



Sitting on the fence: Conflicts of interest and how to regulate them

Quentin Reed

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Governance and Anti-Corruption Consultant

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U4 Issue

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Abstract

This paper describes the problem of conflict of interest of public officials and the main ways in which it may be tackled, with particular focus on regulation of elected officials. The paper describes three main types of regulation – prohibitions on activities, declarations of interests, and exclusion from decision-making processes – and how these may be best implemented in practice. The author¹ underlines the need for regulation to be realistic, tailored specifically for different categories of officials and to the specific circumstances of the country in which they are to be applied. The author also suggests possibilities for the engagement of the donor community, in line with the implementation of the UN Convention Against Corruption.

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Introduction

In the past two decades increasing perceptions of falling ethical standards in legislatures have led in many advanced democracies to the introduction of ethics frameworks for elected officials. Scandals such as those surrounding cash-for-questions have pushed lawmakers to regulate themselves in contexts as different as the United Kingdom and India, and international conventions, in particular the United Nations Convention Against Corruption now oblige all signatories to introduce codes of conduct and other mechanisms to tackle conflicts of interest.

However, the mechanisms introduced in many countries – and particularly transitional or developing democracies - are not always based on a clear understanding of the concept of conflict of interest itself or of the **need to regulate elected officials, civil servants and members of the government differently**, and tend to underestimate the difficulties of implementation and enforcement. This paper describes the problem of conflicts of interest of public officials and outlines the main ways in which it may be tackled, with special attention devoted to the regulation of elected officials. The paper provides practical advice based on these lessons, and underlines the need for regulation to be realistic, tailored specifically for different categories of officials and to the specific circumstances of the country in which they are to be applied.

1 What is conflict of interest?

This paper is developed around five fundamental assumptions:

- i) Conflict of interest is a **situation in which a public official has a private or other interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties.**
- ii) **Conflicts of interest are naturally occurring phenomena**, not a pathology – that is, they are an inevitable consequence of the fact that people occupy more than one social role.
- iii) The challenge for regulation in the public and political sphere is therefore to prevent conflicts of interest leading to corruption, not to prevent conflicts of interest in all cases.
- iv) Therefore, only one way of tackling the issue of conflict of interest is to actually prohibit (prevent) certain conflicts of interest. Of equal or greater importance are other mechanisms to address conflicts of interest as they arise.
- v) Regulation should be designed not only to impose obligations on public officials, but also to help them to resist improper approaches, and more generally to contribute to the development of a public service culture.

1.1 Definition

It is vital to clarify what is meant by ‘conflicts of interest’ before discussing how to address and/or regulate them. This is not just an issue for political theorists, but has profound implications for how conflict of interest should be addressed. This is especially important because there is a widespread tendency within the community of anti-corruption practitioners to confuse conflict of interest

situations with actual corrupt or unethical **behaviour**. For example, the conflict of interest law in force in the Czech Republic from 1992 to 2006 defined conflict of interest as follows:

A conflict between the public interest and personal interest is understood to be conduct [of a public functionary] or failure [of a public functionary to act] which undermines trust in his/her impartiality, or by which a public functionary misuses his/her position in order to obtain unauthorised benefit for him or herself or another individual or legal entity.

This confusion is not just found in the odd law. The United Nations Anti-corruption Toolkit for example states that

Most forms of corruption involve the creation or exploitation of some conflict between the professional responsibilities of a corrupt individual and his or her private interests. The acceptance of a bribe creates such a conflict of interest.²

Both the above examples confuse conflict of interest and corruption itself. In reality, conflict of interest is properly understood as a situation, not an action, and it is clear that a public official may find him or herself in a conflict of interest situation without actually behaving corruptly. As Speck points out, “**The concept of conflict of interest does not refer to actual wrongdoing, but rather to the potential to engage in wrongdoing.**”³ Indeed, it is all but inevitable that a public official will face situations where the public interest s/he has been elected or appointed to serve will conflict with other interests to which s/he is subject.

1.2 Conflict of interest: examples

The United Kingdom Civil Service Management Code provides a useful definition of the scope of conflicts of interest:

Conflicts of interest may arise from financial interests and more broadly from official dealings with, or decisions in respect of, individuals who share a civil servant's private interests (for example freemasonry, membership of societies, clubs and other organisations, and family).⁴

This description of what is meant by conflict of interest can be illustrated by the following examples, which are selected to cover civil servants, government members and elected officials:

- An elected local councillor owns land in an area where the council is currently discussing where to route a planned highway. The exact route has important implications for the value of adjacent land.
- A Member of Parliament sits on a standing committee that is scheduled to discuss proposed changes to the customs code that would specifically affect duties levied on certain goods, the import of which is effectively monopolised by a company in which s/he holds an ownership stake.

² United Nations Office on Drugs and Crime, United Nations Anti-corruption Toolkit, p. 15-16.
http://www.unodc.org/documents/corruption/publications_toolkit_sep04.pdf

³ Bruno W. Speck, Conflict of Interest: Concepts, Rules and Practices regarding Legislators in Latin America, *The Latin Americanist*, Volume 49 Issue 2 (Feb 2008), p. 67.

⁴ United Kingdom Civil Service Management Code, Section 4.1.3.c,
<http://www.civilservice.gov.uk/iam/codes/csmc/index.asp>

- The former Prime Minister takes a position as chairman of a consortium to build an oil and gas pipeline to his country, having previously signed as Prime Minister an agreement on the project with the country from which the pipeline will originate.
- A ministry official sits on a procurement commission that is scheduled to discuss bids for a tender. One of the bidders is a company owned by the official's brother.
- A tax inspector is responsible for inspections in a district where members of his family own a number of important businesses.
- A Civil Service Commission official is responsible for conducting recruitment procedures for applicants to certain grades throughout the civil service; a member of his/her family is currently applying for a civil service position.

The previous section underlined the fact that **being in a conflict of interest situation itself is not the same thing as using one's public office for private benefit**. A public official who finds him or herself in one of the situations described above **may or may not** allow the interest that conflicts with the public interest wrongly affect his or her conduct. For example, in the first example the councillor may in fact vote for a highway route that benefits the value of his or her land the least. The example of the oil and gas project does not even concern a public official but a former public official.

