

# HELPDESK

PROVIDING ON-DEMAND RESEARCH TO HELP FIGHT CORRUPTION

## REGULATING NEPOTISM: APPROACHES AND BEST PRACTICES

### QUERY

Please provide an overview of approaches to and good practices for regulating nepotism

### PURPOSE

Transparency International Venezuela plans to present proposals for an anti-nepotism regulation to candidates in the upcoming elections. This answer will serve as input to those proposals.

### CONTENT

1. Nepotism: definition, extent and nature of the problem
2. Regulating nepotism: selected examples
3. Dealing with political dynasties
4. General considerations and challenges when regulating nepotism

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### SUMMARY

Nepotism is defined as a form of favouritism based on acquaintances and familiar relationships whereby someone in an official position exploits his or her power and authority to provide a job or favour to a family member or friend, even though he or she may not be qualified or deserving. The negative consequences of nepotism have been well-documented and include decreasing efficiency, generating conflict among colleagues and lowering the ethical standards in the public sector.

There are several examples of anti-nepotism regulations worldwide. These range from broad constitutional articles (Nicaragua) to specific anti-nepotism legislation (Brazil) to organisation codes within public bodies.

While it is assumed that anti-nepotism regulations act as a corruption deterrent, thus promoting merit-based recruitment, we found little empirical evidence to corroborate that assumption. Enforcement is critical, and it is clear from the case law that some jurisdictions have been more vigilant than others at enforcing existing anti-nepotism rules and at investigating breaches.

When regulating nepotism, a number of general considerations must be taken into account. These include whether to opt for an outright ban on nepotism or to focus on ensuring the use of merit-based appointment systems for all applicants regardless of their connections.

## 1 NEPOTISM: DEFINITION, EXTENT AND NATURE OF THE PROBLEM

Nepotism is broadly defined as a form of favouritism based on acquaintances and familiar relationships whereby someone in an official position exploits his or her power and authority to provide a job or favour to a family member or friend, even though he or she may not be qualified or deserving (Transparency International 2009). It overlaps with the practice of cronyism, which involves actual and perceived preferences given by one friend to another (Jones and Stout 2015). A related issue is that of political dynasties, whereby a family or families dominate the political process and public office.

There are several reasons why nepotism is generally seen as a bad practice, particularly in public sector recruitment. Among the most notable negative consequences associated with nepotism are that it reduces productivity and decreases the efficiency of the public sector by giving responsibilities to people who are not qualified to handle them (Lesne and Gauthier 2014). It also makes it difficult to remove connected but incompetent employees (Croston 2015). Furthermore by extending an unfair advantage to well-connected people, nepotism also lowers ethical standards in the public sector. This may in turn encourage other forms of favouritism and corruption, such as absenteeism or embezzlement of public funds (Lesne and Gauthier 2014).

Nepotism can also have a negative impact on staff morale, as non-beneficiaries become demoralised and lose confidence in the organisation and its mission, especially when it is practised by the organisation's leaders (Kneale 2009 cited in Croston 2015). Furthermore, studies show beneficiaries may feel and be perceived as unworthy or unfavourably by co-workers even after demonstrating competence in their job duties (Padgett and Morris 2005 cited in Croston 2015).

A number of studies have shown a country-level correlation between meritocratic recruiting practices and lower levels of corruption (Rauch and Evans 2000; Dahlstrom, Lapuente and Teorell 2009 cited in Rose-Ackerman and Truex 2015: 20).

The extent of the problem is difficult to assess as nepotism is a form of corruption that is particularly hard to detect. Decision making in recruitment and

promotions involves complex and sometimes unwritten norms and procedures, and the subjective elements that come into play when choosing among candidates can hide the abuse of power (Lesne and Gauthier 2014). Nonetheless, it appears that nepotism is a global phenomenon. It manifests itself in different ways depending on the country and cultural contexts. Whether it is the French president being accused of nepotism after attempting to place his son into a key position in a public agency (The Guardian 2009) or dynastic families dominating public office in the Philippines (Democracy Chronicles 2015), nepotism scandals are found worldwide.

