

Conflict of Interest and Good Governance in the Public Sector — Looking at the Private Interests of Government Officials Within a Spectrum

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Introduction

A discussion of good governance principles is timely amidst the backdrop of the coming Philippine elections. Patronage has always played a key role in Philippine politics and it may be wishful thinking to believe that the electorate will, this time around, choose their elected government officials based on platform and not on “who-can-give-the-most-dole-outs” but one can hope. Philippine local elections tend to be prone to dole outs in that, at the grass roots level, the public look to their locally elected politicians as direct sources of funding to spend on the town *fiesta*, a wedding, a funeral, building a make-shift basketball court where the town’s people can play a round of hoops to distract the unemployed, ad infinitum. This popular concept in politics has been named the “patron-client relations framework,” as defined in a study conducted by the Institute for Political and Electoral Reform:

In this framework, political leaders who are of a higher socio-economic status (patron), acquire power by providing material benefits to people of lower status (client), who in turn, commit their votes to the patron during elections. Electoral exercises are often oriented to

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more personal and practical concerns as manifested during election campaigns where candidates woo voters not through programs of government but through favors and promises of material reward.¹

Ideally, becoming acquainted with principles of good governance may elevate the discourse in Philippine elections and be a jumping board for the electorate to determine which amongst their choices may be deserving of the public's trust. On a more personal level, these principles should be revisited by any public officer zealously guarding himself from the trap of submission to self-interest.

Good governance may be an abstract concept in that it means different things to different players in the social and economic structures of civil societies. In its broadest sense, according to the UN, "within the community of nations, governance is considered "good" and "democratic" to the degree in which a country's institutions and processes are transparent."² By itself, "governance encompasses all aspects of the way a country is governed"³ and good governance may be measured by specific behaviours demonstrated by certain actors within government.⁴ Thus, it may be said that the public can determine whether or not governance is "good" not so much by having the actors within the government arrive at

¹ Restudying the Filipino Voter Today; available at http://www.ombudsman.gov.ph/UNDP4/wpcontent/uploads/2012/12/FinalPsychographics_HTML.pdf.

² UN Global Issues, Governance, available at <http://www.un.org/en/globalissues/governance/index.shtml>.

³ Democracy, Good Governance, and Economic Development, Shalendra D. Sharma, Taiwan Journal of Democracy, Volume 3, No.1: 29-62, available at: <http://www.tfd.org.tw/export/sites/tfd/files/publication/journal/dj0301/029-062.pdf>.

⁴ The enactment of laws by the legislative branch of the government and the interpretation and/or application by the judiciary of the said laws are in themselves indicators of good governance. "Good governance promotes equity, participation, pluralism, transparency, accountability and the rule of law, in a manner that is effective, efficient and enduring. In translating these principles into practice, we see the holding of free, fair and frequent elections, representative legislatures that make laws and provides oversight, and an independent judiciary to interpret those laws." UN Global Issues, Governance, available at <http://www.un.org/en/globalissues/governance/index.shtml>.

the correct decisions in governance but whether their decisions were reached through a transparent process.⁵ Whether or not a public officer acts upon a “conflict of interest situation” is one such specific behaviour demonstrating good or bad governance, as the case may be. Oxford English Dictionaries define conflict of interest as “(a) an incompatibility between the concerns or aims of different parties; (b) (chiefly in Business, Politics, and Law) a situation whereby two or more of the interests held by, or entrusted to, a single person or party are considered incompatible or breach prescribed practice; specially, a situation in which an individual may profit personally from decisions made in his or her official capacity.” Conflict of interest may be reigned in, to a limited extent by a person’s moral compass, or to an institutional scale, by specific anti-corruption laws criminalising “acts” manifesting conflict of interests.

This paper, thus, asks the specific question insofar as conflict of interest relates to good governance: does engaging in a transaction of pecuniary interest or engaging in a profession (whilst in public office), by and of itself, manifest conflict of interest and is therefore prohibited?

