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Parliamentary Code of Conduct: a Guidebook for Parliamentarians

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Abstract

This is the first draft of the Guidebook on Parliamentary Ethics developed in the context of the Global Parliamentarians Against Corruption (GOPAC) task force on Political Ethics and Conflict of Interest chaired by Hon. Ghassan Moukheiber (M.P.—Lebanon). The Guidebook highlights the issues parliamentarians and other stakeholders must take into consideration when developing a code of conduct. The purpose of the code, the structure and principles, rules and content and finally mechanisms for regulations are all discussed here. This draft aims to provide a blueprint for the creation of a parliamentarian code of conduct as both an anti-corruption measure and linchpin of ethical standards within the legislative branch. This Guidebook has been drafted by Mr. Greg Power, of Global Partners & Associates, with funding from the Westminster Foundation for Democracy (WFD). This document is a work-in-progress and we value your input, please email any comments and/or suggestions to mbulbul@arpacnetwork.org.

The views expressed in this document are not necessarily the views held by ArPAC, GOPAC or WFD.

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Parliamentary Code of conduct: a Guidebook for Parliamentarians

Executive summary

In recent years an increasing number of parliamentary institutions have introduced codes of conduct. Such codes have generally been prompted either by specific cases of unethical behaviour by MPs, or by a broader desire to address low levels of trust and public concern about the honesty and integrity of politicians. They have, as such, principally been regarded as ways of tackling corruption and improving parliamentary standards. However, as these systems have grown, so their application has extended beyond what might be defined solely as ethical issues. Increasingly the rules and mechanisms contained in a code of conduct are being used as a general tool to reinforce parliamentary procedure and etiquette.

This guidebook is intended to provide an overview of the issues for politicians and others seeking to introduce a code of conduct. It focuses mainly on the use of a code as an anti-corruption measure, but also examines the potential implications and overlap between initiatives to ensure both ethical and procedural standards.

The guide does not aim to provide a blueprint, capable of being implemented in every parliament. This is not feasible. It is impossible to translate a code from one parliamentary institution to another, as the content, structure and provisions will vary according to the political context, culture and rules that exist within that institution. Instead the guide sets out a series of issues which need to be addressed by those contemplating a code of conduct. These issues are contained in four sections;

1) Determining the purpose of the code of conduct

The first chapter examines the basis from which a code of conduct should be built. It emphasises the importance for reformers of being clear about the nature of the problem that the code is intending to solve. It also urges reformers to be realistic about the limitations of any code, that it will not, by itself, solve all the problems faced by the parliament. As such, it needs to form part of a wider effort to improve understanding of the rules and to shape the political values that determine political behaviour within the institution.

2) Establishing the structure and principles of the code of conduct

The second chapter identifies the three main parts of any code of conduct as i) a set of institutional ethical principles, ii) a set of detailed rules and restrictions governing behaviour, and iii) a regulatory framework for enforcing the rules. The chapter suggests that the starting point for developing a code should be to get parliamentary agreement about the general values, from which detailed rules can then be formulated. Using examples from other countries, it highlights the sorts of values that might be used to underpin a code.

3) Developing the content and the rules for the code of conduct

The third chapter looks at the detail of the code of conduct in three sections. First it highlights the importance for parliaments in establishing what constitutes a 'conflict of interest'. That is, where a politician's private interests might interfere with their public role or, bluntly, where an MP could use their public position for private gain. Given that MPs are continually having to decide between competing interests in the course of their decision-making this is a difficult, but central, part of developing a code.

The commonest way of addressing this issue is by ensuring that politicians have to declare their private interests, allowing others to judge where there is the potential for

conflict. The second section of the chapter looks at the provisions used by a number of parliaments to ensure openness and transparency, the sorts of interests that MPs are obliged to disclose, and the restrictions placed upon them.

The third part of the chapter looks briefly at the issue of parliamentary immunity. There is a tension between the principles enshrined in parliamentary immunity systems and limitations placed on an MP's actions by a code of conduct. This section highlights the ways in which parliaments have sought to resolve them.

4) Mechanisms for regulation and enforcement

The fourth chapter describes the three main models for the regulation and enforcement of the code of conduct, namely, external regulation (such as by the courts), internal regulation (by a parliamentary committee), and the semi-independent model which combines an external commissioner with a parliamentary committee. The chapter then examines the various sanctions that are used to enforce the rules and improve standards of behaviour. The chapter highlights how codes for establishing ethical standards are overlapping with the more general task of ensuring order and shaping MPs' behaviour.

The final part of the chapter highlights the importance of education and training in forming an integral part of the code of conduct. The most effective code of conduct is, arguably, the one that does not need to impose sanctions on errant members because members understand and abide by the rules. To this end a code should not only set out the correct path for members to tread, but it should also provide streetlights to illuminate the way. The final section therefore examines the role of an ethics committee or commissioner in providing ongoing advice and guidance, and the importance of engaging key parliamentary figures in the development of the code.

The fifth chapter aims to summarise the key points by providing a set of questions that those seeking to implement a code will need to address. This guide cannot cover every eventuality, as political circumstances in any given country will prompt a range of political issues that will be unique to that institution. Its aim is rather to encourage the development of a code that is specifically suited to that parliament. To this end, it is built around four basic tenets;

- First, that the effectiveness of a parliament is determined by the attitudes, outlook and behaviour of its members as much as by its constitutional powers. As such, the code of conduct must focus on changing behaviour as much as changing the rules;
 - Second, a code of conduct which seeks to influence behaviour must emerge from the specific parliamentary circumstances within which it seeks to be effective. MPs must feel a degree of ownership of the rules if they are to regard them as legitimate and authoritative;
 - Third, the process of developing the code is as important as the content that emerges. Developing a detailed set of rules should not be the only objective. If the rules are to be effective the process must also engage with MPs to build a set of core institutional values;
 - Fourth, the creation of the code will not, by itself, solve all the problems faced by the institution. The code of conduct should be viewed as only one part of a wider effort to improve the functioning of the institution.
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Footnotes

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1) Determining the purpose of the code of conduct

The idea of a code of conduct is one that, according to various authors¹, has been borrowed from the private sector. As globalisation has diffused the production processes and outlets for multinational companies, so companies have found it increasingly important to develop common ethical standards. The use of codes of conduct has been one way of trying to maintain consistency and quality amongst staff and protect corporate reputation.

In turn, these ideas have been imported into the public sector as part of an effort to secure public trust and the legitimacy of public institutions. And, in recent years there has been a growing interest in the development of codes of conduct for legislative bodies. Several long-established parliaments have introduced codes in response to political scandals involving money, conflicts of interest and a misuse of power, or to try and address the general slide in public perceptions of politics. As such, they have sought to re-state the ethical principles by which Members of Parliament (MPs) should conduct their business, provide a detailed set of rules defining what constitutes 'ethical behaviour', and created new regulatory mechanisms to police and enforce these rules.

These developments have prompted a wider interest in the role that such codes might play in promoting good governance, especially within emerging democracies. That is, how a code of conduct might seek to improve MPs' understanding of their roles, establish norms of behaviour and help to reinforce parliamentary procedures during debates or committee work. In such circumstances codes aim to reinforce the Speaker's authority and establish parliamentary etiquette. As is noted in this guide, the way in which codes of conduct and regulatory mechanisms are being used in practice has blurred the distinction between parliamentary misbehaviour and unethical activity. Often codes are being used in a wider range of situations than originally envisaged, but they are still principally regarded as anti-corruption tools.

Characteristically, they emphasise the need for greater openness, obliging MPs to declare publicly any outside interests that might prejudice their role as a representative and decision-maker. Such systems include detailed provisions identifying which outside interests need to be published, which interests would prevent an MP from participating in debates on certain subjects, and which are incompatible with public office and therefore need to be removed.² However, the overriding principle is one of transparency, so that it is possible for others to judge whether certain outside interests might have affected an MP's behaviour.

In a similar vein, many governments have developed codes which apply specifically to ministers. Given that ministers wield so much influence over government decisions and, specifically, allocation of government funds, ministerial codes are usually more restrictive and detailed than those for MPs as a whole. Some of these elements are touched upon during this guidebook, particularly in chapter 3 which examines the detailed provisions within codes of conduct, but the primary focus is on codes of conduct for MPs.

This first chapter examines three basic issues in addressing the need for a parliamentary code of conduct. First, being clear about the problem that the code of conduct is seeking to address. Second, how codes of conduct should seek to shape MPs' behaviour and improve their understanding of the rules. Third, identifying the political and contextual factors that are likely to shape the success of the code of conduct.

Defining the problem

As indicated above, parliaments introduce codes of conduct usually for one of three reasons. First, some countries have introduced codes as a direct result of MPs breaking the rules. In the United Kingdom, for example, a new system for policing ethical behaviour amongst MPs was introduced in the mid-1990s following the increase in private lobbying activity, and several cases where MPs were being paid to represent private interests in the House of Commons. This behaviour breached previous parliamentary resolutions, and highlighted the weaknesses of the existing system of self-regulation. In response to political, public and media concern a new and more comprehensive regulatory system was introduced which tightened and reinforced the rules governing ethical conduct.