The examples presented in the following section focus on regulating nepotism in the public sector. Although many private sector companies do have anti-nepotism policies, there is no consensus on the imperative to regulate nepotism in the private sector (see Cucina and Votrow 2015; Jones and Stout 2015), while in the public sector it is general accepted as best practice to limit nepotism. It is worth noting that nepotism can have a public/private dimension. A case in point is that of the US securities regulators recently using the Foreign Corrupt Practices Act (FCPA) to probe US companies' practices of hiring relatives of high level Chinese and MENA officials to win business, considering that this form of nepotism may be prosecutable as a case of foreign bribery (New York Times 2013).

## 2 REGULATING NEPOTISM: SELECTED EXAMPLES

Examples of successful anti-nepotism policies and regulations are scarce, as attempts to regulate it often come up against a lack of political will and strong opposition from individuals who benefit from nepotism (Lesne and Gauthier, 2014). Below we present a range of regulations, outlining the approach taken and where available, indicating how successful the policy has been.

### United States: federal restrictions

The United States has a long history of regulating nepotism, and anti-nepotism rules appear to be more well-established and commonplace there compared to other parts of the world.

At the federal level, there are several provisions that cover nepotism and cronyism: the Prohibited Personnel Practices (1978; 5 USC § 2302) and the

Merit Systems Principles (1978; 5 USC § 2301) statutes are of most relevance. The Prohibited Personnel Practices (1978) statute makes it illegal for any federal employee to “appoint, employ, promote, advance, or advocate for [the] appointment, employment, promotion, or advancement” of a “relative” (Cucina and Votrow 2015:45).

Basing hiring decisions on nepotism and cronyism is also inconsistent with the Merit Systems Principles (1978) statute, which states that “selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition” (5 USC § 2301(b) (1)) and that “employees should be...protected against personal favouritism” (5 USC § 2301(8) (Cucina and Votrow 2015: 46)).

Furthermore, section 2635.702 of Title 5 of the Code of Federal Regulations prohibits an employee from using his public office for the “private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity” (US Patent and Trademark Office 2014: 5).

It is important to note that a key element in the federal government anti-nepotism policy model is that friends and relatives of a federal employee are permitted to be hired to work for the organisation. However, they must apply and compete for the position, just like any other applicant for federal employment (Cucina and Votrow 2015).

In terms of enforcement, there are clear mechanisms in place to ensure that individuals can report violations of these two laws to the US Office of Special Counsel and the US Merit Systems Protection Board. In a limited number of cases, violations have been investigated and have led to disciplinary actions (see Welch v. Department of Agriculture 1988 and US Patent and Trademark Office 2014, cited in Cucina and Votrow 2015). While there is limited empirical evidence on the effectiveness of the rules, it does appear from the existence of cases that the rules are enforced at least to a certain extent.

### United States: state-level restrictions

At the state level, all 50 states have laws that either prohibit or suggest guidelines for conflict of interest situations, which may include nepotism restrictions

depending on the interpretation of the law (Sampson 2001).

Most states regulate nepotism through their general rules related to ethical conduct, but in some states specific laws on the appointment of relatives are in place. In states where the practice is not prohibited, states have conflict of interest laws, which may restrict nepotism depending on the interpretation of the law.

Many states regulate the degree of relationship between legislators and the relative they wish to hire. A number of states with no specific nepotism prohibition have established hiring guidelines for legislators. The National Conference for State Legislatures gives an overview of each individual state’s approach to regulating nepotism (National Conference for State Legislatures 2015).

There is thus wide variance in the *form* of regulation (state constitutional articles, incorporation into general ethical rules, specific anti-nepotism legislation), the *scope* of regulation (branches of government covered by regulation and degrees of consanguinity/affinity prohibited) and the severity of *sanctions* for abuse.

Nearly half the states restrict nepotism through statute or by constitution. In Missouri and Rhode Island, for example, the state constitutions explicitly ban nepotism (NCSL 2015). In Arizona, the law prohibits any legislator from appointing or voting for appointment anyone within third degree of affinity or consanguinity. A person who knowingly gives or offers any gratuity or reward in consideration that he, or any other person (that is, a relative), be appointed to a public office is guilty of a class 6 felony, which could lead to imprisonment (NCSL 2015).

In Missouri, the constitution prohibits nepotism within fourth degree of consanguinity. Some states have exceptions (for example, for towns with a small population) and/or salary thresholds below which the rules do not apply (New Mexico and Georgia).

### Brazil

In Brazil, the regulation of nepotism was initiated in the judicial sector and was subsequently extended to the other branches of government.