Specifically, this paper looks at Section 90 of Republic Act No. 7160 (R.A. 7160), otherwise known as the Local Government Code of 1991; Section 1, Rule IX, The Rules Implementing Republic Act 6713 or the Code of Conduct and Ethical Standards for Public Officials and Employees (IRR of R.A. 6713); and Section 3(h) of R.A. No. 3019, otherwise known as the Anti-Graft and Corrupt Practices Act.

This paper argues that although the laws allow certain pecuniary interests, a government official, whether elected or appointed, must nonetheless conduct themselves within the broad framework of good governance in conflict of interests situations and ensure that they choose the public’s interest over theirs.

The absolute and relative prohibition under the Local Government Code

Section 90 of the Local Government Code outlines the absolute prohibition upon all governors, city and municipal mayors to practice their

⁵ What is Good Governance, available at <http://www.goodgovernance.org.au/about-good-governance/what-is-good-governance/#sthash.0gGOW6G8.dpuf>.

profession or to engage in any occupation other than the exercise of their functions as such local chief executives.

The law is explicit on the matter and provides as follows:

SECTION 90. Practice of Profession. – (a) All governors, city and municipal mayors are prohibited from practicing their profession or engaging in any occupation other than the exercise of their functions as local chief executives.

Section 90 of the Local Government Code does not define the phrase “practice of profession” but deems it necessary to distinguish between “practicing a profession” and “engaging in any occupation.” Such being the case, we resort to general principles of statutory construction to instruct us of the implication of this silence and expression, respectively. “The general rule in construing words and phrases used in a statute is that, in the absence of legislative intent to the contrary, they should be given their plain, ordinary and common usage or meaning; the words should be read and considered in their natural, ordinary, commonly accepted usage, and without resorting to forced or subtle construction. Words are presumed to have been employed by the lawmaker in their ordinary and common use and acceptance.”⁶ That said, we may conclude that, absent proof to the contrary, the legislative intent in this case is to ascribe to the word “profession” and to the word “occupation” their “plain, ordinary and common usage or meaning.” Webster defines a profession as a “calling requiring specialised knowledge and often long and intensive academic preparation.” On the other hand, occupation, by its common use and acceptance, is said to mean as “an activity in which one engages;” a catch-all phrase where an “activity” does not fall within the term “profession.”

In this jurisdiction, to engage in a profession means that one has to be registered with a licensing body that regulates and supervises that profession and one is therefore authorised to practice the said profession in the Philippines by virtue of a valid certificate of registration and a valid

⁶ Ruben E. Agpalo, *Satutory Construction*, 177-178 (2003), as cited in *Atty. Reynante B. Orceo v. Commission on Elections*, GR No. 190779, March 26, 2010.

professional license issued by the regulatory and licensing body. This is buttressed by the mandate of the Professional Regulation Commission (PRC)⁷, i.e. to regulate and supervise the practice of the professionals who constitute the highly skilled manpower in the Philippines. The PRC regulates forty-two (42) professions. The legal profession, on the other hand, is the only profession not regulated by the PRC but is uniquely regulated by the Philippine Supreme Court, through the instrumentality of its Integrated Bar of the Philippines or the IBP.⁸

Clearly, it is the intent of the law to prevent, say, a lawyer, a doctor, an architect, a nurse, an accountant (and such other professions regulated by the PRC) from assuming the post of a governor, city and municipal mayor whilst at the same time moonlighting, on the side, as a lawyer (whether handling cases and appearing before the courts or assuming a post as a corporate secretary of a corporation, or as in-house legal counsel of a company, and such other positions which necessarily require the use of their legal skills), or as a doctor (owning their private clinic or as a consultant for any hospitals, and such other positions which necessarily require the use of their medical skills). This prohibition to practice another profession is absolute. Where the activity does not fall under the definition of a “profession”, the same may nonetheless be prohibited under the phrase to “engage in any occupation other than the exercise of their functions as such local chief executives.” This is instructive where the incumbent governor or mayor, although not

⁷ The Professional Regulation Commission was first created as a national government agency by Presidential Decree (P.D.) No. 223 dated June 22, 1973, signed by then President Ferdinand E. Marcos. It was previously called the Office of the Boards of Examiners created by Republic Act No. 546 on June 17, 1950, under the Civil Service Commission (CSC).

