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of interest in parliament:
The case of the
Portuguese *Assembleia
da República*

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Abstract

In recent years, the problematic relationship between conflicts of interest and corruption has been a sensitive one to democracy. Although conflicts of interest have not always resulted in corruption, they do constitute an important opportunity structure for such illicit behaviour.

The Portuguese attempt at regulating conflicts of interest in parliament has been paradigmatic: eight legislative interventions to the first Statute of MPs in less than two decades and parliament was still unable to create an appropriate ethical framework to prevent financial impropriety deriving from the accumulation of the representative mandate with other outside jobs and activities. The incremental nature of adjustments, the peculiar “tailor made” nature of legislation and the importation of regulatory models “in place” abroad, raise important aspects in regard both to the scope and efficacy of the instruments adopted as well as the legislators’ intentions and willingness to move on with the necessary reforms.

This paper attempts to assess the regulatory performance and reform efforts of the Portuguese *Assembleia da República* in addressing MPs’ conflicts of interest through the analysis of the control framework adopted, namely, rules of disclosure and legal constraints to accumulation.

THE REGULATION OF CONFLICTS OF INTEREST IN PARLIAMENT: THE CASE OF THE PORTUGUESE *ASSEMBLEIA DA REPÚBLICA*

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In recent years, the problematic relationship between conflicts of interest and corruption has been a sensitive one to democracy. Although conflicts of interest have not always resulted in corruption, they do constitute an important opportunity structure for such illicit behaviour. The introduction or revision of rules of disclosure and incompatibilities – as a means to secure the *equality* of citizens concerns before representative institutions; to ensure *transparency* on interest representation; to make representatives *accountable* to their electorate; and to guarantee the *impartiality/objectivity* and *integrity/selflessness* of MPs in performing the duties and prerogatives associated with their representative mandate – was part of the package of legislative measures implemented during the late 1980s and early 1990s to curb the incidence and scope of corruption in political life.

The Portuguese attempt at implementing rules of disclosure of MPs' assets and interests or limiting accumulation with outside jobs and activities has been paradigmatic: eight legislative interventions to the first Statute of MPs in less than two decades. In all these legislative initiatives, MPs were unable to create an appropriate ethical framework to prevent financial impropriety in office deriving from the accumulation of the parliamentary mandate with other outside jobs and activities. The incremental nature of adjustments and the peculiar "tailor made" nature of regulation raise important aspects in regard both to the scope and efficacy of the instruments adopted as well as the legislators' intentions and willingness to move on with the necessary reforms.

Another important aspect of the Portuguese approach at reforming conflict of interest regulation is the adoption of instruments from countries where they seem fit and effective. In spite of the legislators' increased knowledge about successes and failures of foreign regulatory experiences and the subsequent importation of instruments "experimented" or "in place" abroad, this institutional copycat only goes as far as importing the form, but not the essence of the control structure. Portuguese legislators have been guilty of admiring the outcome of the self-regulatory Westminster approach while overlooking its method. Unfortunately, the importation of models and approaches has taken place more easily and faster than the expected convergence of ethical standards across the two very different political systems. For that reason, neither the regulatory performance and reform efforts of the Portuguese *Assembleia da República* can be assessed without taking into consideration specific lines of legal-historical development, nor the MPs' poor record on making control frameworks workable can be disassociated from the overall indifference of Portuguese society towards conflicts of interest.

This paper attempts to assess the way Portugal has addressed the problem of conflicts of interest in parliament through the analysis of the rules of disclosure and legal constraints to accumulation adopted.

THE REGULATION OF CONFLICTS OF INTEREST IN PARLIAMENT: THE CASE OF THE PORTUGUESE ASSEMBLEIA DA REPÚBLICA

“Law and morality may succeed for a time in holding human appetites, ambitions and propensities in check, but when opportunities arise, they will break out again from the depths of the human heart.” Theophrastus

1. A Brief Historical Background to Reform in Western Democracies

In recent years, the problematic relationship between conflicts of interest and corruption has been a sensitive one in most democracies. The changing nature of the State and the blurring of the public/private divide have been at the core of recent cases of corruption, alerting decision-makers to the need to strengthen controls and reinforce public ethics. Corruption grows where the distinction between public or private interests, which is so central to democratic administrative and political systems, is neither legally regulated and enforced, nor socially expected. Even if conflicts of interest have not always resulted in corruption, they do constitute an important opportunity structure for such illicit behaviour.

Cases of financial impropriety in office have varied across countries and so have the moral costs against these practices. Of particular relevance have been the increasing occurrences of corruption, influence trafficking and profiteering at the parliamentary level. The inadequacy of conflict of interest rules to MPs, in the light of increased opportunities for illicit behaviour, posed a serious threat to the ethical standards underpinning representative institutions. On the one hand, opportunity structures for corruption and impropriety in parliament grew apace due to the interaction of a number of transformations: the increased regulatory function of the State; the expansion of political consulting and lobbying firms; the changing nature of national political elites; the decline in the popularity and visibility of national representative functions; the “payroll” vote relationship between MPs and the executive; and the possibility of accumulating several offices, jobs or mandates. On the other hand, the costs imposed upon conflicts of interest in parliament have been substantially reduced: weakened ethics and controls inside party structures and the house of parliament; weak conflict of interest rules applying to elective officials; and more worryingly, a tolerant environment towards these

exchanges. These are some of the conditions that help us to understand the complex nature of the problem and the difficult task of introducing a workable regulatory framework.

Unlike public office, one of the major difficulties in regulating conflicts of interest in parliament is that MPs, or any elective official to that matter, are temporary office holders, whose permanence in office is dependent upon (re)election. Hence it is difficult to make them accept and guide their conduct by the same principles which govern civil servants and to impose credible sanctions, which aim at clearing conflicts of interest in a continuum, i.e. prior to and following the holding of office.¹ For that reason, legal frameworks regulating conflict of interests have often aimed only at targeting specific situations of conflict which are more prone to threaten the probity of office holders *while in office*. The object of control is therefore the *accumulation* of elective office with certain jobs and positions across different spheres of activity. Controls address the office itself rather than its holder. A more comprehensive initiative to conflicts of interest would require that they be addressed in a continuum as opportunity structures for illicit behaviour, emerging from past or future interactions between actors positioned in different spheres of activity which may put the public interest at risk. This continuous scrutiny of conflicts of interest has not been an easy solution to implement. Whereas, in some regimes, elective officials have been impeded from entering contractual agreements with certain business sectors after leaving office, as part of a conflict of interest

¹ In Portugal, the law 42/96, which came to review incompatibilities and impediments to elective and senior public officials, introduced a new art. 9-A (*previous professional activities*) aimed at constraining situations of conflict taking place before entering office. Elective and senior public officials – MPs excluded! – who have detained directive positions or a certain share in capital in private companies during the three years prior to entering office, were excluded from celebrating any contract or from being suppliers of goods and services to the State or any public entity to that effect and to take part in any public decision or administrative procedure, such as the concession of change of authorisations and licensing, acts of expropriation, the concession of patrimonial benefits, in which those companies were parties. These impediments were obviously aiming at safeguarding the impartiality and rectitude of office holders during any contractual or commercial relation between the state and any public entity and private actors. An interesting exception, however, was set by art. 9(2): those who have detained those directive positions in private companies doing business with the State by public appointment were excluded from such impediment. The risk of this exception is notorious, in the sense that it does not demand the same requirements of impartiality and rectitude from those ministers or secretaries of state recruited from the B.o.D.s of newly privatised public and semi-public companies. The consequence is both situations of personal enrichment at the ministerial level due to the use of privileged information and the establishment of solid clientelistic and privileged relationships between the executive and these companies in detriment of fairness and impartiality.

