

An International Comparison of Legislative Ethics

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1. Introduction

The practice of representation permeates our society and is essential to its routine functioning. This representation is based on a transfer of authority, a (limited) surrender of autonomy, and a set of shared expectations about the rights of the represented and the duties of the representative. Ethics has become a leading item on state legislative agendas, although most legislators wish the furor would die down and the subject of ethics would simply go away. For them ethics puts the legislature squarely between the proverbial rock and hard place. In political parlance, it is a no-win situation.¹

People are often suspicious of politics-skeptical about its claims and dubious about its practitioners. Why should this be so? We can find a reason if we think about the character of the political realm itself and the intrinsic nature of political practice. The familiar claim that power corrupts is hard to establish as a necessary truth but may be easier to maintain as a general tendency. In politics there may be a suspicion not simply that corrupt men are attracted to it but that good intentions or high motives tend to be undermined. To put the point another way, one resonant of Machiavelli, it may

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1 See generally BRUCE JENNINGS AND DANIEL CALLAHAN EDS., REPRESENTATION AND RESPONSIBILITY: EXPLORING LEGISLATIVE ETHICS, (1985) at xi.

be that political agents, if they are to do what is required of them and what we expect of them, cannot afford high moral motives or dispositions.² The idea that politics is a realm which we cannot properly countenance from a moral point of view is an unacceptable one since highly undesirable consequences are likely to follow up.³

Legislatures are vital political institutions and ought to be maintained and improved. The democratic process itself is more important than any particular outcome, and we cannot afford to neglect it. Legislative ethics is central to the integrity of the legislature as an institution. That integrity is critical if trust in political institutions is to be rekindled representative democracy is to endure.⁴

Unethical and corrupt behavior by legislators is neither a figment of the media's imagination nor simply a manifestation of the public's uneasiness in turbulent times.⁵ It is an unpleasant reality, as is revealed by a number of scandals, both large and small. Confidence in politicians and the political process is low in almost every country and members of Congress and Parliament are not people who command widespread trust.⁶

2 For detailed Information about Machiavelli's view of ethics see, ERWIN A. GAEDE, *POLITICS AND ETHICS: MACHIAVELLI TO NIEBUHR*, (1983).

3 See, STEVE BUCKLER, *DIRTY HANDS: THE PROBLEM OF POLITICAL MORALITY*, (1993) at 1.

4 See, ALAN ROSENTHAL, *DRAWING THE LINE: LEGISLATIVE ETHICS IN THE STATES*, (1996) at 16.

5 The public around the world perceive political parties as the Institution most affected by corruption, according to a new public opinion survey published on 9 December 2004 by Transparency International (TI) to mark UN International Anti Corruption Day. TI is the leading global non-governmental organization devoted to combating corruption worldwide. In 36 out of 62 countries surveyed, political parties were rated by the general public as the Institution most affected by corruption. On a scale from a corrupt-free 1 to an extremely corrupt score of 5, parties ranked worst worldwide, with a score of 4.0, faring most poorly in Ecuador, followed by Argentina, India and Peru. At the same time, the public rated political or grand corruption as a very grave problem, and reported that in most countries surveyed corruption affected political life more than business and private life. After political parties, the next most corrupt institutions worldwide were perceived to be parliaments followed equally by the police and the judiciary, according to the TI Global Corruption Barometer 2004. The survey included more than 50,000 respondents from the general public in a total of 64 countries and was conducted for TI by Gallup International as part of its Voice of the People Survey between June and September 2004.

6 The 2001 British social attitudes survey reported that trust in government fell sharply from almost 40% in 1974 to 22% in 1996. The sleaze allegations associated with the Conservative Party in the early 1990s gave rise to the Committee on Standards in Public Life which in turn produced a range of reforms intended to restore public confidence, including the creation of an Independent ele-

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Elected parliaments are the essence of democracy. Indeed, democratization in itself presents an opportunity to control systemic corruption by opening up the activities of public officials to public scrutiny and accountability.⁷ It has been suggested that democracies, more so than any other political system, are better able to deter corruption through institutionalized checks and balances and other meaningful accountability mechanisms.⁸ They reduce secrecy, monopoly and discretion. But they do not guarantee honest and clean government, nor do they eliminate all corruption. They can only reduce its extent, significance and pervasiveness.⁹

Once elected, Legislators must be held accountable for their exercise of power. Managing conflict-of-interest situations and

ment in maintaining standards of conduct In the House of Commons. In 1997, Labor returned to power and the new Prime Minister, Tony Blair, pledged to 'restore faith in public life'. Unfortunately, the restoration still seems some way off because the British social attitudes survey shows that, since 1996, trust in government has fallen to 16%. Sleaze and scandal were equally conspicuous In the United States in the 1990s and culminated In the Impeachment of President Clinton. In Congress, the Speaker of the House of Representatives, Newt Gingrich, was driven from office and indeed from political life partly by a series of allegations of misconduct. Opinion poll evidence suggests that the 'mess In Washington' continues to be of concern to the American public, and politicians on both sides of the Atlantic stress the need to re-engage the public with the political process. This raises Important Issues about political participation, attachment and trust.

7 See, John Uhr, "Democracy and the Ethics of Representation," in NOEL PRESTON, CHARLES SAMPFORD EDS., *ETHICS AND POLITICAL PRACTICE: PERSPECTIVES ON LEGISLATIVE ETHICS*, (1998).

8 According to Nobel Laureate Oscar Arias Sanchez, "corruption is best exposed, and best attacked, in a democracy. Corruption can only be examined and eradicated in an environment of pluralism, tolerance, freedom of expression, and individual security—an environment that only democracy can guarantee." At a speech given at OECD Symposium on Corruption and Good Governance, Paris, March 15, 1995.

9 Nor do they necessarily respect the laws they themselves pass with a fanfare and claim that they are to eradicate graft. For example, the Kohl affair in Germany, involved blatant breaches by the former Chancellor, of laws he had himself guided through Legislature (Reuters, 26 Jan 2000).

monitoring the assets, income, liabilities and business interests of legislators is essential, as it is for all public officials. However, there are two additional elements which are especially important in the case of legislators. First, as Parliament makes the laws, it frequently falls to legislators to determine matters affecting their own personal interests. The electorate may be less than impressed when they hear legislators arguing in favor of their own privacy, of containing disclosures to levels which the public knows will be ineffectual, and of being unenthusiastic about measures designed to ensure ethical behavior.¹⁰ Attending to matters of ethics may not help legislatures put other issues to rest, but no matter what the reward, ethics issues have to be confronted. The public and legislatures themselves deserve no less.¹¹

It is unfortunate that ethics as an issue has become politicized. Ethics today is a political issue, candidates use it in their campaigns to get elected and the idea that somehow corruption pervades the institution, despite all of the reform efforts, is a powerful one.¹²

Parties and candidates accuse one another of ethical violations, and the accusations are being carried over into the legislative process. All of this is contributing to a breakdown of trust among members and a diminution of civility in legislative bodies. The consequences are dire. On the one hand, governance becomes more difficult. When distracted by ethics controversies and provoked by the assassination of their character, members have a more difficult time developing consensus required to resolve public policy disputes. Deadlock and gridlock are more likely therefore to be the

10 TI SOURCEBOOK (2000), Chapter 6, an Elected Legislature.

11 See, ALAN ROSENTHAL, DRAWING THE LINE: LEGISLATIVE ETHICS IN THE STATES, (1996).

12 Quoted in Garry Boulard, "Pluperfect Purity," State Legislatures (January 1995) at 31. Long years of party cooperation and--in the case of Austria--grand coalitions involving the two largest parties have fostered a climate of coziness with business interests, breeding opportunities for corruption... In one EU member country, Austria, Freedom Party Jorge Haider ran a successful political campaign in 1999, in part on an anticorruption plank... Haider doubled the Freedom Party's share of the Austrian vote between 1985 and 1999, in part because of his inclusion of anticorruption as a campaign platform. While extremist parties will not win elections on this platform alone, the corruption issue will give them a fertile voter base to draw on that dovetails nicely with their anti-EU, anti-outsider rhetoric. Economic troubles would only serve to magnify the voters' disgust with the traditional parties and will likely continue to plague large parts of continental Europe in the future. This means that we could easily see nationalist or other extremist parties increase their share of the vote into the 20 to 30 percent range, which is usually enough to win a share of power in parliamentary systems based on proportional representation.

outcomes. Politicization also does the subject of ethics an injustice. As Dennis Thompson writes, "When ethics charges become yet another political weapon, they lose their moral authority."¹³ Under such circumstances, ethical conduct is less important than the points that can be scored; ethics is the means, winning is the end.

No one would challenge the assertion that elected public officials should conduct themselves ethically. We all think we have a notion of what ethical conduct is and that it takes common sense and decency to conform to ethical standards. When a person holds public office, which is a public trust, we expect more from him or from her than we expect from ourselves, which is as should be. We prohibit officials from using office improperly; we go further, insisting that they use it properly. On the negative side, this means, among other things, that office holder ought not to allow self-interest to affect their public decisions. They should not surrender their independent judgment for money, gifts, favors, and other benefits. On the positive side, ethical conduct calls for honesty, openness, due consideration, fairness, the fulfillment of obligations, and respect for the rights of others.¹⁴

After this introduction, in the second section of this Article, we shall make an attempt to define legislative ethics and review the theory of legislative ethics. In the third section, we shall examine the scope of legislative ethics, by analyzing legislative codes of ethics and conducts. In the fourth section of this Article, we shall describe the conflict of interest in legislation which has long been the focus of legislative ethics. In the fifth section, we shall study the enforcement of legislative misconducts and ethics committees. In the sixth section of this Article, we shall examine the political ethics tackling corrupt party and campaign financing by introducing disclosure requirements and increasing transparency. In the seventh section, we shall analyze the legislative ethics in Turkey especially parliamentary immunities comparing it with other jurisdictions especially those of EU member states and the US. Finally in the last section, we shall draw a conclusion to propose more action taken to raise public awareness of corruption and ethics as a serious criminal offence and continuous support at the highest political level for the fight against corruption and unethical conducts in legislation.

13 See, DENNIS THOMPSON, *ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION*, (1995), at 48.

14 See, THOMPSON, *ETHICS IN THE CONGRESS*, at. 10-25.

2. What is Legislative Ethics?

The first issue on which there is little consensus¹⁵ is the most fundamental one. What is legislative ethics? How do we define it? And what is the proper scope? One obvious parameter which helps define legislative ethics is that legislators should not break the law. They should not engage in bribery, they should not sell, or trade on, their office. But to define ethics by reference to the criminal law is to provide only a floor of minimal standards of conduct; “serve, and break no laws” as an inspirational norm for legislators addresses questions of criminal procedure and rules of evidence more than it does conduct befitting the dignity of legislative institutions.¹⁶

Legislative ethics obviously means more than simply break no laws. Many would suggest that ethics is defined in terms of a “higher standard” – higher than the inspirational norms against which we measure the conduct of the average citizen. Higher standard is often expressed by the maxim, traceable to Plato¹⁷ that “public office is public trust.”¹⁸ Perhaps better than any single statement

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- 15 It is necessary to refer to consensus, because ethics refers to shared values and principles, not purely subjective or Individualistic ones. In seeking consensus, we are elevating to a level of mutual recognition, and affirming, certain principles we hold in common but which previously we may not have so clearly recognized as being shared. The need for consensus in the field of legislative ethics was repeatedly recognized in recent hearings to revise the legislative codes of conduct all over the world. Dr. Daniel Callahan, ex-director of the Hastings Center, testified, “In studying the experience of various professional groups with their own codes of ethics, we have found that they do not function well unless they are firmly rooted in an underlying ethical consensus among members of the professions.” U.S. Congress, Senate Select Committee on Ethics, Hearings, Revising the Senate Code of Official Conduct Pursuant to Senate Resolution 109, 97th Cong. 2nd sess. (Washington DC. Government Printing Office, 1981) at 79.
- 16 See, John D. Saxon, “*The Scope of Legislative Ethics*”, in BRUCE JENNINGS AND DANIEL CALLAHAN EDS., REPRESENTATION AND RESPONSIBILITY, EXPLORING LEGISLATIVE ETHICS, (1985) at 197.
- 17 See, OLIVER A. JOHNSON, ANDREW REATH, ETHICS: SELECTIONS FROM CLASSICAL & CONTEMPORARY WRITERS, (2004) at 27-55. Also see, JULIA ANNAS, AN INTRODUCTION TO PLATO’S REPUBLIC (1981); TERENCE INRWIN, PLATO’S ETHICS: THE ETHICAL VIEWS OF SOCRATES AND PLATO (1982); RICHARD KRAUT, PLATO’S REPUBLIC: CRITICAL ESSAYS (1997).
- 18 “The public office is a public trust” has long been a guiding principle of the governments for centuries. See, House Ethics Manual, 102nd Congress 2d Session, April 1992, and Committee on Standards on Official Conduct. Also see, Code of Ethics for Government Service 10, H. Con. Res. 175, 85th Cong., 2nd Sess., 72 Stat., pt. 2, B12 (adopted July 11, 1958). This creed, the motto of the Grover Cleveland administration, has been voiced by such notables as Edmund Burke (REFLECTIONS ON THE REVOLUTION IN FRANCE 1790), Henry Clay (Speech at Ashland, Kentucky, March 1829), John C. Calhoun (speech, Feb. 13, 1835),

this concept captures the essence of ethics in the public service. It means that all times a legislator will do what is in the interest of the public, as opposed to what is in his personal interest.¹⁹

Legislative ethics pertains to both the behavior of legislators and the integrity of the legislative process as a consequence of individual behavior. Important here are the relationships of legislators with one another, lobbyists, interest groups, campaign contributors, officials of the executive branch, and constituents and the larger public.