The examples given also show that many positions are such that they are bound to lead to conflict of interest situations at some point in the future. For example, the civil service recruitment officer may or may not find him/herself in a situation at some point where s/he is responsible for hiring to a position for which a family member is one of the applicants. Many occupations in the public service are by nature likely to give rise to conflict of interest situations, or are laden with potential to generate conflict of interest situations.

Last but not least, the examples also show that the types of interest that may come into conflict with the public interest are varied. The focus – and especially in conflict of interest laws - is usually upon personal interest, and is moreover usually understood as a personal financial interest. However, personal interests may be non-financial. The most obvious example of this is family interest – for example, the recruitment officer may have an interest in influencing hiring procedures to secure a position for his brother or cousin, without ever benefiting financially.

In addition to personal interests, there are also other interests to which an official may be subject which are not directly personal yet may come into conflict with the public interest. This is especially the case for elected officials. Members of parliament for example are or may be subject to the interests of their constituents and of their party, either of which may subject them to pressure to take decisions which are against the public interest. An obvious example is pressure to use their position for the electoral benefit of the political party of which they are a member.

1.3 The implications for regulating conflict of interest

Section 1.1 mentioned a tendency within the anti-corruption community to confuse conflict of interest with corruption itself. The consequence of confusing the two is likely to be a tendency to try and prevent (prohibit) conflict of interest completely – in practice, a tendency to have very wide ranging prohibitions or 'incompatibility' provisions excluding officials from holding certain positions, ownership stakes or other interests in addition to their public office.

By contrast, the main implication of the arguments and examples provided above is that **it is not possible to simply prevent or prohibit all conflicts of interest**. Some kinds of conflict of interest

may be prohibited, for example the holding by a public official of certain positions or ownership stakes in the private sector. But as the examples in the previous section make clear, the possible range of conflicts of interest to which an official may be subject mean that a range of other solutions must also be used to address specific situations where conflicts of interest arise.

The objectives of conflict of interest regulation are therefore wider and in practice include the following:

- To prevent conflict of interest situations arising, to the extent that this is possible and practical.
- To establish rules that address conflict of interest situations where they do arise.
- To provide guidance to public officials and enable them to protect themselves more easily.

The mechanisms to achieve these objectives, elaborated in Section 2, are prohibitions on holding certain functions or interests, duties to declare personal interests, and duties to be excluded from specific decision-making processes where a conflict of interest arises.

1.4 Elected officials, members of the government and civil servants

The points made in previous sections apply to all three categories of officials – civil servants, members of the government and elected officials. The implications for regulation are different however for different types of official. This paper stresses the importance not only of distinguishing conflict of interest from corruption, but also of realising that **different types of official need to be regulated differently**. This is particularly important given the tendency in many countries – for example countries of Central and Eastern Europe and the former Soviet Union – to draft conflict of interest laws that regulate all public officials in the same way.⁵ It is also especially important if the issue of conflict of interests of elected officials is to be regulated properly. This subsection aims to underline the specific characteristics of elected officials by contrasting them with civil servants.

There are **fundamental differences between elected officials and civil servants** which have major implications for conflict of interest regulation. The essential differences between the two are the following:

- Civil servants are (at least in principle) permanent, professional and full-time, whereas the position of an elected official is by definition temporary, non-professional in a strict sense and sometimes even part-time.
- Elected officials are accountable to voters through the ballot box and other forms of direct public pressure on legislative bodies, whereas civil servants are accountable only to the institution for which they work and its rules.
- Elected officials by the nature of their position may be expected to participate in discussion or decision-making on a much wider range of issues than any given civil servant.

The implications of these differences between civil servants and elected officials for how they should be regulated are fundamental. In particular, the temporary and wide-ranging role of elected officials necessitates that they are regulated **less strictly** than professional civil servants, with primary emphasis on duties to disclose interests, less emphasis on exclusion from decision-making and even less

⁵ Examples include a recently approved law in Moldova and a draft law under discussion in Azerbaijan.

emphasis on prohibitions on external activities and interests. These differences are elaborated in Section 2.

Members of the government

Ministers – whether elected or not – are in a unique position due to the extent of the powers they wield both in specific decision-making processes and as heads of their institution. This paper does not cover government ministers separately in each section, with the exception of the section on implementation and enforcement. It is assumed here that regulations applicable to members of the government (ministers) should be at least as strict as the strongest regulations applied to other categories of public official (civil servants and elected officials).

1.5 The importance of consultation

A final general point on regulation concerns the manner in which it is established. Conflict of interest regulation – and any other regulations of official ethics – may be imposed from the top or developed in consultation with the officials who are to be subject to the regulations. Experience and common sense suggest strongly that the latter approach is preferable, yet in many countries for example codes of conduct are often introduced with no consultation at all.

Consultation of a draft conflict of interest law or code of conduct with the public officials to be subject to it is of value firstly for technical reasons: drafters are likely to receive many valuable comments on the details of the draft. However, of equally importance is the fact that in order **to function effectively, codes of conduct and other ethical rules need to be owned and internalised by those who are subject to them.** A top-down approach which simply imposes rules and enforces compliance may encourage an instrumental attitude to the rules themselves on the part of civil servants (“I will ignore or circumvent this regulation unless the risk of getting caught is too high”). Reflecting this, for example the United States regulation on Standards of Ethical Conduct for Employees of the Executive Branch⁶ underwent a long process of elaboration in which an initial draft was circulated for comments to all executive branch employees for an extended period, after which extensive modifications were made. In this way it was hoped that civil servants would not only understand the code better but also regard it as their own.

2 Tackling conflicts of interest – types and instruments of regulation

2.1 Basic mechanisms

In order to achieve the objectives of regulation listed in Section 1.3, three basic types of regulation can be applied:

- Prohibitions on the performance of certain functions, and/or the holding of certain positions or certain interests by public officials.

⁶ http://www.usoge.gov/laws_regs/regulations/5cfr2635.aspx

- The establishment of duties of public officials to declare interests they have, either generally or in specific cases.
- Exclusion or self-exclusion of public officials from participation in decision-making processes or matters where they are subject to a conflict of interest.