Second, in some countries the need for a code of conduct has been mooted in response to a more general public concern about the standards and behaviour of politicians. This may often be prompted by specific cases of MPs using public office for private gain, but the code is seen as a way of emphasising public standards across the board as much as the need to introduce new regulations to deal with specific cases. In Australia, for example, the debate about the need for a code of conduct was the result of a slew of stories about misuse of public funds and declining levels of public trust in politicians - at one stage only 7% of Australians believed that had high standards of honesty and ethics.³ In such circumstances, codes of conduct are principally about attempting to restore public trust in politicians.

Third, codes of conduct are sometimes used as a way of establishing general standards for behaviour inside and outside parliament. As noted above, new mechanisms for regulating political behaviour have expanded their focus beyond purely 'ethical' activity and are increasingly being used to sanction errant MPs for other forms of misbehaviour which interfere with the operation of parliament.

There is particular interest in emerging democracies as to how codes of conduct might be used to establish standards in a new parliamentary institution. The process of 'institutionalisation', whereby a parliament develops a set of norms and values which inform its procedures, is one that faces all new legislatures. In the early years of a legislature, there is no general acceptance or common understanding of how the rules of procedure should be interpreted. In fact, they are highly-contested by MPs, so that debate is fractious and the Speaker's authority frequently questioned. The battle is over the type of institution that members wish to create – in which all Members have a direct interest. The high turnover of MPs at each election is likely to prolong that process as each successive wave goes through the same process of contestation. Increasingly such parliaments are seeing codes of conduct as a way of reinforcing parliamentary procedure, protocol and etiquette in the chamber, committee work and even interactions with voters.

The key issue for those seeking to introduce a code of conduct is to identify the nature of the problem that the code of conduct is seeking to address. It is likely that it will include elements of all three of the examples listed above. But the objectives of the code need to be closely defined. They will determine its contents and scope, and the way in which it is enforced. If the objectives of the code are clear from the outset, the more likely it is that the code will succeed in meeting those objectives.

The broader purpose of the code - ensuring MPs understand their roles

In deciding the nature of the code it is also important to ensure that it complements other sources of advice and guidance for MPs. At its most basic level a code of conduct should ensure that MPs understand and adhere to the basic rules of parliament. But, given that all parliamentary institutions are governed by often quite detailed rules of procedure, what additional purpose should a code of conduct serve?

The initial problems exist at three levels. Firstly, there is frequently a lack of knowledge amongst members about how the institution works, especially when they are first elected. Secondly, rules of procedure tend to be complex, legalistic documents. They are often difficult to understand, and interpretation of one section of the rules often relies on understanding the provisions in other sections. Thirdly, although the rules dictate how the institution works, they do not guide the MP in how to do the job. They deal only with the MP's role within the institution, and even then only offer guidance on process, but rarely on the quality or content of that work.

New MPs in all countries face the same problems of trying to understand the rules and procedures of the institution to which they have just been elected. In long-established, stable parliaments the number of new members at each election is often small enough that they can be assimilated into the existing system, and learn from the experience of their older colleagues. Where turnover is higher, or the parliament is itself in the early stages of development, members will need additional help in firstly, understanding the rules of procedure and secondly, understanding the standards expected of them.

The most obvious way in which to achieve this is through a system of induction or training for new members. Although most parliaments acknowledge the principle and importance of training, it varies enormously in practice and delivery.⁴ In addition, the impact of training can be time-limited, especially if such efforts are not followed up or are not part of an on-going programme.

As a result a number of parliaments have developed guides to act as reference sources for MPs. These documents are generally used as supplements to the rules of procedure, explaining the institution and its processes. These can simply be glossaries of parliamentary terminology, such as that developed by the Namibian parliament.⁵ Other parliaments have more detailed handbooks of parliamentary procedure, which include more guides to the operation of the institution. For example, the House of Commons *Business of the House and its Committees: a short guide* covers aspects such as the rules of debate and how and when to table a question to a minister, as well some of the technical aspects of statutory instruments, regulatory reform orders and programming orders. Similar documents exist in Canada, Australia, India and Japan.

Some legislative bodies in the Arab region are also developing more user-friendly guides to parliament for members. In 2007, the UNDP helped the Bahraini Council of Representatives to publish its own handbook of procedure and the Omani Majlis A'Shura is due to publish a similar handbook in 2008.

[Sidebar here: country comparisons of guides, with examples and links]

Guides to procedure and etiquette form another category of handbook. These tend to be associated with the older Westminster-style parliaments which have built up their methods of business over decades, and perhaps centuries, and whose rules rely as much on precedent and practice as the formal standing orders. As a result publications such as *Erskine May* in the UK or *Beauchesne's Parliamentary Rules*

and Form in Canada⁶ run to several hundred pages (Erskine May is almost 1,200 pages in total).

However, although most of these guides will give MPs a better understanding of their role and the institution, they tend to focus on process rather than content. That is, they will explain how the institution works but won't necessarily describe how to behave. It is here that a codes of conduct could perform a complementary role. Codes should focus more issues that determine the standards and quality of an MP's work, but in doing so need to be informed by, and seek to reinforce the parliament's rules and procedures.

The political context for developing a code of conduct

The scope and content of the code will therefore be determined by the nature of the parliamentary institution for which it is being developed. However, it should seek to perform both a descriptive and normative role. That is, it should reflect the commonly-accepted standards of behaviour that already exist within the institution, but it should also seek to establish new ones.

In this process the development of the code needs to engage MPs from the outset. A code of conduct will not, by itself, solve problems of unethical behaviour, public trust or establish new institutional norms. As Rick Stapenhurst and Ricardo Pelizzo have argued,

“A legislative code of conduct is a formal document which regulates the behaviour of legislators by establishing what is to be considered to be acceptable behaviour and what is not. In other words, it is intended to create a political culture which places considerable emphasis on the propriety, correctness, transparency, and honesty of parliamentarians' behaviour. However, the code of conduct is not intended to create this behaviour by itself.”⁷

Ultimately, no code of conduct - no matter how comprehensive - will be able to govern the conduct of Members in every given situation. There will always be grey areas or rules that are open to interpretation. In these cases the legislature must rely on the individual MP's best judgement to always behave in a manner that upholds the integrity of the institution.

This has several implications. In the first place, and as mentioned above, the code of conduct must be developed as part of a wider range of initiatives designed to reinforce certain patterns of behaviour, such as the rules of procedure, and other parliamentary handbooks. They should all complement and reinforce one another if they are to have the desired effect.

This also means that there is no blueprint for developing a code of conduct that will suit every parliamentary institution. The detailed provisions forming the code of conduct must emerge from that institution so they work within the parliamentary structure and procedures. The code of conduct must be regarded as legitimate by the MPs who are governed by its rules. The effectiveness of a code of conduct in practice is determined by the way in which it is observed and applied. For this to occur, there must be a political culture which recognises the importance of having a code from the outset, and accepts that its provisions and sanctions have authority.

In other words, the development of a code of conduct is not simply about drafting a technical document or building a regulatory framework. Rather, it is a process of

getting parliamentary agreement about key standards, an institution-wide exercise in building a political culture which reinforces those values. There must be wider political support within the institution which recognises that, first, there is a problem that needs to be addressed, second, a code of conduct is the best way to address it, and third, the code of conduct provisions are suitable for that purpose. Understood in this context, the process of discussion, deliberation and negotiation over what constitutes acceptable behaviour is as important as the content of the code.

Conclusion

In summary, those wishing to develop a parliamentary code of conduct need to establish, firstly, the nature of the problem that they are seeking to address and whether a code of conduct is likely to meet these objectives. Secondly, how the code of conduct will complement other initiatives and improve the general understanding of the rules amongst MPs. Thirdly, to recognise the inherent limitations in a code of conduct, so that it forms part of a wider strategy to build a political culture around core values.

The next chapter looks at the first stages of structuring a code of conduct and establishing the core principles around which a more detailed set of rules can be built. The third chapter examines the way in which various institutions have developed their rules governing parliamentary behaviour, and the options that are available to other parliaments. The fourth chapter goes through the mechanisms for regulating and enforcing the rules.