Legislative ethics involves the morality of public policies and collective decisions by legislators as well as the morality of their individual conduct. It encompasses personal morality based on individual conceptions of standards of rights and wrong as well as institutional moral responsibilities based on individual conceptions of criteria of judgment for public policies. Ethical dilemmas in legislative life arise from:

- The enormous discretion legislators have in choosing how they define and execute their array of official and often conflicting, duties, and
- The substantial impact their decisions have upon the lives of citizens.²⁰

The function of personal ethics is to make people morally better or more modestly, to make the relations among people morally tolerable. Legislative ethics serves to guide the actions of individuals, but only in their institutional roles and only insofar as necessary for the good of the institution. Legislative ethics uses personal ethics only as a means-not even the most important- to the end of institutional integrity. Also, in many ways legislative ethics provides preconditions for the making of good public policy. In this respect it is more important than any single government policy because all other policies depend on it.²¹

and Charles Sumner (speech, U.S. Senate, May 31, 1872) Also see, Association of the Bar of the City of New York, Congress and the Public Trust (New York: Atheneum, 1970) at xix.

19 See, John D. Saxon, "The Scope of Legislative Ethics", in BRUCE JENNINGS AND DANIEL CALLAHAN, EDS., REPRESENTATION AND RESPONSIBILITY, EXPLORING LEGISLATIVE ETHICS, (1985) at 200-203.

20 See, generally, Vera Vogelsang-Coombs and Larry A. Bakken, "The Conduct of Legislators," in JAMES BOWMAN, FREDERICK A. ELLISTON, EDS., ETHICS, GOVERNMENT, AND PUBLIC POLICY: A REFERENCE GUIDE, (1988).

21 See, DENNIS THOMPSON, ETHICS IN CONGRESS. Also see, Charles Wolf Jr. "Ethics and Public Policy Analysis" in JOEL FLEISHMAN, LANCE LIEBMAN,

2.1. The Theory of Legislative Ethics

Reviewing the legislative ethics literature one finds that there is not consensus on the definition, scope, and standards related to legislative ethics. There exists conceptual ambiguity over what is and is not ethical behavior in legislative context. Given the absence of universal ethical standards, the analytical task becomes one of grouping related ethical behavior along important theoretical dimensions. One of the most enduring discussions in the literature focuses on the “theories of representation.”

Two primary theories of representation are the trustee and delegate conceptions. Underpinning these two conceptions are different ethical values and legislative responsibilities. As John Saxon noted, these differences largely arise out of an absence of universal agreement on how to define “publics” and to which “public interests” legislators should respond.²²

Legislatures acting as trustees are according to Edmund Burke, supposed to use their own judgment to serve the general interest rather than personal or narrowly based constituency interests.²³ The trustee notion is based on the assumption that “public office is public trust”. In contrast, there is the delegate theory, which is premised on the notion of a social contract between sovereign citizens and their representatives; legislators acting as delegates are expected to bind themselves to their community because of the inability of the citizens to perform the business of government themselves. According to James Mill, delegates must have an “identity of interest” with their constituency so that there is almost a one-to-one correspondence between their interests and the interests of those who elect them.²⁴ A paradox occurs because although citizens may admire the trustee type of public official, they appear to elect the delegate type of representative because of what the latter promises to do on behalf of the constituents in his or her district.²⁵

These theories lack explanatory power and are incapable of documenting empirical relationships. As Amy Gutmann and Den-

MARK MOORE (EDS.), *PUBLIC DUTIES: THE MORAL OBLIGATIONS OF GOVERNMENT OFFICIALS*, (1981).

22 See, John D. Saxon, “*The Scope of Legislative Ethics*”, in BRUCE JENNINGS AND DANIEL CALLAHAN, EDS., *REPRESENTATION AND RESPONSIBILITY, EXPLORING LEGISLATIVE ETHICS*, (1985) at 200-203.

23 See, Peter French, “*Burking A Mill*” in NORMAN E. BOWIE, ED., *ETHICAL ISSUES IN GOVERNMENT*, (1981), at 11.

24 James Mill, cited in French, “*Burking a Mill*”, at 9.

25 See, Vera Vogelsang-Coombs and Larry A. Bakken, “*The Conduct of Legislators*”.

nis Thompson noted, such theories cannot tell legislators when it is best to act as a trustee or as a delegate, how to vote on issues, or which criteria of judgment to apply to policy choices.²⁶ In practice, legislators sometimes vote with their constituency against the general interest and at other times with the national interest, irrespective of constituent views. Saxon concluded that given the empirical evidence showing that legislators alternate between the trustee and delegate roles, uniformity may not be a necessary ingredient of legislative ethics.²⁷

2.2. Legislative Corruption

Like all forms of corruption, the institutional kind involves the improper use of public office for private purposes.²⁸ But unlike individual corruption, it encompasses conduct that under certain conditions is a necessary or even desirable part of institutional duties. The use of public office is institutional in this sense. What makes the conduct improper is also institutional in the sense that it violates principles that promote the distinctive purposes of the institution.²⁹ It is still individuals who are the agents of institutional corruption and individuals should be held accountable for it, but

26 See, Amy Gutmann, Dennis Thompson, "The Theory of Legislative Ethics," in BRUCE JENNINGS AND DANIEL CALLAHAN, EDS., REPRESENTATION AND RESPONSIBILITY, EXPLORING LEGISLATIVE ETHICS, (1985) at 167-195.

27 See, John D. Saxon, "The Scope of Legislative Ethics", in BRUCE JENNINGS AND DANIEL CALLAHAN, EDS., REPRESENTATION AND RESPONSIBILITY, EXPLORING LEGISLATIVE ETHICS, (1985) at 204.

28 This concept is intended to be consistent with a variety of definitions in the social science literature. However, further specification of the concept beyond this level of generality remains controversial (mostly with regard to what should count as improper). For a review of various approaches, see ARNOLD J. HEIDENHEIMER, MICHAEL JOHNSTON, VICTOR T. LEVINE, EDS. POLITICAL CORRUPTION: A HAND BOOK (1989) at 7-14. Also see, John G. Peters, Susan Welch, "Political Corruption in America: A Search for Definitions and a Theory", AMERICAN POLITICAL SCIENCE REVIEW, VOL. 78 (September 1978) at 974-84; PETER DE LEON, THINKING ABOUT POLITICAL CORRUPTION (1993).

29 "The element of institutional impropriety is a necessary but not sufficient condition for conduct to qualify as institutional corruption. Some substantial connection to private interests is necessary. In its absence abuse of office would not count as corruption at all. An essential of the general concept of political corruption is the idea of the pollution of the public by the private. When a legislator simply violates the Institutional rules, the conduct does not yet constitute corruption in this sense; the violation must be in the service of private interest." For an example of political corruption see, CONGRESSIONAL ETHICS: HISTORY, FACTS AND CONTROVERSY, CONGRESSIONAL QUARTERLY INC, WASHINGTON DC. (1992).

their actions implicate the institution in a way that the actions of the agents of individual corruption do not.

Legislative corruption is institutional insofar as the gain a member receives is political rather than personal, the service the member provides is procedurally improper, and the connection between the gain and the service has a tendency to damage the legislature or the democratic process. When a member takes a bribe in return for a political favor, the personal gain is not part of the salary and the service provided is not part of the job description. The exchange serves no legitimate institutional purpose.³⁰ That is straightforward individual corruption. But when a member accepts a campaign contribution, even while doing a favor for the contributor, the political gain may or may not be corrupt. It is not if the practice promotes political competition or other desirable goals of the institution. But it is corrupt if it undermines institutional purposes or damages the democratic process. When several members repeatedly and improperly intervene in regulatory proceedings on behalf of an important campaign contributor, they may not be individually corrupt but their actions constitute institutional corruption.³¹

Yet the harm that institutional corruption causes to the legislature and the democratic process is often greater than that caused by individual corruption. Intertwined with the duties of office, institutional corruption by its nature strikes at the core of the institution, threatening its central purposes. It is also more systematic and more pervasive than individual corruption, which typically consists of isolated acts of misconduct which effects limited in time and scope. Researches have showed that cases of institutional corruption in legislatures are increasing all around the world.³²

30 "The most notable example of corruption charges considered by US. Congress arose from the Abscam investigation, which implicated seven members of Congress in criminal wrongdoing. In 1981 six House members and one senator were convicted by juries for criminal activities." See, "Congress and Government" 1980 Congressional Quarterly Almanac (1981) at 513.

31 See, DENNIS THOMPSON, ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION, (1995) at 7-8. Also see, David E. Price, "Legislative Ethics in the New Congress," in BRUCE JENNINGS AND DANIEL CALLAHAN, EDS., REPRESENTATION AND RESPONSIBILITY, EXPLORING LEGISLATIVE ETHICS, (1985) at 129.

32 In .U.S. from 1789 through 1977 (the year before the Ethics in Government Act) Congress took official notice of charges of ethics violations Involving fifty-three members, of whom twenty one received sanctions from either a committee or the full body, eleven resigned, and two served prison terms. From 1978 through 1992 Congress considered charges involving sixty three members,

3. The Scope of Legislative Ethics

In a pluralist society citizens do not always agree on what is good or just legislation. Members of the legislature seek agreement while expecting that disagreement will persist. The challenge for legislative ethics is to devise rules that will help legislatures make good and just policy even while they continue to disagree about what it is. Under these circumstances the best hope is to encourage a process that is justifiable from as many moral perspectives as possible. If the process is reasonable, fair, and open, it is presumably more likely to produce just laws or at least laws that citizens can reasonably accept. The aim is to make the legislative means moral even while legislators dispute the ends. The province of legislative ethics is therefore the integrity of the legislative process.

Following the principles is a moral good; it promotes an ethical process independent of the ethics of the outcome. Acting on relevant reasons, doing one's fair share, giving others an account of one's activities—all are actions that constitute ethical conduct at the same time that they promote the other ethical ends: moral deliberation and just legislation.

The purpose of legislative ethics is therefore more positive than might be assumed from reading the rules enacted in its name. Many take the form of negative commandments, as in "No member shall knowingly accept....any gift from any other person.." this negative mode is perfectly understandable and indeed justifiable. Actions that people want to prevent can usually be stated with more precision and less disagreement than can those they wish to promote.³³

3.1. Legislative Codes of Ethics

Ethical decision-making and adherence to good standards of behavior by politicians, and in particular by parliamentarians, is difficult to enforce. Every democracy has rules in place to regulate the conduct of parliamentarians, but approaches vary widely between legislatures. While some countries, such as France, rely on

thirty one were sanctioned or convicted and sixteen resigned or announced their Intention to retire. In the Senate alone the total since 1978 has been lower than it was in the earlier period, although the annual rate of cases has been much higher. See, Charles Stewart III, "Ain't Misbehaving", or *Reflections on Two Centuries of Congressional Corruption*, Occasional Paper 94-4, CENTER FOR AMERICAN POLITICAL STUDIES, HARVARD UNIVERSITY, (April 1994) at 10-11. Another research that points out this increase is TRANSPARENCY INTERNATIONAL INTEGRITY SYSTEMS RESEARCH, (2000).

33 *Ibid.*

a compliance-based approach, in which the behavior of legislators is prescribed by a combination of constitutional and legal sources, others, for instance South Africa, have opted for the codification of these rules and standards of behavior in one document.³⁴

Codes of ethics are at once the highest and lowest standards of practice expected of the practitioner, the awesome statement of rigid requirements, and the promotional material issued primarily for public relations purposes they can embody the gradually evolved essence of moral expectations, as well as the arbitrarily prepared shortcut to professional prestige and status. At the same time they are handy guides to the legal enforcement of ethical conduct and to punishment for unethical conduct. They are also the unrealistic, unimpressive, and widely unknown or ignored guides to wishful thinking.³⁵

Codes of ethics or conduct vary. Some set out in broad terms those high-level values and principles that define the professional role of members of the legislature such as integrity, openness and accountability while others focus on the application of such principles in practice. Some provide detailed rules, such as the UK Code of Conduct for Members of Parliament (see below). Codes may also set out procedures and sanctions to be applied in cases of non-compliance and, if given statutory status, can add to the legal framework of a given country.

Codes of conduct typically include guidance on conflicts of interest and set out sanctions to apply in case of failure to declare interests in accordance with the directives of parliament. Conflicts of interest when the private interests of a politician or official clash with the public interest occur when, for example, an MP approaches a minister on behalf of a company in which the legislator is a shareholder; when an MP accepts an offer of future employment from a company that is currently seeking a government license; or when an MP must decide from a number of options on the route of a new

34 See, South Africa, Code of Conduct for Elected Members of the ANC, 1994. This code of conduct was adopted by the National Executive Committee of the African National Congress. It has to be read in conjunction with the constitution of the ANC, and applies to all elected Members of the National Assembly, the Senate and Provincial Legislative Assemblies who have been elected on the ANC list or, in the case of the Senate, who were elected to their positions by Provincial Legislatures. For full details see www.tibangladesh.org/cgi-bin/cgiwrap/Wtiban/bpvoview.cgi?../BP_PDFfiles/Codes_of_Conduct_Public_Officials/981272705_b3.html

35 See, Charles S. Levy, "On the Development of a Code of Ethics," Social Work 19 (March 1974) at. 207.

highway, one of which would reduce the value of his family's farm. Standards that aim to reduce uncertainty about conflicts of interest may include, for example, a prohibition on the use of confidential information for private advantage, or a prohibition against accepting inducements to advocate in favor of individual or particularistic interests.

Codes of conduct can also give guidance on legislative or parliamentary immunity. Legislators are given a measure of legal immunity to ensure that they cannot be prevented from attending sittings and that the threat of civil or criminal action cannot be used to influence their participation or voting. But the scope of the immunity should be narrow to ensure that legislators do not abuse immunity privileges as a means of escaping justice from ordinary criminal liability.