These types of regulation are generally established and implemented through three main instruments: civil service legislation, conflict of interest legislation and codes of ethics/conduct. In many countries codes of ethics are passed as legislation, although there is generally a need for individual institutions to draft their own more detailed code of conduct. The Kenyan Public Officer Ethics Act of 2003⁷ for example regulates all aspects of the ethics framework, including an extensive Code of Conduct, but also includes a duty of all commissions responsible for particular government institutions to establish their own specific codes of conduct. The United Kingdom on the other hand regulates both civil servants and elected officials mostly through codes of conduct.

Which mechanism(s) is used to establish conflict of interest regulations may not be crucial. However, there are reasons to believe that **codes of ethics/conduct are an essential mechanism due to the need for rules to be tailored to individual institutions**. In addition, codes are more likely to encourage the internalisation of public service values – if they are formulated and approved in a consultative way as stressed in the previous section. The establishment of codes of conduct is also an obligation under Article 8.2 of the United Nations Convention Against Corruption.

It is important to note however that it is not necessary for a code of conduct to be passed as legislation in order for it to be binding. A common civil service approach is to make the **code of conduct a part of an official's contractual obligation**; this allows disciplinary proceedings including dismissal to be applied as sanctions, while at the same time making the code easier to adapt. In the case of elected officials, it is even more likely for a code not to be enshrined in law, given the fact that elected officials are themselves legislators.

Most legal frameworks also contain general provisions obliging public officials to avoid conflicts of interest. For example the Kenyan law states that “A public officer shall use his best efforts to avoid being in a position in which his personal interests conflict with his official duties.” Regarding elected officials, the United Kingdom House of Commons Code of Conduct⁸ states that “Members shall base their conduct on a consideration of the public interest, avoid conflict between personal interest and the public interest and resolve any conflict between the two, at once, and in favour of the public interest.” Such general provisions are useful and important because neither specific legal provisions nor written guidance can cover all possible situations. For the same reason, as Section 3.2 will describe, a vital component of any ethics framework or set of rules is the provision of *ad hoc* guidance and consultation to public officials.

The remainder of this section describes the three main types of regulation, with special reference to differences between regulations for civil servants on the one hand and elected officials on the other.

⁷ http://www.marsgroupkenya.org/Reports/LawsandConventions/Kenya_PublicOfficer_Ethics_Act_2003.pdf

⁸ <http://www.publications.parliament.uk/pa/cm/code.pdf>

2.2 Prohibitions/incompatibility provisions

The strictest type of conflict of interest provisions are prohibitions on the holding of certain positions, functions or interests in addition to an official's public function. Provisions may prohibit specifically the following:

- holding another post in a different branch of government,
- holding a position to which a relative of the official is subordinate within the government agency,
- being employed in the private sector,
- holding a position in the statutory organ of a private legal entity,
- entering into any contractual relations (e.g. consulting) with a private entity,
- holding ownership stakes in private legal entities owned or partly owned by the state or do business with the government,
- being a party to a contract with the government or the government agency in which the official works, and
- accepting for a certain period after leaving public service a position of employment or other interest in a legal entity which one's government agency did business with or exercised regulatory powers over.

These measures are listed only in summary form. Some but not all of them may be used, and they may be formulated with varying degrees of strictness. For example, restrictions on holding shares in private companies may be absolute (rare) or only relating to shares over a certain size of stake (e.g. 25%), or only relating to shares in companies that do business with the government or government agency within which an official works. Likewise, restrictions on post-service employment can be applied with various periods for which a former official may not take employment with particular companies.

Given the need for regulations to be realistic, when determining the degree of strictness of prohibitions on external activities of public officials legislators should also take into account the specific circumstances of the country in question. For example, **where the salaries of public officials are too low to realistically survive on it, it is unrealistic (as well as unfair) to prevent officials from having any external sources of income.** The 2003 Public Officer Ethics Act in Kenya does not prohibit civil servants from owning stakes or having any other interest in a private company unless "holding those shares or having that interest would result in the public officer's personal interests conflicting with his official duties." A draft code of conduct recently distributed to government departments by the Botswana Directorate of Public Service Management would not ban outside employment, but would oblige civil servants to seek the permission of the Permanent Secretary of the department.⁹ The importance of taking into account the constraints of local context are elaborated further in Section 4.

Elected officials

It is very important to note that prohibitions such as those listed above are generally applied much less to elected officials than to civil servants or members of the government, and for good reasons.

⁹ 'Botswana: For a Sombre - And Sober - Outlook at the Public Service', Mmegi/The Reporter (Gaborone), 5 September 2008. <http://allafrica.com/stories/200809080679.html>

Members of the legislature are elected for a limited period with no guarantee of re-election, making it impractical to prohibit them from having any external business or employment interests. Nevertheless, MPs are generally prohibited from the following:

- Holding a position in other branches of government. However, it is a common though often controversial practice in many democracies (for example France) for MPs to also hold other local elected offices such as local councillor or mayor.
- Occupying any position in or having an interest in a company that receives contracts from the government.
- Holding a position of employment or other interest that prevents the MP from performing his/her job.

For the reasons already stated, rather than imposing other prohibitions beyond these basic ones it is far more common – and preferable – to place the emphasis on duties of elected officials to declare interests and/or exclude themselves from decision-making processes in which they have a personal interest. As will be seen in sub-sections 3-4 below, these duties of declaration and exclusion are usually closely linked.

2.3 Declaration of interests

The second main mechanism for addressing conflicts of interest is to impose obligations on public officials to declare their personal interests. **Declarations of interests may be seen as the single most important component of a framework for tackling conflicts of interest:** they are a fundamental instrument of transparency, they provide an incentive for officials to put their affairs in order, and serve as a necessary condition for other components of the regulatory framework to work – in particular exclusion from decision-making and detection of conflict of interest situations. Article 8.5 of the United Nations Convention Against Corruption¹⁰ obliges parties to the Convention to

establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.

Such declarations have two main forms:

- general declarations of personal interests, usually recorded in a register of interests; and
- case-by-case declarations by members of any interest they may have in a matter that is before the legislature or one of its committees of which they are a member.

It is important to distinguish between declarations of assets/income and declarations of interests.

Assets and income refer to concrete financial ownership or benefits, whereas ‘interests’ encompasses a wider range of benefits that may at the time of declaration not have provided the public official with any concrete benefit. Examples include membership in a business association, but also any position, function or similar that results in the official being subject to certain incentives – for example the job held by a relative.