Footnotes

¹ See Stapenhurst, R. & Pelizzo, R. (2004), *Legislative Ethics and Codes of Conduct*, World Bank Institute; Pelizzo, R. (2006), 'A Code of Conduct for Indonesia: Problems and Perspectives', *SMU Social Sciences & Humanities Working Paper Series, Paper no 11*

² See Carney, G., (1997) *Working Paper: Conflict of Interest: Legislators, Ministers and Public Officials*, Transparency International, Chapter 3

³ Brien, A., (1999), *A Code of Conduct for Parliamentarians? Research Paper 2*, Department of the Parliamentary Library, Parliament of Australia, p.2

⁴ See Van Der Hulst, M., (2000), *The Parliamentary Mandate*, Geneva: IPU, pp. 104-7; Hubli, S., & Schmidt, M., (2005), *Approaches to Parliamentary Strengthening: A review of Sida's Support to Parliaments*, SIDA; Hudson, A., & Wren, C., (2007), *Parliamentary Strengthening in Developing Countries*, DFID

⁵ See <http://www.parliament.gov.au/parlidocs/NA%20glossary.pdf>

⁶ *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, (2004), 23rd Revised Edition, Butterworths Law: London; *Beauchesne's Parliamentary Rules and Forms of the House of Commons of Canada*, (1988), 6th Edition, Thomson Professional Publishers: Canada

⁷ Stapenhurst, R. & Pelizzo, R. (2004), *op cit.*, p. 9

2) Establishing the structure and principles for a code of conduct

The first practical steps in building a code of conduct need to consider the way in which that code is structured, its constituent parts and establishing the characteristics and principles that the code should reflect. This chapter highlights the basic structure for a code of conduct and examines the sorts of principles used by parliaments to underpin the more detailed rules and regulatory frameworks.

The structure and characteristics of the code of conduct

It is obviously important for the parliament to be clear about what, exactly, a code of conduct consists of. Here there has been some disagreement over terminology amongst authors and practitioners, which has often served to confuse what is already a complex area. For example, the National Democratic Institute, describes a 'code of conduct' as a set of general principles for ethical behaviour, whereas the 'ethics rules' are the detailed provisions which prescribe and proscribe certain types of activity. In contrast, other authors suggest that a 'code of ethics' describes the general principles, while the 'code of conduct' specifies the rules governing behaviour.⁸ In other publications the terms relating to ethics, rules and codes are used interchangeably.

Regardless of the choice of words it is important that the institution uses them consistently and therefore builds common understanding about content, structure and purpose. All commentators seem to agree that a code of conduct, however defined, has three key elements, namely,

- i) Principles: The general ethical principles which all members of the parliamentary institution should seek to uphold.
- ii) Rules: The detailed provisions which identify acceptable and unacceptable conduct and behaviour for MPs.
- iii) Regulatory framework: The framework for enforcing the rules and applying sanctions.

For the purposes of this guide, the term 'code of conduct' will be used as an all-encompassing term to cover all of those elements, while the constituent parts will be referred to as principles, rules and regulatory framework. Despite the confusion over definition, all authors are agreed that one must inform the other. It is pointless having a set of general principles, without specifying the rules that give those principles their force, and in order for the rules to have authority there must be the threat of real, but proportionate punishment of those who break the rules.

Within this basic structure it is possible to identify common characteristics to which codes of conduct should conform. Other authors have identified four elements which should be reflected in the development of the code.

- Prevention: The code of conduct should aim to prevent unethical conduct before it occurs.
- Simplicity: The code of conduct should be simple and clear if it is to find wide acceptance.

- **Relevance:** The code of conduct must fit the specific parliamentary institution which it is designed to govern. It should also, obviously, complement the rules of procedure or other guides to behaviour rather than conflict with them.
- **Protection:** Politicians face constant requests for help by individuals or private institutions, which may mean acting in an unethical way (e.g. they are offered a gift in exchange for a favour). The code of conduct should offer protection to politicians by stating clearly the correct course of action in such circumstances.⁹

Defining the principles of parliamentary conduct

The four points above provide a theoretical framework from which to build. In practice, the parliamentary process of developing a code of conduct must start with the political culture within which the code needs to operate. As mentioned previously, the code should embody the cultural values of the parliament.

Most institutions will already have defining values, either included in the rules of procedure or, sometimes, in the constitution. If parliamentary behaviour is failing to reflect one or more of the principles, it can be a useful catalyst for starting a debate about the need for a code of conduct. Even if such a set of principles does not exist, the discussion of what values MPs should uphold is a useful way of creating a basis from which to launch the creation of a code, in that they are usually so general that it is relatively easy to generate widespread political agreement.

One of the most widely-cited set of principles is that developed by the Committee on Standards in Public Life, established in the UK in 1994. The committee established a new comprehensive code of conduct for MPs, which incorporates the committee's 'Seven Principles of Public Life'. These are:

1. **Selflessness**
Holders of public office should act solely in terms of the public interest. They should not do so in order to gain financial or other benefits for themselves, their family or their friends.
 2. **Integrity**
Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might seek to influence them in the performance of their official duties.
 3. **Objectivity**
In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.
 4. **Accountability**
Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.
 5. **Openness**
Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.
 6. **Honesty**
Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.
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7. Leadership

Holders of public office should promote and support these principles by leadership and example.

Other countries have similar statements which provide basic standards of conduct for MPs. For example, in Canada MPs must agree:

- to recognise that service in Parliament is a public trust;
- to maintain public confidence and trust in the integrity of Parliamentarians individually and the respect and confidence that society places in Parliament as an institution;
- to reassure the public that all Parliamentarians are held to standards that place the public interest ahead of Parliamentarians' private interests and to provide a transparent system by which the public may judge this to be the case;
- to provide for greater certainty and guidance for Parliamentarians in how to reconcile their private interests with their public duties; and
- to foster consensus among Parliamentarians by establishing common rules and by providing the means by which questions relating to proper conduct may be answered by an independent, non-partisan advisor.

While the constitution of Belize includes the following provisions:

Legislators should not act in such a way as:

- to place themselves in positions in which they have or could have a conflict of interest;
- to compromise the fair exercise of their public or official functions and duties;
- to use their office for private gain;
- to demean their office or position;
- to allow their integrity to be called into question; or
- to endanger or diminish respect for, or confidence in, the integrity of the Government

As can be seen, each of the examples includes very similar basic principles designed to uphold the integrity of the institution, retain public trust, and urges members to act in such a way as to not bring the institution into disrepute. However, there is very little in each of these statements which would be enforceable on members. As principles, they set down the basis for all conduct, but do not provide detailed guides for MPs.

Conclusion

By their very nature the principles and values which underpin proper conduct tend to be general and broad-based. They reflect values that are regarded as the foundation of the organization and as such tend to be aspirational, rather than prescriptive. In short, the establishment of core principles is an important first step in building a code of conduct, but it is not enough by itself. Such principles are usually general, so that all members of parliament can agree to them. However, giving them meaning and application requires the institution to elaborate more detailed provisions, and develop a mechanism for monitoring and enforcing the rules. These are dealt with in the next two chapters.

Footnotes

⁸ NDI, (1999), *Legislative Ethics: A Comparative Analysis*, Legislative Research Series Paper 4, p. 3; Brien, A., *op cit.*, p. 13

⁹ Adapted from Davies, M., (2002), *Ethics in Government and the Issue of Conflicts of Interest Fostering Transparency and Preventing Corruption in Jamaica*, quoted in PIMS/IDASA, (2004), *Government Ethics in Post-Apartheid South Africa*, p.15

3) Developing the content and rules of the code

As mentioned in the previous chapter, the principles which underpin a code of conduct are not enough by themselves. As one author has noted, such principles are vague about the “the sorts of actions prescribed and proscribed. Different people possess different interpretations of the ethical values, ... and the sorts of actions that naturally flow from observing those values.”¹⁰ Research in different countries has shown the extent to which members of the same parliament will sign up to general principles, but have very different conceptions of which activities are acceptable, and those regarded as illicit.¹¹

As such, the process of developing a code should be seen as part of a wider process of building understanding and consensus around detailed new rules. This though is a difficult process, and this chapter deals with three main factors that need to be taken into account when developing those rules.

The first part of the chapter examines the potential for conflicts of interest. That is, how to ensure that MPs can reconcile their private interests with their public duties in a way that does not compromise their integrity or that of the institution. It is not possible to set down universal rules that can be applied in every parliament. The very nature of political representation means that it will reflect cultural norms specific to that society. The section highlights some of the potential difficulties.

The second part of the chapter examines some of the key provisions in codes of conduct, specifically relating to disclosure of interests. There has been a general trend in recent years towards greater openness and transparency in MPs’ private interests through codes of conduct. In other words, by forcing MPs to declare their interests, voters are able to judge whether their activity has been motivated by private concerns or the wider public interest.

The third part of the chapter looks at how this greater openness is reconciled with protection for MPs in carrying out their work. This section looks at the use of parliamentary immunity in different countries, and the effect on representation. It highlights, again, the importance of the political context in determining how the balance between parliamentary rights and responsibilities is struck, and how this needs to inform the contents of the code of conduct.

Political representation and conflict of interest

At the root of most unethical behaviour lies the notion of a ‘conflict of interest’. In other words, where the private interests of a politician conflict with the public interests of those they were elected to represent. In its most extreme form it involves an MP using their public position for private benefit. Preventing conflicts of interest is therefore at the centre of almost all parliamentary codes of conduct. Yet, defining what constitutes a conflict of interest for politicians is a difficult task.