The document aimed at reducing the opportunity structures for corruption emerging out of situations of conflict of interest, yet there was great disparity in relation to the penalties imposed to elective or public officials. Article 14 provides that any acts and contracts celebrated under these conditions will be considered null and the senior public officials who have acted in conflict will be suspended from their duties for a period of three years. Elective officials, i.e. governmental officials, are excluded from punishment. One practical reason for that is the fact that their mandate might have ended by the time a conflict of interest is ascertained. In practice, this means that the proclaimed standards of “exemption” and “rectitude” demanded by this legal document to elective

clearance system, in most cases, they are only required to submit a declaration of interests and activities (i.e. *declaration of honour*) before taking and when leaving office. Even with the adoption of a register of interests, more often than not, declarations are not clear, systematic or representative of the interests and activities held by the elective officials in question.

The reforms on regimes of incompatibility that took place during the late 1980s and early 1990s show that not all elective offices were paid the same attention by legislators. Reforms have targeted those offices which are most exposed to media scrutiny and where the unveiling of a conflict of interest may trigger scandal. However, public opinion understanding of the risk of conflicts of interest to the due process in democracy varies from one country to another, from one period to another. In countries like Portugal, there is a myriad of situations of conflict that are perfectly acceptable to office-holders and citizens at large and, therefore, have not been subject to reform. In such a climate of toleration, it is unlikely that legal impediments will be adopted to constrain elective officials to adopt a particular posture in office. Unelected ministers, ministerial cabinet appointees and advisers, and local elective officials are still exercising their prerogatives under a feeble conflict of interest framework. The risks for impropriety are great and have only been minimised, to a very limited extent, by the media visibility of some of these positions. However, the watchdog role of the media in these matters is still inexistent.

Traditionally, conflict of interest rules have been particularly flexible and limited concerning the accumulation of a parliamentary mandate with private activities and interests. For a long time, such impediments were viewed as an encroachment on the representative function of MPs, hence they were kept to a minimum. The holding of private/professional activities cumulatively with the parliamentary mandate was perceived as a means of preventing an undesirable level of professionalisation of MPs, a method of enriching legislative works and debates and a mechanism enabling interest groups to voice their concerns in parliament.

In recent years, however, the functionality of such accumulation to representation has been overtly contested and difficult to sustain in the light of a series of scandals of financial impropriety deriving from conflicts of interest. The increased media reported instances of collusion between money and politics, between public and private interests in parliament,

officials can only be safeguarded if the government, its leader, or the party in parliament, imposes a political sanction, something highly unlikely to be put into practice.

through the “selling” of parliamentary procedures, privileged information, influence, and even amendments in legislation, proved costly to representative institutions. The abuse of office and its prerogatives for personal benefit – *profiteering* – helped to widen the gap between voters and the political class:

‘That “politicians” are blamed emphasizes the fact that they constitute a privileged group and a class in their own right, a *nomenklatura*, greedy for its privileges in contrast to popular and national virtues’ (Mény 1996, 320).

The visible aspects of financial impropriety became the ingredient for a ‘confrontational attitude’ (Mény 1996, 320) between the “haves” – i.e. “the politicians”/“them” – and the “have nots” – “the people”/“us” - wisely exploited by populist parties/movements which saw their electoral chances improving during this period. However, it was not just the ostentation and greediness of “a few rotten apples” that triggered public discontent, but the systematic way - or at least the perception of it - in which elective officials had profited illicitly from their office and prerogatives. It is true that MPs, parliaments, parties, the tenets of representative democracy, have never enjoyed great confidence from citizens at large, but, in some countries, the seriousness and systemic nature of these practices, put the dignity of parliament and the contractual relationship between voters and their representatives at risk for years to come.²

Regulating conflicts of interest to elective officials has become a standard corruption control concern in the majority of democracies worldwide. Having said this, if an unregulated environment is no longer an acceptable condition to the exercise of office prerogatives, most legislators are still finding hard to know exactly what does regulation need to address or, in other words, what constitutes conflict of interest, how much regulation is sufficient to safeguard their impartiality without encroaching with their representative function and

² It was not surprising, therefore, when, as a reaction to the wave of scandals on impropriety in British politics, such as the “cash for questions” saga and the Hamilton-Greer-Al Fayed affair, Lord Nolan suggested that it was ‘vital for the democratic process, that Members of Parliament should maintain the highest standards of propriety in discharging their obligations to the public which elects them. It is also essential for public confidence that they should be seen to do so’ (*First Nolan Report* 1995, 20). Two Gallup polls carried out in 1984 and 1995 respectively, showed that 64% of the public agreed that “most MPs make a lot of money by using office improperly”, a figure that has risen from 46% in 1984. The same survey showed 77% of the people interviewed believed that “MPs care more about special interests than about people like themselves” compared to 67% scored previously.

political nature of their mandate,³ and what model is preferred: honorary, disclosure, legal constraints or a combination of the three?

The universe of cases unveiled by the media varied from one country to another and that explains the diversified answers to the problem. Although the most problematic instances to control have been conflicts rising between elective and private jobs and interests, which will be the main focus of this study, the measures adopted have equally touched other kinds of conflicts no less relevant such as the accumulation of elective and governmental/appointed office or of several mandates across different levels of government, a practice known to the French as *cumul des mandats*.⁴

There is no panacea or standardised model of reform. Countries have responded differently according to their own legal and institutional traditions. Some countries have attempted to address conflicts of interest through the adoption or revision of impediments, incompatibility,

³ Elective officials need to demonstrate work done, if seeking re-election. Politics is about winning elections and getting re-elected, hence it is not sufficient for an elective official to show rectitude in office, he/she also needs to deliver. This, however, tends to be more a problem to executive offices than legislative ones. Direct political accountability to voter should not be overemphasized with regard to MPs. In many democracies, such as Portugal, the representative link between MPs and their constituents is feeble, hence accountability at the ballot box, if it does take place, it is meant to the incumbent party or coalition and not to the single individual.

⁴ On October 1994, the parliamentary working group "*Politique et argent*" gave an approximate picture of the extension of this practice: out of 450 MPs who accumulated their parliamentary seat with another mandate, 446 held cumulatively local executive and regional elective functions, the remaining 4 were also Euro-MPs. Most instances of corruption which took place in France during the early 1990s, involved politicians performing at different levels of decision-making (local, national and European) and across different spheres of activity (public, parapublic, private) thanks to accumulation. As Mény put it, 'La corruption à la française fonctionne à la confusion des rôles et des genres [...] Qu'on ne se méprenne pas: tous ceux qui cumulent ne sont pas corrompus heureusement! -, mais la structure du cumul et plus généralement la tolérance à l'égard du conflit d'intérêts sont au coeur du problème' ('Corruption – Leçons françaises du cas Italien', *Le Monde*, 30 September 1994, 2). Nonetheless, the problem of *cumul* is not just a French concern. The First Report by the Committee of Independent Experts on *Allegations Regarding Fraud, Mismanagement, and Nepotism in the European Commission*, which would culminate with the Santer Commission's decision to resign, found that the accumulation of local, regional or national and European mandates was at the heart of many instances of favouritism by certain commissioners. The ex-President of the European Commission, Romano Prodi also alerted to the growing dysfunction of representation caused by MEPs accumulating their seat in Strasbourg with other national elective offices (*La Repubblica*, Friday 30 March 2001, *Politica Interna*, 23). His intervention was essentially directed to Italian and French MEPs who are still allowed to exercise cumulatively both national and European parliamentary mandates contrary to the prohibition of such accumulation by most national regulatory frameworks. Most member-states have banned such type of accumulation in the light of the incompatibility that is often placed between representatives of the first and second parliamentary chambers. The problem at stake, however, is not longer the accumulation between national and European parliamentary mandates, which has been gradually curtailed and banned in most member-states, but between European and local ones. Mayor MEPs other than MPs-MEPs are the main challenge to any workable and comprehensive conflict of interest framework (to be) adopted by the European Parliament. In this regards, the EP will not only encounter different national regulatory arrangements to MEPs but, more importantly, different attitudes by national voters and political elites alike regarding the accumulation of local elective functions with the European parliamentary mandate.

