

CONFLICT OF INTEREST: ETHICAL DILEMMA IN POLITICS AND ADMINISTRATION

*by Dr MJ Mafunisa**

ABSTRACT

This paper addresses the subject of conflict of interest: an ethical dilemma in politics and administration. Conflict of interest denotes a situation in which an employee has a private financial interest sufficient to influence, or appear to influence, the exercise of his or her public duties. A primary reason for concern about conflicts of interest is that they reduce public trust and confidence in the integrity and impartiality of public functionaries. The subject of this article is the categories of conflict of interest, conflict of interest's overlap with corruption and measures for combating conflict of interest. Different categories of conflict of interest that are identified and explained include the use of inside knowledge and influence, self-dealing, the misuse of government property, outside employment, post-employment, gift-giving traditions and entertainment, influence peddling and personal conduct. Measures for combating conflict of interest include oversight bodies, judicial institutions and commissions of inquiry. Oversight bodies include the Public Protector, the Auditor-General and the Public Service Commission.. To effectively fight conflict of interest, the government should implement the recommendations of these oversight bodies, no matter who may be involved. Failure to implement their recommendations damages the image of oversight bodies.

1 INTRODUCTION

Actual or apparent conflict between, or convergence of, public duty and private or personal interest has been the cause of numerous scandals involving those in public office, or unethical conduct by such persons, occasionally with serious repercussions. Globally, dealing effectively with conflict of interest is surfacing as a priority. The question normally asked is why dealing with conflict of interest should be seen as a priority. One explanation is that conflict of interest has grown worse, leading to a wave of public outrage and a new political resolve.

* Dr MJ Mafunisa is a Senior Lecturer at the School of Public Management and Administration at the University of Pretoria.

The other question is: why should conflict of interest have taken on more serious proportions? One line of argument cites the rapid increase of international trade and international communications, which exposes public functionaries to monetary temptation as never before. In emerging democracies, such as South Africa, it is possible that the extent of conflict of interest has not changed as much as the public's awareness and tolerance of it. Freedom of expression and media independence, as provided for in the Bill of Rights, make it easier for the media to expose unethical conduct such as conflict of interest. This was not possible under the old constitutional dispensation, as there was less freedom of expression. At all events, conflict of interest must be combated as it destroys public trust and confidence as well as the country's social and economic standing.

2 DEFINING CONFLICT OF INTEREST

Interest includes all those influences, emotions and loyalties that could influence a public functionary and compromise the exercise of his or her competent judgment. Conflict of interest involves a clash between influences of this nature and the interests of the public that the functionaries serve. According to Williams (1985:6), conflict of interest denotes a situation in which an employee has a private financial interest sufficient to influence, or appear to influence, the exercise of his or her public duties and responsibilities. The concept is applicable not only to situations where a conflict of interest actually exists, but also to situations where it appears to exist. A charge of conflict of interest may arise not only when public duty clashes with private interest, but also when they appear to converge. This conflict or convergence is invariably reduced to two specific kinds of interest: the interest of the elected office bearer or appointed employee in the proper administration of his or her office; and his or her interest in his or her own private financial affairs.

Frier (1969: 3-4) argues that a conflict of interest exists when a public employee's public responsibilities clash, or appear to clash, with his or her private economic affairs. In its narrowest and perhaps crudest sense, conflict of interest refers to a set of circumstances in which a public employee uses his or her government position, either overtly or covertly, in such a way as to achieve personal monetary gain. In its broadest sense, it refers to any situation in which an employee's public responsibility and private interests conflict and does not suggest that the clash has been resolved to the advantage of the private rather than the government interest.

The above definitions contain three key elements. First, there is a private financial or economic interest, which could also be another sort of interest, for example, securing some advantage for a family member. In actual fact, there is nothing wrong with pursuing private financial interest; for example, joining a new employer to improve the family's living conditions. The problem arises

when this private interest comes into conflict with the second element in the definitions, "public duties/responsibilities". Public employees and political office bearers have certain responsibilities to discharge by virtue of the offices they hold. They should know that they must put their public duties before their private interest. Third, conflict of interest interferes with the public duties of public functionaries in that objectivity and judgment are likely to be compromised.

