



Preventing a Tragedy of the Commons

Economist Garrett Hardin coined the term “tragedy of the commons” to describe a situation in which private interest groups consume too much of a resource that is both limited and openly available or publicly accessible. When private interests outweigh the public interest, the resource tends to be depleted.

In politics, legislators constitute an “institutional commons” in the sense that their function and position within parliament—a public institution—equates to a limited public resource. Their time and attention is limited and over-exploitation by private interests can undermine the broader public interest.

Legislators’ ultimate responsibility is to represent their constituents in the legislature. They can also be involved in committees and other parliamentary business which expands their role to include the interests of citizens on a broader scale; in essence, they become accountable for safeguarding the common good. In some jurisdictions, legislators may be appointed and therefore do not directly represent a local electorate but they are equally accountable for the common good. Regardless of how they came to their position, it is their duty to pursue, recognise and uphold the common good even though it is not always apparent or clearly defined.

The common good is threatened when individuals or interest groups divert legislators’ attention away from their primary role. Combining their legislative duties with the fiduciary duties of a paid and for-profit corporate directorship threatens this common good and is incompatible. Combining these roles undermines public trust in democratic institutions and hampers the fight against corruption. Preventing a tragedy of the commons from happening in parliament requires including clear rules on conflicts of interest in parliamentary ethics and conduct regimes.

GOPAC urges parliamentarians to view the parliamentary system as a “commons” and to view their role within the commons in terms of the promotion and preservation of the “common good” above that of private interests. They should take an active role in developing and honouring ethics and conduct regimes that reflect this view.

Conflicts of Interest and Separation of Powers

Accountability goes beyond transparency. It implies the integrity to act in a way that decision-making ultimately benefits the constituents represented by parliament. Public and private corporations represent the interests of citizens indirectly and should therefore not be considered the direct constituents of legislators. Indirectly, though, parliamentarians should take into account the strength of corporations and particular sectors of the economy as engines of prosperity and higher standards of living. However, for legislators to participate directly in the affairs of for-profit corporations, as either non-executive or executive directors, poses too great a risk for conflicts of interest. The issue arises in part because board membership involves a fiduciary duty to make decisions in the interest of the company, which conflicts with the duties legislators have to their constituents.

Closely tied to the prevention of conflicts of interest is separation of powers, especially in democracies where the state continues to have a major direct role in the economy. This is particularly the case where legislators are hypothetically appointed to sit on the boards of crown corporations or state-owned enterprises.

The functions of legislators include fact-finding, determining public policy, and appropriating money.¹ These roles are separate and distinct from the role of executive power, which is essentially tied to implementation. When parliamentarians or other legislators sit on the boards of crown corporations or state-owned enterprises they cease to have clearly defined functions and the risk arises that power will be concentrated in the hands of the corporate entity in question and the parliamentarian will cease to be an effective instrument of oversight.

Open to Interpretation: Principles Apply

Legislators should not be permitted to accept paid directorships or directorships on for-profit corporate boards. However, legislators could be permitted to sit on boards of non-profit organizations when their role is unpaid and advisory in nature. In these circumstances, the following principles or rules should apply: transparency, ongoing review, and non-commercial character. The latter protects against board membership on industry associations. Legislators should at all times seek to avoid both actual and perceived conflicts of interest.

Transparency comes with public-access reporting of any affiliations or formal commitments legislators have with particular interest groups outside of parliament. Parliaments need to make this information public. Ongoing review refers to the habit of consulting with an ethics commissioner to determine whether particular activities done to support a non-profit and non-commercial organization might pose a conflict of interest for a member of parliament. With these principles in mind, a legislator can continue to directly support the work of non-profit organizations in or outside their constituency. In so doing a parliamentarian fulfills a civic duty.

This position paper addresses the issue of board membership. The issue of employment outside of parliament for part-time parliamentarians is an issue beyond the scope of this paper. However, it is our current thinking that part-time parliamentarians may pursue professions or occupations where they are employees of a corporation or owners of a sole-proprietorship or limited partnership. Parliamentarians should not, however, be directors or in an executive position of for-profit companies that have a board of directors with fiduciary duties as a central part of their corporate governance structure. Part-time parliamentarians may therefore own and run a small business so long as an ethics commissioner clears them of any potential or perceived conflicts of interest. It is also our current thinking that having part-time parliamentarians in office is not the ideal system for democratic governance.