⁸ “The Integrated Bar of the Philippines (IBP) is the official organization of all Philippine lawyers whose names appear in the Roll of Attorneys of the Supreme Court. The IBP came into being when the Supreme Court created on October 5, 1970 the Commission on Bar Integration which was tasked “not only to ascertain the advisability of integration of the Bar, but even more, to serve as a common vehicle of the Court and the Bar in fashioning a blueprint for integration and putting the same into actual operation.” Republic Act No. 6397, which became effective September 17, 1971, confirmed the power of the Supreme Court to adopt rules of court to effect the integration of the Philippine Bar;” available at http://www.ibp.ph/ibp_about.html.

practicing a “profession” may wish to engage in another occupation. For instance, we have quite a number of governors or mayors who are/were movie and television personalities. It may thus be argued that a movie actor who has been elected into office as a governor or a mayor may no longer appear in movies or work as a television host or engage in such other activity that will require such incumbent governor or mayor to devote and take time away from “the exercise of their functions as such local chief executives.” This prohibition in the law is absolute as the law itself makes the pronouncement that practicing their profession or engaging in any occupation other than the exercise of their functions as local chief executives automatically gives rise to an absolute conflict of interest. The prohibition is designed to counter the evil arising from devoting the time of a local government official, particularly governors, city mayors and municipal mayors, in another engagement (a profession or an occupation other than their government posts) to the detriment of public service. The case of *Wilfredo M. Catu v. Atty. Vicente G. Rellosa A.C. No. 5738 February 19, 2008* elucidates on this point. There, our High Court held that:

Under RA 7160, elective local officials of provinces, cities, municipalities and barangays are the following: the governor, the vice governor and members of the sangguniang panlalawigan for provinces; the city mayor, the city vice mayor and the members of the sangguniang panlungsod for cities; the municipal mayor, the municipal vice mayor and the members of the sangguniang bayan for municipalities and the punong barangay, the members of the sangguniang barangay and the members of the sangguniang kabataan for barangays. Of these elective local officials, governors, city mayors and municipal mayors are prohibited from practicing their profession or engaging in any occupation other than the exercise of their functions as local chief executives. ***This is because they are required to render full time service.*** They should therefore devote all their time and attention to the performance of their official duties.

However, it is not far-fetched that a governor or a mayor may in fact have other pecuniary interests but such interests need not necessarily

butt-head with their functions as elected local chief executives. An example may be owning equity in a business or enterprise without actively participating in the management and daily operations of the said business.

Prescinding from the foregoing discussion, governors, city mayors and municipal mayors, although mandated to render full time service as local chief executives, need not necessarily divest themselves of their ownership, should they have one, in any private enterprise (for instance ownership of shares of stocks in a corporation), once they assume their public office. It may be argued that owning a business or having an equity in an enterprise by and of itself, without any other act, e.g., actively participating in the management and daily operations thereof, should not be considered as falling within the term “practice of profession” nor should it be considered as “engaging in any occupation.” Clearly, the mere presence of an economic interest, without affecting their full-time service in the “exercise of their functions as such local chief executives” is not the evil sought to be prevented by the said legislation.

This is not to say, however, that there are no other pecuniary interests (by any elected local government officer, as well as a governor, city and municipal mayor) that are prohibited under some other provisions (other than Section 90) in the Local Government Code. Paragraph 1, Section 89 of the Local Government Code, in essence, provides that:

SECTION 89. Prohibited Business and Pecuniary Interest.