and disqualification rules.⁵ Others ventured on a more comprehensive reform, which also included setting codes of conduct, introducing inductive guidance to new MPs, and revising or reinforcing rules of disclosure. In most instances, however, the process of reform has proved to be a sensitive and contested one, creating enough turmoil in backbenches. Reformers are often trapped between pressure from their peers and from public opinion at large. Evidence of this is the fact that these reforms, especially when it comes to the adoption of (new) impediments, are always negotiated together with a review of parliamentary privilege, and the wage and benefits of parliamentarians. There is nothing wrong with the carrot and stick strategy to formulate control measures aimed at curbing or preventing the likelihood of certain conducts in office. In practice, however, the carrot has often been bigger and sweeter than the stick. In other words, during the process of reviewing conflict of interest regulations as response to scandal or growing public concern, politicians have tended to raise or secure their privileges and perks without a tantamount increase on obligations and constraints. This is partly due to the *tailor-made* nature of legislative measures aimed at curbing corruption in political life: conflicts of interest rules are aimed at controlling/regulating the conduct of the very same people who legislate. Another common characteristic across country responses is the scandal-driven nature of reform. More often than not, addressing conflicts of interests to elective officials, and MPs in particular have been late responses to specific scandals rather than a proactive and long-term effort to curb conflicts of interest in parliament. The outcome of this legislative process is often characterised by two interrelated pitfalls: *the institutionalisation of situations of conflict*, i.e. the need to establish by law what ethics cannot prevent; and *the trivialisation of control*, the avoidance of stringent impediments through the introduction of symbolic or cosmetic reforms on the regime of incompatibilities as a reaction to crisis situations.

2. Concepts and options

Before assessing recent Portuguese attempts at regulating conflicts of interest in parliament, it is worthwhile untangling the various concepts involved: What do we mean by conflict of interest? What are the conceptual differences between the major regulatory options available:

⁵ In Portugal, for example, the Laws 9/90 of 1 March (art. 11) and 56/90 of 5 September (art. 7) introduced new incompatibilities to political office similar to those of senior public officials, whereas parliamentary office remained subject to special regulation, i.e. the Statute of MPs.

disclosure, disqualification and incompatibility rules? And why is it important to regulate for conflicts of interest in parliament?

The term “conflicts of interest” is yet another jargon of politics for which there is no universally accepted definition. Any tentative definition is unlikely to cover all possible scenarios, but should try to satisfy the most of one’s research objectives. *Conflicts of interest is when office-holders are placed in a situation in which their professional impartial judgment concerning a primary interest (the public interest) can be or perceived to be unduly influenced by or subjugated to other competing secondary (private) interests* (Williams 1985; Mény 1992; Kaye 2001 and 2003).⁶

Conflicts of interest are not deviant conduct or practice *per se*, but a condition which may lead office-holders to undermine the prerogatives and expectations attached to their office for private regards in the pursuit of public affairs. Hence, they are not inherently bad or avoidable at all times. It is rather the way they will be handled by the officer-holder in question and the regulatory instruments in place that can lead to inappropriate or undesirable consequences.

Despite many attempts at classifying these situations (bias, conflict of conscience, potential and actual conflict) and creating a sort of yardstick upon which regulators can make their evaluations and justify their preventive priorities, the conflicts of interest scenarios which office-holders can face on a daily basis remain patchy and their public condemnation unpredictable. Let us consider the following scenario. While few people would probably question an opposition MP who decides to help the incumbent’s budget proposal to pass in parliament by one vote majority – even if against his party will – because it devotes large sums of public investment to its constituency; his position would probably trigger immediate disapproval if it was unveiled that such public investment is destined to revitalise a small number of industries, which had been important financial contributors to his last campaign other than having employed his wife as a managing director. Confronted with a journalist’s question on his alleged conflict of interest, the MP would claim that his mandate demands loyalty to his constituents’ interests and that his “sympathy for the cause” of these small number of industrials will have a spill-over effect and eventually produce a “greater good” to his constituency by creating new jobs and fostering local development. This scenario shows

⁶ Although conflicts of interest can also take place in the private sphere alone, this article will be addressing only those situations which concern public office-holders, in particular, MPs.

how the condemnation of conflicts of interest is not always clear-cut, especially when ethical standards expectations are confronted with development questions and clientelistic contexts.

Although the term conflict of interest does not automatically suggest any pecuniary or non-pecuniary advantages drawn by office-holders from the subversion of their impartial judgement, profiteering has become central to the distinction between conflicts of interest and other bias or conflicting situations in the pursuit of public affairs, which remain outside the focus of regulatory efforts.

The second problem, which relates to the first, is what model of regulation should be adopted? There are essentially two approaches to addressing conflicts of interest (voluntary/soft or regulatory/hard) and three models of regulation: honour system, rules of disclosure and legal limitations to accumulation (ineligibility, disqualification and incompatibilities) (Kaye 2001). Most countries tend to display a mixture of all three.

It would be sufficient that all MPs shared a common understanding of what *negative influence* and *impartiality* meant, to make them refrain from entering into a situation of conflict. The honour system of regulation is based on the assumption that MPs know the basic principles and standards they are expected to apply to their work and where the boundaries of acceptable behaviour lie, because these have been clearly transmitted to them. The honour system is, therefore, a soft approach to conflicts of interest regulation, which puts emphasis on induction, codes of conduct - i.e. a concise, well-publicised statement of core ethical standards and principles that guide elective office – training and education with the ultimate objective of creating a shared understanding across elective officials and voters at large. However, standards of democratic governance might not be always harmonious and compatible as it is often suggested – market-imported principles, such as cost-efficacy and efficiency may clash with more traditional ones, like fairness and accountability – and different people and cultures have different understandings of the boundaries between public and private. For that reason, it is necessary to agree on a set of legal parameters to the interpretation of those standards. Despite any reasonable relativist criticism on the cultural looseness of ethical standards and skepticism on the enforcement of “ethics laws” in political life, a comprehensive legal framework is still the basis for communicating the minimum obligatory standards of conduct for every office-holder. Laws and regulations must state what are the fundamental values expected from elective office and put in place a framework for guidance, monitoring, inquiry,

and sanctioning. Of the various legal instruments put in place to regulate conflicts of interest, two have been emblematic: rules of disclosure and incompatibilities.

Rules of disclosure are essentially meant to provide *public control* over the elective officials' assets and interests before, during and after leaving office by rendering these transparent to citizens. Elective officials have to guarantee that they have the integrity and impartiality required to hold office. It is not sufficient that an elective official declares himself/herself to be honest, since there would be a myriad of interpretations of what is meant by "honesty". Some basic legal rules are laid down to create parity amongst elective officials and to establish objective obligations to the exercise of their representative mandate. The principles of *transparency* and *accountability* are viewed by this control measure as a pre-condition to the *integrity* and *impartiality* required to hold elective office. There are important variations across countries in terms of the addressees, the modes of disclosure (oral and written), the contents of declarations, the time scope of provisions and the monitoring and sanctioning procedures adopted.