Other standards for legislators might include:

- the prohibition of the misuse of parliamentary entitlements or resources
- restrictions on post-parliamentary employment
- rules requiring elected officials to disclose the sources and amounts of political donations and to account for election expenditure
- acting in a way that prevents the parliament functioning as it is supposed to or that may damage the reputation of the institution
- failing to table documents, or failing to answer questions directly in parliament or in committee, which harms the process of accountability³⁶

The majority of ethics regimes include a general commitment to principles of integrity, or a "code of conduct," whereby legislators pledge to conduct themselves in manner befitting their position as bearers of the public trust. The "Seven Principles of Public Life" in the United Kingdom represent one such example.³⁷ Unlike ethics rules that dictate expected behavior in great detail, codes of conduct are basic documents written in easily understood language that set forth broad goals and objectives that legislators seek to achieve. Occasionally, as in Argentina, expectations for proper conduct are enshrined in a country's constitution. While a code of

36 See, <http://www.corisweb.org/article/articlestatic/474/1/320/>.

37 See, <http://www.archive.official-documents.co.uk/document/parlment/nolan/nolan.htm>.

conduct is not in itself sufficient to stem legislative misconduct, it articulates the sacred trust that exists between legislators and their constituents.³⁸

Below is the Seven Principles of Public Life. These principles apply to all aspects of public life. These principles were issued in 1995 by the Nolan Committee and incorporated into the UK Code of Conduct for Members of Parliament in 1996.

Selflessness - Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.

Integrity - Holders of public office should not place themselves under any financial or other obligation to outside individuals or organizations that might influence them in the performance of their official duties.

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.

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.

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.

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.

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

The United States House of Representatives provides a 12-point code of conduct for its members, who along with officers and staff, “must conduct themselves at all times in a manner which reflects creditably on the House.”³⁹ This brief code also addresses conflict of interest issues, gifts, campaign funds, hiring practices, etc.

38 NATIONAL DEMOCRATIC INSTITUTE FOR INTERNATIONAL AFFAIRS: LEGISLATIVE ETHICS, A COMPARATIVE ANALYSIS, (1999) at 4.

39 *House Ethics Manual* (1992) at 1. The House Code of Official Conduct was first

Likewise, the Code of Conduct for Members of Parliament in the United Kingdom stresses that members “shall at all times conduct themselves in a manner which will tend to maintain and strengthen the public’s trust and confidence in the integrity of Parliament and never undertake any action which would bring the House of Commons, or its Members generally, into disrepute.”⁴⁰

The South African parliamentary code of conduct urges members to “maintain the highest standards of propriety to ensure that their integrity and that of their political institutions in which they serve are beyond question.” Furthermore, the code acknowledges that no set of rules “can bind effectively those who are not willing to observe their spirit. ...Therefore, where any doubt exists as to the scope, application or meaning of any aspect of this Code, the good faith of the member concerned must be the guiding principle.”⁴¹

By themselves, codes of conduct are limited in their capacity to curb legislative corruption. Rather their aim is to outline the overall principles of proper conduct. Given their aspirational and general nature, codes of conduct must be accompanied by detailed and specific “ethics rules” in order to be effective.⁴² These rules provide the details necessary to fulfill the goals set forth by codes of conduct.

Codes of conduct for members of parliament have received increased interest over the past years, fuelled in part by scandals tarnishing the public image of both the institution and its representatives. They offer a number of advantages over the legalistic approach in terms of both public perception and institutional integrity.

Firstly, they serve to guide members of the legislature as to the appropriate behavior in their daily work. A code can prescribe in great detail certain standards of behavior, thereby reducing uncertainty for parliamentarians. In so doing, it provides the foundations

added to House rules in 1968. For further details, see, <http://www.house.gov/ethics/Ethlcforward.html>.

40 Adopted 1995. Available at <http://www.parliament.thestationery.office.co.uk/pa/cm199697/cmselect/cmstand/688/code.htm>.

41 Code of Conduct in Regard to Financial Interests, adopted May 21, 1996. § 1.

42 See, for example, John Uhr, “*Institutions of Integrity: Balancing Values and Verification in Democratic Governance*,” PUBLIC INTEGRITY VOL. 1 NO. 1, (Winter 1999) at. 94-106; Public Management Committee (PUMA) “Ethics Checklist,” [DRAFT] 1997; and Dr. Andrew Brlen, “A Code of Conduct for Parliamentarians?” Report prepared for the Parliament of Australia, September 14, 1998, at. 3. Available at: <http://www.aph.gov.au/library/pubs/rp/1998-99/99rp02.htm>.

for responsible action and ethical decision-making by legislators, while providing a sound basis for disciplinary action in case of breach.

Secondly, a code can help to sensitize members of the public to the standards of behavior that they should expect from their representatives. It promotes public trust in the institution of parliament and its members by publicly displaying the values and norms guiding legislators in their work.

If implemented properly, codes of conduct have the potential to considerably improve behavioral standards within the legislature, and increase adherence by legislators to those values they can legitimately be expected to uphold. An improperly enforced code of conduct will, however, do little more than fuel the cynicism and mistrust of citizens that it set out to resolve.

3.2. Model Legislative Code of Conduct

Legislative codes of ethics ought to be taken seriously, in their formulation, their publication, and their implementation. Yet it would be naïve to expect that a code, however well formulated, can alone carry the burden of improved individual or institutional behavior. If it would be a mistake to place the entire burden of moral hope on a code, it would be no less an error to think that a legislative body can get by without written statement its higher values and the ethical requirements of office.

Any effort to write a legislative code of ethics must begin with the basic question of the purpose of a code. To judge from present codes the tacit answer seems to be that a code is meant to specify and to curb unacceptable behavior; and such behavior is for the most part taken to be that which bears on financial gain.⁴³ The scope of the present code of the United States Senate is not untypical, focusing on eight topics only—the acceptance of gifts, outside earned income, financial conflict of interest, unofficial office accounts, foreign travel, use of the franking privilege, political fund activities, and employment practices.⁴⁴

A legislative code should do full justice to even a minimal range of the ethical issues that confront legislators. It must place their moral duties within the context of their other duties. It must identify the moral customs or traditions or reasoning that would provide

43 See, Daniel Callahan, “*Legislative Codes of Ethics*”, in REPRESENTATION AND RESPONSIBILITY: EXPLORING LEGISLATIVE ETHICS, at 222.

44 U.S. Senate Code of Conduct.

a rationale for the specific provisions of the code. From the wide range of other codes in other fields it is possible to imagine some richer possibilities for legislative codes. A legislative code ought to contain both general aspirational elements and precisely codified rules of conduct, principally negative prohibitions. It should encompass the equivalent earlier code of the American Bar Association referred to as “ethical considerations” and “disciplinary rules”.⁴⁵ In distinguishing between aspirational principles and specific rules, it may be necessary to think of some parts of a code permanent and others as changeable according to shifting circumstances. The aspirational parts should be written in a way that can stand the test of the time.

The purpose of the more changeable rules is not only to clarify and modify specific points where necessary but also to make certain that those items that are in principle enforceable are stated in such a way that they can be acted upon. A code with a number of unenforceable aspirational elements will be far more credible if it also contains elements that are enforceable.

A legislative code ought to lay out the moral obligations of individual legislators and of the legislature as an institution. The moral obligations should be stated in positive as well as negative terms. Although a legislative code may not be able to touch on everything it should try to encompass the most important parts of a legislator’s varied roles.⁴⁶

Legislators are public officials. As public officials they have a special obligation to promote the public interest. To use their office for private gain is the most obvious betrayal of that role. A code should express the broad and positive obligation to promote the public interest and the negative obligation to refrain from using the office for private gain.⁴⁷

Legislators are also representatives. They are elected to act as the agents of those they represent and are accountable to them for their performance in office. On occasion there may be and probably will be a conflict between their duties to the public interest and their duty to their constituents. Maybe no code can resolve that old and inherent dilemma but at least a code should make clear how

45 *Code of Professional Responsibility and Code of Judicial Conduct* (Chicago: American Bar Association, 1975).

46 *Ibid.*

47 *Ibid.*

basic and inescapable are the obligations of responsible representation.⁴⁸

Legislators are also legislators. The purpose of noting this self evident point is to underscore the collective duties of legislators. Those collective duties are toward the institution of the legislature, toward its customs and rules, and toward those parliamentary and other procedures designed to promote both health debate and mutual cooperation. No less important is their credibility as a collective whole, a decisive determinant of the extent to which the public respects the legislative process and representative democracy as fundamental institutions for the common good.⁴⁹

The issue of enforcement is no less important. Legislators and the general public must believe that violations of a code, at least those “disciplinary” and black letter aspects of it, will be promptly, fairly, and effectively enforced. That may not always be easy to accomplish, in great part because of the requirements of due process or because of jurisdictional complications with certain kinds of violations. Nonetheless, the public is far more likely to be tolerant of those complications if there are mechanisms to see that all charges are speedily investigated, that serious charges are pursued with diligence, and that an efficient and expeditious procedure exists for dealing with violations of the code.

The term code of ethics, when applied to elected bodies, has appeared to take on meanings beyond the term itself.⁵⁰

Some aspects of a legislator’s behavior are subject to legislative enforcement, whereas others are not. The use of one’s office for private gain is proscribed behavior, rightly subject to legislative enforcement. However when it comes to behavior that might bring discredit to the member personally, such as a traffic offense, but would not discredit the institution, such behavior ought not to be subject to legislative enforcement. In the case of the first example, the traffic offense, enforcement would fall upon the courts under law. In the case of the second example or any question of general moral turpitude, enforcement should be limited to press, peer, and public pressures and the adversarial nature of politics. Containing generally admonitory or aspirational points of observance, a code of

48 See, Jean Ford, “An Insider’s View of State Legislative Ethics,” in REPRESENTATION AND RESPONSIBILITY: EXPLORING LEGISLATIVE ETHICS, at 263.

49 *Ibid.*

50 John M. Swanner, “Enforceable Standards and Unenforceable Ethics”, in REPRESENTATION AND RESPONSIBILITY: EXPLORING LEGISLATIVE ETHICS, at 235.

ethics would assist citizens in assessing the politically enforceable activities of their elected representatives.

For the behavior that would bring discredit upon the legislator and be enforceable by the courts, there are instances whereby discredit would be brought upon the institution as well as the member, for example bribery. In instances such as bribery, the act implicates not only the law but also the institution and as such brings into question the “representational fitness”⁵¹ of the legislator. Hence a second code is required – a code of conduct- a violation of which would bring discredit on the institution and call into question the fitness of the representative to be a member of that institution.

Violation of a code of conduct would be subject to legislative enforcement. Only those laws involving representational fitness should be simultaneously prosecuted at the legislative level as well as in the courts. Crimes that should be left entirely to the courts, such as traffic offenses or assaults, do not involve the member’s representational fitness. Examples of crimes that are subject to enforcement by both the courts and legislature- a violation of the law and a code of conduct- would include treason, bribery, and sedition.⁵²

Lastly, while writing a legislative code of conduct it is necessary to remember that the relationship between the legislator and the citizen can be best envisioned as essentially a contractual relationship. This representational contract need not have the implications of the social contract theory of Hobbes, Locke, or, for that matter, Rousseau.⁵³ Rather it is within a tradition closer to the observation of Justice Brandeis: “The old idea of a good bargain was a transaction in which one man got the better of another. The new idea of a good contract is a transaction which is good for both parties.”

4. Conflict of Interest

Conflicts of interest in both the public and private sectors have become a major matter of public concern world-wide. In government and the public sector, conflict of interest situations have long been the focus of specific policy; legislation and management approaches intended to maintain integrity and disinterested decision-making in government and public institutions. In the private sector there

51 *Ibid*, at 237.

52 *Ibid.*, at 239.

53 For more information about the social contract theory see, OLIVER A. JOHNSON, ANDREW REATH, ETHICS: SELECTIONS FROM CLASSICAL & CONTEMPORARY WRITERS, (2004).

has also been a long history of concern for integrity in business, and in particular for protecting the interests of shareholders and the public at large. Recent scandals have drawn attention to the importance of avoiding conflicts of interest which can become an issue when, for example, a public official leaves public office for employment in the business or NGO sector, or an accounting firm offers both auditing and consulting services to the same client, or a regulatory agency becomes too closely aligned to the business entities it is intended to supervise.⁵⁴

A kind of personal gain that can violate legislative ethics is one that is perfectly legitimate in itself to subvert a member's independent judgment. This is the realm of conflict of interest, a central concept in the regulation of ethics in all professions.

A conflict of interest may be described as a set of conditions in which professional judgment of a primary interest, such as making decisions on the merits of legislation, tends to be unduly influenced by a secondary interest, such as personal financial gain.⁵⁵ The primary interest is determined by the duties of role as specified by the principles of legislative ethics. Although what these duties are may sometimes be controversial (and the duties themselves may conflict), whatever they are they should be the primary consideration in any official decision a legislator makes.⁵⁶

The secondary interest is not illegitimate in itself, but its relative weight in a legislative decision is problematic. The aim of rules regulating conflict of interest is not to eliminate or necessarily reduce

54 OECD, RECOMMENDATION OF THE COUNCIL ON GUIDELINES FOR MANAGING CONFLICT OF INTEREST IN THE PUBLIC SERVICE, OECD PUBLICATIONS, (2003).

55 This analysis of the concept of conflict of interest draws on Dennis F. Thompson, "Understanding Financial Conflict of Interest", NEW ENGLAND JOURNAL OF MEDICINE, VOL. 329 (August 19, 1993) at 573-76. Also, according to the United States House Ethics Manual (1992), "the term is limited in meaning; it denotes a situation in which an official's conduct of his office conflicts with his private economic affairs." at 87. A definition of "conflict of interests" that relies solely on a financial interpretation has drawn some criticism. George Carney of Transparency International argues that such a "narrow view of conflict of interest avoids having to deal with the wide range of non-pecuniary interests, such as membership of a sporting, charitable, cultural or environmental body or organization. To ignore non-pecuniary interests increases the likelihood of distortion in government decision-making." See, Carney, "Conflict of Interests: Legislators, Ministers and Public Officials" (Berlin: Transparency International Working Paper, 1998) § 2, at 4. See also, ANDREW BRIAN, "A Code of Conduct for Parliamentarians?" Report PREPARED FOR THE PARLIAMENT OF AUSTRALIA (1998) at 9.

