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### **Piotr Stankiewicz and Stanislaw Burdziej: Conflict of Interest as a Research-Analytical Category**

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## Abstract

The aim of this article is to offer a critical review of the concept of conflict of interest, primarily as it is understood and applied in the field of legal studies. We argue that when couched in strictly legal terms, conflict of interest loses much of its potential power and promise as a research-analytical category. A more nuanced, sociological view would broaden the conceptual scope and help to uncover obvious and potentially destructive conflicts of interest that the narrow legal definition would fail to detect. In this vein, we try to establish a link between conflict of interest and the phenomena of corruption, nepotism, illegal lobbying and the revolving-door syndrome. Finally, we develop the concept of a structural conflict of interest involving key state institutions and attempt to apply it to the study of contemporary Poland and other countries in Central and Eastern Europe.

## 1. Introduction

Contrary to common understanding, a conflict of interest (COI) is not a situation in which two different actors have conflicting interests. According to one of the best-known definitions, offered by Michael Davis,

*[a] conflict of interest is a situation in which some person P (whether an individual or corporate body) stands in a certain relation to one or more decisions. On the standard view, P has a conflict of interest if, and only if, (1) P is in a relationship with another requiring P to exercise judgment in the other's behalf and (2) P has a (special) interest tending to interfere with the proper exercise of judgment in that relationship.<sup>1</sup>*

More succinctly, Nobel Prize-winning economist George J. Stigler defines COI as arising 'whenever one man is an agent for another'.<sup>2</sup> Put differently, whenever one person or institution is charged with acting in the interest of another party, the temptation to pursue private or third party interests will emerge. COI can thus arise whenever people are forced to trust each other, and trust can always be violated. It is also possible to think of COI as a situation of 'double loyalty', whereby one 'should pursue goals which in the given circumstances cannot be achieved simultaneously'.<sup>3</sup>

The aim of this article is to offer a critical review of the concept of COI, primarily as it is understood and applied in the field of legal studies. We argue that when couched in strictly legal terms, COI loses much of its power and promise as a research-analytical category. A more nuanced, sociological view would broaden the conceptual scope and help to uncover obvious and potentially destructive conflicts of interest that the narrow legal definition would fail to detect. In this vein, we try to establish a link between COI and the phenomena of corruption, nepotism, illegal lobbying and the revolving-door syndrome. Finally, we develop the concept of a structural COI involving key state institutions and attempt to apply it to the study of contemporary countries in Central Eastern Europe.

<sup>1</sup> Davis, Michael: Introduction, in: Davis, Michael / Stark, Andrew (eds): Conflict of Interest in the Professions, Oxford, New York: Oxford University Press, 2001, pp. 3–19, here p. 8.

<sup>2</sup> Stigler, George J.: The Economics of Conflict of Interest, in: Journal of Political Economy, 1967 (Vol. 75), No. 1, pp. 100–101, here p. 100.

<sup>3</sup> Lewicka-Strzałecka, Anna: Teoretyczne i praktyczne aspekty identyfikacji i ograniczania konfliktu interesów, in: Węgrzecki, Adam (ed.): Konflikt interesów – konflikt wartości, Cracow: Wydawnictwo Akademii Ekonomicznej, 2005, pp. 7–23, here p. 7.

## 2. Legal definitions of COI

At the beginning of this brief discussion, it is necessary to distinguish between actual and potential COI. Again, Michael Davis offers a useful definition of the two forms:

*A conflict of interest is potential if, and only if, P has a conflict of interest with respect to a certain judgment but is not yet in a situation where he must (or, at least, should) make that judgment. Potential conflicts of interest, like time bombs, may or may not go off. A conflict of interest is actual if, and only if, P has a conflict of interest with respect to a certain judgment and is in a situation where he must (or, at least, should) make that judgment.*<sup>4</sup>

Although potential COI may seem more innocuous than actual COI, it can be just as destructive. For example, it is equally capable of undermining trust in public institutions.

The legal difficulties in pinning down the nature of COI stem mainly from the elusive character of the phenomenon. Two factors contribute to the conceptual haziness: first, merely acting in the circumstances of a COI cannot be treated and sanctioned as wrong per se; numerous COI can and are solved with the common good in mind. This, however, is strictly related to the second difficulty: a COI is a state of mind, a psychological construct, rather than a concrete, tangible entity.<sup>5</sup> Obviously, mental perceptions and intentions cannot be scrutinized by any external authority.