The ultimate task of the MP is to ensure that they always seek to promote the public interest. Some constitutions are explicit in stating that the MP should not be beholden to anything other than the national interest.¹² However, what the ‘national interest’ is, is a subjective judgement. All politicians will claim that their party has the best policies for pursuing the national interest, yet those policies are likely to diverge significantly.

In addition, the task of representation involves MPs in a constant process of mediating between different sectional interests in trying to find what’s best for the

population as a whole. In doing so the MP will take into account the interests of the locality, race, religion, and political party which they were elected to represent. In addition, their judgement will be affected by their own personal background, that of their family, their region and their previous profession. As one academic has put it,

“We have to realise that public office is based on a conflict between duty and interest. We would be deluding ourselves if we did not start from the premise that politics is concerned with compromise, partiality and self-interest behaviour. The problematic question is where on that spectrum does that behaviour become unacceptable?”¹³

Research into the prospects for an ethical code of conduct in the Indonesian parliament has shown that although a majority of representatives believe that corruption is a problem, their definition of what constitutes corruption varies widely. For some, it was characterised as using power to further personal interests, whereas for others it involved lying to the public.¹⁴ These findings were similar to those found in the UK prior to the introduction of a code of conduct in 1995. In this research, Maureen Mancuso found that MPs defined a conflict of interest in very different ways. Whereas the majority believed that giving privileged access to private interests or asking parliamentary questions in return for payment reflected a direct conflict, others justified this on the basis that this was part of their representative role.¹⁵

Sidebar here: country comparisons of definitions of conflict of interest

The perception of a conflict of interest will also be affected by contextual factors such as culture and constitution. In many societies there is a tradition of gift-giving which forms a familiar part of political practice. In such circumstances care has to be taken to determine at what point tradition turns into bribery and the buying of favours.

Interpreting the rules will also be conditioned by the constitutional system within which they operate. Lobbying for government grants for constituents is regarded as a central feature of the work of the US Congress, where members actively engage in the award of public contracts. For many congressmen, the amount of government money they can secure for their district is part of their electoral pitch. In Westminster-style systems, MPs would usually be prevented from taking part in such activity – their involvement would be regarded as exerting undue influence and, as such, distorting the wider public interest.¹⁶

However, even where MPs are prevented from certain types of lobbying, there are grey areas. For example, a dairy farmer elected to parliament by a constituency with a large number of dairy farms would be expected to articulate their interests in parliament. A distinction could therefore be made between representing the interests of the dairy farm industry as a whole (which would not be seen as a conflict) and seeking to influence decisions which would benefit only the dairy farms in that constituency (which would be a conflict).¹⁷

In some countries a distinction is made between pecuniary and non-pecuniary interests. That is, where there is a direct financial link between a politician and individuals or organisations seeking to influence political decisions the possibility of a conflict of interest is obvious. Where a politician is representing a charitable organisation and where there is no financial link, the potential for conflict may appear less pressing. However, the UK system of regulation includes non-pecuniary interests, and where this link is likely to influence a decision that has an impact on the wider population the MP is prevented from participating.

These few examples highlight some of the difficulty in defining what constitutes a conflict of interest in any particular set of circumstances. Ultimately, the purpose of identifying the potential for conflict is to ensure public trust in the political system, and avoid any suggestion that MPs are using their position for private gain. The perception of misuse of power can be as damaging as the actual misuse of power. Therefore, one of the underlying principles of any code should be that MPs should not behave in a way that they would find difficult to justify publicly. And in order to dispel any sense that MPs might be involved in a conflict of interest, the trend amongst parliaments is towards far greater openness and transparency about MPs' interests.

Key provisions in codes of conduct: transparency and disclosure rules

Although the publication of a particular interest does not necessarily remove a conflict between a private interest and the public interest, it does identify that the potential exists. This approach requires MPs to declare any interests to a parliamentary register, thus allowing others to judge whether their actions as an MP might have been influenced by those interests.

However, the definition of what needs to be registered, by whom and when varies from county to country, as does the status of the register, which in some countries is a fully public document, while in others is only partially open to public inspection. It is not possible to examine at length all the possible inclusions in a register of interests but it is possible to identify some common characteristics in such disclosure mechanisms.¹⁸

This section deals with,

- i) Forms of disclosure
- ii) Who should register?
- iii) What should be registered?
- iv) Implications and restrictions

i) Forms of disclosure

The forms of disclosure tend to fall into one of two categories, either *ad hoc* or *routine*.

Ad hoc disclosure means that the MP must announce an outside interest before they participate in a debate, committee hearing or vote where that interest is likely to conflict. *Routine* disclosure means that MPs must declare their interests on taking up the position, and at regular intervals thereafter.

The purpose of disclosure in both cases is to highlight the potential for a conflict of interest. In some cases this may result in the MP being prevented from participating in a debate or vote (see below), or it may be enough simply for the MP to announce the nature of the interest. However, the routine registration of interests is a far more thorough and consistent mechanism for declaration. It means developing a register of all MPs' interests which is periodically updated during the lifetime of a parliament. It is easier for parliamentary authorities to manage, and to identify where MPs have failed to declare an interest.

Of course, the two forms of disclosure are not mutually exclusive, and in the UK MPs are required to both declare their interests in the annually published register, and to announce any potential conflict of interest before they speak in the House of Commons.

Sidebar here: Country comparisons, forms of disclosure

ii) Who should register?

Although it seems obvious that the register should contain the interests of the legislator, many countries also include the financial details of the MP's spouse and children. This is partly so that MPs are not tempted to circumvent the regulations by channelling assets to other members of their family. However, this has raised concerns about the level of privacy afforded to those who, after all, have not sought public office themselves, and do not see why their private affairs should be made public. This can be dealt with in a number of ways, firstly by limiting the level of detail held on other members of the family, or by obliging families to register collectively rather than as individuals.

In many countries restrictions on access to certain parts of the register frequently limiting public access to family details. In France, for example, the committee on Financial Transparency in Politics ensures the privacy of the records, whilst in Spain the private assets of legislators are kept private but the remainder of the register is open to the public.¹⁹ In South Africa, the financial statements are divided into confidential and public parts, with the Committee on Members' Interests determining the contents of each.²⁰

Sidebar here: country comparisons, obligations to register, access to register

iii) What should be registered?

It is in this area that there is most variety between different codes of conduct as to what should be disclosed publicly by politicians. This itself reflects the significance of adapting the code of conduct to the specific parliamentary institution and to ensure the support and compliance of those covered by the code. For example, in Nigeria in 1979 when several thousand public officials were obliged to declare their private interests, only two did so, the incoming President and his Deputy.

Despite the variety there are, broadly, four categories under which declarable interests fall. Namely, a) assets, b) income, c) liabilities and d) gifts (including travel).

a) Assets

Assets will typically include property, shares, directorships, trusts, partnerships and any other investments. In addition to disclosure there may be further requirements on certain elected officials. For example, in the USA they are required to place shares and other assets into blind trusts or declare their full value. Similar provisions exist for ministers in the UK to place substantial assets into blind trusts so as to avoid any suggestion of undue influence on their governmental decisions.

b) Income

In most countries there are restrictions on certain forms of outside employment, deemed incompatible with holding elected office (see below). However, few countries have an outright ban on outside employment, and many MPs combine their official role with professions that can be pursued part-time such as journalism, the law or medicine. Where this is the case MPs should be obliged to declare by whom they are employed and how much they are being paid. Other forms of income such as sponsorship or remunerated offices (directorships or other appointments) also need to be included.

South Africa National Assembly Code of Conduct

Details of registrable interests to be disclosed

8. The following details of registrable interests must be disclosed:

- (a) Shares and other financial interests in companies and other corporate entities:
 - (i) The number, nature and nominal value of shares of any type in any public or private company;
 - (ii) the name of that company; and
 - (iii) the nature and value of any other financial interests held in a private or public company or any other corporate entity.
- (b) Remunerated employment outside Parliament:
 - (i) The type of employment;
 - (ii) the name, and type of business activity, of the employer; and
 - (iii) the amount of the remuneration received for such employment.
- (c) Directorships and partnerships:
 - (i) The name, and type of business activity, of the corporate entity or partnership; and
 - (ii) the amount of any remuneration received for such directorship or partnership.
- (d) Consultancies:
 - (i) The nature of the consultancy or any retainerhip of any kind;
 - (ii) the name, and type of business activity, of the client concerned; and
 - (iii) the amount of any remuneration or other benefits received for such consultancy or retainerhip.
- (e) Sponsorships:
 - (i) The source and description of direct financial sponsorship or assistance from non-party sources; and
 - (ii) the value of the sponsorship or assistance.
- (f) Gifts and hospitality:
 - (i) A description and the value and source of a gift with a value in excess of R350;
 - (ii) a description and the value of gifts from a single source which cumulatively exceed the value of R350 in any calendar year; and
 - (iii) hospitality intended as a gift in kind.
- (g) Benefits:
 - (i) The nature and source of any other benefit of a material nature; and
 - (ii) the value of that benefit.
- (h) Foreign travel:
 - (i) A brief description of the journey abroad; and
 - (ii) particulars of the sponsor.
- (i) Land and property:
 - (i) A description and extent of the land or property;
 - (ii) area in which it is situated;
 - (iii) nature of interest.
 - (iv) Properties outside the state
- (j) Pensions:
 - (i) The source of the pension; and
 - (ii) the value of the pension.