56 *Ibid.*

financial gain or the other secondary interests (such as preference for family and friends or desire for prestige and power). It is rather to prevent these secondary factors from dominating, or appearing to dominate, the relevant primary interest when legislators make decisions. The rules seek to minimize the influence of secondary interests as the welfare of a member's district or the public good.⁵⁷

Consensus likely exists for the proposition that legislators should not engage in conflicts of interest. Conflict of interest is usually defined in financial terms- that a legislator will not undertake an official act in return for a thing of value which redounds to his personal financial benefit.⁵⁸ The philosophical justification for the avoidance of conflicts of interest is legislative autonomy: a legislator should be free to exercise his independent judgment on behalf of his constituents.

In a rapidly changing public sector environment, conflicts of interest will always be an issue for concern. A too-strict approach to controlling the exercise of private interests may be conflict with other rights, or be unworkable or counter-productive in practice, or may deter some people from seeking public office altogether. Therefore a modern Conflict of Interest policy should seek to strike a balance, by identifying risks to the integrity of public organizations and public officials, prohibiting unacceptable Forms of conflict, managing conflict situations appropriately, making public organizations and individual officials aware of the incidence of such conflicts, ensuring effective procedures are deployed for the identification, disclosure, management, and promotion of the appropriate resolution of conflict of interest situations.⁵⁹

57 For more information see, ALAN ROSENTHAL, *DRAWING THE LINE*, at 73-102.

58 Thompson has criticized "the exclusive-almost obsessive- focus of the (U.S. Senate ethics) code on conflicts of financial interest," contending that financial conflict of interest alone cannot provide an adequate basis for a code of ethics for legislators. See, DENNIS THOMPSON, *THE ETHICS OF REPRESENTATION*, (1992) at 11-12.

59 According to OECD "Defining a policy approach to dealing with conflict of interest is an essential part of the political, administrative and legal context of a country's public administration. These Guidelines do not attempt to cover every possible situation in which a conflict of interest might arise, but instead are designed as a general policy and practice reference that is relevant to a rapidly changing social context. The proposed measures are intended to reinforce each other to provide a coherent and consistent approach to managing conflict of interest situations. The key functions of this approach are:
Definition of the general features of conflict of interest situations which have potential to put organizational and individual integrity at risk.

In Germany, Ireland, and the United Kingdom legislators are required to disclose the existence of a potential conflict of interest, but are still allowed to vote on the matter. For example, according to rules in the British House of Commons, “any relevant pecuniary interest or benefit of whatever nature, whether direct or indirect, should be declared in debate, or other proceeding.”⁶⁰ In contrast, Australian, Canadian and South African legislators are prohibited from voting on any matter that may be construed as a conflict of interest. Sweden’s parliament adopted a similar, albeit limited, prohibition of conflicts of interests in 1996: “A Member may not participate in the deliberations of the Chamber or be present at a meeting of a committee on a matter which concerns him [or her] personally or a close relative.”⁶¹

4.1. Restrictions in the Field of Conflict of Interest

a) Outside Employment Restrictions During and Post-Tenure

Many countries limit the outside employment of legislators. A common restriction prohibits legislators from holding posts in other branches of government (except for unrelated boards, commissions, etc).⁶² Generally this practice is forbidden to some degree.⁶³

Identification of specific occurrences of unacceptable conflict of interest situations.

Leadership and commitment to implementation of the Conflict of Interest policy. Awareness that assists compliance, and anticipation of at-risk areas for prevention.

Appropriate disclosure of adequate information, and effective management of conflicts.

Partnerships with other stakeholders, including contractors, clients, sponsors and the community.

Assessment and evaluation of a Conflict of Interest policy in the light of experience.

Redevelopment and adjustment of policy and procedures as necessary to meet evolving situations.”

60 “The Code of Conduct together with The Guide to the Rules Relating to the Conduct of Members: Section 2: Declaration of Members’ Interests” clause 37. Available at <http://www.parliament.the-stationery-office.co.uk/pa/cm199697/cmselect/cmstand/688/code2.htm>.

61 Transparency and Members of Parliaments’ Financial Interests in the European Union,” (Luxembourg: European Parliament, Director General for Research, 1996) at. 24.

62 For more information, see, Carney, “Conflict of Interests: Legislators, Ministers and Public Officials,” § 3a, at. 2.

63 Hungarian legislators, for example, may not hold any of the following government positions: president of the Republic, member of the Constitutional Court, certain other public or state offices, judge, or membership in the armed, police

Such restraints do not mean that members rarely hold jobs outside the legislature. Indeed, most legislators maintain private sector jobs while serving their term. This is particularly the case in smaller legislatures, which often operate on a part-time basis.⁶⁴ However, some countries restrict employment in the private sphere to some degree. For example, both the United Kingdom and Mexico place certain limitations on legislators who are also members of the clergy, and Czech MPs cannot simultaneously practice law.

Legislative misconduct can occur even after an MP or minister leaves office. Problems arise because former legislators enjoy access to privileged information, and through their government connections may be able to exert undue influence over their former colleagues. To protect against abuse in this area, some countries surveyed limit post-employment options.⁶⁵

b) Financial Disclosure Requirements

There are three kinds of disclosures; transactional disclosure, applicant disclosure and annual disclosure. In the field of legislative ethics the legislators usually have to file annual financial disclosures.

Annual disclosure consists of a form that higher level officials fill out once each year listing certain basic information about their assets and liabilities, such as the location of real property the filer and his family owns, the names of the filer's private employers and his or her outside businesses. Only those officials who are in a position to have a significant conflict of interest should file annual disclosure reports.

Annual disclosure has four main purposes. First, it focuses the attention of legislators at least once each year on where their potential conflicts of interest lie and on the requirements of the

or security forces. France, Italy and Korea extend these restrictions to quasi-governmental posts, prohibiting legislators from occupying leadership positions in state-owned or state-aided firms. See, NDI SURVEY, (1999).

64 The various state legislatures within the United States provide an illustrative example; of the 50 states, only 10 have full-time legislatures. Rosenthal, *Drawing the Line*, at 78.

65 France prohibits post-employment in any corporation owned or subsidized by the government, and also in real estate-related firms or banks. Korean members face a two-year ban on working in corporations that have substantial ties with the legislature. Members of the United States Congress (and senior staff) are barred from attempting to influence, communicate with, or appear before Congress for one year after leaving office. Canada confines the post-employment activities of ministers only.

code of ethics. Second, annual disclosure alerts the public, media, and the government to what the legislator's private interests are. (Therefore his/her possible conflicts of interest). Third, annual disclosure provides a check on transactional disclosure. Fourth and most important it helps to prevent a potential conflict of interest from actually occurring.⁶⁶

Financial disclosure requirements are a commonly applied mechanism to reduce legislative misconduct. This system is designed to track and make public the personal finances of legislators (and in many cases their families). By disclosing their assets and income, members demonstrate their commitment to a transparent and ethical legislature. Publication of individual financial records raises right-to-privacy issues. Opponents of disclosure requirements assert that they denigrate the integrity of legislators and may deter qualified candidates from running for office. Political leaders around the world have wrestled with this dilemma, which has contributed to a diverse array of financial disclosure requirements.⁶⁷

Successful ethics regimes require members not only to file financial reports, but file them in a timely manner. As with most procedures, strict deadlines improve adherence.⁶⁸

In general, financial disclosure rules are designed to reveal substantial assets, income and liabilities. However, the specific requirements of these rules vary greatly. For example, compare the cases of Australia and Japan.

Australia: Members must declare any holding valued at over a \$ 5000 (US\$3,180 in 1999), including but not limited to: sharehold-

66 See, Mark Davies, "Ethics in Government and the Issue of Conflicts of Interest", in YASSIN EL-AYOUTY, KEVIN J. FORD, MARK DAVIES EDS., GOVERNMENT ETHICS AND LAW ENFORCEMENT: TOWARD GLOBAL GUIDELINES, (2000) at 106-7. Also see, ANDREW STARK, CONFLICT OF INTEREST IN AMERICAN PUBLIC LIFE (2000) at 235.

67 Most of the developed countries have mandatory financial disclosure from every member. Canada and Sweden constitute two of four variations: Canadian rules exempt non minister MPs and Swedish legislators disclose their finances voluntarily. India and Argentina lack financial disclosure requirements altogether.

68 According to NDI SURVEY "A majority of the countries surveyed provide an exact schedule of disclosure requirements, although the specifics vary. Polish legislators, for example, must file a financial disclosure statement within 30 days of taking office, and annually thereafter. Korea follows a similar model, although members need file additional annual reports only if there are any changes in their finances. So too in Germany, where each member must file at the beginning of their four-year term, but must also report any additional income, honoraria, or gifts during that period. Some countries, such as the Czech Republic and Ireland, merely require that members file annually."

ings in public and private companies, family and business trusts, real estate, directorships, partnerships, liabilities, and investments.

Japan: Each Member must report the salary and title of any position he or she holds in a private company, including unpaid positions.

In the Australian case, members must reveal considerable detail about their finances. In contrast, the Japanese rules are restricted to employment income. Accordant to the NDI survey of the 18 countries with financial disclosure rules, only the Czech Republic, France, Germany and Japan do not require legislators to report their assets.

While the majority of disclosure requirements include assets, few legislators are required to report liabilities; only Australia, Canada, and the United States impose such a criterion. The rare inclusion of liability requirements may stem from a perception that they are overly invasive of a particularly sensitive private issue. One expert argues that such exclusion may undermine efforts to curb legislative corruption.

A declaration of assets without liabilities gives a distorted picture of the financial affairs of declarants. More importantly, indebtedness can easily give rise to conflicts of interest and even corruption. At times, legislators, ministers and officials may be tempted to enjoy a lifestyle similar to their financially successful constituents when their incomes are insufficient to support them.⁶⁹ Outside income disclosure is a common stipulation of ethics rules, and some form of this requirement was found in nearly all countries. Definitions of outside income vary, however. While most countries with financial disclosure rules require disclosure of employment income, Australia and Canada do not. Those countries require the disclosure of investments (a form of income), but not wages earned from outside employment.

Financial disclosure means just that: disclosure. If the financial interests of legislators remain hidden from view even after disclosure, the process serves little purpose. Therefore, public access to these documents is crucial. Also at stake, however, is the personal integrity of legislators and their families, whose private financial interests would be exposed for all to see. The issue is controversial, and countries handle it in many different ways.⁷⁰

69 See, CARNEY, CONFLICT OF INTEREST.

70 Australia, the Czech Republic, Ireland, Italy, Spain, Sweden, the United King-

c) Gift Restrictions

Receiving gifts is a problematic issue for legislators. The presentation of gifts to political leaders is a time-honored practice, and is generally perceived as an expression of respect. On occasion, however, gifts represent compensation for political favors. In order to protect both legislators and the integrity of their positions, countries have developed various methods to govern this practice. For example, the United States Congress imposes the most severe gift restrictions. Members and their staffs may not accept any gifts valued at greater than \$50.⁷¹

d) Travel Restrictions

The acceptance of travel expenses has become an increasingly common dilemma for legislators. A hypothetical case illustrates the problem. Some countries place no restrictions on the receipt of travel expenses, while others treat travel like gifts; requiring legislators to disclose sponsored travel in their financial statements. Again, the specifics vary. In the United Kingdom, travel for conferences such as the one described above need not be disclosed. In contrast, Czech and South African legislators must reveal travel taken for official business, but not travel unrelated to their positions.

The United States places additional conditions on travel beyond disclosure requirements. While members may accept travel

dom, and the United States require disclosure routinely publicize financial statements. In contrast, the Hungarian ethics committee may release to the public, at its discretion, an abridged version of financial disclosure statements, so too in Poland, where the parliamentary speaker maintains complete control over public and media access to financial statements. French and Taiwanese rules dictate that only those financial statements of legislators found to be in violation of rules be made public. South African financial statements are divided into "confidential" and "public" parts, the composition of which is decided by the Committee on Members' Interests. Canada follows a similar model, allowing certain financial items to remain confidential. Germany prohibits any public inspection of financial statements. See NDI SURVEY.

71 United States Members of Congress may receive gifts of any value from family members or close personal friends., also according to the NDI SURVEY, Argentina, India, Mexico, and Poland place no restrictions on gifts (apart from general criminal laws prohibiting bribery). Thirteen countries allow legislators to accept gifts but require that legislators disclose the receipt of such presents in their financial statements. The specifics of this arrangement vary considerably. Australian legislators must disclose all gifts valued at more than a\$500 (US\$329 in 1999) that are received from official sources, but must disclose gifts valued at more than a\$200 if obtained from unofficial sources. In Germany, legislators are required to disclose only those gifts totaling more than 10,000 DM. (US\$5,425 in 1999) and in Italy 10 million lire (US\$5,500 in 1999). Korea limits its disclosure requirements to gifts acquired from foreign sources.

expenses for fact-finding trips and other events in connection with their official duties, travel within the United States may not exceed four days and foreign travel is limited to a week. In addition, members may be accompanied only by their spouse or one child. These restrictions aside, members are free to accept travel expenses for activities wholly unrelated to their official positions, such as business or campaign activity.⁷²

5. Enforcement: Tribunals of Legislative Ethics

When elected officials cannot agree on the proper treatment of charges of perjury and obstruction of justice against a duly elected president, proposing an international model for global ethics rules may seem virtually impossible. This is so because there are so many different forms of government, fundamental values and business customs that nations do not always agree on norms of conduct.

Even if all could agree on what a code of ethics should say, they may not agree on how best to enforce a code of ethics. Complicating the matter is the basic truth that ethics complaints inevitably require the exercise of sophisticated judgments about human behavior in light of reason, common sense and experience, all in accordance with the rule of law and with a measure of compassion when appropriate. Thus, once a legal framework is in place for the investigation and prosecution of individual cases, the selection of capable, nonpartisan individuals to serve in ethics enforcement becomes crucial to the success and credibility of any enforcement program.