3 WHY THE CONCERN ABOUT CONFLICT OF INTEREST?

A primary reason for concern about conflicts of interest is that they reduce public trust and confidence in the integrity and impartiality of public functionaries. In this respect, the appearance of a conflict of interest can be as damaging as an actual conflict (Kernaghan & Langford 1990:139). Once in discussing his code of conduct, President John F Kennedy (in Frier 1969:3-4) remarked that even though a technical conflict of interest may not exist, it is desirable to avoid the appearance of such a conflict from a public confidence point of view.

The above view is also supported by Williams (1985:6), who remarks that even if no financial gain accrues to the employee involved, other aspects of the conflict of interest dilemma do create problems and attract criticism: for example the problem of competition for the public functionary's time has been recognised. There is also the criticism that a multiplicity of outside interests may consume an unduly large amount of the time and energy public functionaries have available to think about and perform their duties. Media coverage of incidents and allegations of conflict of interest have stimulated this public concern, which in turn has prompted many politicians to seek out cases of actual or apparent conflicts of interest involving their political opponents with a view to making political capital out of adverse media coverage.

Increased concern in contemporary society about conflicts of interest is largely due to the realisation that public employees now have more opportunities to put private benefit before public duty. These opportunities arise from the increased scale and complexity of government and the expansion of bureaucratic power in the policy process. The slow growth in government means that public employees now have fewer opportunities for promotion and that their jobs are likely to be less permanent. The detrimental effect of these developments on morale has been aggravated by the relatively low public image of the public service. That is one of the reasons why more public employees may feel less committed to their jobs and may increasingly engage in activities for remuneration outside government as a hedge against losing or quitting their jobs. In some cases, public employees may feel that the financial and psychological rewards that they derive from serving the public are so inadequate that they are justified in using their public office for private gain (Kernaghan & Langford 1990:139-140).

4 CATEGORIES OF CONFLICT OF INTEREST

Different categories of conflict of interest are identified and discussed in the paragraphs that follow.

Using inside knowledge and influence

Stipulation C.5.4. of the code of conduct for public servants (PSC: undated) does not allow an employee to use or disclose any official information for personal gain or the gain of others. In many situations a public employee can make access to inside knowledge a source of potential profit. In the sphere of local government, the director of city planning could potentially profit from knowing where new sewer facilities are to be constructed or what land is likely to be rezoned. Such knowledge has significant financial implications for land purchasers. There is a temptation to pass this invaluable information on to friends or relatives before it is made public. Public employees often become silent partners and profit from these transactions, either in exchange for the information they provide or as a gratuity for their tacit manipulation of events to make such transactions possible.

According to Murphy et al (1981:496), some public employees argue that it would be foolish not to take advantage of inside knowledge gained as bystanders, but that it would be immoral and illegal to actively influence decisions which could favorably affect their own pockets.

Public employees are often able to avoid conflicts of interest by disqualifying themselves from situations in which personal interests are involved. In judicial circles, for example, a judge may disqualify himself or herself because he or she was the prosecuting attorney on a case that is now before him or her on appeal. Similarly, a professional employee may disqualify himself or herself when he or she is called upon to make decisions affecting a firm for which he or she formerly worked or where he or she is a director.

Self-dealing

Self-dealing refers to a situation where one takes an action in an official capacity which involves dealing with oneself in a private capacity and which confers a benefit on oneself. The notion of self is expanded to include one's spouse, family members, and business partners. It also refers to situations in which a public administrator may be in a position to do favours for a relative. This form of conflict of interest is also called nepotism. It is a special class of influence peddling since the motivation is similar to that in other such cases discussed above. It involves using influence to gain preferential treatment in hiring, promotion, awarding contracts, or other business practices in which a

relative will benefit. The public administrator who engages in such practices gains not directly but indirectly, by reinforcing family bonds and obligations of mutual support (Cooper 1990:117).

An obvious example of self-dealing is a public employee who awards a contract to a company which he or she owns (Kernaghan & Langford 1990:142). In an actual case, four tenders were submitted to the former Department of Development Aid for earthworks at a cost of R2.6 million. It emerged that three of the tenders were fictitious and the fourth (successful) tender was signed in the maiden name of the wife of the public employee responsible for awarding the contract (Pickard Report 1992:45 & 47).

Using government property

Public employees should not use, or permit the use of, government property of any kind for activities not associated with the performance of their official duties, unless they are authorised to do so. The private use of government property can take different forms. These can range from relatively minor offences such as taking pencils home or using a government office for non-governmental purposes to major offences such as using government computers for a private business (Kernaghan & Langford 1990:145).

