcement at the national level.
Progress

- Mandatory provisions on requirements of transparency in funding of political parties and election candidates
- th4, an edge over the UN Convention
- However, the process of ratifying the treaty unexpectedly slow
- 43 signatories and 16 ratifications (out of 53 African countries)
Regional Frameworks

• None yet in the MENA region
• West Africa: Protocol on the Fight Against Corruption (ECOWAS Protocol)
  • - Signed on December 21, 2001
  • - Not yet ratified by the required minimum for entry into force
• South Africa: Protocol Against Corruption (SADC Protocol)
  • - Adopted in 2001 and entered into force in July 2005
  • - Has provisions for preventive and enforcement mechanisms
Public Service Charter

• Charter for the Public Service in Africa
• Product of the pan-African conference of ministers of public services in Africa, called by CAFRAD
• Adopted at the 3rd biennial Pan-African Conference of Ministers of Civil Service at Windhoek in February 2001
• A set of guiding principles and standards, based on international best practices, relating to public service reforms
Purpose of the Charter

• (a) Define the principles and general rules governing African public services with respect to transparency, professionalism and ethical standards;

• (b) give concrete expression to the commitment of African States to promote such values in the public service; and

• (c) serve as a policy framework and a source of inspiration for the development, strengthening or updating of national codes of conduct
Key Provisions

• (a) the duties and role of the public service “designed to restore and/or enhance its image, credibility and legitimacy”;
• (b) the conduct of public service employees in the exercise of their duties;
• (c) legislations, organs and implementation mechanisms as well as monitoring and follow-up.
• (d) a code of conduct for public service employees with emphasis on professionalism, ethics, political neutrality and duty of confidentiality, declaration of assets, and avoidance of conflict of interests and illicit enrichment.
State Obligations

• To in place mechanisms to ensure proximity and accessibility of public services, including
• - application of ICT (e-governance);
• - stakeholders involvement, including civil-society participation;
• - optimal use of resources to ensure quality, effectiveness and efficiency;
• - periodic evaluation of services provided;
• - transparency and information access;
• - speed and responsiveness in provision of services; and
• - reliability and confidentiality of information concerning citizens.
Transforming the “Guiding Principles”

- A set of benchmarks
- Efforts on to transform the document from a mere policy guide into a binding treaty
- The African Charter on the Values and Principles of Public Service and the Administration (draft)
- Consideration by government experts in Addis Ababa May 2010
- Approval and adoption by AU summit soon
Core Principles of the Proposed Charter

• Equality of all users before the public service;
• Prohibition of all forms of discrimination;
• Neutrality in the provision of public service;
• Continuity of the public service in all circumstances; and
• Adaptability of public service to changing needs of the community and users.
State Obligations

- The member states are to make provisions for:
- Respect for human rights and principles of legality;
- adequate and accessible public service to all users, including civil society involvement and consultation;
- professionalism and diligence in the discharge of public service;
- integrity, and adherence to ethical rules and values;
- avoidance of conflicts of interests;
- fight against corruption;
- enabling working environment to enhance performance of public employees, including social benefits;
- inter-state collaboration and continental support assistance to build capacity of states for implementation of the Charter;
- etc.
Enforcement Mechanisms

• Biennial submission of country reports on legal and policy measures taken to the AU Commission

• Setting up of national monitoring bodies
Constitutional Frameworks

• Constitutions
• - Charter of Government/ contractual obligations
• - Fundamental Objectives/Directive Principles
• - Non-justiceability
• - Measures of accountability and good governance
• - May be enforceable
Codes of Conduct/Ethics/Integrity

• As constitutional instruments, eg Nigeria
• Acts of Parliament in other countries
• Enforcement mechanisms created
• Sanctions for breach – disciplinary measures, retirement, removal, debarment, disqualification, seizure of assets, impeachment
Ombudsman

• Scandinavian origin
• Different names in different countries, eg PCC, parliamentary commissioner
• Focus – official maladministration
• Scope of operation – public services, excludes the private sectors
• Limitations: political control, limited powers, limited scope of operation
The Legislature

• Accredited representatives of the people
• Controllers of public funds
• Appropriation of Funds (Budget)
• Establishment of consolidated revenue fund
• Law making powers
• Ratification of appointment & control of auditors-general/presidents of supreme audit institution
Still on the Legislature

• Power of investigations
  • - limitations – legislative purpose & exposure of corruption/waste

• Problems:
  • - Executive/party control
  • - Corrupt legislators
  • - Lack of enforcement powers
Anti-corruption Laws

• Specialised laws and institutions
• Why?
• - hydra-headed monster (corruption)
• - varieties/dimensions of modern crimes
• - transnational criminal activities
• - inadequacies of existing frameworks
• - local/international pressures for reform
Trends and Patterns

• Three broad categories:

A: States with comprehensive anti-corruption laws coupled with institutional mechanisms for monitoring and enforcement

B: States with no visible anti-corruption policies and institutional mechanisms; still struggling to cope with requirements of the conventions

C: States with some structures but not yet considered adequate enough to meet the standards set by international conventions and global best practices
Samples...