But we should not abandon hope of enforcing certain basic conflicts of interest norms internationally. The importation of ethics enforcement to countries, which traditionally have had little or none, is not impossible if there is the will to legislate and enforce the highest standards of conduct.⁷³

Any good ethics enforcement program has the following features:

- Fairness,
- Effective penalties,

⁷² See, House Ethics Manual, 102nd Congress 2d Session, April 1992, and Committee on Standards on Official Conduct.

⁷³ See, Joan R. Salzman, "Ethics Enforcement: the New York City Experience", in YASSIN EL-AYOUTY, KEVIN J. FORD, MARK DAVIES EDS., GOVERNMENT ETHICS AND LAW ENFORCEMENT: TOWARD GLOBAL GUIDELINES, (2000) at 167.

- Some type of confidentiality prior to final decision,
- A means of publishing final findings of conflicts of interest so that the particular cases can be used for educational purposes,
- Appellate review.

In the field of enforcement of legislative ethics standards electoral verdict, the courts and ethics commissions have main roles.

5.1. Electoral verdict

The most prominent difference between legislators and members of other professions is that legislators have to run for the office. They must defend their performance in public and at regular intervals let voters judge their success. Because of this electoral connection, they are more directly accountable than other professionals who exercise power over other people. They can be trusted to run their own disciplinary procedures, it is said, because they are subject to the most fatal form of discipline of all for a politician—loss of office. “You are not your brother’s keeper”, a House member once said. “He is answerable to the people in his district just as you are.”⁷⁴

In practice the current system of enforcement consists of two decisions: a finding by the parliaments and a subsequent verdict by the electorate. (expulsion is so rare in modern times that it has little practical effect as a threat) colleagues declare a judgement and voters deliver the final verdict.

According to a survey in U.S. of the twenty three members on whom an ethics committee imposed sanctions from 1978 to 1992 for corruption offenses, five were defeated in their bid for reelection and four decided not to run again.⁷⁵ During the same period the average rate for all members facing reelection was 7 percent and that of retirement 10 percent.⁷⁶ This comparison does not however, indicate whether the ethics charges actually contributed to the retirement or the failure to win reelection.

74 See, Edmund Beard and Stephen Horn, *Congressional Ethics: The View from the House* (1975), at 66. See also Investigation of Senator Alan Cranston Together with Additional Views, Committee Print, Senate Select Committee on Ethics, 102 Cong. 1. sess. (GPO, November 1991) at 10.

75 See, MARY ANN NOYER, “CATALOG OF CONGRESSIONAL ETHICS CASES,” (1993).

76 Calculated from tables in Norman J. Ornstein, Thomas E. Mann, and Michael Malbin, *Vital Statistics in Congress*, (Washington: Congressional Quarterly, 1994) at 58-59.

The most systematic study of the effects of charges of corruption on voting behaviour in more than one election found that accused candidates suffered a loss of 6 to 11 percent from their expected vote in reelection races.⁷⁷ A significant number of accused candidates lost the primary or resigned rather than risk defeat in the general election. (the study covered all races in which a candidate alleged corruption was an important issue, not only races in which a candidate had been charged or had a sanction imposed by an ethics committee.). Although voters evidently do not ignore corruption they do not protest unequivocally against it at the polls. More than 60 percent of all those accused won reelection. Of the accused candidates who reached the general election, nearly three quarters prevailed.⁷⁸ The voters most likely to vote against the accused candidates may be those least likely to have the classic characteristics of good citizenship: strong issue orientation, party identification, active participation, and commitment to the democratic rules of the game.⁷⁹ If this is so, relying on the electoral verdict puts the health of the democratic process in the hands of the least reliable citizens.

The considerations that explain why voters should not be blamed also underscore why ethics process should not rely mainly on the electoral verdict. Voters have the final word in any democratic state, but before they give that word the process should provide more and better information than it does now.

5.2. The Courts

Cases involving general offenses are better left to the criminal court system. Although reserving the right to take up a case at any time, the committees could declare as a matter of policy that they would let the courts deal with these offenses. Ethics committees are increasingly postponing action until courts reach a judgement or at least prosecutors conclude their investigation.

In practice the ethics process is moving toward violations of ordinary law should go to courts and violations of higher standards should be heard by the committees.⁸⁰ Although the courts in this

77 See, John G. Peters and Susan Welch, "The Effects of Charges of Corruption on Voting Behavior in Congressional Elections", *AMERICAN POLITICAL SCIENCE REVIEW*, VOL. 74 (1980) at 703-6.

78 *Ibid.*

79 *Ibid.* The authors suggest that this suggestion is speculative and must await the results of individual level studies.

80 THOMPSON, *ETHICS IN CONGRESS*, at 144.

way play an important role in some ethics enforcement, they are not an appropriate tribunal for many charges against members and should not be the sole or final tribunal for any ethics charge. Because the aims and methods of the criminal process and the ethics process differ in principle, the two must remain distinct in practice. In simplest terms the ethics process seeks to determine whether a member's conduct has harmed the institution: the criminal process judges a whether a citizen has harmed the society. In this respect the ethics rules and committees are like the professional standards and the disciplinary board of a medical or bar association. Just as the question for such a board is professional integrity and performance as prescribed by the standards, so the question is integrity and performance as prescribed by the Code.⁸¹

5.3. Ethics Committees

Although both elections and courts serve as important tribunals for the enforcement of the standards of conduct for legislators, neither can substitute for the parliament itself. In order to be effective, ethics rules require sanctions and enforcement mechanisms. According to one expert, such mechanisms generally follow one of three institutional models.⁸²

One approach establishes a regulatory commission that is external to, and independent from, the legislature. Such a commission administers the ethics regime, investigates accusations of misbehavior, reports back its findings to the legislature, and in some cases is empowered to punish violators.

Taiwan's Control Yuan is an example of such a regulatory commission. The Control Yuan is a quasi-judicial government branch whose members are appointed by the Taiwanese president with the consent of the upper house. The Control Yuan decides if members have violated any disclosure provisions and, if so, may impose fines. If fines are not paid, the Control Yuan refers the matter to the courts.

India also employs an independent commission to investigate corruption. In 1963, the Indian parliament established the Central Bureau of Investigation (CBI) to examine charges of corruption among public officials. In the 1990s, what began as an effort to combat petty corruption among civil servants turned its attention instead to incidences of grand corruption among political elites.

81 *Ibid.*

82 See, Brien, "A Code of Conduct for Parliamentarians?" at 16-17.

Members of parliament, chief ministers and even prime ministers now constitute the primary targets of CBI and the judicial system. The fact that they are now being held accountable for their conduct has taken many of the veteran lawmakers by surprise. As one former parliamentary secretary noted, "It seems pretty certain that while making the law, the legislators never imagined that it could be used against them."⁸³

Occasionally, institutional constraints curtail the ability of independent ethics commissions to oversee legislators. In Argentina, for example, the executive branch established a National Office of Public Ethics that requires all public officers to disclose their finances.

However, this law does not apply to members of parliament, who remain exempt from any ethics codes outside general provisions of the constitution. Another institutional model involves establishing a regulatory system within the legislature. Such a system is typically created through internal standing rules rather than through legislation. It generally takes the form of a parliamentary committee composed of members, combined with an independent parliamentary commissioner or commission.

Ireland and the United Kingdom adopted this model in the wake of several ethics scandals in the mid-1990s.⁸⁴ In the British House of Commons, members appoint a Parliamentary Commissioner for Standards who, along with the Registrar, maintains the Register of Members' Interest. The Commissioner, who cannot be a member of Parliament, also advises members on proper conduct under the code, and may investigate alleged violations. Should the Commissioner find evidence of a violation, he or she reports the facts and conclusions to the Select Committee on Members' Interests, and that Committee determines whether the case should be reported to the full House.

In Ireland, the Public Offices Commission maintains jurisdiction over the ethics regime. This Commission comprises the comptroller, auditor general, ombudsman, the chairman of the *Dail* (lower house) and clerk of the *Seanad* (upper house). The minister

83 See, Subhash C. Kashyap, "CBI: Its role, legitimacy and future," THE OBSERVER OF BUSINESS AND POLITICS, (September 3, 1997) at. 9.

84 The Canadian Parliament has also proposed such a model. As this paper went to press, the parliament had yet to decide the issue. See: *Second Report of the Special Joint Committee on a Code of Conduct of the Senate and the House of Commons, House of Commons, Canada*. Available at http://www.parl.gc.ca/committees352/sjcc/reports/02_1997-03/sjcc-02-cov-e.html.

of finance oversees the Commission and may temporarily replace any member who has any connection with the matter under investigation. Like the British system, the Commission may conduct investigations where upon it prepares a written report for the Committee on Members' Interests, which it may in turn recommend to the entire chamber for a vote.

A third institutional model requires members to police themselves, a system employed by the United States Congress. In this case, a special ethics committee comprised of legislators oversees nearly all aspects of an alleged ethics violation, from receiving complaints and conducting an investigation to deciding whether a violation has occurred and recommending appropriate sanctions. Like the previous model, however, the committees refer the issue to the entire chamber for a final vote.

A model that depends on legislators to investigate and sanction their fellow members can be problematic. Professor Dennis F. Thompson, author of numerous books on ethics regimes, notes that legislators "rarely report improprieties of their colleagues or even of the members of their colleagues' staffs, and they even more rarely criticize colleagues in public for neglecting their legislative duties."⁸⁵ According to counsel for the United States House ethics committee (the Committee on Standards of Official Conduct), distaste for overseeing the behavior of fellow members often makes it difficult for the House leadership to identify members willing to sit on the Committee.⁸⁶

Politics and Partisanship: U.S. and UK. Cases

The regulation of legislative ethics presents slightly different problems to other forms of professional regulation in that it is frequently suffused with partisanship. The competition between the political parties for legislative advantage often involves politically motivated complaints, politically tainted processes of investigation or politically biased ways of resolving complaints and punishing the individual legislators involved. Legislators often justify making complaints against fellow legislators on the grounds that it is important to defend the reputation of the institution. But it is a curious fact that, on both sides of the Atlantic, legislators rarely believe that members of their own party jeopardize the reputation of the institution. Strangely, it is always members of the opposing

85 See, DENNIS F. THOMPSON, POLITICAL ETHICS AND PUBLIC OFFICE, (1987) at. 108.

86 NDI Briefing, July 24, 1998.

party who seem particularly prone to the sort of ethical lapses that merit official complaints.

There is good reason to believe that ethics complaints are not always spontaneous, naturally occurring phenomena. They often appear orchestrated by organizations and groups inside and outside the institution. In the late 1980s and 1990s, it seemed that ethics complaints had become the strategic weapon of choice in the struggle for partisan advantage. The 'ethics war' in the House of Representatives invited parallels with the discourse of nuclear warfare strategy with its talk of first strike, retaliation, escalation and mutually assured destruction. A former Speaker, Jim Wright, himself brought down by ethics complaints, warned his colleagues of the dangers of 'mindless cannibalism'. Those, like Newt Gingrich, who were first to raise the ethics sword in anger, soon discovered that it was double edged and, as the ethics war intensified, the Committee on Standards on Official Conduct was overwhelmed. Its inability to cope with its workload in turn invited politically motivated attacks on it, with accusations of willful delay and obstruction in resolving cases.

Ethics committees in Congress have always differed from other committees in that they are formerly bipartisan with equal membership of Democrats and Republicans. The Ethics Reform Task Force Report makes clear its determination to develop this feature by, for example, introducing new rules governing the appointment of Committee staff on a bipartisan basis and making clear that they should not be partisan or engage in partisan activity. Even stringent critics of the Ethics Reform Task Force Report and the way the House handles ethics complaints have welcomed this innovation as likely to encourage trust in the way complaints are processed.

The Report also strengthened the rights of the Ranking Minority member of the Committee regarding the determination of properly filed complaints and instituting preliminary fact-finding. In the wake of the furor over the Gingrich case and to enable the Ethics Reform Task Force members to complete their work, the House of Representatives approved by unanimous consent a 65 day moratorium on the filing of new ethics complaints. This was extended on several occasions until the Task Force had completed its report. It was apparently felt that the latter would be better able to complete its work 'in a climate free from specific questions of ethical propriety'.⁸⁷

87 The origins of the ethics wars in the House of Representatives can partly be

British politics also experienced a spate of ethics cases in Parliament in the early 1990s and the offenders were largely to be found among the ranks of Conservative MPs. The spate of scandal led to the Prime Minister, John Major, announcing the creation of a new independent Committee on Standards in Public Life chaired by a senior judge, Lord Nolan. The creation of *'blue-ribbon'* committees and commissions is, of course, a long-established device of political leaders to deflect or resolve acute political issues or at least to defer their resolution to a later date when political, media and public interest may have abated. Parliament accepted the main thrust of the Nolan recommendations, and the experience of the 1995 reform of ethics regulation is the subject of the Committee's inquiries in 2002. Witnesses to the public hearings made a number of references to the role of party Whips in encouraging their members to make complaints about members of the opposing party and this seems to have contributed to the increase in workload experienced by the second Parliamentary Commissioner for Standards, Elizabeth Filkin. A culture appeared to develop in the late 1990s which required complaint to be met with complaint, or what some witnesses referred to as 'tit for tat' complaints. Given the role of Whips in encouraging, these complaints, the current chairman of the Commons Committee on Standards and Privileges, Sir George Young, was optimistic to argue that Whips have a role to play in encouraging MPs to observe the Code of Conduct. In his evidence to the Wicks Committee, he argued that 'tit for tat just brings everybody down, not just the party that is complained about'. He also indicated that his Committee had sent a warning letter to an MP who had made what it regarded as a vexatious complaint, indicating his willingness to identify publicly such MPs if further frivolous complaints were received.