Stipulation C.4.8. of the code of conduct for public servants (PSC: undated) instructs public employees to be honest and accountable in dealing with public funds and to use the public service's property and other resources effectively, efficiently, and only for authorised official purposes.

Outside employment

Outside employment refers to the work or activity in which a person engages outside normal working hours for additional remuneration. While such activity may be conducted on a full-time basis, it usually involves part-time work and includes a wide variety of activities such as working for a non-governmental organisation, running a business, or consulting. Conflict of interest problems arise when outside employment (or moonlighting) by public employees clashes with the performance of their official duties. Cooper (1990:116) argues that conflict situations include the use of public employment status to enhance a private employer (or oneself), the draining away of effort and energy required for official duties, and the use of government services and equipment in outside work.

More specifically, moonlighting may need to be restricted:

- if the activity is in direct competition with the employer,
- if the employee's work performance is affected,
- if the employer's property is being used to engage in the activity,
- if confidential information is being used by the employee,
- if the employee is using his or her position to solicit business, or
- if the employee's activity could be perceived by the members of the public to be a conflict of interest (Kernaghan & Langford 1990:147).

Stipulation C.55 of the code of conduct for public servants (PSC: undated) does not allow public employees to undertake remunerative work without approval outside their official duties or use equipment for such work.

Post-employment

The scope of private interests considered relevant to the conflict of interest debate also varies, extending from the fundamental level of interest the employee possesses while holding office to encompass interests discussed when taking office, interests their families have and interests acquired on leaving office. Economic interests for public functionaries are likely to arise on retirement or resignation, where there are potential opportunities for using confidential information or expertise obtained in public office, or influencing policy either for their own benefit or for that of their prospective employer (Williams 1985:8-9). Kernaghan and Langford (1990:149) describe post-employment as subsequent employment or future employment. It constitutes conflict of interest when public employees use, or appear to use, information and contracts acquired while in government to benefit themselves or others after they leave office.

Among the varieties of conflict of interest, the post-employment problem is one of the most difficult to regulate. The difficulty arises in large part from the fact that the persons being regulated are former public employees; once public employees have left the government, the range of penalties that the government can apply to them is more limited. In the Canadian federal government, ministers and public employees are responsible for ensuring that former public employees do not take advantage of their previous position (Kernaghan & Langford 1990:150).

Reaffirming their political commitment to enhance professionalism and ethics in the public service, African public service ministers (Charter for the Public Service in Africa 2001) argue that upon leaving office, and for such period of time as may be stipulated by law or by the relevant regulations, public service employees appointed to certain positions of responsibility and trust should not take undue advantage of the positions they previously held, by accepting

remunerated employment that is related to their previous functions.

Addressing a media briefing in Pretoria, President Mbeki (The Star 2001:1) stated that the government was working on new regulations that would clarify the role of employees involved in the negotiation of huge contracts and limit corruption. He cited as an example the fact that any cabinet minister could leave the government to join a field in the private sector which operated in an area covered by the minister during his or her term. Such a move, Mbeki stated, could be viewed as corruption since the minister would have participated in the award of tenders to a firm that he or she later joined. The legislation was to make it impossible, for instance, for a former defense minister to join the arms industry after leaving the government. The new regulations were being drafted in the light of the controversies emanating from the arms deal probe as "the issues that had been raised were relevant and needed to be addressed".

Gift-giving traditions and entertainment

Gifts and entertainment refers to seeking or accepting gifts and hospitality that might influence a public employee's impartial discharge of his or her duties. This category simply amounts to a broadening of one's understanding of bribery. It includes such things as discounts on purchases, theatre tickets, sex, vacation trips, the use of vehicles, lavish meals, recreational equipment and liquor. Typically, gifts of this kind are given with no specific favours requested, as would be the case with bribery, but are intended to create a generally positive predisposition towards the donor (Cooper 1990:116).

Stipulations C.4.5.2 and C.5.3-5.5 of the code of conduct for public servants (PSC: undated) state that an employee should not engage in any transaction or action that is in conflict with or infringes on the performance of his or her official duties; nor should he or she use his or her official position to accept any gifts or benefits when offered, as they may be construed as bribes.