United Kingdom Parliament Code of Conduct: Registrable Interests

1. **Directorships:** Remunerated directorships in public and private companies including directorships which are individually unremunerated, but where remuneration is paid through another company in the same group.
2. **Remunerated employment, office, profession, etc:** Employment, office, trade, profession or vocation (apart from membership of the House or ministerial office) which is remunerated or in which the Member has any pecuniary interest.
3. **Clients:** In respect of any paid employment registered in Category 1 (Directorships) and Category 2 (Remunerated employment, office, profession, etc.), any provision to clients of services which depend essentially upon, or arise out of, the Member's position as a Member of Parliament should be registered under this Category.
4. **Sponsorships:** (a) Any donation received by a Member's constituency association which is linked either to candidacy at an election or to membership of the House; and (b) any other form of financial or material support as a Member of Parliament, amounting to more than £1,000 from a single source, whether as a single donation or as multiple donations of more than £200 during the course of a calendar year.
5. **Gifts, benefits and hospitality (UK):** Any gift to the Member or the Member's spouse or partner, or any material benefit, of a value greater than 1 per cent of the current parliamentary salary from any company, organisation or person within the UK which in any way relates to membership of the House.
6. **Overseas visits:** With certain specified exceptions, overseas visits made by the Member or the Member's spouse or partner relating to or in any way arising out of membership of the House where the cost of the visit was not wholly borne by the Member or by United Kingdom public funds.
7. **Overseas benefits and gifts:** Any gift to the Member or the Member's spouse or partner, or any material advantage, of a value greater than 1 per cent of the current parliamentary salary from or on behalf of any company, organisation or person overseas which in any way relates to membership of the House.
8. **Land and property:** Any land or property— (a) which has a substantial value (unless used for the personal residential purposes of the Member or the Member's spouse or partner), or (b) from which a substantial income is derived.
9. **Shareholdings:** Interests in shareholdings held by the Member, either personally, or with or on behalf of the Member's spouse or partner or dependent children, in any public or private company or other body which are: (a) greater than 15 per cent of the issued share capital of the company or body; or (b) 15 per cent or less of the issued share capital, but greater in value than the current parliamentary salary.
10. **Miscellaneous:** Any relevant interest, not falling within one of the above categories, which nevertheless falls within the definition of the main purpose of the Register which is "to provide information of any pecuniary interest or other material benefit which a Member receives which might reasonably be thought by others to influence his or her actions, speeches, or votes in Parliament, or actions taken in his or her capacity as a Member of Parliament," or which the Member considers might be thought by others to influence his or her actions in a similar manner, even though the Member receives no financial benefit.

c) Liabilities

In many respects the need to declare liabilities is equally important as declaring assets and income. For example, a politician who is hugely indebted is perhaps more likely to try use their official position to secure additional sources of funding. If liabilities are built up the register needs to include details of how much is owed, to whom, the rate of interest and the reason for the debt.

d) Gifts and travel

Restrictions on gifts and travel are included in most codes of conduct. In some countries, such as Argentina, there is a direct ban on gifts directly related to the MPs position. In Australia, by contrast, MPs are allowed to accept gifts, provided they do not present a direct conflict of interest. In the UK gifts are acceptable, and do not have to be disclosed if they are unrelated to membership of parliament. But where they are related and valued above £95 MPs are required to declare them and their value in the register of interests. In the USA no gift valued at more than 100\$ can be accepted by an elected official.

As can be seen, in each of the categories there is usually a lower limit, below which interests do not have to be declared. However, as some of the examples have shown, these vary enormously according to local context, often the specific provisions reflect an attempt to prevent the sort of abuses that led to the introduction of the code in the first place.

For those seeking to draw up a new code of conduct it is also worth noting category 10 in the UK register of interests which is designed to encourage MPs to err on the side of caution in their declaration. In other words, where MPs are unclear as to whether an interest falls under the code they should follow the spirit, as well as the letter of the code.

iv) Implications and restrictions

The purpose of disclosure is to enable others to judge whether there is likely to be a conflict of interest. In other words, it is sometimes enough to know about the interest without any further action. However, in certain circumstances where the nature of an outside interest has a direct bearing on the MPs' involvement it may be necessary to prevent the MP from participating further, or where the MP is adjudged to have broken the rules, further sanction may be necessary. (The enforcement of sanctions is dealt with in detail in the next chapter).

The restrictions that go with a code of conduct tend to fall into one of three categories. The first is simply monitoring the potential for a conflict of interest. In such cases disclosure of the interest is sufficient. The second category involves the prohibition of certain forms of activity by MPs due to their interest. An MP might be prevented from speaking in certain debates or voting on specific issues where their private interests are likely to conflict with their public responsibilities.

The third category is where particular outside interests are deemed to be incompatible with membership of the legislative body. Many parliaments have 'incompatibility' rulings which identify categories of outside earnings and employment that are deemed to be unsuitable with the task of being an elected official. These typically include working in sensitive professions such as the armed forces, security services, civil servants or judicial roles. In addition, some countries have restrictions

on members of the clergy. In all such cases MPs are required to resign from these roles before becoming an MP.

Sidebar here – country comparisons: restrictions on political involvement

In some situations and countries the restrictions are severe. For example, in the USA congressmen may not have any form of outside employment. The intention is to preserve the independence of the politician, and to avoid any possibility that a private business interest might interfere with their public duties. The situation in the UK is different where the argument is made that that outside interests enable MPs to get a variety of perspectives which assist with their role as lawmakers.

There are also restrictions on forms of employment for politicians after they have left office. Politicians – and especially ministers – have privileged access to key decision-makers and information when in office, and are likely to take much of this with them when they depart parliament. As Gerald Carney has noted, they take with them two kinds of information; i) a general understanding and knowledge of the way government operates, its structures and personalities, and; b) specific confidential information about government policy or about entities regulated by the government.²¹ It has been suggested that it is relatively helpful for the first type of information to spill out into the private sector, but that transmission of the latter is unethical and conflicts with the former politician's public responsibilities.

As mentioned, this is more of an issue for ministers than it is for MPs in general, but the code of conduct may wish to make explicit the expectations on politicians that apply once they have left office, and restrict the forms of employment that they may seek after holding public office.

Parliamentary immunity and codes of conduct

The arguments against disclosure of interests or restrictions on MPs' activity are usually made on the grounds that it limits the ability of the MP to pursue their representative role and, more specifically, conflicts with the principle of parliamentary immunity. This is another contentious area. The central issue is contained in the GOPAC declaration that "Parliaments should adopt functional systems of parliamentary immunity that provide protection from unwarranted and politically motivated prosecutions, but also ensure that parliamentarians are held accountable to the law."²² There are few substantial arguments as to why a code of conduct cannot co-exist with a system of parliamentary immunity. However, the development of a code does need to consider how far it wishes to limit the immunity of MPs.

The purpose of parliamentary immunity is based on the idea that, as Marc Van der Hulst puts it,

"representatives of the people must enjoy certain guarantees, on the one hand to underline the dignity, gravity and importance of their office and, on the other and more importantly, to give them the peace of mind they need to discharge their mandate. From this standpoint, the institution of parliamentary immunity is undoubtedly imbued with universal and permanent value, although its characteristics and scope differ from country to country."²³

Although the detailed provisions of parliamentary immunity schemes differ, they tend to follow either the British model of 'non-accountability' or the French model of 'inviolability'.

In the first instance, the British model of non-accountability protects freedom of speech in the pursuit of the MPs' duties. The principle can be traced back to 1397 when the then King of England attempted to sentence the MP Thomas Haxey to death for treason. This followed the MP's introduction of a bill denouncing the behaviour of the royal court. The House of Commons therefore developed a method of working without interference from the King, enshrined as the right of freedom of speech in the Bill of Rights of 1689.

The modern translation of this form of parliamentary immunity now influences a wide range of legislatures,²⁴ and means that representatives cannot be prosecuted for any opinions expressed, or votes cast in the course of parliamentary business. This right often extends to witnesses in parliamentary hearings. In some cases it also covers activity outside of parliament, such as constituency work, provided it can be defined as 'parliamentary business'.