1 Washington and Lee Law Review: Volume 40:171

Moreover, with pieces of legislation being passed in a number of jurisdictions that hold company officials, i.e. directors, liable for corrupt practices within the organizations they represent, e.g. Foreign Corrupt Practices Act (USA) and Corruption of Foreign Public Officials Act (Canada), legislators should seek to distance themselves from the potential for indirect culpability.

Former Parliamentarians in the Board Room

Despite the threat to democracy posed by allowing legislators to sit on boards of corporations while in the legislature, there are definite advantages to promoting the potential role of former parliamentarians on the boards of for-profit corporations and non-profit organisations. The primary benefits derive from the continuation of a stewardship role and the use of uniquely acquired “oversight” knowledge and capacities. Parliamentarians are uniquely placed to acquire oversight and due diligence skills. Boards of directors look to members to have these skill sets and therefore the benefits to employing former parliamentarians are mutual.

In a number of jurisdictions, ethics and conduct regimes stipulate that former parliamentarians cannot engage, during a specified time period, in employment activities directly related to the official dealings they had while a member of parliament. However, even these rules, in some jurisdiction, make exception for appointments to boards of directors. The important point to remember is that once the legislative functions of parliamentarians are relinquished they should be free to, and indeed encouraged to, market their skills in oversight to the private or non-profit sectors. The involvement of former parliamentarians in the governance of corporations can potentially lead to the strengthening of governance outside of public institutions and the parliament.

Personal Account of a Former Parliamentarian

As a former parliamentarian, serving on Boards of Directors provides the opportunity to bring different skill sets to the table, from the importance of budgetary oversight to policy development.

As parliamentarians, our most important role is budget oversight. Ensuring that proposed expenditures are evaluated and key questions are asked of relevant Ministers is an important function of policy makers. Similarly, on Boards it is critical and essential that CEO's are held accountable for expenditures and that both short-term and long-term strategic plans are appraised with measurable benchmarks.

Parliamentarians can draw on their experiences on committees, evaluating legislation, interacting with various associations and interest groups to provide a well-rounded approach to dealing with both staff and other Board Members.

Parliamentarians can bring a wealth of knowledge concerning parliamentary procedure, and the rules of order to meetings, which is often very helpful in dealing with motions and agenda items. Strengthening the governance model is critical both for the institution and for stakeholders. Good governance is essential for any organization and parliamentarians can play a unique and positive role in contributing to building a solid foundation for the organization.

In my role as a member of various non-profit Boards, colleagues are very interested in the experiences that I bring to the table to help illustrate points or provide useful examples in dealing with a particular issue.

The Honourable Bryon Wilfert P.C., ICD.D (former Canadian Parliamentarian 1997 – 2011)

Recommendations

- All legislators should refrain from seeking and accepting positions as directors on boards of for-profit corporations while they are assuming legislative duties.
- Parliamentarians should push for reforms to ethics and conduct regimes to make it a violation of the spirit and letter of such standards for legislators to sit on the boards of for-profit corporations while in the legislature.
- Parliamentarians in countries where there is not currently an ethics commissioner, or similar independent body within parliament, should aim to pass legislation that would create such an office of parliament.
- Open parliamentary data up to the public so that standards of accountability and transparency are raised and parliamentarians maintain the confidence, which comes with integrity, of both citizens and constituents.
- Parliamentarians and other legislators should avoid both “actual” and “perceived” conflicts of interest as a standard that protects the trust of citizens in the democratic process and in public institutions.
- Former parliamentarians should consider the good governance capacities obtained while in parliament as transferable skills that can be applied to board membership following terms in the legislature.
- All legislators should push for democratic reforms that would eliminate situations whereby part-time legislators are forced to assume other paid work while assuming public duties.

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What is a conflict of interest?

A conflict of interest is where someone is compromised when their personal interests or obligations conflict with the responsibilities of their job or position. It means that their independence, objectivity or impartiality can be called into question. A conflict of interest can be:

- Actual: where the conflict already exists;
- Potential: where the conflict is about to happen, or could happen; or
- Perceived: where other people might reasonably think that a person has been compromised.

A poorly managed ‘perceived’ conflict of interest can be just as damaging as a poorly managed ‘actual’ conflict of interest.

<https://www.business.govt.nz/procurement/pdf-library/suppliers/quick-guide-conflicts-of-interest.pdf>

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