Incompatibility rules aim at regulating those activities or jobs whose accumulation is considered to be in conflict with the representative mandate, but unlike ineligibility or disqualification rules, candidates found in a situation of conflict are not precluded from acceding to office. The validity of the electoral act is not questioned. Once a situation of conflict is asserted, *the candidate elected is allowed to choose* within a predetermined period, often short, between holding his mandate or the job or activity incompatible with it. Regimes of incompatibility are meant to act both as preventive and corrective measures against corruption by addressing conflicts of interest. On the one hand, these rules comprise legal/formal constraints aimed at reducing or excluding certain types of interaction and accumulation deemed unhealthy to democracy. MPs may be legally precluded from accumulating their mandate with public functions, private activities or other local, regional, national and European mandates. On the other hand, a series of controls are meant to monitor, unveil and sanction those situations in which the MP does not show the objectivity and exemption required to hold elective office.

Countries have traditionally regarded incompatibility regimes as primarily designed to uphold the principle of division of powers within the State apparatus by avoiding the concentration of decisional power in the hands of a few people. Incompatibility rules targeted conflicts of

interest emerging from *horizontal accumulation*, i.e. between the parliamentary mandate and public, judicial appointed and ministerial offices and from *vertical accumulation*, i.e. between the parliamentary mandate and other mandates. In recent years, however, incompatibility rules have gradually shifted to regulate a series of conflicts of interest hitherto ignored or regarded compatible with, if not functional to, the exercise of a parliamentary mandate. Some of these legal constraints to “*oblique*” *accumulation* are meant to avoid the mingling of elective/public and private interests, hence reducing the likelihood of undue business influence over the decision-making process.

2.1. *Why does it matter to regulate conflicts of interest?*

Democracies rest upon an ideal distinction between public and private spheres and interests, and the belief that a key number of standards governing public life – such as *impartiality*, *transparency*, *accountability* and *integrity* – must be observed at all times, something which has never been fully achieved in any country hitherto.

These principles can be sworn to both under democratic and non-democratic regimes, but there are substantial differences that need to be taken into consideration: whereas a non-democratic regime can do without ethical standards governing public life, democracy can only afford to be bad at observing them with considerable costs to its legitimacy and support. The inability or impossibility of achieving ideal democracy leaves no better choice than to accept real democracy at its face value. As Churchill once put it, “Democracy is the worst form of government except for all those others that have been tried.”

It is not so much the statement of these principles in constitutional or legal documents that makes the difference – even non-democratic regimes can claim to uphold them – but how they are actually incorporated into the functioning of institutions, appropriated and observed by office holders and demanded/expected from citizens at large. Hence, if non-democratic regimes can (only) survive without transparency, democracies cannot do without a free press and free access to information. Non-democratic regimes can do without political accountability; democracies cannot do without the citizens’ right to reward or punish incumbents by vote. Non-democratic regimes can afford to be crooked (repression, fear, an ignorant and, often, poor society are their rectitude tool kit); democracies cannot handle

scandal caused by the unveiled dishonesty of their leaders, without great risk to its performance. Non-democratic regimes can afford to be unjust (power is justice); democracies must bind power to justice and protect minorities against the tyranny of the majority. Although democracies are not good at addressing and putting into practice ethical standards to office holders that does not invalidate their importance in framing voters' evaluations about the way democracies work and/or are expected to work.

Conflict of interest represents a threat to the ethical standards underpinning democratic governance in so far the public interest can be subjugated to private ones. Elective officials with a conflict of interest will give a different or distorted reading of the authority entrusted on them by their principal (the voter) and of their office prerogatives, which they would otherwise not do if they were not in a conflicting situation. The unpredictability and complexity of conflicts of interest and the impracticability of honour being a sufficient deterrent, has led governments and legislatures to regulate them by putting in place systems of monitoring and enforcement.

Regardless whether conflicts of interest might result in corruption or net financial gain to elective officials or third parties, they still represent a threat to the principles of *impartiality*, *transparency*, *accountability* and *integrity* underpinning democratic governance. Although the degree of success of national regulatory frameworks in safeguarding these principles has been considerably different across countries, suggesting that their understanding is always subject to particular tensions and value conflicts, it is still possible to grasp their essence:

- *impartiality*, conflict of interest regulation is meant to safeguard the objectivity and selflessness of elective officials in the pursue of their duties and prerogatives. Impartiality, in carrying out public affairs, means two interrelated things: that elective officials must *make choices on merit* and *take decisions in terms of the public interest* and not as a means to seek and secure financial or other advantages for themselves, their family or their friends.
- *transparency*, conflict of interest regulation is meant to ensure *clear and comprehensive disclosure of all assets and interests* held by elective officials (and, to an extent, their close relatives) in connection to their public duties, and to *make them available for public scrutiny*. Elective officials must enable citizens and their colleagues to see through their financial activities and interests at all times and to resolve without delay any situation susceptible of creating public suspicion. Transparency other than being an external demand is also a collegial duty;
- *accountability*, conflicts of interest regulation is meant to ensure *regular, effective and impartial monitoring* of elective officials' assets and secondary interests and activities and to put in place a *workable sanctioning framework*. Although elective officials tend to be

made accountable only for the occurrences taking place while in the conduct of public business, some regulatory frameworks place restrictions prior and after leaving office;

- *Integrity*, conflicts of interest regulation is meant to ensure that elective officials *avoid* any financial or other obligation to outside individuals or organisations that might have a negative influence on their judgement and *take steps to resolve* any conflicts arising from their private interests in connection to their public duties in a way that protects the public interest. Prudence and honesty come before monitoring and sanctioning.

The analysis that follows aims to address the way Portugal as regulated conflicts of interest by placing disclosure obligations and setting incompatibilities to MPs and to what extent these have safeguard the principles at stake.

3. Rules of disclosure: symbolic public control and the protection of vested interests

The 1983 regime of “public control on the wealth of elective officials” was the first attempt to control the assets of elective officials and tackle financial impropriety in office by means of disclosure. The instrument was part of a broader legislative and institutional reform by the then PS-PSD coalition (*Bloco Central*) to combat corruption in public life. The government’s strategy was based on three pillars: the revision of penal provisions,⁷ the creation of the High Authority Against Corruption (AACC)⁸ and the introduction of public control on the wealth of elective officials - *Lei 4/83, 2 Abril 1983, Controlo público da riqueza dos titulares de cargos políticos*.⁹

The Law 4/83 had been created at time of important social, economic and institutional changes. Private interests were gradually re-organising and entering into the political arena, following the purges of market actors that took place between 1974-76. The IXth constitutional government started re-privatising the banking and insurance sectors and a series of nationalised industries following the recommendations of the second IMF austerity programme. The need to restore citizens’ trust and support for the political-institutional and social-economic transformations in course was a priority to the new government coalition. The setting of new ethical principles disciplining instruments to elective officials aimed at strengthening the credibility of representative actors and institutions fundamental to a

⁷ *Decreto-Lei 371/83*.

⁸ *Decreto-Lei 369/83*.

⁹ The *Decreto-regulamentar 74/83* of 6 October 1983 set deadlines and clarified terms for the effective applicability of the law 4/83

democracy in consolidation. The transparency of the financial status of elective officials served as an instrument against growing anti-democratic feelings that saw in the lack of transparency and probity of the political a condition for the attack on the system of representation and the democratic institutions. The new regime of “public control on the wealth of elective officials” was therefore perceived quintessential to improve ethical standards in political life. However, the instruments of control put in place were few and far from guaranteeing the *transparency*, *accountability* and *integrity* invoked during the preparation of this legislative document. The symbolism of the legislation was tantamount to the inefficacy of its provisions. “Public control” was a euphemism, both from the perspective of monitoring and public access to declarations. The regime had been designed in a way as to protect the financial interests of elective officials from unnecessary public intrusion and scrutiny, especially from journalists.