While partisanship has infused the complaints procedures in both legislatures, the committees differ in that the govern-

found in the decades of Democratic control of the House which ended in 1994 and the associated Republican perception that the Democrats had displayed the sort of political arrogance and corruption more often associated with one-party states. The success of Gingrich and other Republicans in helping to force the resignation of the Democratic Speaker of the House, Jim Wright, in 1989 and the subsequent Republican victory in the 1994 House elections helped radically reshape the political and ethical landscape. Given such a disruption to what they regarded as the normal partisan equilibrium, it was to be expected that Democrats in the House of Representatives would seek to regain their position by any means available. It was in this political climate that the ethics war intensified to the point where a temporary truce was called in the form of the creation of the Ethics Reform Task Force.

ing party in the House of Commons traditionally has a majority on the Standards and Privileges Committee. This has given rise to some concerns, especially when senior Labour politicians have been the subject of ethics complaints. According to some observers, including at least one member of the Committee, certain Labour ministers were afforded special treatment because of their status and because of the potential consequences of upholding complaints against them. The appointment of the senior Conservative MP, Sir George Young, as its chair is a symbol of a concern to ensure that the work of the Committee is seen to be genuinely bipartisan, and his appointment has met with widespread approval. Until now, the opposition have only supplied the chairman of one parliamentary committee, the Public Accounts Committee, but the appointment of Sir George Young may well have set a precedent for the Standards and Privileges Committee.

This analysis of ethics regulation has focused on external involvement in ethics regulation, the independence or otherwise of investigations, the burden of proof, the impact of increasing partisanship in making ethics complaints and the institutional responses to this increase. However, to understand the regulation of ethics aright in each legislature, it is necessary to locate these issues within the distinctive cultures and traditions of parliaments.⁸⁸

5.4. Sanctions

Once institutional authority is established, a process must be developed to address alleged wrongdoing. The first step lies in forwarding complaints to the regulating institution. Given the political environment in which they work, legislators are concerned that their reputations could be forever tarnished by fraudulent and/or partisan claims of improper conduct. Therefore, many legislatures have created safeguards to carefully screen complaints. In the United States, complaints initiated by the general public are typically filtered through members, although ordinary citizens may also file complaints directly to the ethics committee.

In the United Kingdom, written complaints from either members or citizens must be filed to the Parliamentary Commissioner for Standards. The Czech system relies exclusively on members to forward complaints. Any 10 members (5 percent of the chamber) may request the Committee investigate a member whom they suspect to have breached the ethics regime. The South African system

⁸⁸ For more information about politics and partisanship see, THOMPSON, ETHICS IN CONGRESS.

employs an additional method to protect members; legislators who believe their integrity has been questioned by public statements or the media may request a tribunal of appointed judges to settle the matter.

In some countries, the speaker or presiding officer of the legislature processes ethics complaints. In Poland, the presiding officer decides whether to forward a complaint to the Rules and Deputies' Affairs Committee. Germany takes this approach one step further, allowing the presiding officer to handle the entire affair, including the imposition of sanctions.

Following the complaint process, the determination must be made as to whether the accused member violated the rules. In nearly every country where information was available, a committee or tribunal makes this determination, and then presents these findings along with its recommendations for sanctions to the entire chamber for a final decision. Argentina does not rely on a committee system. Instead, the whole chamber determines in a single step if a violation occurred and appropriate sanctions. Germany and Canada forego both the committee approach and a chamber vote. Instead, ethics matters fall under the jurisdiction of the presiding officer in Germany and prime minister in Canada.

The imposition of sanctions constitutes the final step of the complaint process. The types of sanctions available to members differ considerably both within and between cases. Irish members face three options: suspension, fines, or public censure. So too in Poland, where legislators may reproach, admonish, or reprimand violating colleagues. In France, only one option is available: banishment from future candidacy for one year. Germany has adopted a somewhat market-oriented approach: the president of the Federal Diet discloses any violations to the voters, thereby letting them decide the member's political fate.⁸⁹

6. Political Finance

Money has always been necessary for political parties and candidates to compete in elections. In recent years, however, the need for money appears to have become more acute as political parties are caught between dwindling numbers of paid-up party members on the one hand, and the demands of virtually permanent media campaigns on the other. There are plenty of wealthy individuals, businesses and even crime syndicates willing to foot the bill for

89 NDI SURVEY 2000.

such costly campaigns. In exchange, they may expect policy favors, government posts or protection.

The impact on democracies of such corrupt exchanges can be devastating. The exposure of underhand dealings to obtain operational and campaign finance gives the impression - in some cases well-founded - that access to the democratic decision-making process can be bought, irrespective of what the public wants. As a result, people lose interest in the political process and lose trust in government. Many tools are available to governments to control money in politics and to prevent political parties from falling into the pockets of their donors. Legislatures can try to curb the need for private funding by passing laws to provide funding or subsidized access to the media. They can also lessen the demand for money by shortening campaign periods or capping expenditures.

A second way of tackling corrupt party financing is to regulate the flows of money into politics. The most common methods are bans on contributions from certain individuals (such as convicted criminals) or institutions (for instance from foreign governments) and ceilings on donations.

A third route is to increase transparency of campaign finance by introducing disclosure requirements - where the public is informed of who gave how much to whom, for what purpose and when.

A worldwide survey of national political finance regimes reveals that most of the 104 countries studied have some form of public financing of political parties, yet about half rely on private funds from corporations, trade unions or foreigners - three sources considered very influential in determining the outcome of an election and with great potential for corruption. With regard to limits, restrictions on spending are more popular (41 per cent of the countries surveyed) than restrictions on contributions (28 per cent), though the majority of nations have restrictions on neither. Disclosure is even less common.⁹⁰

A good set of political finance regulations is, of course, of little use if it is not properly enforced. Effective enforcement requires independent oversight agencies endowed with powers to supervise, investigate and, if required, institute legal proceedings in cases of malpractice. Unfortunately, many governments lack the political will to give teeth to supervisory agencies lest it work to their disadvantage once out of office.⁹¹

90 <http://www.corisweb.org/article/archive/315/>.

91 Estimates by Michael Pinto-Duschinsky. For detailed information see, Michael

Political competition among political parties harbors the potential for reducing corruption through raising the stakes in case of discovery. At the same time, however, democratic elections may induce competing politicians to resort to illicit means for financing their campaigns. In democracies, corrupt opportunities thus depend on the relationship between political structure and private wealth. Three factors that contribute to the incidence of corruption are: the politicians' willingness to accept bribes, both for themselves and their parties, the voters' tolerance of such payments and the willingness of wealthy groups within the society to make such payments.⁹²

6.1. Corporate Funding and Buying Influence

Much of the money that funds political corruption is from the corporate sector, with the aim of securing contracts or favorable legislation. Sometimes this is legal and regulated, for instance in the case of the multimillion dollar corporate lobbying industries of the United States and Canada. But even in Canada, where lobbying is considered to be well regulated, there are loopholes, such as limited rules on disclosure and weak enforcement, which allow the narrow divide between legitimate and illegitimate influence to be crossed.

One of the areas which have been especially closely researched is international bribery. Until recently, the process was fairly straightforward; it was not only legal for companies to pay bribes to foreign public officials in order to secure contracts, but they received tax breaks from their home governments for doing so.

Since the entry into force of the OECD anti-bribery convention the situation has changed, on paper at least. It is now illegal for OECD-based companies to bribe foreign public officials (though, crucially, the prohibition has not been extended to party officials). The process involved in securing a prosecution is so cumbersome

Pinto-Duschinsky, "Financing Politics: A Global View," *Journal of Democracy*, vol. 13 no. 4. (2002). This article explores the link between political finance and political corruption, and discusses the difficulties most commonly associated with two of the more popular means to control corruption in party funding, the provision of parties with public subsidies and the enactment of laws regulating political finance. Based on the comparative analysis of over 100 countries rated 'free' or 'partly free' by Freedom House in 2001, one of the key lessons to emerge is the need to prioritize the enforcement of key regulations rather than overly ambitious statutes.

92 See, generally, SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, REFORM*, Cambridge University Press, (1999).

and costly though, that no single company has been convicted under the Convention, and companies continue to pay bribes to foreign politicians and governments in pursuit of deals, often covering them up by a smokescreen of intermediaries or layers of secret bank accounts in tax havens.

Corruption cuts across industries, but characteristics particular to certain sectors may render them more vulnerable to the temptations of corruption.

Sanctioned secrecy and the lack of price transparency help perpetuate corruption in the arms trade. According to a recent study by TI UK, the result is that corruption in the sector exists on a scale entirely disproportionate to its share of world trade. Corruption can act as the very motor for the sector, the authors suggest. In Sri Lanka, for instance, independent observers have alleged that a major factor prolonging the civil war was the reluctance of politicians and officials to lose the lucrative pay-offs from procuring arms. Another example is Angola's peace accord of 1994, which was undermined by weapons deals with the government which were dependent on covert payments to politicians and individuals in Angola and in France.

The energy sector is another breeding ground of political corruption. Time and again the pattern emerges of poor countries that discover immense oil or gas reserves and see the resulting proceeds seep into the pockets of government officials and deal-brokers rather than fund improved living standards for the majority. From Angola and Gabon to Azerbaijan and Kazakhstan, the absence of robust safeguards against corruption means that the net impact on development of the discovery of energy resources is sometimes negative.

A number of civil society and government-backed initiatives aim to shore up anti-corruption safeguards in the energy sector, and could usefully be replicated in other industries. The NGO-driven Publish What You Pay Initiative calls for regulators in rich countries to require natural resource companies to publish disaggregated data, country by country, to show oil firms' tax and other payments clearly. The Extractive Industries Transparency Initiative (EITI), backed by the British government, focuses not just on international oil companies, but also on host governments, asking them to "publish what you earn". Weakening the initiative, though, is the fact that all reporting under the EITI is voluntary.

6.2. Vote Buying

One of the most blatant manifestations of political corruption is when politicians bribe voters directly. The practice - proscribed by most national legislations - is fuelled by money that is not properly accounted for at best, from criminal sources at worst.

It is difficult to assess how widespread the practice of vote buying is. The term encompasses many kinds of inducements, such as the distribution of food, clothing or public services, in addition to direct monetary exchanges. Surveys give a first approximation of how frequently votes are “bought” in some countries. Compelling data is available for the Philippines, for example, where about 7 per cent of all eligible voters received some form of payment in the 2002 *barangay* (village, community level) elections; and for Thailand, where 30 per cent of household heads surveyed in a national sample said that they were offered money during the 1996 general election. A survey by *Transparencia Brasil* suggests that in the municipal elections of March 2001, 7 per cent of voters were offered money for their votes.⁹³

It is also difficult to assess the impact of vote buying on election results, since ballots are supposed to be cast in secret and so an inducement is no guarantee that the ballot cast will in fact favor the vote “buyer”. In the 2000 Mexican presidential elections, for instance, both the *Partido Revolucionario Institucional (PRI)* and the *Partido Accion Nacional (PAN)* offered money for votes, but the effectiveness of their offers varied: surveys suggest that while less than 50 per cent of voters who took inducements for the PRI voted for its presidential candidate, about 80 per cent of the PAN’s offers resulted in votes.

In the final analysis, the fact that parties and candidates continue to spend money buying votes is evidence that the practice distorts election results. The sums involved can be large: the *Nakhon Ratchasima Rajabhat Institute*, which monitors poll fraud in Thailand, estimates that candidates gave a total of 20 billion baht (US \$ 460 million) to voters in the 2001 legislative elections.

Vote buying tends to be carried out where parties are weak, with elections centered on candidates rather than parties, and where traditions of patronage are engrained. A number of studies suggest that it is poor people who are most often targeted with offers to buy their votes, though recent surveys by Brasil suggest that the relationship does not always hold.

93 www.transparency.org.

Votes are often bought by incumbents using public funds. In Mexico, for example, voters testified that they had been threatened with the withdrawal of subsidies under the state poverty-alleviation programme, *Progresa*, if they voted for the opposition. This connection between the crimes of vote buying and of misuse of public funds is an area ripe for study: the correlation between public expenditure patterns and electoral cycles could yield interesting data. TI Russia has already begun to monitor this practice.⁹⁴

6.3. Monitoring the Elections

Transparency International has conducted many surveys and made many studies about monitoring the elections and the effect of it on corruption.⁹⁵ Those studies have focused mainly, but not exclusively, on monitoring the financing of election campaigns and political parties - tracking “quid pro quo” donations, the misuse of state funds and public administrative resources for electoral purposes and bribery of voters and election officials. Monitoring of electoral fraud and other abuses on polling day have traditionally been done by other organizations, both NGOs and IGOs. But the division between corruption in the run-up to elections and bribery of voters on elections day; and ballot stuffing or other forms of electoral fraud is not always clear cut. Some organizations have “mainstreamed” campaign finance monitoring into their broader election monitoring programme. Conversely, anti-corruption NGOs, including TI chapters in Kenya, Vanuatu and Zimbabwe have begun to address electoral fraud in their anti-corruption work. These are both positive developments

Many international actors have taken on the challenge of monitoring elections. States, both bilaterally and through international organizations (IGOs), have been frequent participants. IGOs have been actively involved in election monitoring in recent years, including The Commonwealth Secretariat, Organization of American States (OAS) and the Organization for Security and Co-operation in Europe (OSCE), amongst others.

Recently NGOs such as the International Foundation for Election Systems (IFES), the National Endowment for Democracy (NED) and EISA, have greatly expanded their work on democratic assistance and arguably possess a number of advantages over governmental bodies. Their independence leaves them relatively free from

94 <http://www.corisweb.org/article/archive/338/>.