¹⁰ <http://www.unodc.org/unodc/en/treaties/CAC/index.html>

Even in the case of civil servants, it is impossible to prevent the holding of any personal interest that might at some point give rise to a conflict of interests, especially taking into account that the interests of family members (for example the job held by an official's spouse) may also be regarded to some extent as the interests of the official. For this reason civil servants are often obliged to declare personal interests (and assets). It is more common for civil servants to be required to do this only on an *ad hoc* basis, although civil servants above a certain grade are often required to provide general declarations of their assets and income. For example, the Kenya Act states that a public officer whose personal interests conflict with his official duties shall "declare the personal interests to his superior or other appropriate body and comply with any directions to avoid the conflict...".

There are other important issues to be resolved when establishing duties to declare interests, in particular which grades of official should be obliged to submit declarations, how frequently and to what extent family interests should be included in declarations. These are not the prime focus of this paper, and good guidance can be found elsewhere.¹¹ The author wishes to underline only two key points here:

- It is important to **define the circle of officials who are obliged to submit declarations sufficiently narrowly so that it encompasses only officials with important decision-making powers** and does not lead to an impossible burden of implementation and enforcement. This may mean limiting declaration requirements to heads of structural units or departments and above. Many conflict of interest laws, especially those drafted in response to pressure from international organisations, attempt to cover all civil servants; the result is typically – and sometimes deliberately – little or no implementation and enforcement.
- It is important to define carefully thresholds for declaration of financial interests – that is, the value or size of particular kinds of interest over which they must be declared. Otherwise the burden on public officials and on supervision and enforcement will escalate with no good reason.

Elected officials

Since the early 1990s legislatures in a number of countries have established obligations of elected members to declare their personal interests in order to increase the transparency of their conduct. A number of legislatures have established general registers of members' interests, to which members are obliged to submit lists of 'registrable interests'. As a typical example, in South Africa MPs are required under their Code of Conduct to submit to the register details of the following¹²:

- shares and other financial interests in companies and other corporate entities,
- remunerated employment outside Parliament,
- directorships and partnerships,
- consultancies,
- sponsorships,
- gifts and hospitality from a source other than a family member or permanent companion,

¹¹ For example see G. Carney, *Conflict of Interest: Legislators, Ministers and Public Officials*, Transparency International Working Paper, 1998.

¹² Parliament of the Republic of South Africa, Code of Conduct for Assembly and Permanent Council Members, Section 6. http://www.parliament.gov.za/live/content.php?Item_ID=235

- any other benefit of a material nature,
- foreign travel (other than personal visits paid for by the Member, business visits unrelated to the Member's role as a public representative and official and formal visits paid for by the state or the Member's party),
- ownership and other interests in land and property, and
- pensions.

These categories are then described in more detail in Section 7 of the South African Code, including financial thresholds (the size of an interest at which disclosure becomes compulsory).

In India, the Council of States (the upper house) requires Members to submit the following shorter list of interests to the Register of Members' Interests: remunerative directorships, regular remunerated activity, shareholdings of a controlling nature, paid consultancies, and professional engagement.¹³ The Council of States also imposes detailed obligations on members to declare all their movable and immovable assets.

As will be stressed in Section 3.1, it is essential that guidelines are provided to elected members defining exactly what kinds of interests should be declared, any financial thresholds under which a particular item of income or assets need not be declared and so on. One of the best examples of such guidelines may be found in the UK House of Commons Code of Conduct.¹⁴ Legislatures may also provide explicit forms for members to fill in (as in the Indian Council of States as cited above), but as long as a professional staff is managing the register of interests **forms are less important than guidelines** and – most importantly - should not take their place.

In addition, these and other legislatures oblige members to declare interests on an *ad hoc* basis. A Member of the South African Parliament must

*declare any personal or private financial or business interest that that Member or any spouse, permanent companion or business partner of that Member may have in a matter before a joint committee, committee or other parliamentary forum of which that Member is a Member...*¹⁵

The Indian Council of States Rules of Procedure and Conduct of Business states that

*whenever a member has a personal or specific pecuniary interest (direct or indirect) in a matter being considered by the Council or a Committee thereof, he shall declare the nature of such interest notwithstanding any registration of his interests in the Register....*¹⁶

Registers of members' interests define more-or-less clearly *what* interests should be declared. Nevertheless, **it is a good idea to include a provision obliging them to register other relevant interests** that do not fall under the formal classification. The UK Code – which defines the list of interests in even more detail than in South Africa or India, also states that “Members are responsible

¹³ http://164.100.24.167/template/mem_interest.pdf

¹⁴ House of Commons Code of Conduct together with The Guide to the Rules relating to the Conduct of Members, Section 1. <http://www.publications.parliament.uk/pa/cm/code.pdf>

¹⁵ Parliament of the Republic of South Africa, Code of Conduct, Section 11. http://www.parliament.gov.za/live/content.php?Item_ID=235

¹⁶ Rule 294(1), Rules of Procedure and Conduct of Business in the Council of States. http://rajyasabha.gov.in/com_ethics/ethics_main.asp

for making a full disclosure of their interests, and if they have relevant interests which do not fall clearly into one or other of the specified categories, they are nonetheless expected to register them.”

It is also important to define more clearly exactly what makes an interest subject to *ad hoc* disclosure in a particular case. In order to guide members on when an interest should be declared, the UK House of Commons guidelines provides a useful rule-of-thumb that could usefully be adopted elsewhere: “[A] pecuniary interest should be declared if it might reasonably be thought by others to influence the speech, representation or communication in question.”¹⁷

Balancing Transparency and Privacy

For both civil servants and elected officials, a very important issue to be resolved is the extent to which declarations of interests should be public. While **the benefits of transparency are clear, they need to be balanced against the right to privacy**, which is a principle of value in its own right. This is a complex issue to resolve and the right balance to be struck depends on a number of issues. The following general guidelines may be useful in striking the right balance:

- Especially for civil servants, the rule should be followed that invasion of privacy is only justified if there is a clear benefit from public disclosure. Following from this, the higher the office held by the official and the greater are his/her decision-making authority, the stronger is the argument for public disclosure. For lower-level officials, it should be sufficient for declarations to be overseen internally.
- The less it is possible to rely on the integrity of internal regulation – i.e. the oversight of declarations by an internal civil service body – the stronger is the case for public disclosure.
- Public disclosure is important as a mechanism for detecting conflicts of interest. The inherent difficulties of enforcement mean that the role of the media and public in scrutinising declarations can be crucial.
- It is a good idea to split the information contained in declarations into a public and non-public parts. For example, declarations of assets by Canadian public officials are divided into exempt assets which are not publicly declared (for example for private use or of a non-commercial nature, for example a family home) and publicly declared assets, defined as ‘assets that could be directly or indirectly affected as to value by government decisions or policy’. Regarding elected officials, in South Africa the declaration of general assets of MPs is publicly available but the value of such assets and details of family members’ assets are not.¹⁸

¹⁷ House of Commons Code of Conduct together with The Guide to the Rules relating to the Conduct of Members, 2005, para. 57. <http://www.publications.parliament.uk/pa/cm/code.pdf>. The Code states that “In any debate or proceeding of the House or its Committees or transactions or communications which a Member may have with other Members or with Ministers or servants of the Crown, he shall disclose any relevant pecuniary interest or benefit of whatever nature, whether direct or indirect, that he may have had, may have or may be expecting to have.”

¹⁸ These two example are cited in G. Carney, *Conflict of Interest: Legislators, Ministers and Public Officials*, Transparency International Working Paper, 1998.

Consequences of disclosure

Once a disclosure of interests has been made, the important question is what follows, that is what are the consequences of disclosure. There are three possibilities:¹⁹

- allow the proceeding or matter to continue as usual, assuming that transparency is a sufficient mechanism to prevent corruption,
- require a decision to be made by a superior or appropriate body on whether the official concerned may continue participation in the matter or not, or
- require the official to withdraw from the matter.

The second and third of these possibilities are covered in the following section.

2.4 Exclusion from decision-making processes

Ad hoc declarations of interests – i.e. declarations of interests that might influence or be seen to influence a public official in a particular case - are more often than not only the initial stage of a process of resolving a conflict of interest. The second stage is either one of the following:

- A decision by an official's superior on how to resolve the conflict, in particular by excluding the official from dealing with the matter in hand (exclusion).
- A duty of the official him/herself to withdraw from the matter in hand (self-exclusion).

In Kenya, civil servants must in addition to reporting a conflict of interest to their superior or appropriate body and complying with instructions given in the matter “refrain from participating in any deliberations with respect to the matter.” The extent to which the emphasis should be placed upon the decision of the superior and to what extent on self-exclusion is an important one. The author feels that there are strong arguments for a one-track approach in which **officials are obliged to declare the interest, while their superior is obliged to determine the appropriate course of action.** This can only work, as will be underlined in Section 3.1 if declarations are made to a superior at an appropriate level (i.e. not too senior) and superiors are adequately trained to deal with them.

Elected officials

For elected officials, there is generally a much stronger emphasis on self-exclusion from decision-making. As Carney notes, in some legislatures – for example the U.S. Congress or the Canadian and Australian parliaments, the legislature requires exclusion from voting on a matter in which the member has a pecuniary interest, but not declaration of the interest.

In India, Members of the Council of States are not excluded from proceedings where they have an interest, but “shall not participate in any debate taking place in the Council or its Committees” before making a declaration of their interest in the matter as cited in Section 2.3 above. South African legislators are under a stricter obligation: after declaring an interest in a matter an MP must “withdraw

¹⁹ G. Carney, *Conflict of Interest: Legislators, Ministers and Public Officials*, Transparency International Working Paper, 1998.

from the proceedings of that committee or forum when that matter is considered, unless that committee or forum decides that the Member's interest is trivial or not relevant.”

Whether elected officials should, in addition to having to declare an interest in a matter exclude themselves from participating in a proceeding relating to the matter is a question that should be answered only after close analysis of the local context and – even more important – consultation with legislators themselves. Two very important issues or questions should be raised here.

The first one is that it can and often is argued that because MPs are accountable at the ballot box then disclosure (including *ad hoc* disclosure) of interests is a sufficient mechanism for addressing conflicts of interest. On this argument, if the conduct of MPs and the motives affecting that conduct are public then it can be left up to the electorate to pass judgment on that conduct. However, there are at least two major problems with this argument. First, the extent to which voters are informed of such details of and MPs conduct is questionable, even in a country with high-quality professional media. Second, **the extent to which individual MPs are accountable at the ballot box depends crucially on the electoral system: systems based on party lists remove such direct accountability, for example.**

Therefore, some degree of self-exclusion by MPs of themselves from proceedings in which they have a direct pecuniary interest seems a sensible and efficient component of a legislature's ethics framework. It is important, however to ensure that a relevant interest is defined sufficiently narrowly. In particular, it is important that 'interest' is not understood so broadly as to include the MPs electoral interest – so that s/he would be obliged to exclude him/herself from voting on a subsidy bill that would directly benefit an industry in his/her constituency. Again, a useful approach appears to be the UK requirement only to declare a narrow interest. Carney states the example of the MP who is also a dairy farmer: under the UK Code, the MP would be allowed to vote on legislation that would benefit all dairy farmers in his/her constituency, but not on legislation that benefited only his/her farm.²⁰ If exclusion applied to the first case, this would prevent the MP from performing his/her representative function.

2.5 Members of the government: prohibitions, declarations and exclusion

As mentioned already in Section 1.4, given the importance of their position in terms of power but also the potential they hold to increase or undermine public trust in politics, members of the government should be governed by strict regulations in all three of the areas outlined in this section. However, for reasons outlined in Section 4.2, in some countries it may not be politically feasible to restrict the holding of external interests (for example of a business nature) too strictly. In such contexts:

- It is all the more important that both general and *ad hoc* declarations of interests are required from ministers.
- Ministers must be governed by strict regulations not only to declare interests that may affect or appear to affect their judgment in a particular matter, but also to withdraw themselves from participation in that matter.

²⁰ G. Carney, *Conflict of Interest: Legislators, Ministers and Public Officials*, Transparency International Working Paper, 1998.

3 Implementation and enforcement

Section 2 outlined the types of regulation that can be used to tackle the problem of conflict of interest. Choosing which type of regulation is appropriate to the category of public official is of vital importance, and Section 2 focused especially upon appropriate regulations for elected officials. Whether the discussion is of civil servants or elected officials, it is of vital importance to be aware of **what is needed to implement and enforce a given set of regulations in practice**. Conflict of interest legislation or codes of conduct are all-too-often passed without any provision, or with inadequate provision for mechanisms of their implementation and enforcement.