The French system of 'inviolability' is a much wider ranging notion of immunity, which means that elected representatives cannot be prosecuted for any criminal activity, unless they are caught while engaging in that act. The French tradition again reflects that country's history. Following the Revolution of 1789 it was necessary, not only to protect MPs' freedom of speech, but also to protect them from random arrest by the Executive. The notion of inviolability developed as a way of ensuring that the Executive powers could not be misused to criminalise MPs they disliked, and MPs could only be arrested with the authorisation of the National Assembly.

The extent of inviolability tends to take three main forms. In Westminster-style systems there is a very limited form of inviolability where the Speaker simply has to be notified of the arrest of any member. In some countries (Liberia, Sierra Leone, Norway) members cannot be arrested on their way to or from parliament. However, in most other countries MPs cannot be prosecuted during the term of their parliamentary mandate, without the approval of the parliament.

Sidebar here: country comparisons, forms and extent of immunity

The concept of parliamentary immunity is an important one, and absolutely necessary for a properly functioning parliament. In newly-emerging parliaments – and especially in post-conflict societies – this principle can be particularly important. There are many examples of Executive bodies seeking to undermine or victimise members of opposition parties through the misuse of laws or parliamentary procedure.²⁵ The system of immunity must therefore be strong enough to withstand this threat.

As an IPU/UNDP paper suggests:

"On the one hand inviolability may favour a perception that parliamentarians are above the law and thus undermine the confidence of the people in their parliaments. ... On the other hand transitional societies need strong parliaments which are capable of defending themselves against encroachments of the executive branch and controlling it effectively. ... Clearly, the reasons underlying the introduction of parliamentary inviolability in modern constitutions, namely fear of the executive and abuse of its powers are still valid, even more so in transitional societies."²⁶

However, the worldwide trend is away from the broad-ranging principle of 'inviolability' to the more limited concept of 'non-accountability'. The fear in many

countries is that by protecting MPs from prosecution, the system of immunity is being used as a means to hide corruption and misuse of power.²⁷

The guiding principle for the system of parliamentary immunity should be that the right to immunity is integral to the position, not the individual. The purpose is to protect the integrity of the office and the institution, but should not be used as a means to protect individuals who are engaged in obviously criminal activities. As USAID have argued,

“legislative reforms should examine and promote the use of parliamentary Codes of Ethics or Conduct to establish clear minimum standards of behavior below which members would be censured or expelled. Similarly, laws that regulate disclosure of assets and income should be adopted to counter the scope for potential abuses of immunity.”²⁸

Conclusion

The three factors described in this chapter demonstrate that the contents of a code of conduct will need take into account many competing aspects to the role of the MP.

It is important for those seeking to develop a code of conduct to consider the implications of restrictions and disclosure in each of these areas. In the first instance, MPs must understand the potential for a conflict of interest and misuse of their position for private gain. However, defining what constitutes a conflict of interest will depend on the specific political culture and the attitudes and expectations of MPs themselves. As has been stressed at several points in this guide, MPs need to regard the code of conduct as legitimate, and the process of developing the code may need to shape attitudes as to what is, and what is not, acceptable.

Secondly, the detailed rules of the code of conduct need to cover a wide range of eventualities. At the most basic level it means deciding what form of disclosure (ad hoc or routine), how regularly disclosures are made, and what categories need to be covered by the register of interests. At the next level, where there is an identifiable conflict of interest the code needs to specify whether the MP can continue to be involved, should refrain from certain activities or whether their private interest is incompatible with public office. In addition, outside sources of income and employment during and after holding public office raise questions about whether such experience detracts from or adds value to the political position.

Thirdly, and perhaps most importantly, the code of conduct must ensure that it reconciles giving MPs enough freedom to do the job, with ensuring that all MPs adhere to the expected standards of conduct. There is undoubtedly a tension between a code of conduct and parliamentary immunity. In emerging democracies it may be that conditions dictate the need to err on the side of protecting MPs. But a code should also be seen as a way of ensuring that systems of parliamentary immunity are not abused.

Footnotes

¹⁰ Quoted in Brien, A., *op cit*, p. 13

¹¹ See, for example, Pelizzo, R., *op cit.*; Mancuso, M. (1995) *The Ethical World of British MPs*, Quebec: McGill Queen University Press

¹² Van der Hulst, *op cit*, pp.8-9

¹³ Professor Paul Finn, quoted in Carney, G, *op cit.*, p. 9

¹⁴ Pelizzo, R., *op cit.*, p.13

¹⁵ Mancuso, M., *op cit.*, pp. 39-46

¹⁶ See Carney, G. *op cit.*, p. 11

¹⁷ See Carney, *op cit*, p. 18

¹⁸ For a detailed analysis of different disclosure regimes see Toonstra, D., (2001) *Parliamentary Codes of Conduct in Europe: An Overview*, Brussels: ECPRD; National Democratic Institute, (1999), *Legislative Ethics: A comparative analysis*, Legislative Paper No 4

¹⁹ Van der Hulst, *op cit*, p.59

²⁰ NDI, *op cit.*, p. 14

²¹ Carney, G., *op cit.*, p. 40

²² Global Organisation of Parliamentarians Against Corruption, Arusha Declaration, 23rd September 2006

²³ Van der Hulst, *op cit.*, p. 63

²⁴ See Toonstra, D. (2001), *Rules on Parliamentary Immunity in the European Union Parliament and the Member States of the EU*, Brussels: ECPRD; IPU/UNDP, (2006), *Parliamentary Immunity: Background Paper, UNDP Initiative on Parliaments, Crisis Prevention and Recovery*,

²⁵ IPU/UNDP, (2006), *op cit.*, pp.19-23

²⁶ IPU/UNDP, (2006), *op cit.*, p. 19

²⁷ See Wigley, S., (2003), “Parliamentary Immunity: Protecting Democracy or Protecting Corruption?” *Journal of Political Philosophy* 11, no. 1, pp. 23-41.

²⁸ USAID, (2006), *Parliamentary Immunity Brief: A summary of case studies of Armenia, Ukraine and Guatemala*, p. 6

4) Mechanisms for regulation and enforcement

The underlying principles and detailed rules contained in a code of conduct provide part of the impetus for improving the ethical standards of politicians. They will undoubtedly provide a form of guidance for elected officials, but a code of conduct also needs to include systems for monitoring, ensuring compliance with the rules and providing a set of sanctions to deter potential offenders.

As mentioned at the beginning of the guide, the intention of the code of conduct should be as much to prevent as to punish. A code of conduct is arguably at its most effective where MPs understand and abide by its rules. The code should identify the correct path for MPs to walk, but also needs to provide streetlights making it as easy as possible to follow. As such, the system of regulation and enforcement must also include provision for the training and education of MPs, providing continuing advice and guidance on how to interpret and implement the rules. This final chapter examines three issues in turn. First, it examines three possible models for regulation and enforcement. Second, it looks at the sorts of sanctions that parliaments can apply. Third, it then goes through the significance of the role and function of education and training.

Three models for regulation of ethical conduct

It is not surprising that the growth in the number of ethical codes of conduct in many parliaments in the last two decades has also resulted in the adoption of new mechanisms for overseeing and enforcing the regulations. In general there are three main models. The first is entirely external regulation, as used in Taiwan. The second is to rely solely on regulation within the legislature itself, as practised in the USA. The third is to combine an external investigative commissioner with a parliamentary committee to enforce sanctions, which is the system adopted in the UK and Ireland.

The first model involves the creation of a judicial or quasi-judicial body which oversees and enforces the regulations on Members of Parliament. The difficulty in this model for many parliaments is that it makes any breaches of the regulations subject to criminal proceedings and therefore may interfere with the provisions of any rules relating to parliamentary immunity. But, in addition, as an externally-enforced code, there is little sense of ownership of the provisions of the code amongst parliamentarians. If the intention of the code is to build some collective acceptance of its provisions, it may make more sense to find a more direct way of building it into the parliamentary culture.

The second model relies entirely on self-regulation. This system requires the creation of a special ethics committee, which deals with the reporting, investigation and sanctioning of MPs who have been alleged to have violated the code. However, the model has come in for considerable criticism, as it turns legislators into investigators, judges and juries, rather than maintaining them as a body which ratifies a judgement reached by an impartial adjudicator.²⁹ In addition, if the intention is to ensure or restore public trust in politicians, a model that relies on politicians regulating themselves is unlikely to retain public credibility. Perhaps with good reason, as the British system of self-regulation broke down in the early 1990s, following a number of scandals surrounding misuse of parliamentary office.

The third model combines elements of the first two. The model adopted in the UK involved the creation of an independent 'Parliamentary Commissioner for Standards' who is appointed by and reports to the House of Commons. The Commissioner is

responsible for investigating cases and advising members on the application of the code. The Commissioner cannot though impose penalties on errant MPs, this task is left to parliament itself. As such, the Commissioner's reports on individual cases are presented to the parliamentary committee on Standards and Privileges. In cases where the Commissioner believes the code of conduct has been transgressed, the Committee is responsible for determining and implementing the suitable punishment.