95 For monitoring elections guidelines see, <http://www.corisweb.org/article/articlestatic/554/1/338/>.

political pressure. They are seen as unbiased. Because they typically have more limited resources, they are often more judicious in using funds. Their smaller size and flexibility enables them to meet the unique challenges presented by each election. Their tendency to have stronger ties with grassroots organizations and civil society may enhance prospects for democracy over the long term.⁹⁶

7. Legislative Ethics in Turkey

The legislature plays a key role in promoting good governance and curbing corruption and poor administration in all sectors of society. Citizens expect parliamentarians to maintain a high moral standard in their professional and private lives. They expect parliamentarians to serve out of conviction and a commitment to the public good, rather than for aspirations of personal power and the pursuit of private profit. In turn, they are conferred the legitimate authority to take decisions that determine the fortunes of both the state and its citizens.

Failure by parliamentarians to live up to these expectations can seriously undermine not only the trust citizens have in the ability of their elected leaders to act in the public interest, but also in the legitimacy of the state and its institutions. At best, this leads to cynicism and apathy on the part of citizens. At worst, it leads to a questioning of the entire political system. It is crucial therefore, that elected members of government act, and are seen to act, in an ethical manner.

Mechanisms are needed that tell parliamentarians in clear terms what is expected of them and what constitutes a violation of public ethics. Such mechanisms, for instance codes of conduct, need to be enforced and well publicized so that they serve to improve the accountability of Members of Parliament (MPs) to parliament and to the general public.

According to a very recent survey conducted by Transparency International, in 36 out of 62 countries surveyed, political parties were rated by the general public as the institution most affected by corruption. On a scale from a corrupt-free 1 to an extremely corrupt score of 5, parties ranked worst worldwide, with a score of 4.0, far-

96 Some International organizations providing election monitoring support are Organization of American States (OAS)-United for the Promotion of Democracy (UPD), United Nations (UN) - Electoral Assistance Division Department of Political Affairs, Office for Democratic Institutions and Human Rights (ODIHR): Election Observation, National Democratic Institute (NDI), The Center for Democracy- Election Monitoring.

ing most poorly in Ecuador, followed by Argentina, India and Peru. At the same time, the public rated political or grand corruption as a very grave problem, and reported that in most countries surveyed corruption affected political life more than business and private life.

After political parties, the next most corrupt institutions worldwide were perceived to be parliaments followed equally by the police and the judiciary, according to the TI Global Corruption Barometer 2004. The survey included more than 50,000 respondents from the general public in a total of 64 countries and was conducted for TI by Gallup International as part of its Voice of the People Survey between June and September 2004.⁹⁷

Turkey gets a “weak” rating in the Public Integrity Index, which tracks corruption, openness and accountability in 25 countries. This peer-reviewed country report includes a timeline covering corruption over the past one to two decades, a reporter’s notebook on the culture of corruption and an assessment of the six main integrity categories. The integrity scorecard lists the full set of integrity indicators with scores, commentary and references.⁹⁸

In our country today we are going through a serious economic and ethical depression. We believe that the main cause of this depression is the weight with which the phenomenon of corruption oppresses our society and the degeneration of ethical values.

Transparency International, of which Turkey is a member, publishes a Corruption Perception Index each year. Turkey is considerably below western countries in this index and is among those countries where corruption has become a way of life. On a scale

97 See, www.transparency.org, according to TI Board member and President of TI Cameroon, Akere Muna, “It is time to use international co-operation to enforce a policy of zero tolerance of political corruption and to put an end to practices whereby politicians put themselves above the law - stealing from ordinary citizens and hiding behind parliamentary immunity. Political parties and the politicians they nominate for election are entrusted with great power and great hopes by the people who vote for them. Political leaders must not abuse that trust by serving corrupt or selfish interests once they are in power,”

98 The Public Integrity Index is the centerpiece of the Global Integrity report, providing a quantitative scorecard of governance practices in each country. The Public Integrity Index assesses the institutions and practices that citizens can use to hold their governments accountable to the public interest. The Public Integrity Index does not measure corruption itself, but rather the opposite of corruption: the extent of citizens’ ability to ensure their government is open and accountable. <http://www.publicintegrity.org/ga/ii.aspx>

of 10 on this index Turkey's score is between 3.0 and 4.0. Again according to Transparency International's index, G7 countries have an average score of 7.15 to 7.35 for the years 1995 to 2000. For 15 European Community countries the score is between 6.61 and 7.59. While the score for OECD countries (29 countries) is between 6 and 7.11, unfortunately, Turkey's score remains 3.1 in 2003 and 3.2 in 2004.

It is important to stress one point in this issue. According to many surveys with regard to public ethics in Turkey, political parties and the Parliament have been rated as one of the most corrupt institutions in Turkey.

In 2003, some further progress has been achieved in adopting anti-corruption measures in Turkey. However, surveys continue to indicate that corruption remains a very serious problem. Turkey has signed the UN Convention against corruption and ratified the Council of Europe Criminal Law Convention on Corruption. In January 2004, Turkey joined the Group of States against Corruption (GRECO), which monitors compliance with European anti-corruption standards.

The Law on Electronic Signature entered into force in July 2004. A Law concerning the Foundation of an Ethics Board for Public Employees entered into force in June 2004. The Law provides for the establishment of an Ethics Board which will supervise the ethical conduct of public officials. The Board will have powers concerning declarations of property and assets by public employees, and will be able to investigate complaints from citizens. The law encompasses all public officials except the President, Members of Parliament and Ministers.

After November 2003, the Parliamentary Anti-Corruption Committee proposed parliamentary inquiries into the dealings of 25 former government ministers, including former prime ministers and asked that their parliamentary immunity be lifted. In December 2003 the Parliament adopted proposals to open investigations into corruption allegations against a former Prime Minister as well as against several other ministers. The Parliamentary Investigation Committee concluded that it was necessary to bring the former State Ministers before the High Tribunal and Parliament endorsed this with a vote in July 2004.

Turkey still lacks a legislative ethics code or a Parliamentary Ethics Committee. On the other hand the scope of Parliamentary immunity has been identified as one of the problems in the context of corruption in Turkish public life. In spite of frequent debate, no development can be reported in limiting the scope of Parliamentary immunity. A temporary Parliamentary Investigation Committee on Parliamentary Immunity established in June 2003 submitted its report in January 2004. The Report concluded that parliamentary immunity should be retained in its present form until the issue is taken up together with other structural reforms.⁹⁹

Despite some legislative developments in the field of ethics, corruption remains a very serious problem in almost all areas of the public affairs. Developing ethic codes for the parliamentarians is one of the core issues facing Turkey on the way to European Union.

7.1. Regulations with Regard to Legislative Ethics in Turkey

The Constitution:

Provisions Relating to Membership

1. Representing the Nation

ARTICLE 80. Members of the Turkish Grand National Assembly represent, not merely their own constituencies or constituents, but the Nation as a whole.

2. Oath-Taking

ARTICLE 81. Members of the Turkish Grand National Assembly, on assuming office, shall take the following oath:

"I swear upon my honour and integrity, before the great Turkish Nation, to safeguard the existence and independence of the state, the indivisible integrity of the Country and the Nation, and the absolute sovereignty of the Nation; to remain loyal to the supremacy of law, to the democratic and secular Republic, and to Atatürk's principles and reforms; not to deviate from the ideal according to which everyone is entitled to enjoy human rights and fundamental

99 COMMISSION OF THE EUROPEAN COMMUNITIES Brussels, 6.10.2004 SEC (2004) 1201 2004 Regular Report on Turkey's progress towards accession, anti corruption measures see, at europa.eu.int/comm/enlargement/report_2004/pdf/rr_tr_2004_en.pdf.

freedoms under peace and prosperity in society, national solidarity and justice, and loyalty to the Constitution.”

3. Activities Incompatible with Membership

ARTICLE 82. Members of the Turkish Grand National Assembly shall not hold office in state departments and other public corporate bodies and their subsidiaries; in corporations and enterprises affiliated with the state and other public corporate bodies; in the executive or supervisory organs of enterprises and corporations where there is direct or indirect participation of the state and public corporate bodies, in the executive and supervisory organs of public benefit associations, whose special resources of revenue and privileges are provided by law; in the executive and supervisory organs of foundations which enjoy tax exemption and receive financial subsidies from the state; and in the executive and supervisory organs of labour unions and public professional organisations, and in the enterprises and corporations in which the above-mentioned unions and associations or their higher bodies have a share; nor can they be appointed as representatives of the above-mentioned bodies or be party to a business contract, directly or indirectly, and be arbitrators of representatives in their business transactions.

Members of the Turkish Grand National Assembly shall not be entrusted with any official or private duties involving recommendation, appointment, or approval by the executive organ. Acceptance by a deputy of a temporary assignment given by the Council of Ministers on a specific matter, and not exceeding a period of six months, is subject to the approval of the Assembly.

Other functions and activities incompatible with membership in the Turkish Grand National Assembly shall be regulated by law.

This subject is referred to as “incompatibilities” in legal language. Regulation against “incompatibilities” may play a useful role in preventing corruption and political degeneration. The growing political degeneration of our times is one of the most important enemies of democracy; the importance of the subject and the necessity of ensuring the restoration of the prestige of parliament should be better understood.

In Article 82, which is reserved by the Constitution for this matter, a list is given of duties which members of parliament may not undertake and jobs they may not take. In this list, there are both excesses, and some deficiencies.

In most of the countries with regard to legislative ethics, there are some outside employment restrictions for members of parliament to prevent any kinds of conflict of interest. As we have examined in the second chapter of this article these restrictions vary. In most of the countries members of parliament are not allowed to hold high positions in private sectors as a member of the board or as a manager. In some countries members are not allowed to work in public corporations. There have been some proposals for changing the provisions of this article.

The provision of Article 82/2 would be: "Members of the Grand National Assembly of Turkey may not be entrusted with any official or private duties involving recommendation, appointment or approval by the executive organ, nor may they by means of using their influence as members of parliament in any way make propositions to offices and persons in authority in any type of undertaking, contract award or sales and purchase in public establishments and organizations or their affiliates and subsidiaries. The acceptance by a member of a temporary assignment given by the Council of Ministers on a specific matter, and not exceeding a period of six months, is subject to the approval of the Assembly."

According to a Report the proposed provision, even if not very successful from the viewpoint of legal drafting, strongly indicates a course of action arising from a need. From this point of view it may be considered that it would be appropriate to make use of it.

Another recommendation contains a prohibition on members of parliament from assuming office on the executive and supervisory boards of private banks.

4. Parliamentary Immunity

ARTICLE 83. Members of the Turkish Grand National Assembly shall not be liable for their votes and statements concerning parliamentary functions, for the views they express before the Assembly, or unless the Assembly decides otherwise on the proposal of the Bureau for that sitting, for repeating or revealing these outside the Assembly.

A deputy, who is alleged to have committed an offence before or after election, shall not be arrested, interrogated, detained or tried unless the Assembly decides otherwise. This provision shall not apply in cases where a member is caught in the act of committing a crime punishable by a heavy penalty and in cases subject to Article 14 of the Constitution if an investigation has been initiated before

the election. However, in such situations the competent authority shall notify the Turkish Grand National Assembly immediately and directly.

The execution of a criminal sentence imposed on a member of the Turkish Grand National Assembly either before or after his election shall be suspended until he ceases to be a member; the statute of limitations does not apply during the term of membership.

Investigation and prosecution of a re-elected deputy shall be subject to whether or not the Assembly lifts immunity in the case of the individual involved.

Political party groups in the Turkish Grand National Assembly shall not hold discussions or take decisions regarding parliamentary immunity.

7.2. Immunity: A Comparative Study, Regulations in European Union Member States and Turkey

A hotly debated issue is the immunity from prosecution granted by the Constitution to all legislators and cabinet ministers. Although a solid majority of citizens favors doing away with parliamentary immunity, and civil society organizations have organized a number of campaigns to that effect, legislators have so far remained blind to these demands and have been successful in keeping the immunity rule intact. One might call this a “full-coverage immunity” which protects legislators from prosecution not only for corruption charges but for all ordinary crimes, as well. Although this immunity can be lifted for an individual legislator by a vote of Parliament, this is extremely rare.

All legislators and ministers are required to file asset-disclosure forms. However, these are kept under lock and key and usually do not have any function beyond fulfilling a legal requirement. Putting together a corruption case as a result of ad hoc examination of these forms is not a rule, but an exception. The system works—if at all—not as intended: When a person is faced with serious accusations of corruption, only then may his asset disclosures be examined. But again, legislators are immune from prosecution.

Among the various problems arising in Turkey in the recent times in connection with the fight against organised crime and corruption, it is necessary to emphasise the issue of using (in some cases maybe also abusing) the institute of legislative immunity. Without providing specific cases, we think that a clear evidence for the above statement is the fact that the government considered a

reform in this field – including eventual modifications in the Constitution of the Turkey.

As generally known, the sense of legislative immunity is the provision of adequate protection for the representative of the legislative power against external interventions, especially in cases of criminal proceedings lead against MPs, what would consequently damage the decision of the voters. This means that the existence of the institute of legislative immunity constitutes a basic requirement for the existence of a constitutional state which (in itself) must be preserved.¹⁰⁰

A problem occurs if this legitimate goal conceals the abuse of immunity and the use of this immunity for unjustified protection of persons that could have committed criminal acts or even when those persons are wilfully protected by enlisting them in the election list of political parties. But to be just, we ought to say that this is not a specific Turkish problem and unfortunately, we can find those cases in abundant numbers also in other European countries and in elsewhere in the world.

Most national legal systems provide for dual protection of members of parliament: *non-liability or non-accountability* for votes cast and opinions expressed in the performance of their duties and, as regards all other acts, *inviolability*, prohibiting detention or legal proceedings without the authorization of the Chamber of which they are members.

Non-Liability

Its scope normally covers protection against all kinds of public penalties for acts committed in the performance of members' duties or, more popularly formulated, deals with members' freedom of speech. In general, MPs are not liable in civil or criminal terms for the acts encompassed within this form of immunity.¹⁰¹

The protection against public penalties afforded by non-liability does not, however, exclude members from disciplinary liability within the scope of Parliament or, in principle, from the application of measures of a political or partisan nature which may go to the

100 See, generally, ADAM PRZEWORSKI, SUSAN C. STOKES, BERNARD MANIN (EDS.), ACCOUNTABILITY AND REPRESENTATION, Cambridge University Press; 1st edition (1999); Also see, ROBERT D. BEHN, RETHINKING DEMOCRATIC ACCOUNTABILITY, Brookings Institution Press (2000).