This section briefly outlines issues of particular importance for implementation and enforcement of a framework for preventing and addressing conflicts of interest, with particular focus on elected officials. Fortunately, the difficulties of implementation for elected officials are less severe than for civil servants, due to the limited number of elected representatives involved and the greater incentives they have to at least appear to regulate themselves effectively.

Any framework for regulating conflict of interest requires the following components if it is to be implemented effectively.

3.1 A functioning procedure for declarations of interests

Section 2.3 underlined the key importance of declarations of interests in any framework for regulating conflicts of interest. In order for declarations of interests to function in practice, it is crucially important that the procedure for declarations is well-designed. This means the following elements being in place:

- As emphasised in Section 2.3, guidelines must be provided to public or elected officials listing exactly what kinds of interests should be declared.
- It is vitally important that declarations are submitted (or possibly submitted verbally in the case of *ad hoc* declarations) to an appropriate level. For example, designating the head of the state institution as the recipient of declarations is not a good idea as it will overwhelm him/her and also make the submission of declarations a more traumatic experience for officials than it need be. Likewise, designating a person with too low a rank may also be difficult if that person is to control the submission of declarations, if s/he is not sufficiently trained etc. **The recipient of declarations should be a superior who is not too far removed from the official yet holds sufficient authority, or an ethics officer** as outlined in the following subsection.

Elected officials

In legislatures, the responsibility for receiving declarations is complicated by the fact that almost by definition a real hierarchy among MPs is impossible. Responsibility for receiving and processing declarations of interests can be allocated to an external body (for example an anti-corruption bureau), but the preferred approach is to either allocate this responsibility to a parliamentary ethics committee (as for example in the Indian Council of States) or to a specially appointed Parliamentary staff member or commissioner (see following section). In the opinion of the author, the nature of parliamentary sovereignty implies that giving such responsibilities to a body external to the legislature is problematic and may result in harassment of the legislature by the Executive Branch. Also, while it may guarantee

the independence of supervision it may also increase the likelihood of failure by MPs to cooperate. Self-regulation may therefore be preferable. For reasons stated in sub-section 2) below, the best solution appears to be the appointment of an independent commissioner to oversee the ethics framework.

3.2 The existence of staff dedicated to implementation of the ethics framework

While the initial responsibility for implementation and supervision of ethical conduct will fall to ordinary supervisors or heads of units/departments, it is very important if an ethics framework is to be implemented properly for one member of staff to be designated as a full-time ethics officer. This is for no other reason than that **the job of implementation at agency level is likely to be a full-time job** for at least one person, involving at least the following:

- Dealing with complaints about violations of ethical standards/code of conduct.
- Providing training to supervisors within the institution and to ordinary officials.
- Providing guidance on request and in response to questions about conflicts of interest or other ethical issues.
- Coordinating the other elements of an ethics framework, which go beyond only addressing conflicts of interest.²¹

In addition to staff within individual state institutions, for civil service regulations there is a clear need for responsibility for the overall ethics framework to be held by a central body - such as the Public Service Commission in South Africa. The body will often be responsible for tasks such as processing the general declarations of civil servants, dealing with appeals on decisions against civil servants and providing guidance to training to agency ethics officers. It should be noted here that the South African experience has suggested that responsibility for supervising declarations should be decentralised to ministry level, due to the burden on the PSC (see section 3.3).

Elected officials

Despite the limited size of legislatures in comparison with government institutions, experience suggests that the establishment of a permanent and professional senior staff official within the legislature responsible for ethical issues is also an advisable approach in the implementation of a parliamentary ethics framework. **Giving implementation responsibilities only to a parliamentary committee raises the risk that proceedings relating to violations of ethical standards will become politicised** or perceived as politically motivated.²² A better approach is to assign the initial function of supervision to a commissioner, on the basis of whose advice and conclusions a parliamentary

²¹ A good example of a comprehensive approach is the 2004 German Federal Government Directive Concerning the Prevention of Corruption in the Federal Administration, available at <http://www.u4.no/document/showdoc.cfm?id=45>

²² An example is the cash-for-questions affair in India which led to the expulsion of 11 members from the House of the People in 1995. <http://www.tribuneindia.com/2005/20051224/main1.htm>

commission then makes decisions. For example, a good model might be seen in the UK House of Commons, which appoints a Commissioner for Standards. The Commissioner²³ is responsible for:

- overseeing the Register of Members' Interests,
- providing advice on a confidential basis to MPs and to the Select Committee on Standards and Privileges about the interpretation of the Code of Conduct and Guide to the Rules relating to the Conduct of Members,
- preparing guidance and providing training for MPs,
- monitoring the operation of the Code of Conduct and Guide and proposing possible modifications of it to the Committee where appropriate, and
- receiving and investigating complaints about alleged breaches of the Code and Guide by MPs and reporting the findings to the Committee.

The Select Committee then makes decisions such as imposing sanctions on MPs who have violated the Code of Conduct.

3.3 Sufficient capacity for the bodies or officials responsible for supervision and enforcement

Section 2 highlighted the importance of designing conflict of interest regulations – and especially duties to declare interests - so that they focus on officials who matter and on interests that are relevant. Particularly in the case of civil service conflict of interest regulations, even regulations that are well-targeted may still mean that many hundreds or even thousands of officials are subject to declaration duties. **It is therefore of key importance that the body that is responsible for implementation of civil service ethics rules has sufficient capacity to fulfil this task.**

A classic example of where this is not the case has been in South Africa, where according to a 2004 report the Public Service Commission responsible for receiving and checking financial declarations from around 4300 officials had only one person responsible for the entire process.²⁴

The problem of capacity is likely to be much less severe for elected officials, unless the body responsible for processing declarations of interests is the same as for civil servants.