The model has been criticised for giving too much power to MPs to sanction fellow members. The Committee has the ability to reject the Commissioner's findings, and may be subject to partisan influence. However, of the three models it seems to offer the best balance between independent adjudication and parliamentary ownership of the code of conduct.

Sidebar here, country comparison, forms of regulation

A common factor for all models is determining how cases are referred for investigation. In South Africa, for example, the Ethics Committee can instigate its own enquiries against MPs. In other systems, such as the UK, the Commissioner for Standards can only investigate complaints made against specific MPs, but these complaints can be submitted by other MPs or by members of the general public.

In dealing with cases the independent commissioner model has much to commend it. As one author has argued,

"Investigation can be carried out by an impartial officer of the parliament, which engenders trust in the system by both the public and parliamentarians. Frivolous or politically motivated complaints can be disposed of while complaints that have merit can be investigated. Privacy can be assured in appropriate cases, yet wrongdoing exposed."³⁰

However, as mentioned previously, the development of codes of conduct has blurred the responsibility for aspects of parliamentary conduct that fall beyond purely ethical considerations. As Gay and Leopold note, in the UK,

"Because of its broad aspirational concepts, the Code could also encompass the activities of a Member engaged in noisy behaviour in the chamber, or a Member who was dilatory in response to correspondence from a constituent. In practice, misbehaviour in the Chamber is the province of the Speaker. In the devolved parliaments/assemblies [i.e. Scotland, Wales, Northern Ireland] there have been investigations of these broader areas, including alleged 'poaching' of constituents and inappropriate criticism of public servants. However, no investigatory machinery has yet taken up the task of judging whether the functions of a Member have been discharged adequately."³¹

It remains to be seen whether the UK's Standards and Privileges Committee will be asked to investigate such wider issues. However, in other parliaments, committees do perform that sort of role. For example, the constitution of Sierra Leone empowers the Presiding Officer to refer cases where a Member has defamed someone, and the Committee of Privileges determines disciplinary sanctions. In other parliaments the Ethics Committee is charged with determining sanctions in the more serious breaches of parliamentary protocol.³²

The overlap between breaches of ethical rules and procedural rules is highlighted by the development of South Africa's code. The code of conduct was drawn up by a specially created Ethics committee, which was a sub-committee of - and therefore reported to - the parliament's Rules Committee.³³ In general, Ethics Committees are

playing an increasingly important role in developing and implementing sanctions for both cases.³⁴

The key point, for the purposes of this paper, is that it appears the distinction between traditionally understood 'ethical' codes of conduct and more general issues of parliamentarians' behaviour is starting to blur. This is in part because 'ethical' codes of conduct have sought to establish broad standards of acceptable behaviour in all aspects of public life. This has obvious implications for newly-established parliaments seeking to develop standards of parliamentary behaviour.

A sliding scale of sanctions

The rules relating to conduct within parliament are so diverse and specific to the particular institution that it is difficult to draw anything other than the most general points in a paper of this length. However, a general overview reinforces the perception that sanctions for breaches of ethical codes and poor conduct in parliamentary proceedings are overlapping and blending with each other. This section looks briefly at four categories of rules relating to parliamentary proceedings and then at three main types of sanctions.³⁵

The first set of rules relates to the prohibition of force during proceedings and an implicit or explicit ban on carrying weapons. While in the South African parliament there is an explicit ban on firearms, the House of Commons still has pink ribbons attached to every MP's coat-hook, in order that they may hang up their sword before they enter the chamber.

The second set of rules prohibits threats, intimidation, provocation and insults. However, definitions of what constitutes 'unparliamentary language' varies between institutions. This usually relies on the ruling of the Presiding Officer to determine where the boundaries lie. For example, in the Malawi parliament the Speaker determined that calling members of the opposition 'dogs' was unacceptable. There are usually also restrictions on insults to the head of state. (This category of the code obviously has an impact on the principle of parliamentary non-accountability.)

The third set can be categorised as rules which prevent the unlawful obstruction of proceedings. In other words, cases where parliamentarians refuse to obey the rules of procedure and, in so doing, prevent business from continuing. This may include taking the floor without the Speaker's permission, ignoring a call to order or refusing to acknowledge the Speaker's authority in some other way. A recent case in Nigeria involved the theft of the ceremonial mace which sat at the Clerks' table, and without which the session could not begin. This was used as a deliberate parliamentary tactic by a group of MPs who disliked one of the Speaker's rulings.

The final set of rules are designed to preserve the dignity of the parliament. Such rules often refer to language, but also commonly apply to dress code, particularly those with a British parliamentary tradition. The Sierra Leone constitution stipulates that MPs shall maintain the dignity and image of parliament at all times.

The sorts of rules identified above are usually enforced by the Presiding Officer, mainly because they relate directly to proceedings in the chamber. However, in the case of more serious misdemeanours or those relating to unethical conduct, the tendency is to refer matters to an Ethics Committee (if one exists), which then determines the nature of the sanction.

Sidebar here: country comparison, rules and sanctions

However, the sanctions available to both the Presiding Officer or the Ethics Committee generally fall into three categories. The first, found in the French parliamentary tradition, is the call to order, which is followed by increasingly severe steps. A first offence simply results in a call to order, the second stage is that the call to order is noted in the parliamentary record and the third is to deprive the member of the right to speak if they refuse to follow the Speaker's ruling. This is then followed by an official 'censure' or 'reprimand', which is entered into the record, and can be accompanied by a temporary expulsion from the chamber. This is used in the most serious cases where there has been the threat or use of violence or a challenge to the head of state. In the US Senate, this can be accompanied by a deduction from salary for the time the senator is expelled.

The second category revolves around the British tradition of 'naming' Members, which is the most severe penalty the Speaker can impose. This is usually only enforced after the offender has been warned several times. It can be accompanied by one of two courses of action, either the MP is forced to withdraw from the sitting until the House decides a suitable punishment, or requests that the Government Leader in the Commons suspends the MP from the House.

The third category relates to subsidiary sanctions, which are linked to the above stages. These may include a fine or loss of salary, an enforced apology to the parliament, or the loss of seniority, such as a committee chair and the privileges that go with it.³⁶

As mentioned, the sanctions and enforcement mechanisms attached to ethical breaches tend to fall into the same categories. But because, by definition, such cases tend to be at the more serious end of the scale they tend to involve suspension, expulsion and fines for misconduct.³⁷ For example, breaches of the code of conduct in Ireland involve suspension, fines or public censure; in France there is only one option; banishment from future candidacy for one year; and in Germany (where the complaints are dealt with entirely by the Presiding Officer) he or she discloses any violations to the voters, letting them determine the MP's fate.³⁸ And, in all cases, the most significant deterrent should be that greater transparency means that the final verdict is the decision imposed by voters at the ballot box.

Developing a culture around the code - education and training

The last element of the regulatory and sanctioning framework is the educational dimension. The purpose of introducing a code of conduct is to establish new standards for parliamentary behaviour. The development and implementation of the code is therefore an integral part of creating a culture in which those standards are, firstly, understood, and secondly, regarded as legitimate by those who have to abide by them. Part of the socialisation process of new Members is in understanding and accepting the norms which determine parliamentary behaviour and, in many respects, the opinion of one's fellow MPs can often be the most powerful deterrent to certain forms of behaviour.

For this reason, it is important that MPs are involved in the process of developing the contents of the code of conduct. This is not to suggest that their view should dominate in all instances, but that the process of developing the code should ensure that MPs regard its provisions as fair and realistic, and that they therefore have a stake in the success of the code.

In addition, the code needs to ensure the active support of the key parliamentary actors to generate acceptance and understanding of the code. In this respect the Presiding Officer plays an important role in setting the tone within the institution. Any

new code of conduct will need to be in keeping with the general principles for parliamentary proceedings and the Speaker will be a key figure to involve in the development of the code.

In terms of consulting and educating members, the role of political parties will also be crucial. It is within the political parties that MPs learn many of the critical skills and standards for discharging their duties. Development of the code should involve key figures from the political parties at an early stage to secure their support for the process, and also ensure that they play a role in educating members as to what is expected of them.

The experience of the Indian Lok Sabha is interesting in this regard. In their decision to develop a code of conduct for members, the Ethics Committee also recommended that “Concerted efforts should be made to ingrain amongst the legislators the basic values of ethics. ... The culture of ethics has to be evolved and the sense of discipline and responsibility should come from within.” To this end, the Committee recommended that the parliament hold a seminar covering *An Analysis on the present day functioning of Parliament – An Introspection*, involving the leaders and deputy leaders of the parties, secretaries and whips, as well the chair and members of Committee on Ethics, and the Secretary General. This was to be followed up by a series of four or five seminars for all members of the Lok Sabha.³⁹

The last element in ensuring the code is understood is to establish an official and permanent source of guidance and advice for Members alongside the code. Given that the rules are likely to be complex, and in some instances, open to interpretation, they will need access to sources of expert advice. This role is usually performed by a committee - as in South Africa, where the Committee on Members' Interests both interprets the code and advises Members on its content - or by a Parliamentary Commissioner for Standards - as in the UK, who acts as the guardian of the code and the main source of advice to individual MPs unsure about any aspect of the rules.