The principle of transparency was cut short by a limited interpretation of what disclosure meant and what constituted object of disclosure. Disclosure of patrimonial assets and wealth of politicians as opposed to the registration/declaration of interests was the core strategy adopted to promote financial transparency in political life. As one author to the project put it, the regime in consideration aimed only ‘to control the financial status of the office holder by means of his own declaration’ (Vilhena de Carvalho, ASDI, debate on 27 January 1983, *translation by the author*).

This form of disclosure would prove insufficient to make visible cases of financial impropriety and even less to constrain potential conflicts of interest. The submission of declarations was compulsory and their contents detailed, but rules of enforcement were precarious, to the extent that a large number of elective officials interpreted the Law 4/83 as a voluntary regime. Those who complied with the law and submitted their declarations remained with the conviction that whatever they declared would not threaten their vested financial interests. Although the precursors of this legislative project had continuously alerted that it did not suffice that elective officials were honest, but ‘like Caesar’s wife, they must appear to be and to present themselves as honest to the public’ (*Orador*, ASDI, debate on 27 January 1983, *translation by the author*), prudence and honesty remained, however, wishful thinking.

MPs saw on the mechanism of declaration a substitute of the duty to inform parliament and the public at large about interests that were likely to affect or might have affected their impartiality or integrity even if these were not explicitly addressed by the legal requisites of disclosure. The compulsory submission of patrimonial declarations raised the belief amongst MPs that once these were deposited with the monitoring body, their innocence and integrity were guaranteed. Once MPs had disclosed what they wanted to disclose, further public intrusion into their personal financial interests was perceived as an unjustified violation of their privacy and a challenge to their self-proclaimed honesty.

If there was no guarantee that these declarations were fully comprehensive and illustrative of the wealth and patrimony of elective officials as well as the variety of private interests these represented, there was equally no way of proving against the alleged “sincerity” and “honesty” of politicians. The law lacked efficient mechanisms of monitoring and sanctioning.

The principle of accountability was equally tainted given the various legal/formal obstacles put in place to external monitoring and free access to information. In principle, public access to information had been provided for under art. 5.2.¹⁰ In practice, however, the 1983 regime of disclosure operated under a discretionary mechanism of public access imposed by the “justified legitimate and relevant interest” rule, which would render impracticable any realistic “public” control on standards of financial propriety in political life.

Monitoring competencies were attributed to the Constitutional Court (*Tribunal Constitucional*, hereafter *TC*). Although the TC enjoyed credibility and the consensus of all political forces, its monitoring action up to now has been cumbersome. The TC acted like an “old register”, i.e. a depository body which decided almost “arbitrarily” public access to declarations, instead of monitoring its contents and evolution and demanding further judicial investigation when relevant elements of impropriety were found. According to Lobo Antunes (1995), this resulted largely from the fact that the TC was continuously confronted with the uncomfortable task of having to present a clear judgement on matters which concerned essentially political evaluations. In other words, the decision on the “legitimate and relevant interest” of any member of the public or entity without criminal investigative powers to access patrimonial

¹⁰ ‘*Têm acesso às declarações e decisões previstas no n.º 1 quaisquer cidadãos que justifiquem, perante aquela Tribunal, interesse relevante no respectivo conhecimento, podendo ser dada publicidade, por decisão do mesmo Tribunal, a um extracto das mesmas, nos termos do seu Regimento*’.

declarations was essentially of a political nature, hence inappropriate to be justified according to objective juridical criteria. The TC's inadequacy to monitor the patrimonial declarations resulted not so much from its being an external body to parliament, but from the way its competencies had been framed and attributed under the Law 4/83.

From the outset, legislators had difficulty in explaining how the Constitutional Court would monitor and manage public access to patrimonial declarations. The law had stipulated that the TC would operate according to its internal statutes (*Regimento*). In reality, however, there were no internal statutes and that is the reason why a statutory decree¹¹ had to be issued some months later to establish the way in which declarations could be accessed for consultation following the Court's decision. But the problem of delegation of competencies was not completely solved. When confronted with requests by members of the public to access patrimonial declarations, there was a continuous and confusing "ball passing game" between the TC's college and its President in terms of who had what competency in deciding the relevance and legitimacy of public access to declarations. In practice, this has resulted in the TC insistently giving a restricted interpretation on what was meant by "justified" and "unjustified" access to declarations. The Court's position was unequivocal: access was "justified" when asked for by the MP concerned or judicial institutions and "unjustified" when requested by the media or normal citizens. There was no "public control" of financial impropriety by elective officials as such by the simple fact that the right of free access to and scrutiny of patrimonial declarations were continuously denied to members of the public. Through a hesitant, inconsistent and contradictory jurisprudence,¹² the Constitutional Court was gradually perceived as being the gatekeeper of the financial interests of the political class.¹³

The sanction framework targeted essentially those who refused to comply with the law. Art. 3 provided that MPs would be dismissed from office when failing to submit their first

¹¹ *Decreto Regulamentar* 74/83 of 6 October which has now been given a different reading by *Dec. Reg.* 1/2000 of 9 March.

¹² The *Acórdãos do Tribunal Constitucional* presents a selective publication of the Court's decisions on the field for doctrinal purposes only. Names and references of the politicians involved are omitted. Nonetheless, it is possible to capture the essence of the TC's position on the "justified legitimate and relevant interest" rule: *justified* – the AACC, the Public Ministry, the Judiciary Police, the Court of Criminal Instruction; *unjustified* – the media.

¹³ For instance, the TC had continuously shown reluctance to report to the Public Ministry cases in which declarations were not submitted or the contents were inaccurate, because it considered that such procedure was not *explicitly* of its competency.

patrimonial declaration and declared ineligible for a period of one to five years when failing to submit their final patrimonial declaration. Since public officials can qualify as candidates without having to resign from their previous functions, the electoral sanctions stipulated would not affect them suitably. For that reason, and in order to create parity amongst candidates with different professional backgrounds, the regime of disclosure set disciplinary sanctions to those public officials who failed to submit their patrimonial declarations.

With regard to those who cheated disclosure requirements, however, the law imposed very low costs. Although the regime provided that false or misleading declarations could be treated as criminal offence, its applicability was cut short given the lack of proper monitoring procedures and the courts' inability to try these offences. In two court decisions, the *Tribunal da Relação de Lisboa* established that the omission or untruthfulness about the contents of patrimonial declarations was a criminal act, but not of a penal nature. Instead, it was confusingly defined as “an administrative offence *sui generis*”, therefore precluding normal courts from treating these cases (Cf. *Acórdão 21/01/87, Acórdão 4/02/87*).¹⁴ The inadequacy of disciplining created a climate of impunity, as evidenced by the poor record of crime processes initiated against those who failed to comply with the Law 4/83. During the period between 1983 and 1988, out of 1945 investigative processes initiated, only 175 found their way to the courts (of which 126 were granted an amnesty, 48 prescribed and only 1 was sanctioned).

Throughout the 1980s, MPs had become imprudent about their privileges, sometimes believing themselves to be a sort of “untouchables”. On 19 April 1988, the AACC produced a memorandum in which it condemned the lassitude installed in parliament with regard to rules of disclosure and recommended the revision of enforcement procedures.¹⁵ Not only had the majority of MPs systematically failed to submit their patrimonial declarations, their non-compliance was not being sanctioned as expected.¹⁶ The Law 4/83 had been arbitrarily and wrongfully interpreted as a voluntary regime - obviously, by *voluntary* elective officials meant *non-compliance*.