3.4 A functioning procedure and commensurate sanctions for addressing violations

The last issue relating to implementation concerns enforcement in cases where violations of conflict of interest regulations occur or such violations are alleged or suspected. The most important issue concerning enforcement in general is to ensure that **sanctions are commensurate with the scale of the violation**

²³ http://www.parliament.uk/about_commons/pcfs.cfm

²⁴ Institute for Democracy in South Africa, "Government ethics in post-apartheid South Africa: 2003", http://www.idasa.org.za/index.asp?page=output_details.asp%3FRID%3D94%26TID%3D1%26OTID%3D2

In addition, and especially for civil servants, enforcement procedures must reflect the legal status of the conflict of interest provisions, in particular whether they are legally binding or only contractually binding (for example in the case of codes of conduct as discussed in Section 2.1) for civil servants. In cases where they are legally binding the enforcement framework must be shaped to reflect the kind of liability the provisions envisage for violations, namely whether liability will be only administrative/disciplinary or also criminal (as in the USA for example in cases where officials fail to submit declarations of interests).

Elected officials

In the case of elected officials, enforcement is generally easier given the smaller number of persons subject to the conflict of interest provisions. However, the fact that conflict of interest is invariably regulated internally by the legislature tends to limit the range of sanctions that can be applied to violators, with temporary suspension from the legislature usually the most severe possible punishment. The US House of Representatives appears to be an exception, with the Congressional Committee on Standards of Official Conduct empowered to seek fines of up to \$11,000 for deliberate failure to submit information or submission of misleading information, while the same offence is also a criminal offence with a penalty of up to \$11,000 and/or imprisonment of up to five years.²⁵

3.5 A suitable framework for supervision and enforcement for members of the government

A particularly tricky issue is whom to entrust with the task of supervising and enforcing conflict of interest regulations for ministers. Experience and logic suggests that entrusting such a role to a civil service body (such as the Civil Service Commission) is problematic if the commission is subordinate to government ministers. Giving the role to an external body (such as an anti-corruption bureau) is also likely to be problematic for similar reasons unless the bureau is itself subordinated to the legislature rather than the Executive Branch. In practice, it is likely that there will be a need to accept that ministers should be subject to strict regulations, but enforcement of those regulations should rely largely on transparency and ministers' political accountability. In the UK the Ministerial Code of Conduct²⁶ contains the following relevant provisions:

- Ministers should provide a list of their interests, and particularly financial interests, to their Permanent Secretary on taking office. The list should be discussed and a decision taken by the Minister on whether any action needs to be taken to dispose of any interests, taking into account advice from other government agencies if necessary.
- Ministers should 'scrupulously avoid any danger of an actual or apparent conflict of interest between their Ministerial position and their private financial interests' either by disposing of the interest or informing their Cabinet colleagues and withdrawing from a particular matter.
- The Code underlines the fact that '[A]ny exercise or non-exercise by a Minister (including a Law Officer) of a legal power or discretion or other influence on a matter in which the

²⁵ <http://ethics.house.gov/Subjects/Topics.aspx?Section=114>

²⁶

http://www.cabinetoffice.gov.uk/~media/assets/www.cabinetoffice.gov.uk/propriety_and_ethics/ministerial_code%20pdf.ashx

Minister has a pecuniary interest could be challenged in the courts and, if the challenge is upheld, could be declared invalid. The courts interpret conflict of interest increasingly tightly.’

The main problem with the UK framework appears to be that there is no duty of ministers to declare their interests publicly. If such a provision were included, the UK approach might be seen as a good model for consideration elsewhere.

4 Lessons for conflict of interest regulation and challenges for transitional/developing democracies

4.1 Guidance for regulation

The main lessons/recommendations for regulating conflict of interest contained in this paper so far may be summarised as follows:

- It is vital to **be realistic when designing regulations**. Public officials (or persons close to them) will have external interests that can potentially come into conflict with the public interest they are appointed to pursue. This is the case especially for elected representatives. The aim of regulation should not therefore be to prohibit any interest that might give rise to a conflict of interests. The importance of realism is underlined further in the following section on less developed democracies.
- Regulations should be introduced in such a way that those who are subject to them – be they civil servants or elected officials – regard them as their own. **Regulations that are internalised will require less monitoring** and enforcement than those that are imposed from above.
- Reasonable prohibitions on external activities are important for civil servants. However, **for elected officials the emphasis in regulation should be placed on duties to disclose** personal interests, both as a condition of holding office and *ad hoc* where they are subject to an interest that may influence or appear to influence their conduct.
- Duties to declare interests – especially financial ones – are of central importance in tackling conflict of interest, and should be in place for all the categories of official discussed in this paper. However, it is vital to define such duties in such a way that they **focus on relevant interests and relevant officials**, and to ensure that the procedure for declaration is user-friendly. Duties to declare interests should also be balanced fairly with the right to privacy.
- Regulations should also be designed to ensure that elected officials may not participate in matters in which they are subject to an obvious and specific conflict of interest, although it is very important to **design the regulations such that MPs can perform their representative function**.
- In order to implement conflict of interest regulations (and more broadly, a code of conduct and ethics rules in general) within the legislature it is advisable to establish a permanent official (commissioner) responsible for overseeing the register of members’ interests, providing advice and guidance, dealing with complaints and reporting to the relevant parliamentary committee or parliament.

- It is very important to take account of the pitfalls of implementation and enforcement in the civil service – in particular determining the right level of official to whom civil servants should report and be responsible, and **ensuring that any central body responsible for oversight has sufficient capacity to do so.**

4.2 Challenges for transitional/less developed democracies

Political culture and other factors of a socioeconomic nature may have a decisive effect on how successful are particular attempts to regulate conflict of interest. In view of the forum for which this paper is written, it is appropriate to identify some of the special challenges confronting conflict of interest regulation in the context of less-developed democracies, or democracies in transition from an authoritarian regime or conflict situation. These additional lessons and challenges are outlined below.

Working environment

For prohibitions on external activities to have any legitimacy civil servants must be sufficiently well paid and enjoy a working environment that guarantees some degree of security of tenure. By implication, the same point applies to duties of exclusion from decision-making. To the extent that such an environment is not in place, conflict of interest regulation – with the possible exception of declaration of interests – will not work. If civil servants are very poorly paid and have no security of tenure – which tends to be the case in poorer countries – they cannot be expected to respect restrictions on moonlighting.

Overlapping economic and political elites

Poorer countries in general, or countries in transition from an authoritarian past or background of internal conflict tend to be characterised by stark inequality and a situation where the political elite and economic elite overlap to a considerable extent. Such elites will often be organised around a limited number of families and/or tribal or clan structures. This context may be a source of widespread corruption and nepotism and – *inter alia* – give rise to demands for strict measures to prevent conflict of interest.