101 See, Ergun Özbudun, Türk Anayasa Hukuku, Ankara, (2000) at 277. Also see, Erdoğan Teziç, Anayasa Hukuku, İstanbul (1998) at 368.

point of exclusion. With regard to the acts covered by non-liability, these include votes and opinions expressed.

The Spanish Constitution contains no reference to votes cast, but these are included within the scope of this privilege. The scope of the protection afforded as regards 'opinions' stated is one of the most controversial aspects of non-liability. The majority of constitutional texts make use of the concept of opinions expressed 'in the exercise of duties' (Austria, Belgium, France, Greece, Italy, Luxembourg, Portugal), which permits a somewhat broad interpretation, so that it makes the protection applicable to certain statements made outside Parliament.

In France, according to the information obtained, judicial practice appears to have proceeded from a narrow definition of the acts covered by non-liability, excluding, for example, comments made by a member of parliament during a radio interview or views expressed in a report drawn up in connection with a mission undertaken at the request of the Government. Some constitutions refer specifically to votes cast and opinions expressed on the floor of the House or at parliamentary committee meetings.

Denmark's Constitution, for example, provides that members of parliament may not be subject to criminal action for statements made in the *Folketing*. The Netherlands Constitution reserves that protection for statements made in the States General or at parliamentary committee meetings while the Irish Constitution refers to statements made in both. Under the Finnish Parliament Act the protection applies to opinions expressed in Parliament.

In the same way, according to the Basic Law of Germany, non-liability covers votes cast and opinions expressed in the Bundestag or on one of its committees. Despite the reasonably broad nature of constitutional texts, legal theory and parliamentary practice tend, in the majority of systems, to reject the extension of non-liability to opinions expressed, for example, in newspaper articles, public debates or election declarations. On the other hand, they are unanimous in recognizing that statements made in the ordinary fulfillment of civic duties or duties of a purely private nature are not covered by this aspect of immunity.

Under the Greek Constitution, members of parliament, by virtue of their non-liability, may refuse to testify on information obtained or passed on in the performance of their duties or on the persons who have supplied or to whom they themselves have given such information.

Unlike inviolability, non-liability has an absolute quality, reflected in particular in the duration of its effects: the protection afforded is maintained even after the member's mandate has come to an end.

In some European Union Member States, parliaments are not empowered to waive the non-liability applying to their Members, this situation being recognized to derive from the absolute nature of the form of immunity in question. In other Member States, however, non-liability may be waived by decision of the House. This is the case, for example, in Denmark, Finland, Sweden, Germany, and Greece. In Italy, Parliament is frequently called upon to consider requests relating to the application of non-liability.

In most Member States, non-liability is considered to belong to the public sphere, and a member of parliament cannot, therefore, relinquish it of his own free will. In the United Kingdom, however, since the Defamation Act 1996 entered into force, members have been permitted to forgo their privilege in defamation trials.

On another point relating to the United Kingdom, non-liability applies not only to members, but to all those attending parliamentary proceedings (witnesses, Civil Servants, experts, and so forth). This is also the case in the Irish Parliament where parliamentary committee meetings are concerned.¹⁰²

Turkey

The provision of Article 83/1 of the Constitution reads: "Members of the Grand National Assembly of Turkey shall not be held responsible for their votes and statements concerning parliamentary functions, for the views they express before the Assembly or, unless the Assembly decides otherwise on the proposal of the Presidential Council for that sitting, for repeating or revealing these outside the Assembly."

As we can see, this provision covers protection against all kinds of public penalties for acts committed in the performance of members' duties. In general, MPs in Turkey are not liable in civil or criminal terms for the acts encompassed within this form of immunity.

Inviolability

In general, this form of immunity is such that, unless Parliament gives its authorization, no member may be arrested or pros-

¹⁰² European Parliament studies Rules on Parliamentary Immunity in the European Parliament and the Member States of the European Union.

ecuted for acts *not* carried out in the performance of his duties. The scope of inviolability varies according to the degree of protection afforded to members: it may thus be the case that, unless the House concerned has given its prior authorization, members are protected only from arrest or, in addition, from enforcement of particular measures such as searches or, more widely still, from summonses before a court or indeed any form of criminal proceedings.

In a number of European Union Member States the scope of inviolability has been restricted in the 1990s to the extent that the authorization of the House is no longer required in order to institute criminal proceedings. Authorization is necessary only when it is proposed to take certain steps against a member such as arrest or other specific measures (such as in Italy and France). In Belgium, the House concerned must give its authorization for a member to be committed for trial, or summoned directly before a court or tribunal, or arrested. Authorization is no longer required, however, for an investigation to take place.

The only acts covered are, in principle, those likely to be the subject of criminal prosecution. Some legal systems exclude from the sphere of inviolability certain categories of offence considered as more serious. For example, the Irish Constitution excludes offences such as treason, felony and violations of public order. Under certain conditions, the Portuguese Constitution excludes premeditated offences punishable by imprisonment of more than three years. The Swedish Constitution excludes criminal offences punishable by a term of imprisonment not less than two years.

Derogations from the principle of inviolability are sometimes laid down for minor offences. Such is the case with simple misdemeanors, since it is felt in some quarters that, in this case, given the relative non-seriousness of the punishment and the type of act punished, the function, independence and reputation of the parliamentary institution and of its members would not be called into question. Moreover, it is sometimes felt that it would not be compatible with the principle of equality for a member of parliament to avoid such penalties just because of his position. Under the Austrian Federal Constitutional Act, offences clearly unrelated to the political activities of the Member of Parliament concerned are excluded from the scope of inviolability.

However, the Member States are unanimous in considering that, in the case of *flagrante delicto*, inviolability must be waived, at least partially. The term '*flagrante delicto*' covers cases where a

person is encountered during or in direct connection with the committing of a punishable offence.

Judges are generally responsible for ascertaining whether an offence falls under the heading of *flagrante delicto*. The Basic Law of Germany contains a peculiar provision whereby a member of parliament may be arrested when caught in *flagrante delicto* or during the day following the carrying out of the punishable act.

According to some constitutions, in order to remove immunity it is not sufficient that *flagrante delicto* be verified, but the offence in question must also be a particularly serious one. This applies, for example, to a stipulation of the Italian Constitution that the act involved must be such that an arrest warrant is compulsory. This is also the case in the Portuguese Constitution, whereby immunity against arrest or detention is maintained, even in the case of *flagrante delicto*, provided that the act concerned is not a premeditated offence punishable by more than three years' imprisonment. Section 14 of the Finnish Parliament Act stipulates that, if immunity is to be ruled out, the representative in question must be caught in the act of committing an offence carrying a minimum penalty of not less than six months' imprisonment.

As regards the *duration* of the inviolability, it can be seen that, while in some Member States it has effect throughout the duration of the parliamentary term (as for example in Denmark, Spain, Greece, Italy, Germany, and Portugal); in others it refers only to the period of the sessions (Belgium and Luxembourg).

Turkey

The institution of relative immunity or simply "immunity", designed in order for members of the legislative assembly to be able to carry out their functions without being under any pressure or threat, has in recent years been the subject of a number of alterations. There are meaningful differences in the direction of these alterations in Turkey compared to other countries.

In the case of the motherland of parliamentary inviolability, i.e. Britain, the "armour" has been reduced to a function protecting MPs against civil suits and no longer against criminal prosecutions. In France, too, the scope of immunity was limited by a constitutional amendment dated 4 August 1995 (Article 26). The condition of seeking the assembly's "lifting of inviolability" for judicial enquiries and hearings was discontinued. From now on, the decision of the assembly is only necessary for the arrest or deprivation of

an individual's freedom. Moreover, conditions of flagrant crime requiring heavy punishment and their final verdicts are outside this provision.¹⁰³

Developments in Turkey are in the opposite direction. Criminal files concerning members of parliament and in particular files containing allegations of ordinary crimes (embezzlement, fraud, the passing of bad cheques etc.) have greatly multiplied. Protections provided for members of parliament because of their function have come to cover them as individuals. The transformation of the institution of immunity into a mechanism protecting against crime and suspicion of crime means that this institution has suffered functional damage.

Exemption from immunity in the Constitution consists of two items: "The condition of flagrant crime requiring aggravated punishment" and "situations under Article 14 of the Constitution, provided that investigation is initiated before election" (Article 83, paragraph 2). There is no need for the lifting of immunity in these two circumstances.

Here a deficiency attracts attention. The Constitution does not regard the offences that bar election to the parliament (Article 76/2) as outside the area of immunity, whereas offences that are an obstacle to the election of a member of parliament not being an obstacle to his continuation in office are a contradictory situation. It is necessary to remove files on offences coming into this category from the area of immunity as well. Such a provision should be added to the article.

In view of this, the reference made to Article 14 of the Constitution is inconvenient. For one thing, it is difficult to understand it within the meaning of criminal law; there is almost no chance of knowing its exact equivalents in the Turkish Criminal Code. Furthermore, it may be said that it is covered by the crimes requiring aggravated imprisonment, in Article 76/2 of the Constitution.¹⁰⁴

103 Süheyl Batum, "The new dimension of the protection of parliamentary immunity" (in Turkish), *Görüş*; the TÜSİAD, April-May 1996.

104 Article 76: Persons who have not completed their primary education, who have been deprived of legal capacity, who have failed to perform compulsory military service, who are banned from public service, who have been sentenced to a prison term totalling one year or more excluding involuntary offences, or to a heavy imprisonment; those who have been convicted for dishonourable offences such as embezzlement, corruption, bribery, theft, fraud, forgery, breach of trust, fraudulent bankruptcy; and persons convicted of smuggling, conspiracy in official bidding or purchasing, of offences related to the disclosure of state secrets, of involvement in acts of terrorism, or incitement and encouragement

For these reasons, the section of the paragraph referring to Article 14 of the Constitution should be removed.

After the expression “offences that bar election to parliament” has been inserted into the article, there remains no room for the words “conditions of flagrant crime requiring aggravated punishment”; these should be removed.

Proposal

In our point of view parliamentary non liability shall remain in the constitution but the second part of the article which regulates parliamentary inviolability shall be amended.

The second sentence in Article 83/2 of the Constitution should be amended as follows: “Offences that bar election as a deputy do not fall within the scope of this provision.”

What types of action should immunity protect parliamentarians against? This is the second question. In our opinion, the armour of inviolability should not be an obstacle to judicial enquiry or trial. This protection should only be capable of use only against actions such as arrest, detention and detention on remand which remove freedom, because the function and aim of parliamentary inviolability consists of protecting a member of parliament or a minister so that he may carry on his duties unhindered. Beyond this, judicial enquiry and trial cannot be considered as disrupting the duties of a member of parliament or a minister.

Loss of Membership

ARTICLE 84. (As amended on July 23, 1995)

The loss of membership of a deputy who has resigned shall be decided upon by the plenary of the Turkish Grand National Assembly after the Bureau of the Turkish Grand National Assembly attests to the validity of the resignation.

The loss of membership, through a final judicial sentence or deprivation of legal capacity, shall take effect after the final court decision in the matter has been communicated to the plenary of the Turkish Grand National Assembly.

The loss of membership of a deputy, who insists on holding a position or continues an activity incompatible with membership according to Article 82, shall be decided by a secret plenary vote,

of such activities, shall not be elected deputies, even if they have been pardoned.

upon the submission of a report drawn up by the authorized commission setting out the factual situation.

Loss of membership by a deputy who fails to attend without excuse or permission, five meetings in a period of one month shall be decided by an absolute majority of the total number of members after the Bureau of the Turkish Grand National Assembly determines the situation.

The membership of a deputy whose statements and acts are cited in a final judgment by the Constitutional Court as having caused the permanent dissolution of his party shall terminate on the date when the decision in question and its justifications are published in the Official Gazette. The speaker of the Turkish Grand National Assembly shall immediately take the necessary action concerning such decision and shall inform the plenary of the Turkish Grand National Assembly accordingly.

8. Conclusion

Political corruption has gravely affected all parts of Turkish society. It has led to a sharp decline in confidence in politicians. It weakens the political stability of the country and fuels economic difficulties. Political and government officials and the press calculate that corruption in Turkey has cost the country a minimum of \$150 billion in recent years, particularly through siphoning off bank funds.

In recent years, political corruption has been in the newspaper headlines almost daily and there several serious accusations have been levied against politicians. However, legal immunity (criminal immunity) of MPs is a huge obstacle to the correct functioning of the legal system, as accusations against politicians cannot be followed-up. Many people believe that political parties pay only lip service to anti-corruption efforts while covering up actual incidents and acquitting each other's parties.

In the past decade all anti-corruption efforts appear to have been used as political weapons to damage opposition parties, not to set principles and implement systemic improvements in a general movement towards a clean society. The current ruling party appears to be taking the same dead-end road.

Overall, a new focus on public accountability, openness and transparency of political institutions would represent an enormous step towards creating a more democratic and economically stable Turkish society. We hope that all parties will take up the solution of

this critical problem, not as a party matter but as a matter of grave national importance.

As for the last words we want to emphasize what is stated in 2004 Regular Report on Turkey's progress towards accession. "The efficiency and effectiveness of various governmental, parliamentary and other bodies established to combat corruption remain a matter of concern. The consistency of the policies and the degree of co-ordination and co-operation is weak. Turkey is encouraged to set up an independent anti-corruption body and to adopt the anti-corruption law. Furthermore, dialogue between the government, public administration and civil society needs to be strengthened and a Code of Ethics for public servants and elected officials should be developed. In addition more action should be taken to raise public awareness of corruption as a serious criminal offence. Continuous support at the highest political level for the fight against corruption would be welcome."