¹⁴ *Colectânea da Jurisprudência*, Ano XII-1987, Tomo I, 152, 164.

¹⁵ The reform of the Law 4/83 and the criminalisation of certain practices/behaviours in the political sphere – in the light of the outmoded Law 266 of 27 July 1914 - was the starting point of the AACC's crusade against corruption and financial impropriety by elective officials that would cost its existence (Cf. AACC, *Relatório 1984-1986*, [Medidas Legislativas], 114; AACC, *Relatório 1988-1989*, I, 148).

The regime of disclosure set under the Law 4/83 had failed to materialise the heralded principles of transparency, accountability and integrity. The mechanisms put in place failed to address seriously citizens' concern about the honesty of their political leaders.

3.1. *Introducing the Register of Interests*

The demand for reform of the 1983 rules of disclosure came almost ten years later, in January 1992. A series of projects of law were presented in parliament, but the constitutional and institutional difficulties raised to the revision of provisions set under the Law 4/83 were several. On December 1994, the Social Democrat majority in parliament passed a decree (*Decreto 185/VI, 9 Dezembro 1994*) which was partially declared unconstitutional (*Acórdão 59/95, 16 Fevereiro 1995*). The politicisation reached between the Social Democrat majority and opposition parties and the divided intervention of the TC to appreciate the constitutionality of proposals made, contributed little to reassure citizens of the willingness of the political class to improve standards of financial propriety in political life.

On April 1995, a few months before the general elections, a new regime of “public control on the wealth of elective officials” was passed in parliament. The reform was perceived by the opposition and some leaders of opinion as a desperate pre-electoral effort by the declining PSD majority to restore its image before a discontented electorate. The Law 25/95 of 2 April 1995 was part of a broader package of laws – *Pacote Transparência*¹⁷ – aimed at restoring citizens' confidence in political institutions and promoting transparency in political life. The reform was made on three fronts: the revision of control provisions set under the Law 4/83; the introduction of a Register of Interests under the Statute of MPs; and the creation of a

¹⁶ Alto Comissário Contra a Corrupção - AACC, *Relatório 1988-1989*, II, Anexos, A.8.3.-A.8.23.

¹⁷ The 1993 reform would be the starting point of a series of legislative interventions on matters relating to transparency and probity in political life. The reform introduced a new regime on incompatibilities (*Lei 64/93*), on party and electoral financing (*Lei 72/93*), on parliamentary inquiries (*Lei 5/93*), on the public access to administrative documents (*Lei 65/93*). It also revised the Statute for MPs (*Lei 7/93*) and introduced a new ordinance for Administrative and Auditing Courts (*Lei 11/93*). In 1994, parliament passed a new anti-corruption law (*Lei 36/94*) aimed primarily at increasing the Judiciary Police's investigative powers, but whose legal provisions had to be slightly reformulated. The reform would resume in 1995 with the constitution of a parliamentary commission on ethics and transparency in public life (Res. AR 27/95) and the adoption of a package of laws replacing previous regimes. The so-called *Pacote de Transparência* included: Law 24/95, revising the Statute of MPs; Law 25/95, revising control on the wealth, patrimony and interests of elective officials; Law 26/95, revising MPs' wages; Law 27/95, revising party and elections financing; Law 28/95 revising incompatibilities; Law 32/95, providing the government with legislative capacity to implement measures on money laundering and other goods derived from criminal activities.

permanent parliamentary commission on ethics.¹⁸ The Law 25/95 presented some positive changes:

- rules of disclosure were extended to a series of appointed offices (art. 4.3);
- the contents of patrimonial declarations were broadened to include the patrimony and wealth of politicians abroad and the social positions (e.g. directorships) they had held for the last two years or currently in exercise, in public or private foundations, associations other than public companies;
- emphasis was also put on the need to regularly update declarations (art. 2), even if rules remained flexible to MPs. They were only required to update their declarations within two months after the end of their mandate or at the end of the legislature when substituted, but they could always claim that no updating was needed and hold to their first declaration (art. 2.4). In principle, the final declaration should reflect the patrimonial evolution incurred while in office (art. 2.5), in practice, however, there was no reinforcement of monitoring procedures to assess regularly the validity and evolution of contents. No adequate monitoring meant, consequently, no effective sanctioning;
- in what concerns the selective public access to declarations introduced by 1983, the response of legislators was unsatisfactory. The principle of “free public access and scrutiny” of declarations (arts. 5.1 and 6.1) was only partially improved. Elective officials could oppose the publicity of the contents of their declarations when submitting these to the TC or whenever a member of the public requests access. The TC must appreciate the elective officials’ arguments for denying public access and decide whether the contents of patrimonial declarations could be publicised, totally or partially. If, under the Law 4/83, the TC denied almost without reservation access to declarations by members of the public, under the new regime, it was the elective official’s duty to justify “with a relevant motivation” why public access should be disallowed.

The major innovation of the Law 25/95 was the introduction of a Register of Interests.¹⁹ Rules of disclosure moved away from the visible aspects of financial impropriety to address conflicts of interest by elective officials in light of the Westminster model. The Register of Interests for MPs and members of government is kept and controlled by parliament itself and is available for public consultation (though not yet published in the parliament’s website). All activities susceptible to the creation of a conflict of interest or an opportunity for financial impropriety must be registered. This should not be perceived as an ultimate condition to free elective officials from further obligations in declaring potential conflicts of interest when pursuing public business. In fact, art. 27 provides that MPs *must* declare their interests whenever taking part in parliamentary sessions or works. However, the extent of oral

¹⁸ This permanent commission had been previously set as an eventual commission by parliamentary resolution (Res. AR 27/95, 5 April) to study matters on ethics and transparency concerning the works of political institutions and elective officials. The works of this commission, which was due to report to parliament on May 30, were insistently blocked by the Social Democrat majority represented.

¹⁹ Art. 26, 27 and 28 of the 1995 Statute of MPs (*Lei 24/95*).

declaration is limited: it concerns only those interests that may lead to a *direct advantage*²⁰ being obtained from the law or parliamentary resolution under consideration. The provision could be interpreted as a cynical way to render ineffective an instrument which aimed to strike a balance between binding rules and self-regulation, between enforceable standards and the honour of MPs and parliament in dealing with instances of impropriety in office. If this is not a sufficient example of the deliberate attempt on the part of the political class to trivialise control over their pecuniary interests, it suffices to add that no penalties were provided for those MPs and members of government who failed to register or declare their interests during parliamentary sessions and works.

The peculiarity of the present regime is that control over the wealth and patrimony of politicians – i.e. the visible aspect of impropriety and corruption – remains in the hands of an external judicial body, whereas conflicts of interest – i.e. the opportunity structures – are dealt with internally by the parliament’s new Ethics commission. This “dual-monitoring” system renders control confusing, not to say ineffective. This odd arrangement is not unique to the regime of disclosure of MPs’ assets and interests. For many years, the regime of political financing had also operated under two separate monitoring bodies responsible for assessing separately campaign and party annual accounts, as if elections were not the major source of expenditure of party life!

The commission is not yet a credible instrument of control and the chances that such a body may gain some institutional relevance are few, given its in-house nature, party-based composition and inaccessibility by citizens at large. The remote likelihood that a few members of the house start a witch hunting procession against those who fail to register properly their interests would probably decree the commission’s extinction by vote of parliament, as it happened with the High Authority Against Corruption in 1992.