Although concerns with the consequences of overlapping elites may be well placed, the implications of such elites for how conflict of interest regulation should be designed are not so clear-cut. Where for example ministers, senior civil servants or their families control a country's key business sectors, the simple fact is that prohibitions on holding such external interests will probably be unrealistic. Such prohibitions will either be ignored or mechanisms will be found to circumvent them. This is the case for example in Azerbaijan, where ministers commonly control businesses through persons who are not subject to the same restrictions as they are.

In such contexts, the most that can be hoped for from conflict of interest regulation is that it will increase the transparency of such elites. It will be more realistic to allow overlap between elites but in return require them to disclose business interests openly and – where feasible - withdraw from decisions that affect their particular business interests. Openly acknowledging their right to have outside interests may indeed encourage the disclosure of such interests. The same obviously applies to elected officials (MPs).

Poorly developed norms of political conduct: the need for consensus, positive incentives and a public service culture

Less-developed or transitional democracies tend to be characterised by disputes and conflicts over many norms of political conduct over which more-developed democracies tend to exhibit broad consensus. Such disputes and conflicts will often be instrumental – i.e. used or maintained merely for personal or partisan political purposes – but this makes them no less real.

Unfortunately, norms that are relevant to conflict of interest are often among such disputed norms. For example, in many countries the author has witnessed debates surrounding corruption scandals in which officials accused of wrong-doing defend themselves on the basis that although they received a private benefit it had no connection with the favourable decision they made for the provider of the benefit. Such disputes – in this case essentially over whether corruption is corruption – should make us wary of expecting broad agreement on the more demanding and sophisticated concept of conflict of interest. Whether the political class and civil servants will assent to restrictions on holding interests even where they do not behave corruptly is by no means straightforward.

What follows from these considerations are the following points:

- Developing a point already emphasised twice in this paper, it is especially important in countries where norms of official conduct are poorly developed to **include public officials in the process of establishing the rules** or codes that are to regulate them.
- In a context where norms are poorly developed, it is advisable to pay special attention to the elements of an ethics framework that **contribute to the development of a public service culture, rather than designing and presenting such a framework as “a set of rules to be complied with”**. This points to the desirability of developing codes of ethics/conduct rather than relying on a conflict of interest law. It may also lead to seemingly paradoxical conclusions. For example, if the aim is to develop an *esprit de corps* in which public officials identify with their office and its norms, self-regulation of ethics issues may be preferable to regulation by an external independent body.
- It is highly advisable to make use of local cultural ethical concepts when designing codes of conduct and similar mechanisms. For example, in Botswana the principle of *botho* from Setswana was formally incorporated into the recent draft Code of Conduct; although not directly related to conflict of interest or corruption, the **use of other local cultural principles to underpin regulation** of the latter is likely to be more effective than the mere translation of a model code of conduct recommended by an international organisation.

In short, without sufficient consensus on norms of official conduct no regulations to tackle conflict of interest can be expected to work, or at least not without a huge burden of enforcement. A more likely result is a situation of mass non-compliance.

4.3 Donor assistance

There have been various forms of bilateral donor assistance to countries on establishing and implementing mechanisms to regulate conflict of interest. For example, the National Democratic Institute has assisted in the development of codes of conduct in a number of countries including

Georgia, Kyrgyzstan, Mauritius, Namibia, Nepal, South Africa and Turkey.²⁷ The Council of Europe has provided expert opinions on draft conflict of interest laws as a component of anti-corruption projects in Moldova and Azerbaijan. In Azerbaijan it has also provided training to the Civil Service Commission on the implementation of the country's Law on Rules of Ethical Conduct of Civil Servant, which *inter alia* addresses issues of conflict of interest.

Donor work in the area of conflict of interest and codes of conduct for public officials is certain to increase in the future as countries confront their obligations under the United Nations Convention Against Corruption to introduce declarations of interests by public officials (including elected officials) and codes of conduct. This paper has not addressed the role of donors in detail. However, it is important to underline the need for donor assistance to take into account three lessons that follow from the material presented.

- First, the obligations in the UN Convention do not distinguish between elected officials and civil servants. **It is essential that conflict of interest and ethics regulations are tailored for specific categories of officials** and not the same for all types of official – and donor assistance should actively encourage this.
- Second, based on the experience of Council of Europe member states implementing their obligations to regulate conflict of interest, it is also **essential for donors to avoid imposing a regulatory blueprint** that does not take account of local context. Otherwise, countries are likely to adopt such blueprints to satisfy the international community on paper, without making any real effort to implement regulations.
- Third, assistance in preventing and regulating conflict of interest should not be limited to assistance with drafting conflict of interest regulations or codes of conduct. Depending on the local context, **there is a wealth of activities that donors might valuably engage in**. Examples include assistance with basic civil service reform, e.g. to ensure that civil servants receive a sufficient remuneration to make conflict of interest regulation possible, to assist the civil service regulatory body become able to implement regulations such as codes of conduct and conflict of interest regulations, training NGOs or journalists to read and monitor public officials' declarations of interests, and so on

5 Conclusion

This paper has attempted to clarify the notion of conflict of interest, and on the basis of clear understanding of that notion to outline the objectives of regulating conflict of interest and the means and mechanisms available to do so. Even in advanced democracies, regulation is by no means simple and requires a healthy dose of realism, with the main lesson that regulation should be kept simple, clear and tailored to the specific context and should be designed to encourage public officials to identify with the norms of conduct to which they are subject rather than merely complying with them. In poor, less-developed or transitional democracies the challenges of regulation are considerably more severe; while the objectives of regulation remain similar, the means for achieving these objectives may have to be modified considerably in response to local circumstances.

²⁷ <http://www.ndi.org/globalp/gov/programsgov/ethicsgov.asp>

Abstract

This paper describes the problem of conflict of interest of public officials and the main ways in which it may be tackled, with particular focus on regulation of elected officials. The paper describes three main types of regulation – prohibitions on activities, declarations of interests, and exclusion from decision-making processes – and how these may be best implemented in practice. The author underlines the need for regulation to be realistic, tailored specifically for different categories of officials and to the specific circumstances of the country in which they are to be applied. The author also suggests possibilities for the engagement of the donor community, in line with the implementation of the UN Convention Against Corruption.