– (a) It shall be unlawful for any local government official or employee, directly or indirectly, to:

- (1) Engage in any business transaction with the local government unit in which he is an official or employee or over which he has the power of supervision, or with any of its authorized boards, officials, agents, or attorneys, whereby money is to be paid, or property or any other thing of value is to be transferred, directly or indirectly, out of the resources of the local government unit to such person or firm;

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For good measure, the last item under this same Section 89 provides finally that:

(b) All other prohibitions governing the conduct of national public officers relating to prohibited business and pecuniary interest so provided for under Republic Act Numbered Sixty-seven thirteen (R.A. No. 6713) otherwise known as the “Code of Conduct and Ethical Standards for Public Officials and Employees” and other laws shall also be applicable to local government officials and employees.

By dissecting this item (a) (1), we may infer that the acts that it prohibits may be categorised as follows:

- **Direct use of his office for private gain:** (i) Engaging in any business transaction with the local government unit in which he is an official or employee, or (ii) engaging in any business transaction with the local government unit over which he has the power of supervision; or
- **Taking action in which any official has or will have financial interest:** Engaging in any business transaction with the authorised boards, officials, agents, or attorneys, whereby money is to be paid, or property or any other thing of value is to be transferred, directly or indirectly, out of the resources of the local government unit in which he is an official or employee to such person or firm (the public officer’s company/business).

The mere presence of a pecuniary interest by way of ownership of a private enterprise by a governor or mayor, sans any overt acts that take advantage of their office for private gain or financial interest, does not fall under item (a) (1), Section 89 of the Local Government Code.

The prohibition imposed on all government officials

Instructive as well in this matter is Section 3(h) of R.A. No. 3019, otherwise known as the Anti-Graft and Corrupt Practices Act, which criminalises any graft and corrupt acts committed by any government official, local or national. It appears that the evil sought to be prevented in

both Paragraph 1, Section 89 of the Local Government Code and Section 3(h), R.A. No. 3019 may be said to be the same.

Section 3 (h) of RA 3019 states:

Sec 3. Corrupt practices of public officers. – In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful:

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(h) Directly or indirectly having financial or pecuniary interest in any business, contract or transaction in connection with which he intervenes or takes part in his official capacity, or in which he is prohibited by the Constitution or by any law from having any interest.

The essential elements set out in the afore-quoted legislative definition of the crime of violating Section 3(h) of the Anti-Graft Law are as follows:

1. The accused is a public officer;
2. He has a direct or indirect financial or pecuniary interest in any business, contract, or transaction;
3. He either: a. intervenes or takes part in his official capacity in connection with such interest; or b. is prohibited from having such interest by the Constitution or by any law.

There are, therefore, two modes by which a public officer (whether elected or appointed, nationally or locally) who has a direct or indirect financial or pecuniary interest in any business, contract, or transaction may violate Section 3(h) of the Anti-Graft Law. The first mode is, if in connection with his pecuniary interest in any business, contract or transaction, the public officer intervenes or takes part in his official capacity. The second mode is when he is expressly prohibited from having

such interest by the Constitution or any law.⁹ By the same token, the ownership by a locally elected public officer of a private enterprise, by itself, without the public officer intervening or taking part in his official capacity or absent an explicit prohibition, in the Constitution or any law, from having such pecuniary or financial interest, cannot be said to violate the Local Government Code nor the Anti-Graft Law.

Having a pecuniary or financial interest alone is not the evil sought to be prevented by the laws. It is the *use by the public officer of his office for private gain* or the *taking of action in which the elective official has financial interest* that is contrary to the spirit of item (a) (1), Section 89 of the Local Government Code and Section 3(h) of the Anti-Graft Law. To be certain, the Local Government Code sets forth an all-catch provision that operates to limit the proprietary rights of an elected official in a local post.

Conflict of interest in public office

On the other hand, section 1, Rule IX of the Implementing Rules and Regulation of RA 6713 or the Code of Conduct and Ethical Standards for Public Officials and Employees (IRR of R.A. 6713) deals specifically with conflict of interest situations where the public official is: (a) a substantial stockholder; or (b) a member of the Board of Directors; or (c) an officer of the corporation; or (d) an owner or has substantial interest in a business; or (e) a partner in a partnership; and the interest of such corporation or business, or his rights or duties therein, are opposed to or affected by the faithful performance of official duty.