The explanatory manual (PSC 1997) on the code of conduct for public employees has identified three areas where the issue of bribery in the form of a gift may be implied. Firstly, there are gifts that the employee should not accept. These include gifts presented by either the public or potential or current providers of services to the public service. This practice is discouraged because it is believed that it may create unethical and unfair competition between the providers of such services. Secondly, there is another category of gifts that an employee ought not to accept. These include gifts presented by other public employees, for example, on the occasion of a birthday, especially where there is a relationship between the supervisor and the subordinate. Thirdly, there is a category of gifts which an employee may accept; for example when an employee leaves the public service and his or her colleagues decide

to give a farewell gift, and courtesy gifts. From a cultural perspective it is difficult to argue against the acceptance of such gifts.

According to Baai (1999:375), giving gifts has always been an African social tradition. This practice, however, differs significantly in many ways from acts of corruption. The following are its main features:

- The gift is not presented in secrecy.
- It is not a violation of duty or of the rights of the community.
- It is not meant to be in return for favours, such as contracts, benefits and licences.

Bozkurt and Moniz (1997:89) remark that the continuation of the tradition of gift giving prepares a fertile ground for corruption. For example, before the onset of colonialism, in many Southeast Asian countries instead of a regular salary, employees used to receive a given fee for a given job. In the Ottoman Empire too, the “kady” (judge of Islamic law) would receive a fee for resolving disputes between parties. A present of a basket of fruits or a couple of chickens for the employees in Indonesia was very common (Heidenhammer 1970:205). In Burma, too, giving gifts to judges was acceptable according to custom. In societies where this tradition continues to be effective, individuals do not see giving presents to public employees something that is against the rules, and the public employees are not averse to receiving them. For instance, in African countries such as Kenya, Uganda, Tanzania, Nigeria and Ghana, the tradition of giving presents in accordance with tribal customs still persists (Bozkurt & Moniz 1997:90).

Wraith and Simpkins (1964:36-37) also support the argument that this tolerance stemming from traditions creates a fertile ground for corruption and bribery. In addition, they report that in Africa, gifts are being replaced with money.

Influence peddling

Influence peddling is the practice of soliciting some form of benefit from individuals or organisations in exchange for the exercise of one’s official authority or influence on their behalf. It is closely related to the practice of accepting gifts. However, it is a more active form of conflict of interest in that it involves the solicitation of benefits (Kernaghan & Langford,1990:145).

Personal conduct

The question whether a public employee’s personal life is any of the government’s business is difficult to answer. Kernaghan and Langford (1990:152) argue that the personal conduct of public employees is an area

where government must tread warily for fear of infringing the public employee's right to privacy. The question is whether public employees are entitled to the same privacy as other citizens. It seems reasonable to argue that in at least two circumstances, a public employee's personal conduct, outside government, may constitute conflict of interest. The first circumstance is when a public employee's conduct (for example, drug addiction) makes him or her vulnerable to pressure to use his or her public office improperly. The second circumstance is when the public employee's conduct brings significant discredit to the government or to a particular department and thereby undermines public trust in public employees.

Kernaghan and Langford (1990:153) argue that members of the public should be more concerned if a public employee who regularly engages in fist fights in a local bar is a law enforcement officer than if he or she is a janitor. Similarly, they should be more distressed if a public employee addicted to drugs is a director than if he or she is a file clerk. In any event, it is clear that each case of questionable or improper personal conduct involving public employees needs to be carefully considered on its merits.

5 CONFLICT OF INTEREST OVERLAPS WITH CORRUPTION

According to Williams (1985:16), while politicians and commentators alike tend to conflate conflict of interest and corruption in public life, and there is inevitably an intermediary grey area in which qualities of both are to be found, analytically a distinction should be drawn between the two. Conflict of interest in itself does not imply resolution in favour of personal advantage, merely that a conflict exists which could be resolved in one of several ways. Corruption, on the other hand, can be viewed as a particular method of resolving this conflict, whereby personal financial interest overcomes or distorts the exercise of an employee's public duties and responsibilities; distortion may be incidentally beneficial to the "public interest". Corruption is not an end in itself, simply an illegal means to achieve a particular outcome or effect.