In 2005, the National Council of Justice had prohibited nepotism in the judiciary (Resolution No. 7, 18<sup>th</sup> October

2005). The prohibition was challenged by the Brazilian Magistrates Association to the supreme court. After affirming the constitutionality of the resolution, the supreme court subsequently extended the prohibition to all three branches of the government, making the hiring of relatives who have not passed a public service entry exam a violation of the constitution in the federal government, the state government, the federal district, or the municipalities. This applies whether the person is hired directly by an administrative organ or by a private body carrying out a public function (Soares 2008).

In a further measure, in 2010, a presidential decree was signed prohibiting nepotism at the federal level in Brazil. The decree also aims at addressing the problem of “cross-nepotism”, that is, agreements between different branches or government agencies to circumvent the restrictions on nepotism (Martini 2011: 22).

Unfortunately we found little substantive evidence confirming or refuting the effectiveness of the nepotism rules in Brazil. In the judiciary, however, it was noted in 2011, that 203 cases of nepotism had been investigated by the National Council of Justice between 2008 and 2011. At the executive level, the governor of the state of Maranhão, for example, nominated 23 relatives for “trust positions” in his government, including his wife, who was hired as a secretary (Martini 2011: 21). This indicates that the rules are being enforced and alleged breaches investigated. However, it is difficult to assess the degree to which the rules are acting as a deterrent to nepotism.

## Nicaragua

Article 130 of the Nicaraguan Constitution states that public officials, including the president, cannot appoint relatives to state positions. Article 138 determines that the appointment of a minister must be ratified by the National Assembly. Furthermore the Law of Probity of Public Officials of Nicaragua establishes an express prohibition on family serving in public office (Miranda 2015).

However evidence suggests that these provisions are regularly flouted, as shown from the current President Ortega appointing his wife, Rosario Murillo, as “Acting Chancellor of Nicaragua”, and two of his daughters, Camila and Luciana, as presidential advisers, while the oldest child attended the meeting bearing a ministerial rank (Miranda 2015).

## Georgia

In Georgia, although Article 332 of the criminal code, which deals with abuse of office, theoretically prohibits a deliberate violation of the rules of competitive recruitment in the civil service, in practice, the article is almost never interpreted in this manner (TI Georgia 2015).

Transparency International Georgia recently proposed a draft amendment to the criminal code of Georgia to regulate nepotism with a special provision which would also envisage a strict punishment. The proposed amendment would make punishable any overt or deliberate action that undermines the competition and merit-based selection for the civil service. This includes creating favourable conditions for a candidate by violating the terms of the competition or by selective formulation of the qualification criteria. According to the proposal, such actions could receive a fine or result in imprisonment for up to two years or a ban on employment in the civil service for up to three years. If multiple offences are committed by the public official this could result in up to three years imprisonment and ban on employment in the civil service for up to three subsequent years. The draft amendment would also criminalise taking office when the competition rules were violated, if the successful candidate is aware of the violation. However, if the person voluntarily provides the information about the offence to law enforcement agencies, according to the draft amendment, he/she will not be criminally liable. The proposed regulation aims to reduce the politicisation of the civil service, improve its capacity, and further protect the rights of civil servants (TI Georgia 2015).

## 3 DEALING WITH POLITICAL DYNASTIES

In many countries, nepotism manifests itself in family dynasties dominating the political system. The regulation of nepotism aims in part to eradicate the inherent unfairness of political dynasties.

Latin American democracies have a long history of grappling with the issue of the prevalence of dynasties, and the accompanying issue of curbing dynasties through legislation. The oldest prohibition of dynasties was established in Costa Rica. Its 1949 constitution explicitly bans the relatives of former presidents and vice-presidents from running for the two highest positions in the government. Moreover, the same

constitution prohibits the relatives within the second degree of consanguinity or affinity of the incumbent president and vice-president from running for a seat in parliament (Albert et al, 2015: 4-5).

Anti-dynasty rules in Latin America can be found in constitutions, as amendments to charters, or as specific legislation introduced during the third wave of democratisation in Latin America: Honduras in 1982; El Salvador in 1983; Guatemala in 1985; Nicaragua in 1987; Brazil in 1990; Colombia in 1991; and Paraguay in 1992. The anti-dynasty statutes of Honduras, El Salvador and Guatemala are functionally similar to the prohibitions of dynasties in Costa Rica. More specifically, these statutes focus on the presidency, vice-presidency, and congressional seats. In contrast, the anti-dynasty statutes of Brazil, Colombia, and Paraguay extend prohibitions of dynasties to local government officials (Albert et al. 2015: 5-6).