Where there is such conflict of interest, i.e "opposed to or affected by the faithful performance of official duty," the public official is expected to resign from his position in any private business enterprise within thirty (30) days from his assumption of office and/or divest himself of his shareholdings or interests within sixty (60) days from such assumption. For those who are already in the service, and any conflict of interest arises, the public officer or employee must resign from his position in the private business enterprise and/or divest himself of his shareholdings or interests within the periods herein-above provided, reckoned from the date when

⁹ Edgar Y. Teves and Teresita Z. Teves v. The Sandiganbayan, G.R. No. 154182, December 17, 2004.

the conflict of interest had arisen.¹⁰ In this case, it is of no consequence even if the government official does not devote time to this engagement as long as the interest or duties in that other engagement or activity is opposed to or affects the faithful performance of official duty as such government official. Divestment of such pecuniary or financial interest shall be to any person or persons but not to his spouse and relatives within the fourth civil degree of consanguinity or affinity.¹¹

In other words, regardless of the nature of a public officer's position in government, or the nature and extent of his pecuniary interest, where a conflict of interest arises, the law requires that the public officer ensures he puts public service over and above his self-interest by doing either of two things: resignation from his post or divestment of his pecuniary interest.

A conundrum

A conflict of interest issue presents itself as a conundrum. According to some ethicists, a conflict of interest is not "of itself" wrong or unusual; it is when the public officer, having an expectation of receiving a personal benefit based on his or her public position, accepts the benefit that the conflict of interest becomes wrong.¹² Human experience has shown that where private interests collide with that of the duty to uphold public interest, sadly, the inclination is to favour one's personal interest. It thus behooves a public officer to proceed with caution where a possible conflict of interest arises.

According to Alan Rosenthal, professor of public policy at Rutgers University, "conflicts of interest may occur when a legislator's personal interests come in conflict with the public interest. It does occur when the legislator picks the personal interest over the public interest." This premise is in fact echoed in the language of Section 1, Rule IX, IRR of R.A. 6713, where ownership or substantial interest in a business by the public officer must be coupled with overt acts showing that the ownership or substantial

¹⁰ Section 2, Rule IX, IRR of RA 6713.

¹¹ Ibid.

¹² Ethics: Conflict of Interest, National Conference of State Legislatures, available at: <http://www.ncsl.org/legislatures-elections/ethicshome/conflict-of-interest-overview.aspx>.

interest in the business of the elective official, or his rights or duties in such business, are "opposed to or affected by the faithful performance of official duty." Thus, it may be said that the spirit of Section 1, Rule IX, IRR of RA 6713 is not violated by the mere ownership of a business by a public officer concerned, absent any conduct that is "opposed to or affected by the faithful performance of official duty," the latter being the essence of conflict of interest. With that said, it bears stressing that public office is scrutinised under more stringent standards and the test of determining conflict of interest is always seen in light of the surrounding circumstances.

Faithful discharge of duty of a public office

As has been consistently held by our Philippine Supreme Court, public office is a public trust. "When a public officer takes his oath of office, he binds himself to perform the duties of his office faithfully and to use reasonable skill and diligence, and to act primarily for the benefit of the public. Thus, in the discharge of his duties, he is to use that prudence, caution and attention which careful men use in the management of their affairs. Public officials and employees are therefore expected to act with utmost diligence and care in discharging the duties and functions of their office."¹³

Therefore, the acts that any government official may commit or may have committed during their incumbency must be tested against this aforesaid standard as held by our High Court. In each case, a public official must assess his conduct vis-à-vis the standards set by our High Court and determine whether their private interest prevents them from faithfully discharging their duty as such public official to the detriment of public service.

The test of conflict of interest in light of good governance

According to a UN Paper, "good governance has 8 major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and

¹³ Ombudsman vs. Jurado, GR No. 154155, 6 August 2008, 561 SCRA 135(2008).

follows the rule of law.”¹⁴ It further goes on to say that good governance “assures that corruption is minimised, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making. It is also responsive to the present and future needs of society.”¹⁵ Transparency in decision-making, therefore, underscores the very essence of good governance.