However, even a third party's *perception* that an agent, e.g. a public official, has conflicting interests can have real consequences, similar or identical to the consequences of an actual COI. Many authors think that a possible (or potential) COI is in fact tantamount to an actual COI in terms of its negative consequences.<sup>6</sup> By this logic, a COI could be said to exist even when there is merely a *possibility* that a public official could pursue private interests instead of performing his or her duties, regardless of what actually occurs. A way to solve this dilemma would be to talk in terms of acting *in the situation* of a COI, or *in the circumstances* of a COI, rather than of actual or potential COI.

The elusive nature of COI is reflected in the legal approach toward regulating it. Michael Davis argues that much of the legal thinking about COI is based on the notion that one cannot be punished merely for acting in a situation where there are conflicting interests: 'Having a conflict of interest is not like being a thief or holding a grudge. One can have a conflict of interest without being in the wrong. To have a conflict of interest is merely to have a moral problem.'<sup>7</sup> People cannot be 'prohibited' from having conflicting interests, because they are often thrust into ethically murky situations through no fault of their own (e.g. when a policeman pursuing drug dealers finds himself forced to arrest his own son or a municipal clerk has to make a decision that affects family or friends). For these reasons, as we shall see, most legal regulation focuses on ensuring that COI are managed in such a way so as to avoid the very appearance of the COI or – when it cannot be avoided – increase the probability that it will be sorted out to the benefit of the public interest. That is why most of these regulations are

<sup>4</sup> Davis, Michael: Introduction, in: Davis, Michael / Stark, Andrew (eds): Conflict of Interest in the Professions, Oxford, New York: Oxford University Press, 2001, pp. 3–19, here p. 15.

<sup>5</sup> Stark, Andrew: Conflict of interest in American public life, Cambridge/MA: Harvard University Press, 2000, p. 22.

<sup>6</sup> Lewicka-Strzałecka, Anna: Teoretyczne i praktyczne aspekty identyfikacji i ograniczania konfliktu interesów, in: Węgrzecki, Adam (ed.): Konflikt interesów - konflikt wartości, Cracow: Wydawnictwo Akademii Ekonomicznej, 2005, pp. 7–23, here p. 10.

<sup>7</sup> Davis, Michael: Introduction, in: Davis, Michael / Stark, Andrew (eds): Conflict of Interest in the Professions, Oxford, New York: Oxford University Press, pp. 3–19, 2001, here p. 13.

prophylactic: instead of prohibiting the COI (whatever that might entail) and punishing those who breach it, the law concentrates on preventing the emergence of situations leading to COI in the first place. This entails devising institutional conditions that will minimize the risk of their occurrence or reduce their negative consequences.

The above-mentioned approach excludes a number of phenomena related to COI merely because they are not illegal. This shortcoming calls for a sociological approach, which could help to conceptualize and study other dimensions of COI apart from purely legal considerations. Other COI angles worthy of study might include the social costs (such as decreasing social trust), the undermining of civil society, the expansion of economic grey areas, the increased costs of running a market economy, etc.

### 3. Types of legal regulation

Given the difficulties discussed above, most legal regulation of COI is preventive rather than punitive. Andrew Stark put it this way:

*Conflict-of-interest law ultimately does, then, focus on external acts, but on those acts that give rise to encumbered states of mind, not the ultimate acts which flow from them. [...] Because we cannot prohibit officials from becoming mentally beholden to those who give them gifts, we prohibit the very act of receiving gifts under certain kinds of circumstances.<sup>8</sup>*

In effect, there are three main legal avenues for dealing with COI: classic regulation, 'soft law' and no regulation at all. The first revolves around a supposedly precise definition of a COI, usually as part of anti-corruption legislation meant to regulate the financing of electoral campaigns, the expenditure of public money, and the combination of employment in public offices with other jobs. Traditional regulation also contains laws against fraud, tax crimes, nepotism, etc. This approach is probably the most effective of the three, but it views every COI as inherently negative and suspect. 'Soft law', on the other hand, includes 'rules of conduct with no legal binding and not accompanied by sanctions, which should, however, cooperate, or harmonize with classic regulation'.<sup>9</sup> All sorts of internal codes of ethical conduct and intra-institutional policies against COI fall into this category. For example, public officials or candidates for public office can be required to disclose their funding sources, and scholars publishing articles in medical journals are expected to disclose (or not to have) any financial ties to the producers of the substances or drugs described in their papers.<sup>10</sup> The third avenue, no legal regulation, can work in systems with other means of detecting and regulating COI, such as close monitoring of the electoral process by the media and non-governmental watchdog institutions.