There is some evidence that anti-dynasty laws have helped to strengthen the competitiveness of political participation, the openness and competitiveness of recruitment in the political leadership, and public participation in democracy through actual electoral performance of political parties and voter turnout (Feinstein 2011, cited in Albert et al. 2015:6).

However, the enforcement of anti-dynasty rules has not been straightforward and they have been circumvented in some instances. In Guatemala, Article 186 of the constitution prohibits relatives of the president "to the fourth degree of consanguinity and second degree" to aspire to the presidency. However, loopholes can be found and in 2011, First Lady, Sandra Torres de Colom, divorced her husband, President Alvaro Colom, to bypass the constitutional ban which would prohibit her from standing in the presidential election. The strategy was denounced by opposition parties as fraudulent (BBC 2011). It has been posited that establishing a specific law against nepotism would officially condemn this practice. However, the Guatemalan case is proof that to be effective, such regulation must be accompanied by a rethinking of practices by the political class (Donada 2014).

#### 4 GENERAL CONSIDERATIONS AND CHALLENGES WHEN REGULATING NEPOSTISM

When regulating nepotism, it would appear that there are a number of considerations and challenges to bear in mind.

#### Bright line rules versus qualified prohibitions

A key consideration is whether to absolutely prohibit nepotism using "bright line rules" (World Bank 2001) or to focus on having a merit-based system in place and full disclosure of relationships between applicants and current employees.

As a case in point, the World Bank cites an Argentinian draft bill from 2001 (which was never adopted). The bill proposed prohibiting government employees from hiring a friend or relative unless he or she was "qualified" for the position. It has been noted that if prosecutors and courts were left to determine who was qualified, they would have a large degree of discretion in applying the law. A blanket prohibition on the hiring of friends or relatives would have the advantage of removing any discretion, thus making it easier to monitor and enforce but may mean the best person for the job would not be employed because he or she happened to have a connection to someone already working in the relevant department. It has been argued that countries with weak enforcement agencies would be nonetheless better served by so-called bright line rules banning nepotism outright (World Bank 2001).

Others suggest that it is fairer and more effective to focus on having a merit-based objective and valid selection system in place rather than all-out bans. It is argued that this helps to ensure that an employer hires the best qualified applicants, and that it also produces true procedural justice with all applicants being treated the same regardless of who they know and who they are related to. In such an approach any related employee must be exempted from the hiring process (Cucina and Votrow 2015: 46-47).

#### Degrees of consanguinity and affinity

Another important consideration is the scope of the rules, namely who they apply to. The term nepotism, coming from the Italian word for nephew, traditionally covers favouritism to members of the family. It would appear that such a narrow interpretation of the term misses out on common abuses of power whereby favouritism is extended to friends, associates and allies. The practice of cronyism is closely related and should be considered when proposing nepotism rules.

Also to be carefully considered is the appropriate scope and coverage of regulations. Different regulations vary

in how they define the appropriate degree of consanguinity and affinity to regulate. Consanguinity refers to direct blood relatives, while affinity refers to relationship through marriage (spouse's blood relations). The strictest rules in the United States prohibit nepotism to the fourth degree of consanguinity or affinity (Missouri) while many do not extend beyond the third degree. A useful illustrative chart can be found [here](#).

### Scope of institutions to be targeted by regulations

In terms of institutions covered, anti-nepotism rules range from individual organisational policies to constitutional provisions which cover all branches of the public sector. Determining the appropriate targets of regulation will depend on the extent of the problem and identification of problematic sectors. An initiative from Transparency International Slovakia uncovered and visualised the extent of the problem of nepotism in the Slovak judiciary (TI Slovakia 2013). Such research can help to raise awareness of the problem and pinpoint priority areas which regulations should target.

It is difficult to accurately assess the effectiveness of anti-nepotism rules due to limited empirical evidence. It would appear, however, that enforcement is crucial to success. Therefore when designing an approach to regulating nepotism, regulators need to take account of enforcement capacities and the overall quality of meritocratic recruitment in the public sector.

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