Corruption is referred to in a variety of contexts but this article is primarily concerned with the overlap between conflict of interest and corruption within public institutions, namely political and administrative corruption. Most broadly, corruption means the misuse of office for personal gain. An office is a position of trust, where a public employee receives authority in order to act on behalf of a public institution. Corruption refers to charging an illicit price for a service or using the authority conferred by an office to further illicit aims. It may be internal to the institution (for example, embezzlement) or external to it (for example, extortion). It may involve legal activities or illegal ones (Klitgaard; Maclean-Abararoa & Parris 2000:2). Corruption can entail acts of commission or omission. In this regard, the Corruption Act 94 of 1992 prohibits public functionaries from offering or accepting, or agreeing to offer or accept, or

attempting to obtain any benefit for committing or omitting any act in relation to their assigned duties.

Political corruption mainly focuses on political office bearers' behaviour or attitudes, which are the result of the violation of political norms or expectations, while administrative corruption deals with bureaucrats' or public employees' behaviour in the process of implementation of public policy by using their powers for their own benefit or to satisfy their greed.

In fact, it is difficult to distinguish between the two subjects because the paradigm of political theory is sometimes very similar to that of public administration (Bozkurt & Moniz 1997:49-50). Corruption tends to occur when there are unchecked opportunities for collusion between political office bearers and public employees.

6 MEASURES FOR COMBATING CONFLICT OF INTEREST

The following are some of the measures for dealing with conflict of interest in the public sector.

Oversight bodies

Oversight bodies for dealing with conflict of interest will be identified and discussed in the paragraphs that follow.

Auditor-General

The post of the Auditor-General, as it presently operates, was created in terms of section 188(1) of the Constitution of the Republic of South Africa, Act 108 of 1996. The functions of the Auditor-General are to ascertain, investigate and audit all the accounts and financial statements of:

- all departments of the central, provincial and local spheres of government, and
- any statutory body or any other institution which is financed wholly or partly from public funds.

The Auditor-General also conducts performance audits at the request of the President. Du Toit (1991:67) remarks that through his or her responsibility for performance auditing, the Auditor-General judges policies and transactions in terms of the "value for money" principle.

In the performance of his or her functions, the Auditor-General has the power to summon accounting officers. Accounting officers are the administrative

officials who head administrative executive institutions such as the state departments or research institutes. They are also known as the chief executive officers. Although these officials usually work under the direct supervision of ministers, they are directly accountable to the legislatures in respect of financial matters. The legislatures appoint some of their members to public accounts or finance committees which can summon accounting officers to give an account of financial transactions involving their specific institutions. The word "accounting" in the title of the officials concerned, argues Cloete (1998:197), refers to the rendering of account and to answerability, and not to accounting in the sense of bookkeeping.

A forensic auditing capacity was established in 1997, based on the increasing level and negative effect of economic crimes on the public accountability process, which obliges the Office of the Auditor-General to report on such crimes within the public sector. The objective of the Office of the Auditor-General with respect to forensic auditing is to:

- determine the nature and extent of the perpetration of economic crimes and the adequacy and effectiveness of measures that should have either prevented or detected them, and
- facilitate the investigation of economic crime in general by providing support to the relevant investigating and/or prosecuting institutions (by handing over cases and providing accounting and auditing skills) (PSC 2001:13).

To address corruption, preventive and reactive strategies have been developed by the forensic auditing division. The proactive strategy is aimed at preventing economic crime by promoting an overall fraud awareness culture in the public sector through, among other things, publications, workshops and participation in relevant national and international initiatives. The following aspects have been identified to minimise the risk of economic crime:

- strong financial management systems,
- effective internal controls, and
- adequate awareness (and acceptable standards of conduct).

The reactive strategy is aimed at the investigation of allegations of economic crime. Allegations submitted to the office of the Auditor-General are confirmed or refuted by collecting and submitting substantive evidence and findings are reported through the normal audit process or, when applicable, are handed over to institutions with investigating and prosecuting powers (PSC 2001:13).

Public Protector

The Office of the Public Protector was established on 1 October 1995 in terms of the Constitution of 1993. Previously an Office with related functions existed. This was known as the Office of the Ombudsman and was established on 22 November 1991. The latter Office evolved from the Office of the Advocate-General, which was established on 18 July 1979. The name was changed from "Advocate-General" to "Ombudsman" to ensure that South Africa is in line with other countries. For the promotion of legitimacy and gender sensitivity and in order to ensure that the office bearer is seen to be accessible even to the layperson in the street, the name was changed to the Public Protector. The Office of the Public Protector, as it presently operates, was created in terms of section 191(1) of the Constitution of 1993 (Mathebula, Mafunisa & Makobe 2002:41).