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<sup>8</sup> Stark, Andrew: *Conflict of interest in American public life*, Cambridge/MA: Harvard University Press, 2000, p. 23.

<sup>9</sup> Suwaj, Patrycja Joanna: *Konflikt interesów w administracji publicznej*, Warsaw: Wolters Kluwer Polska, 2009, p. 78.

<sup>10</sup> See Górski, Andrzej: *Tendencje do komercjalizacji w nauce i dydaktyce wymagają pilnych uregulowań administracyjno-prawnych*, *Forum Akademickie*, 2002, No. 2; Krinsky, Sheldon: *Science in the Private Interest: Has the Lure of Profits Corrupted Biomedical Research?*, Lanham: Rowman and Littlefield, 2003.

Another approach, discussed by Michael Davis, lists three mechanisms for dealing with COI.<sup>11</sup> First, one can decide to overcome the situation of COI, e.g. by granting someone else the power to decide on a particular issue. One can also terminate a private interest conflicting (potentially or actually) with one's current job, e.g. by selling stocks in a company that does business in the area which one is supposed to regulate or control. However, 'removing' the COI is not always an option: in such a situation one can instead disclose it, as when candidates for the municipal council declare their sources of income. Disclosure does not remove a COI, of course, but helps to control it. Finally, one can manage the conflicting situation; depending on the circumstances, this may include a broad range of measures:

- *choosing non-action if it is determined that the potential conflict is minimal and mere disclosure will be enough to control it;*
- *informing the parties involved that the conflict was disclosed and is under control;*
- *engaging a third party, e.g. an independent auditor, to investigate the threat of conflict of interest;*
- *co-opting additional participants in the decisional process engaging persons in a conflict of interest;*
- *identifying parties that could be harmed by the conflict and seeking their opinion;*
- *restricting access to confidential or secret information to people having a conflict of interest [...];*
- *removing people in the situation of conflict of interest from debating or voting on certain issues;*
- *barring a given person from performing certain duties;*
- *moving the person to a different department;*
- *in serious cases, convincing the person to resign.*<sup>12</sup>

A number of legal and extra-legal devices can help detect and regulate COI. Instruments for regulation range from instituting internal ethical codes, mandating the disclosure of COI, setting up watchdog institutions, and assuring public access to information to introducing regulation concerning the incompatibility of certain offices with certain other jobs. None of these devices will be completely efficient, though, if core state institutions are ineffective, ignore the problem or even actively counter such efforts. The above-mentioned devices could generally be called preventive; however, instruments for detecting and investigating COI are also necessary. 'Whistle-blowing' is one example: when all internal controlling mechanisms fail, an insider (usually an employee) can inform external

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<sup>11</sup> Davis, Michael: Introduction, in: Davis, Michael / Stark, Andrew (eds): Conflict of Interest in the Professions, Oxford, New York: Oxford University Press, pp. 3–19, 2001, here p. 13.

<sup>12</sup> Lewicka-Strzałecka, Anna: Teoretyczne i praktyczne aspekty identyfikacji i ograniczania konfliktu interesów, in: Węgrzecki, Adam (ed.): Konflikt interesów - konflikt wartości, Cracow: Wydawnictwo Akademii Ekonomicznej, 2005, pp. 7–23, here p. 20.

actors, typically the media, non-governmental organizations or state institutions, about the problem. This 'disloyalty' is associated with significant psychological costs, so institutional regulation is necessary to facilitate such decisions and to protect the informant later on. A striking example is the story of a medium-level manager in a German cartel operating for 50 years in the construction business, providing road signs for highways. The manager had a very hard time getting his findings to the police and the courts, where he was repeatedly ignored, and in the meantime he was fired by his company.<sup>13</sup> According to Erwin Scheuch, whistle-blowing is one of the most effective tools in combating complex corruption networks.<sup>14</sup> He cites the case of Opel, where a corrupt system lasted for 20 years and implicated over 60 people.<sup>15</sup>