²⁰ Pecuniary benefit obtained directly by the MP or in favour of his/her companion/spouse and close family members.

4. The pitfall of legalistic approaches to public-private conflicts of interest in parliament: impeding the excess and institutionalizing the orthodoxy

Another mode of addressing conflicts of interest in parliament is by placing limitations on private jobs and activities. The significance of this measure, however, varies across countries. The moral costs have been heavier or softer depending on traditions of interest representation and regulation in national parliaments and the prevailing culture of conflicts of interest in a given political society.

Portugal has always preferred a legalistic and restrictive approach to the problem of elective-private conflicts of interest in parliament. The legislative response has been paradigmatic: it allows accumulation while regulating in an incremental and reactive fashion those instances that have caused public concern.

There is nothing more appropriate than Tommasi di Lampedusa's historical scepticism, "changing everything, so that nothing really changes",²¹ to understand the consecutive waves of reforms to the Statute of MPs in Portugal. Eight legislative interventions²² in less than two decades and MPs were still unable to create an appropriate ethical framework to prevent conflicts of interest deriving from the accumulation of the parliamentary mandate with other outside jobs, appointments or even mandates. The legal provisions permitting these opportunity structures for conflicts of interest were left untouched from one intervention to another.

The accumulation between the parliamentary mandate and private jobs and activities had been a common practice since the early days of the new democracy and was "guaranteed" as entitlement under the 1985 Statute of MPs. According to article 5(2)(b), MPs were entitled to advocate the "urgent exercise of a professional activity" as a legitimate ground to be temporarily substituted in parliament. MPs could return to their professional activities and outside jobs while in office, for a minimum of 15 days and a maximum of 2 years per legislature, without having to declare them. This regime, which was later reduced to a single

²¹ Filippo Tommasi di Lampedusa, *Il gatto pardo*, Torino, Feltrinelli, 1958.

²² *Lei 3/85* of 13 March 1985, *Lei 98/89* of 29 December 1989, *Lei 7/93* of 1 March 1993, *Lei 24/95* of 18 August 1995, *Lei 55/98* of 18 August 1998, *Lei 8/99* of 10 February 1999, *Lei 45/99* of 16 June 1999 and *Lei 3/2001* of 23 February 2001.

period of 45 days for each legislative session, remained contrary to any effective control on public/private conflicts of interest in parliament.

The 1989 reform to the Statute of MPs introduced, for the first time, impediments to private activities (art. 19-A), but the exercise was far from guaranteeing the impartiality and integrity of MPs. The impediments placed on MPs were few and their application was vague. MPs were prohibited from appearing or participating in any commercial publicity or advertisement by private entities (art. 19-A.1.e). But that did not preclude companies from continuously displaying well-known parliamentarians as members of their board of directors or as external advisors. MPs holding private jobs and activities were precluded from entering any public competition for the supply of goods and services to the State or any other collective public entity (art. 19-A.1.d). In practice, however, the impediment only applied to those companies in which MPs held visible positions, such as directorships or ownership, otherwise permissible if MPs held fictitious positions, exercised their rights as shareholders or even acted through an intermediary or family member. MPs were prohibited from taking part, as remunerated experts or referees, to any judicial process in which the State or any other public entity are parties (art. 19-A.1.b). But there were no impediments placed on membership in law, consulting or lobbying firms. In fact, a large number of MPs were members of the major law firms in Portugal, most of which were often requested to write expert opinions on certain regulatory legislation. The court cases these prominent partners brought to the firm in question and that raised conflict with their parliamentary mandate were simply passed on to young apprentices in the office. Adding to its vagueness, the impediment could always be lifted through parliamentary deliberation in cases of alleged “public interest” (art. 19-A.2). This mechanism meant the trivialisation of any serious attempt to deal with growing opportunity structures for corruption and influence trafficking at the parliamentary level that emerged with the proliferation of parliamentary commissions on regulation. A new article 19-B was also introduced making it compulsory for MPs to deposit with the Bureau of the Attorney-General (*Procuradoria-Geral da República*) a declaration of honour confirming the non-existence of any incompatibility or impediment. The declaration of non-incompatibility was a mere formality, liberating MPs from future checks (which were also unlikely to take place), since the regime of temporary substitution for the “urgent exercise of a professional activity” continued to guarantee public/private conflicts of interest entering parliament.

The political class showed great unease to proceed with the necessary reforms. In 1993, when the then president of the Lawyers' Association, Júlio de Castro Caldas demanded a complete ban on accumulation between the parliamentary mandate and the exercise of advocacy, the call for reform immediately triggered the outcry of 38 lawyer-MPs who threatened to vote against this project.²³ While those pressing for a ban claimed that the reform would dignify the parliamentary mandate – an MP cannot serve both gods, the public and their clients' interests – the vast majority of MPs interpreted such an impediment as discriminatory and conducive to an undesirable professional political class. Lawyer-MPs argued, not surprisingly, that the problem of influence trafficking deriving from illicit political lobbying concerned diverse protagonists of whom they were the least suspected. This attitude was a reflection of the prevailing negative environment towards impediments to outside professional activities. Certainly, the problem of influence trafficking at the parliamentary level was not restricted to this class of MPs, but what seemed worrying was the overall unwillingness to preclude MPs from holding lobbying and consulting activities.

The reform of 1989, which finally led to the publication of a new and complete version of the Statute of MPs in 1993, showed a tendency to emulate the Westminster model with regard to the regulation of public/private conflicts of interest in parliament. Disclosure was preferred to setting legal constraints. There were several arguments for impediments to be restricted to specific situations of conflict which arose when MPs acted on both sides of the fence. First, MPs believed impediments to private-sector employment were an assault on their parliamentary entitlements. MPs believed they were able to self-impose ethical standards regulating their conduct *vis-à-vis* business influence, and that the introduction of legal impediments was a dispensable practice (especially if dismissal from office was introduced as a sanction!). Moreover, there was a general feeling that the creation of “career politicians” was undesirable. However, contrary to the British case, where “the courts of public opinion” act to impose standards on MPs, thus ensuring that the system of self-regulation and disclosure of interests works with very few drawbacks, in Portugal, public opinion and in particular the media play no role in the monitoring of conflicts of interest in parliament. In this context, setting or reviewing impediments becomes essentially a cosmetic and “corporate” initiative by members of parliament. The few impediments placed on MPs contrast greatly with an ethical environment where little or no distinction is made between public and private

²³ ‘Deputados não querem deixar advocacia’, *Expresso*, 9 Janeiro 1993, [Política], p. A2.

interests. Instead of *self*-regulation, the reforms of 1989 and 1993 to the Statute of MPs on matters of impediments created a normative context of *non*-intrusion and *non*-interference with parliamentary privilege.

By the mid-1990s, the Socialist Party presented two projects of law reforming incompatibilities to politicians, senior public officials and MPs.²⁴ The project of Law 498/VI was mainly designed to prohibit lobbying and consulting activities, which had become a way of life in parliament. The Commission on Constitutional Matters approved, in principle, the two proposals for reform with a unanimous vote. One month later, the Social Democrat majority rejected both proposals just before the general elections of October 1995, which would bring to an end its 10-year rule. While the problem of advocacy and lobbying had been a source of public concern and an important issue of parliamentary reform in Britain, in Portugal it was met with the indifference of public opinion and the complacency of its political class. Impediments to outside jobs and activities have recently been reviewed and extended in the light of these earlier proposals. The new article 21 of the 1999 Statute of MPs regulated the exception, while the orthodoxy became institutionalised. Notwithstanding the “good will “ of legislators, the fallacy of the legalistic approach to conflicts of interest prevailed: the more detailed impediments to MPs are, the likelier that their applicability and monitoring will be at odds.