The Public Protector has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice. In terms of section 112(1) of the Constitution of the Republic of South Africa Act 200 of 1993 the Public Protector shall, on his or her own initiative or on receipt of a complaint, investigate any alleged maladministration, abuse or unjustifiable exercise of power, improper or dishonest act, corruption, unlawful enrichment, or receipt or any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration of public institutions, or omission by a person in the employ of any sphere of government, or a person performing a public function, which results in unlawful or improper prejudice to any person.

The enabling legislation for the Office of the Public Protector is found in sections 181-183 and 193-194 of Chapter 9 of the Constitution of 1996. National legislation regulating the Office is found in the Public Protector Act 23 of 1994. The Act embroiders on the Constitution by spelling out that maladministration, abuse of power, improper conduct, undue delay or an act resulting from improper prejudice to a person may be investigated.

The Office measures its effectiveness in terms of whether recommendations in a particular case are followed. It has been found that although the government does act in most cases, it does not always follow the recommendations, particularly with respect to political office bearers. According to the PSC (2001:20), where the recommendations are against public officials the Office gets full backing from Parliament. But where those recommendations are against political office bearers the majority party closes ranks. That does not happen too often. It is unfortunate that it happens at all because the image of the Office suffers. It can be argued that those who are found to be corrupt or involved in conflict of interest should be punished to make the re-

commendations of the Public Protector effective in curbing conflict of interest; and also to promote public confidence in the functioning of the Office.

Public Service Commission

The PSC's main role as mandated by the Constitution of 1996 is that of effective oversight and monitoring of the public service. It is responsible for investigating, monitoring and evaluating the organisation and practices of the South African public service. It derives its mandate from sections 195 and 196 of the Constitution of 1996. Section 195 of the Constitution sets out the values and principles of public administration that must be promoted by the public service commission. These values and principles include:

- promoting and maintaining a high standard of professional ethics,
- providing services impartially, fairly, equitably and without bias, and
- ensuring accountability on the part of the public administration.

The PSC (2001:24) recognises that corruption is a problem in all spheres of government and has therefore established the Chief Directorate: Professional Ethics and Risk Management. The role of this directorate is to identify and address the weaknesses and vulnerability of state management systems and highlight the possibilities these offer for abuse by individuals and syndicates. In particular, financial disclosures by senior Public Service managers reveal that conflict of interest is a major issue which requires monitoring and the raising of awareness.

In the course of 1999 the PSC (2001:25) conducted an investigation into dismissals as a result of misconduct (between 1996 and 1998). Out of a total of 2247 cases, 1077 were finalised and 1170 are in the process of being finalised. Almost 90% (964) of the employees concerned were found guilty and as a punishment 238 were dismissed from the Public Service and the rest incurred penalties other than dismissal. Of the finalised cases, 281 were corruption related. One hundred and two employees out of the 238 employees (42,8%) who were dismissed from the Public Service were dismissed in respect of corruption-related transgressions, including fraud, embezzlement and bribery.

Figure 1: Corruption-related dismissal cases 1996-1998
(Source: PSC 2001:25-26)

Corruption variables	1996	1997	1998	Total	%
Fraud/misappropriation/ embezzlement of funds	13	20	26	59	57,84
Theft	9	14	11	34	33,33
Acceptance of commission or fee (bribe) to carry out or not to carry out official duties			9	9	8,83
Total	22	34	46	102	100

It is clear from the above figure that it is difficult to prove that employees have engaged in bribery-related activities and subsequently secure a dismissal. Nevertheless, the Commission has played an important role both in terms of putting the issue of corruption on the agenda by initiating conferences and by establishing the anti-corruption forum. The creation of the investigations component for corruption-related cases is a new development and will need to be monitored to ensure its effectiveness.

Judicial institutions

The existence and proper functioning of judicial institutions are further deterrents against unethical behaviour in the public sector. Rasheed and Olowu (1993) argue that the judiciary contributes to checking the abuse of administrative power and making political office-bearers and public officials account for their actions. Legal disciplinary sanctions are instituted against the erring political office-bearers and public officials.