#### 4. Inadequacy of legal definitions

As we have noted before, it is mostly lawyers and legal scholars who make use of the concept of COI. Alison L. Gash and Christine Trost<sup>16</sup> argue that in effect, most of the existing literature focuses on two areas: (1) analyses of legal regulations pertaining to COI in various countries which take into account local circumstances and solutions, attempt cross-cultural comparison, and study the evolution of this jurisprudence; (2) assessments of the effectiveness of different legal solutions. This second area seems to be sociologically relevant, but when it is framed in legal discourse, scholars tend to explain the efficiency or inefficiency of the law as resulting from incorrectly shaped regulation, without taking the influence of social factors into account. The lack of empirical research on COI leaves a gap in our knowledge regarding its forms, mechanisms, institutional factors that favour or hamper it, and the influence of social, cultural and ethical contexts. This gap is especially troublesome when one particular consequence of the prevailing legal-administrative discourse is stressed: its focus on decision-makers acting in the situation of a COI. This means that the entities that put those decision-makers in such situations in the first place remain in the shadows. For lawyers, a corrupted official is naturally more interesting than the corrupting businessman; ought sociologists to look more closely at 'the perpetrators' rather than at 'the victims' of COI?

The legalistic approach to COI also has significant consequences for the public debate and the ways for dealing with COI in it. COI is often associated – or even equated – with financial interest. As Karen Getman and Pamela S. Karlan observed, a great deal of legal regulation in California is predicated on this equation, with the result of weakening the impact of laws by excluding all cases in which private interest is not overtly financial or material (or when it simply cannot be proven).<sup>17</sup> Indeed, many legal

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<sup>13</sup> Bannenberg, Britta: *Korruption in Deutschland und ihre strafrechtliche Kontrolle*, Neuwied: Luchterhand, 2002, pp. 109–111.

<sup>14</sup> Scheuch, Erwin Kurt: *Die Mechanismen der Korruption*, in: von Arnim, Hans Herbert / Bannenberg, Britta (eds): *Korruption. Netzwerke in Politik, Ämtern und Wirtschaft*, München: Droemer Knauer, 2003, pp. 31–75, here p. 53.

<sup>15</sup> Scheuch, Erwin Kurt: *Korruption als Teil einer freiheitlichen Gesellschaftsordnung. Oder: Die Kriminogenese eines kommunalen 'Klüngels'*, in: *Kriminalistik*, 2002, (Vol. 56), No. 2, pp. 79–91, here p. 82.

<sup>16</sup> Trost, Christine / Gash, Alison L.: *Conflict of interest and public life. Cross-national perspectives*, Cambridge: Cambridge University Press, 2008, p. 3.

<sup>17</sup> Getman, Karen / Karlan, Pamela S.: *Pluralists and Republicans, Rules and Standards. Conflict of Interest and the California Experience*, in: Trost, Christine / Gash, Alison L. (eds): *Conflict of Interest and Public*

systems around the globe simply dismiss COI cases in which no financial gain can be proven. A case in point is the story of a municipal clerk in Torun, Poland, who was exonerated when the court decided it could not prove that he had divulged plans for a new bridge to a female friend, who immediately bought a lot in a relevant location and can now resell it to the city at a significantly higher price. In the verdict we read that 'It was not possible to verify the hypothesis that any municipal officials received any material or personal reward in return for their behaviour.'<sup>18</sup> Note that while reward here was understood broadly, i.e. not only in the material sense, the mere fact that the receipt of such a reward was not proven was enough to dismiss the charges against the clerk. Obviously, from a legal point of view, this was probably a perfectly logical decision, but how did the public perceive the proceedings? Undoubtedly, this case concerned a profound COI, even though the court was unable to determine the nature of the private interest involved when the clerk disclosed the confidential information to his friend. Regardless of whether a kickback, which could not be proven, or platonic love was at play, this was a textbook case of COI (which, we might add, was resolved with a great loss for the public interest). However, the message from the court to the public was unequivocal: If no money changed hands, then no crime was committed.