MPs were precluded from entering, directly as single or collective interested parties or indirectly as shareholders or acting through an intermediary or family member, any public tendering or contract with any public or semi-public institution (arts. 21.3.a, 21-A and 21.3.d). They were equally precluded from providing political consulting or assistance to private entities “whose interests are opposed to those of the State or any public entity” (art. 21.3.b). However, the measure addressed some of the symptoms, but not the cause of the mingling of public/private interests in parliament, i.e. job accumulation. MPs were still allowed to hold jobs or be members of lawyer, consulting and lobbying firms.

Sanctions were also stiffened (art. 21.4) – those MPs found in a position of impediment would immediately lose their mandate – but enforcement remained uncertain. It is the Ethics

²⁴ *Projecto de Lei 462/VI, Alteração da Lei 64/93, de 26 de Agosto (Regime de incompatibilidade de titulares de cargos políticos e altos cargos públicos), D.A.R., II Serie-A, No. 6, 18 Novembro 1994; Projecto de Lei 498/VI,*

Commission responsibility to investigate the truthfulness of an alleged situation of impediment by one of its members, but the likelihood of finding cooperative endeavours amongst MPs in this domain is still meagre. MPs have more to gain from their collegial backslapping and silence about each other's interests than from being the accuser, policeman, judge or jury in an in-house inquisitory framework.

5. General features of conflicts of interest legislative reforms

Today, placing legal constraints on the accumulation of outside jobs, mandates or functions by MPs other than addressing material dysfunctions to the system of representation – e.g. parliamentary absenteeism – constitutes an important pillar of ethics reform. Guidance, deontology and disclosure are fundamental, but insufficient. Incompatibility rules to MPs represent a step forward towards the reinforcement of preventive mechanisms against corruption. Although countries tackled this sort of accumulation in very different ways, and not all have opted for setting legal constraints to outside jobs and activities, there are some general trends of conflicts of interest reforms that should not go overlooked:

- *the reactive and circumstantial nature of reform* - More often than not, setting new incompatibilities to MPs has always come late in the day as a reaction to excess accumulation and/or specific scandals rather than a comprehensive and proactive attitude towards conflicts of interest in parliament. New incompatibilities have been introduced and monitoring procedures have been strengthened, but the drives for political reform have been product of successive crises-reactions to deep-seated practices which gradually proved to be or were perceived as threats to the quality of democracy;
- *the selective application of incompatibilities and the institutionalisation of situations of conflict* – There is a tendency to address by law what individual and collective (parliamentary) ethics are unable to prevent. For that reason, the scope of application of incompatibilities remains strictly formal and denominative. The parameters used and revised have been deliberately selective, addressing some instances of conflict while leaving others unregulated. Incompatibility rules tend to regulate the exception and MPs have always been keen to explore that regulatory deficiency - whatever is not proscribed by law becomes acceptable according to their own mores. In other words, entitlement comes before self-restraint. MPs do not abdicate the accumulation with other mandates, functions, jobs or activities unless expressly told to do so by law. This legal minimalism has often made parliaments overlook certain conflicts of interest;

Cria um registo de interesses dos deputados e alarga as respectivas incompatibilidades e impedimentos, D.A.R., II Serie-A, No. 22,17 Fevereiro 1995.

- *the symbolic nature of reform and the trivialisation of control* – Where certain conflicts of interest have gradually become unacceptable to public opinion, political elites have reacted to address public concern, but the reforms introduced were often cosmetic, that is, deprived of clear norms and adequate instruments to ensure their effective application and enforcement. MPs have always avoided stringent impediments to their accumulative functions, outside jobs and interests;
- *the “tailor made” nature of conflicts of interest regulation* - Similar to party financing regulation, conflict of interest regulation is designed, adopted and implemented by the very same political actors whose conduct they aim to regulate. This explains the slow pace and limited scope of reforms and the low profile kept by both the ruling party and opposition during the discussion and adoption of these legal diplomas. Parliaments never seem to find the right occasion to move on with the necessary reforms and have often reacted as “corporate” guardians of their members’ privileges and interests during tentative reforms. Changes to the regime of incompatibilities affect all MPs, regardless of their partisan allegiance, thus requiring dialogue and accommodation between all major parties in parliament;
- *the difficulty of enforcing standards of financial probity to MPs in a continuum* - MPs, unlike public officials, are temporary office holders, in the sense that their permanence in power is dependent upon (re)election. For that reason, it is difficult to address, through incompatibility rules, conflicts of interest in a continuum, i.e. prior, during and following the holding of office and to make present MPs and future candidates accept and guide their conduct by the principles of objectivity and honesty imposed by these regimes. Incompatibility rules address only those situations of conflict which threaten the probity of MPs *while in office*. In most cases, however, the parliamentary mandate might have ended by the time a conflict of interest is ascertained and this poses considerable problems to create a lasting institutional culture against conflicts of interest. Whereas rules on employment *after leaving public office*²⁵ have been introduced to civil servants and, to a much lesser extent, ministers and government officials, there is no such conflicts of interest clearance applicable to MPs.

5.1. Next steps

Academics are often more comfortable at indicating what went wrong with a particular reform than at providing alternative or feasible solutions. Some of the recommendations, which I am about to enumerate, are known to legislators, but it is useful to recall them:

- *General risk assessment*: not all areas of legislative and parliamentary work offer the same windows of opportunity for financial impropriety. The work of the constitutional commission raises lesser incentives to profiteering than the issuing of regulations to various business sectors and scientific innovations or the approval of a privatisation

²⁵ For a period of time after leaving office, civil servants and, to a much lesser extent, ministers and government officials are often impeded from entering contractual agreements with or accepting jobs in those business sectors for which they have regulated or overseen *ex officio*.

bill. Before engaging in a legislative reform, legislators should have a comprehensive assessment of the problems and values at stake;

- *Solid and open reforms*: preference for single and comprehensive reforms, instead of incessant incremental reforms. Greater openness, for instance through public hearings of the various discussions preceding the adoption/revision of conflicts of interest regulation to enable an input from nonpolitical experts (such as public officials, magistrates, academics, and journalists);
- *The regulation should address conflicts of interest comprehensively and in a continuum*: the regime of disclosure should cover both actual and potential conflicts of interest, by introducing an *open clause* for all those situations which are not specified under the provisions, but that are likely to be met with public or collegial disapproval once unveiled. Conflicts of interest should also be assessed and sanctioned in a continuum: in order to enter office (*screening*), while in office (*monitoring*) and after leaving office (*clearance*);
- *Transparency of regulatory procedures*: ensuring the publication and public access to registers of interests and asset declarations (for instance, by making them available in the Internet). Holding public hearings for disciplinary proceedings;
- *Setting a complaints system*: public opinion plays an important role in ensuring that standards of conduct and conflicts of interest rules are respected and procedures are followed with the ultimate consequences to wrongdoers. Public opinion also plays a central role in bringing situations of conflict to the attention of monitoring bodies (whose oversight is always limited). Experts and watchdog NGOs can raise new issues of concern to the monitoring body, upon which it can issue recommendations to the appropriate legislative committee in view of a future revision of the regulatory framework;
- *Swift response and disciplinary action*: the timing of response between monitoring and enforcement is crucial to a sound regulatory framework. The regulatory body should be able to come to a fast resolution upon the allegation or evidence of conflict of interest; fast and effective sanctioning brings credibility to the control regime. Good results increase support for the monitoring institutions and need to be communicated to the public at large.

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