There is an objective test that determines whether or not a government official exercises the functions of his office in accordance with the spectrum that characterises or lays down principles of good governance. In fact, the Organisation for Economic Cooperation and Development (OECD)¹⁶ has developed a toolkit to precisely remove subjectivity in determining whether or not a specific situation gives rise to a conflict of interest.

These objective tests propose very specific questions which a government official should ask themselves at each stage of a situation and conduct themselves accordingly. The tests are divided into 3 categories of (i) actual or real conflict of interest situations; (ii) apparent conflict of interest situations; and (iii) potential conflict of interest situations.

¹⁴ United Nations Economic and Social Commission for Asia and the Pacific Paper, What is Good Governance?, available at <http://www.unescap.org/sites/default/files/good-governance.pdf>.

¹⁵ Ibid.

¹⁶ “The OECD is a unique forum where the governments of 30 democracies work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies. The OECD member countries are: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The Commission of the European Communities takes part in the work of the OECD.” Available at <http://www.oecd.org/gov/ethics/49107986.pdf>.

Based on the OECD Toolkit,¹⁷ there is actual or real conflict of interest when the private interest of the government official “could be affected by the performance of the official’s duties or functional responsibilities, and is:”¹⁸

- a. Qualitatively, of such a kind that it would be reasonable to believe that the private interest could improperly influence Official X’s performance of their official duties (for example, family or parental responsibilities, religious belief, professional or political affiliation, personal assets or investments, debts, etc.); or
2. Quantitatively, of such value that it would be reasonable to believe that the private interest could improperly influence Official X’s performance of their official duties (for example, a significant family business interest, or an opportunity to make a large financial profit or avoid a large loss, etc.)¹⁹

On the other hand, where there is only an apparent conflict of interest relating to the private interest of the government officer, further investigation may be required. Thus:

The relevant facts about Official X’s private interests, and their official position/ responsibilities, must be established accurately, so that a judgement can be made about whether Official X has a real conflict of interest, or not. This may in turn lead to a conclusion that Official X’s actions also constituted actual corruption, for example, because the conduct of Official X satisfies a test of corruption provided by a relevant law, such as in relation to incompatible relationships or functions, or improper/dishonest conduct in an official capacity. Until such time as the facts about Official X’s relevant interests

¹⁷ Managing Conflict of Interest in the Public Sector; available at <http://www.oecd.org/gov/ethics/49107986.pdf>.

¹⁸ Ibid.

¹⁹ Ibid.

and official duties are made clear, Official X can be said to have a continuing apparent conflict of interest.²⁰

Finally, there may be a potential conflict of interest where the government official's private interests "are currently not relevant interest, because Official X's current official duties are currently unrelated to his/her private interests. However, if it is likely or possible that Official X's official duties could change in such a way that their private interests could affect their performance of official duties, then those interests would become relevant interests"²¹ and may therefore lead to a potential conflict of interest.

Ultimately, this paper affirms its main premise that although the laws allow certain pecuniary interests, a public officer must nonetheless conduct themselves within the broad spectrum of good governance in conflict of interest situations, that is, to always be transparent in their dealings and in the conduct of their office. The personal convictions of the concerned government official should be their first criterion, i.e. their moral compass. A public officer's bad judgment in specific personal situations (whether or not involving their pecuniary interests), though not necessarily in contravention of any law, may shed light on whether they will show bad judgment in the conduct of their public office. When a public officer is in doubt, the rulings of our High Court should enlighten them on whether to divest their private interests. Additionally, the OECD Toolkit, as above-discussed, should be useful. If these tools do not impress them, their track record should inform the public of whether they should be re-elected or not. Then of course, as a last resort, we have the media and civil society watch dogs who can expose them for the self-serving politician that they are and challenge them with disqualification or removal from office.

²⁰ Ibid.

²¹ Ibid.