Sidebar here: country comparison, education and training provision, sources of advice and guidance

Conclusion

A code of conduct by itself will not change parliamentary behaviour. The norms of behaviour must develop from and reflect the internal dynamics of the institution. The very development of a code will be an important feature in this process. As Andrew Brien notes,

“codes can act as a catalyst for the socialisation of [the organisation's] members, and as a means of reducing uncertainty about what is acceptable and unacceptable. Also codes can act as a medium for the communication of values and standards and as a starting point for discussions about acceptable and unacceptable behaviour. In this way, codes of conduct ... can promote the skills needed for ethical analysis, sensitise members to the values implicit in their activities, and in general, promote moral development. These goals are attained, however, not as a direct result of a specific purpose, but indirectly, as a welcome and desirable consequence that results from people aiming for and attaining other goals.”⁴⁰

Ultimately, it is impossible to develop a code of conduct, which is capable of governing the behaviour of MPs in every single set of circumstances. Most of the time, MPs will be expected to use their own judgement to determine which is the

correct course of behaviour. This means that the way in which the institution educates and trains its members, so that they understand and accept the code, should be an essential part of any new framework.

The following excerpt from the code in South Africa's National Assembly's provides a fitting summary of the key considerations when seeking to create any new code;

“No set of rules can bind effectively those who are not willing to observe their spirit, nor can any rule of law foresee all possible eventualities which may arise or be devised by human ingenuity.

This Code of Conduct has been formulated in as simple and direct a manner as possible. Its success depends both first and last on the integrity and good sense of those to whom it applies.

Therefore, where any doubt exists as to scope, application or meaning of any aspect of this Code, the good faith of the member concerned must be the guiding principle.”⁴¹

Footnotes

²⁹ See Brien, *op cit.*, p. 18

³⁰ Brien, *ibid.* 19

³¹ Gay, O. & Leopold, P., (2004), *Conduct Unbecoming: The Regulation of Parliamentary Behaviour*, London: Politico's, p.149

³² See Van der Hulst, *op cit.*, pp.117-9

³³ IMS/IDASA, (2004), *Government Ethics in Post-Apartheid South Africa*

³⁴ an der Hulst, *op cit.*, p. 104

³⁵ This section draws heavily on Van der Hulst, *op cit.*, pp. 112-119

³⁶ There is also a category of sanction linked to the concept of parliamentary privilege. However, this is confined to Westminster-style parliaments. It conflicts with the notion of inviolability, and a lengthy description is likely to be of limited value in this paper.

³⁷ See for example, Gay, O., & Leopold, P., *op cit.*, chapter 4; Van der Hulst, *op cit.*, pp.60-63; NDI, *op cit.*, pp. 20-22

³⁸ NDI, *op cit.*, pp.21-2

³⁹ Second Report of the Committee on Ethics (2000), Lok Sabha, Paras., I. 5. iii-iv

⁴⁰ Brien, *op cit.*, p.15

⁴¹ South African Code of Conduct, Rule 4.1

5) Conclusion: Key issues and questions

Just as there is no blueprint for an all-encompassing code of conduct that will be suitable for every parliament, neither is there an exact right way of developing a code. A code of conduct is ultimately a political document. Its success does not lie in its contents alone, but in the way they are observed and enforced. As such, the process of developing the code is as important what goes into it. This is a highly political process that needs to ensure the final document is regarded as legitimate by MPs. Even if they do not agree with all of its provisions, they must respect its authority.

The purpose of this guidebook is to provide an overview of the stages involved in developing a code. The process of defining the problem that the code of conduct seeks to address through the development of principles, detailed rules and an effective enforcement regime means negotiating numerous objections. It will be shaped by the existing political conditions, the cultural values within the institution and the attitudes of the key parliamentary figures.

This final short chapter highlights the key issues which need to be considered at each stage of developing a code of conduct.

1) Determining the purpose of the code of conduct

What problem is the code of conduct seeking to address? Is it tackling a specific instance of corruption?

Is it intended to improve public trust in the institution? If so, how will the success of the code be measured?

Is the code also likely to be used to enforce parliamentary procedure and shape parliamentarians' behaviour in the chamber, committee and with voters?

What is the attitude of the main political parties and significant parliamentary figures (e.g. the Speaker, key committee chairs, etc.)?

Is the development of the code likely to split opinion along partisan lines? What does this mean for the likely success of the code?

What other mechanisms are in place to ensure that MPs understand and abide by the rules? How will the code of conduct interact with these?

2) Establishing the structure and principles of the code of conduct

Do MPs have to commit to upholding the integrity of the institution on taking office?

Are the values of the institution enshrined in a constitution or the rules of procedure?

Where these values do not exist, can existing parliamentary rule books be used as the starting point for developing a set of principles?

Is disagreement over certain principles or values likely? Is this to do with party politics or other sources of cultural/ethnic/religious difference?

How will the existing political culture and context influence the debate about the institution's core values?

3) Developing the content and the rules for the code of conduct

Does the parliament anywhere define a conflict of interest for MPs? Will the concept impinge on commonly-accepted patterns of behaviour?

Are there particular areas of activity (e.g. gift-giving) that are likely to be contentious when defining a conflict of interest?

Should the rules be established in legislation or as part of the rules of parliamentary procedure?

What form of disclosure does the parliament wish to adopt – routine, ad hoc or both?

If the parliament uses a routine form of disclosure, how often will MPs be required to update their list of interests?

Who will be responsible for the upkeep of the register – a parliamentary official, parliamentary committee or some other?

Will the register be a fully public document or will parts of the register be kept private?

Who should be obliged to register their interests? Will family members be included? If so, which members of the family?

What should be registered? How detailed will the rules be in determining the various assets, income, liabilities and gifts that need to be declared?

At what level should lower limits be set for declaring these interests? What provision will be made to update and change these limits over time?

Will non-pecuniary interests be included in the register?

The disclosure of interests is likely to result in either monitoring, restricting or prohibiting certain activities by MPs. How will each of these be determined?

Does the parliament wish to prevent MPs from any form of outside employment? If outside employment is permitted, how will these forms of employment be defined? Which forms of employment will be deemed incompatible with holding public office?

Will the code of conduct include post-employment restrictions? If so, how long will this 'cooling off' period last for?

How will the code of conduct interact with provisions for parliamentary immunity?

How will the parliament ensure that parliamentary immunity is not used to avoid provisions within the code of conduct?

4) Mechanisms for regulation and enforcement

Does the parliament wish to create; an external form of regulation presided over by the courts; an internal form of regulation by the speaker or a parliamentary committee or; a create an external commissioner that reports to a parliamentary committee?

If the code relies on an external commissioner, who will make this appointment, how long will they serve in that post, who will they report to in parliament?

Will the parliament need to create an additional committee to deal with the enforcement of the code or will the task be given to an existing committee?

What sort of sanctions will be imposed against those who breach the code? How will they be determined? Who will be responsible for implementing them?

Who will be entitled to launch an investigation against an MP? Will members of the public be able to complain? Will the committee or commissioner be able to decide for themselves when to investigate?

What safeguards will be put in place to ensure that the code of conduct is not used simply to pursue political or personal vendettas against particular MPs?

Will MPs have a right of appeal if they believe they have been unfairly treated? Will this be heard by a the commissioner, a parliamentary committee or a plenary sitting of the whole house?

What provisions will be made to ensure that MPs understand the code of conduct?

Where will MPs be able to get impartial and authoritative advice on the rules and regulations?

Conclusion

The list of questions is not exhaustive, but tries to capture the main issues that will need to be considered. As stressed at several points it is not possible to develop an explicit guide which captures every possible eventuality. This will change according to the context. However, it is worth emphasising the four basic tenets around which a code should be built;

- First, that the effectiveness of a parliament is determined by the attitudes, outlook and behaviour of its members as much as by its constitutional powers. As such, the code of conduct must focus on changing behaviour as much as changing the rules;
- Second, a code of conduct which seeks to influence behaviour must emerge from the specific parliamentary circumstances within which it seeks to be effective. MPs must feel a degree of ownership of the rules if they are to regard them as legitimate and authoritative;
- Third, the process of developing the code is as important as the content that emerges. Developing a detailed set of rules should not be the only objective. If the rules are to be effective the process must also engage with MPs to build a set of core institutional values;
- Fourth, the creation of the code will not, by itself, solve all the problems faced by the institution. The code of conduct should be viewed as only one part of a wider effort to improve the functioning of the institution.

Ultimately, this guidebook can only offer suggestions as to how these might be achieved. Their application is down to politicians themselves.
