

Unit 5: Misconduct

Unit 5 Learning Objectives

What does misconduct in the legislature look like?

After studying this unit you should be able to:

- Provide a definition of misconduct.
- Explain the concept of conflicts of interest.
- List the main provisions of conflict-of-interest statutes.
- Discuss circumstances which may be seen as corruption, bribery or extortion.

Introduction

In the last unit you considered how institutions like Parliament aim to avoid misconduct, or deliberate wrongdoing, through codes of conduct and ethics. But what is meant by misconduct? How is it realized for parliamentarians? This unit considers what is meant by misconduct, with particular attention paid towards the most common forms, conflicts of interest. We argue that the notion of conflict of interest was developed in the English tradition of common law. In this tradition the behavior of public officials is regulated by the rules of trust, which establish that government officials cannot have either direct or indirect interests in government decisions and must always act exclusively in the interest of the public. Hence, under this tradition, if a government official has a direct or indirect interest in a government decision, they are not permitted to participate in the decision-making process. Today, the severity varies from country to country. But overall, conflict of interest rules intend to prevent parliamentary misconduct, and to some degree, this rule is applied in almost all government regimes. Some attention in this unit will be paid to those circumstances that may facilitate the emergence of conflicts of interests, to the steps that may be taken to prevent conflicts of interests from emerging, and, finally, which solutions should be adopted to solve conflicts of interests.

Commentary

Misconduct, the failure to comply with codified standards of behavior, does not necessarily demonstrate a criminal offense or corruption (Skelcher and Snape 2001). Misconduct is a form of unethical, though not always criminal, activity. The most common form of misconduct occurs when there is a conflict of interests.

The concept of conflict of interest originated in the English common law tradition, believed to be the rules of trust, is original source of conflict-of-interest provisions leading the behavior of government officials. These rules of trust establish that a government officer has an obligation and must not have a direct or indirect interest in a governmental transaction, since it is the parliamentarian's job to act solely in the public interest (Zimmerman, 1994).

With the expansion and the growth of government activities, the common-law arrangement concerning conflict of interest has no longer been adequate. These arrangements have become integrated into conflict of interest statutes, which were primarily intended to provide guidance to public officers and private citizens dealing with the government, but they also established criminal penalties.

How conflict-of-interest statutes are defined from country to country concern what subjects they cover, how interest is defined, the rules for dual office-holding, contracts, and the extent to which bribes, gifts, disclosure of confidential information are regulated, and outside employment, and post-employment restrictions. All statutes provide penalties for violations (Zimmerman, 1994).

Definition of Interest

An officer defines interest as a right, claim, or legal share of something direct or indirect interest in a transaction. It is also considered as part of the officer's interest if certain family members have pecuniary interests in a pending governmental matter. The interest can be direct, if the public officer is the owner, partner or major share-holder of a firm that is entering into a transaction with the government and if

the officer will be the beneficiary of the profits of the firm under the contract, and *indirect* if the government representative has a company, employer, partner or similar entity with a financial interest in the issue at stake (Zimmerman, 1994).

In order to avoid conflicts of interest among public officers and their employee's statutes are created. These laws or rules require the public officers to disclose whether they have a financial interest that would benefit from a proposed government action. If a public servant has such an interest, the official is often required to abstain or limit participation in the decision-making process.

Dual Office-Holding

Dual office holding, when a private company also employs a public official is sometimes permitted if there is not a conflict of interest between the private company and the government. If the offices are incompatible, the individual must resign from the first office in order to accept the second position. This legal structure was set up to avoid a situation in which an officer must choose between loyalties of one office over the other (Zimmerman, 1994).

Contracts

Constitutions will often forbid public officers from entering into a contract with the government on the grounds of conflict of interest. In these cases, a member of the contract awarding board must void the contract and criminally penalize the officer even if the officer was not a participant in the award-giving process (Zimmerman, 1994).

Gifts, Bribes, and Extortion

Traditionally, conflict-of-interest statutes view gifts as bribery and extortion. Statutes typically prohibit the soliciting or accepting of items of value in exchange for:

1. Influence in any official act or official responsibilities, or
2. Influence to commit, collude, or allow for fraud, directly or indirectly, on government agencies
3. Influence to do or omit to do any acts in violation of the official duty.

To convict a public officer or employee of conflict of interest violations, corrupt intent must be proven. This can be done when a private party and a public officer agree that the bribe or gift will result in a specific course of action by the officer (Zimmerman, 1994:31).

Disclosure of Confidential Information

Public officials are prohibited from disclosing confidential information. When private information is disclosed, it runs the risk of damaging the reputation and the interest of the individual, and more importantly, goes against the public interest. Because it is difficult to enforce an all-encompassing ban on confidential information disclosures, codes of conduct have been adopted and boards of ethics have issued recommendations on how confidential information should be defined (Zimmerman, 1994).

Outside Employment

Public officers are also not permitted to work, seek compensation, receive compensation or represent anything other than the government when the government is involved or has an interest in the outcome (Zimmerman, 1994:35). For example the 1957 New York City Charter forbade public officers or employees from representing a client in a legal case if the city was involved in the case (Zimmerman, 1994:35). Conflict of interest statutes also often have post-employment restrictions for public officers.

Conclusion

In Unit 5 we discussed the various events that constitute misconduct in countries with conflict of interest statutes. How these are played out on a country-to-country basis, and how they specifically impact the legislature is discussed in Unit 6.

Unit 5 questions

Please answer each of the following questions. If you are taking this course in a group you may then meet to discuss your answers.

- What is misconduct?
- What is the most common form of misconduct?
- What is a conflict of interest?
- What are the key differences between direct and indirect interests?
- What activities may have to be regulated and/or restricted to prevent conflicts of interest from emerging?
- Does dual office holding necessarily create a conflict of interests?

Select Bibliography

Joseph Zimmerman, *Curbing Unethical Behavior in Government*, Westport, Greenwood, 1994, chapters 2, 3 and 9.