Maluleke (in Mafunisa 2000:64) argues that imprisonment without the option of a fine should be the minimum sentence for those involved in corruption. Where the government has suffered irrecoverable monetary or proprietary loss through acts of public service corruption, the offenders should have their movable or immovable property attached by due process of civil law, in the context of civil justice. In the event of an elected public functionary's conviction on more than one count of corruption in the context of his or her service to the public, the person convicted should be imprisoned with the obligation to do hard labour for failing to work in the public interest. Maluleke concludes by stating that a sentence that is fair to the accused and consistent with the gravity of the

crime is reasonable and justifiable in an open and democratic South Africa.

Most judicial institutions hear cases in public, and give motivated reasons for their judgments after evidence has been heard. Court cases usually receive wide publicity in the press. The fear of being exposed in public by the press is a factor which might discourage political office-bearers and public officials from acting in an irresponsible manner. For the courts of law to be effective in instilling a sense of accountability to political office-bearers and public officials, their independence and objectivity must be maintained (Cloete 1993: 124-125).

Commissions of inquiry

Commissions of inquiry are established to serve a specific purpose; after that purpose has been served, these bodies cease to exist. Commissions of inquiry are appointed to investigate matters of national or provincial interest. The President or a premier can appoint a commission of inquiry to inquire into matters of national interest, for example if there are allegations of mal-administration, subjective and arbitrary decisions, corruption or fraudulent appointments.

In South Africa, it is a fixed practice to appoint judges to head commissions of inquiry and to do other non-judicial work. Their services are used because of their:

- public standing
- reputation for impartiality and integrity
- capacity to ascertain the true state of affairs
- capacity to make fair proposals for the solution of difficult problems (*South African Association of Personal Injury Lawyers v Heath and Others* 2000:1156).

The practice of appointing judges to commissions of inquiry has been criticised in other countries. For example, Sir Garfield Barwick, Chief Justice of Australia, has pointed to the dangers and disadvantages of having a member of the judiciary investigating matters completely divorced from the law, often requiring the formation of opinions on political issues, and, in the mean time disrupting the administration of justice through his or her absence from the bench (*Hilton v Wells and Others* 1995). The attitude of the judiciary in Australia is that their members will not accept nominations as royal commissioners "except in matters of national importance arising in times of national emergencies". In the United States of America, Stone of the United States Supreme Court stated that it is a long tradition of their court that its members do not serve on committees or perform other services not having a direct relationship to the work of the court [*Mistretta v United States* 1989].

It is submitted that judges may only perform those extrajudicial functions that are either incidental to their judicial role or at least not incompatible with it. An extrajudicial role is incompatible with judicial independence if it in fact erodes a judge's independence of the other two arms of government, or creates a perception that it does so. Situations which might have this effect include the following:

- where the function is more usually or appropriately performed by another branch of government,
- where the performance of the function is subject to executive control or direction,
- where the performance of the function requires the judge to exercise a discretion and to make decisions on the grounds of policy rather than law,
- where the performance of the function creates the risk of judicial entanglement in matters of political controversy,
- where the performance of the function involves the judge in the process of law enforcement, or
- where the performance of the function occupies the judge to such an extent that he or she is no longer able to perform his or her normal duties (*South Africa Association of Personal Injury Lawyers v Heath and Others* 2000:1152).

Rasheed and Olowu (1993:158) contend that commissions of inquiry investigate some aspects of allegations of mismanagement by public functionaries and that such inquiries have a deterrent effect on others. One of the most important factors in creating an effective disciplinary system is establishing patterns of predictability. This means that unethical behaviour at work will be punished promptly and publicly, in a uniform manner. Most public officials will be cautious about becoming involved in such mismanagement because they will be aware that there might be a public inquiry, which could result in their losing their jobs and being publicly castigated. The setting up of an inquiry should be a testament to intolerance and disapproval of unethical practices.

7 CONCLUDING REMARKS

Conflict of interest, including corruption, bribery, fraud and using inside information and influence for personal gain, is a crime of economic calculation. If the probability of being caught is small and the penalty is light and the pay-off is large relative to the positive incentives facing the public official, then the public sector will tend to find conflict of interest.

If it intends to deal effectively with conflict of interest, the government must think of increasing penalties, changing the incentives of public officials and increasing the probability of culprits being caught. The government should also clarify discretionary powers and create a conducive environment within which oversight bodies could function. In other words, the government should not drag its feet when it comes to implementing any recommendations made by the Public Protector, the Auditor-General, commissions of inquiry or the Public Service Commission. Failure to implement the recommendations of the oversight bodies damages the image of these bodies.

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