1. Nigeria – Criminal/Penal codes, Constitution with a comprehensive Code of Conduct for Public Officers, a Code of Conduct Bureau and a Tribunal, Public Complaints commission established under the Public Complaints Commission, Independent Corrupt Practices Commission Act, the Economic and Financial Crimes Commission Act as amended, the Money Laundering Act, and the Public Procurement Act, press freedom under the Constitution, while the legislature possesses the power to conduct investigation with a view to exposing corruption.
2. Uganda - the Prevention of Corruption Act and the Leadership Code Act
3. Zambia also has an Anti-Corruption Commission
4. Burundi has a Penal Code recently updated by amendments, new laws on public access to information, and a Ministry of Good Governance
5. Kenya has a robust anti-corruption programme, particularly since the coming into power of President Mwai Kibaki in 2002. It has, in additions to the criminal provisions in the statute books, the Public Officer Ethics Act, the Anti-Corruption and Economic Crimes act 2003, the Public Procurement and Disposal Act 2005, coupled with an Anti-Corruption Commission for monitoring and Enforcement.
7. Togo has laws on prevention, detection and sanctioning of corrupt practices and has, since 2001, set up a National Commission to Combat Corruption and Economic Sabotage
8. Tanzania has made the fight against corruption priority policy area since the coming into power of President Jakaya Kikwete in 2005. It passed a new anti-graft law in 2007, which gave the state-run Prevention and Combating Corruption Bureau wider powers in such areas as government procurement, money laundering, and seizure of assets.
9. Liberia, a post-war country has no visible anti-corruption policies and institutional mechanisms, but a Governance Reform Commission set up in 2006 recommended the enactment of a code of conduct for the public service and establishment of an anti-graft agency.
10. Until recently, South Africa does not have a single anti-corruption; therefore, institutional conflicts conflict involving the National Prosecuting Authority, the police, the Directorate of Special Operations, the Special Investigations Unit, and the Financial Intelligence Centre.

11. The UN Convention domesticated into the Algerian law, the reports of the *Organe National de Lutte Contre la Corruption* are not made public while the government has “refused to put in place an international monitoring mechanism” on the implementation of the UNCAC to which the country is a signatory.
Progress

• Varying degrees of successes and failures
• Repatriation of stolen money/assets
• Debt relief
• Improved service delivery
• Modest developments
Implementation Challenges

• Lack of genuine political will for public sector reforms agenda
• Overlapping jurisdictions and multiplicity of enforcement mechanisms have often created confusion
• Difficulty of enforcement against political corruption
• Political influence and interference
Implementation Challenges...

- Problems of administration of justice systems
- Justice delay, denied
- Judicial corruption
- Dilemma – punishment or recovery?
- Archaic rules of evidence, and of practice & procedure
- Lack of judicial independence
Ecological Problems

• Reforms are externally-driven
• absence of comprehensive national anti-corruption strategies in many countries
• factors which define the limits of possibilities and constrain the capacity of the states, institutions and individuals to accommodate and adapt
• Poverty and mass unemployment
• Lack of education and mass mobilisation
• Resistance to change
Prognosis

• Implementation, monitoring and review to assess the level of compliance and progress made on a country-by-country basis
• Traditional means of control of administrative discretion – administrative review, parliamentary oversight, judicial review, etc should be overhauled and strengthened
• Continuous supervision of public administration through such systems as the ombudsman, inspectorate, special commissions, prosecutor, parliamentary committees, etc should complement the work of specialised institutions and agencies.
• Creation of enforcement institutions/structures at national levels, and monitoring and oversight institutions at extra-territorial levels;
• Use of non-criminal law to fight cases of corruption have proved useful in both the US and South Africa
More To Do

• The US’ False Claims Act is a good strategy already yielding positive results in the US. Also, in South Africa, the Special Investigation Unit.

• The use of positive incentives to discourage corrupt practices and encourage compliance with the new anti-corruption laws has made some countries to experiment to forgive past offences (amnesty).

• Strengthen the process of purging corruption from public procurement – blacklists, debarments, etc

• The enforcement agencies must be fully protected with adequate powers, independence from undue political interference, headed by and staffed by deeply committed individuals.
Further Steps

• Multiple institutions, where they exist, should be mutually reinforcing rather than antagonistic to each other.

• Continuous collaboration and sharing of countries experience, through seminars, workshops conferences etc can assist in drafting/amending laws, enforcement mechanisms, etc

• Development financing and donor agencies could tie development aids to transparency anti-corruption.
What Next?

• Corruption and official maladministration are global phenomena
• Matters of degree
• A war “against the inevitable”
• Can it be won?
• Yes, if the will is there!
• But must we WIN?

Thank you!