We have no problem with the legal approach as such, but when it is the *dominant* approach to resolving a COI, the social perception of the phenomenon will be severely distorted. The resulting reduction of all COI to the financial dimension can in turn be instrumentalized in public debate: many of the commentators on the so-called gambling affair of 2009 (which implicated a number of important Polish politicians) stressed that there was no proof that any of the politicians were materially rewarded for their 'help'. Therefore, since no material gains could be proven to have changed hands, the judge in the case ruled that the anti-corruption law had not been violated. The same argument has been used as a justification for lobbying politicians.

Conflict of interest can assume both legal and illegal forms, just as lobbying can – and the legalization of lobbying has by no means prevented COI; it simply puts them on a legal playing field. Thus, we have forms of corruption which are not punishable by law, such as the cooperation between scientists and businesses (in fact, such cooperation is strongly encouraged in the Lisbon Strategy of the EU) and the fully legal circulation of people between politics and business (with certain exceptions concerning so-called post-employment). When we add to this list the phenomena of nepotism, protectionism, clientelistic and informal networks, which are almost completely immune to legal judgment, it becomes clear that COI cannot be understood merely in legal terms or in the light of administrative regulations.

## 5. Conflict of interest in psychological and ethical discourse

To forge a broader perspective of COI, it is necessary not only to go beyond the legal point of view, but also to transcend the ethical and psychological discourses, which seem to frame COI in a way that obscures rather than clarifies it. The scholarly penchant for psychological explanations and ethical individualism masks COI's social dimension. With respect to the various codes of ethical conduct

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Life. Cross-National Perspectives, Cambridge: Cambridge University Press, 2008, pp. 56–74, here pp. 64–65.

<sup>18</sup> Quoted in: Dolecki, Karol: Działo się przy toruńskim moście. Oj, działo, in: Gazeta Wyborcza Torun, 11 January 2010.

adopted by public institutions, the corresponding discourse focuses on the public official as the chief or sole actor; his or her interests and motivations are perceived as the causes for the COI and are thought to determine the way it is resolved. This approach neglects the various forces that impact the official's behaviour, as well as the broader social context (in psychology, this tendency is called the 'attribution error'). Corruption is often portrayed as an inherent feature of one's character rather than the product of diverse pressures and temptations flooding in from the outside world. These external factors include the huge gap between the earnings of the corrupters and the corruptees, the low social prestige of many public offices, inadequate working conditions, political pressures, etc. All of these circumstances facilitate corruption, and their combined force can outweigh the power of moral principles. Put differently, the sociological imagination teaches us that institutions often shape their personnel, and not the other way round; likewise, our system of justice produces judges and is not produced by them.

Similarly, in Poland we often hear complaints about the 'low political culture' in the country; this culture is tacitly understood as the way particular politicians behave (it is said that 'we have such politicians as we have been able to educate and elect'). However, there is much more to political culture than just the moral (in)sensibility of the political elite. Structural conditions, including the existence and attitude towards COI, are at least as important. Of course, ethical sensibility can be a significant factor in countering the numerous temptations that crop up in the work of public officials. Codes of conduct, seminars aiming at increasing their morale, etc. can prove to be effective tools of 'soft power'; however, it would be naive to rely exclusively or predominantly on these tools.

## 6. Structural conflict of interest

To address the insufficiency of both the legal and ethical-psychological discourses, we would like to briefly discuss the concept of structural conflict of interest. First introduced by Andrzej Zybertowicz, the concept refers to COI that affect core institutions, whose proper functioning is crucial for the health of the state.<sup>19</sup> These include the parliament, the executive branch, the system of justice, police and secret services, and the media. In sum, these institutions are strategically important, and if COI is widespread in any one of them, state capture becomes possible.<sup>20</sup>

Another feature of structural COI is its prevalence. Conflicts of interest can be systemic (or structural) even if they occur in areas not defined above as crucial for the state, e.g. in sports. Press releases on corruption in Polish football point to a widespread COI in the industry. Structural COI can therefore be said to exist when key state institutions are involved and/or when it is so widespread that it becomes the standard way of doing business in a given field.

Structural COI triggers a destructive snowball effect: the less it is addressed by the law and/or condemned by public opinion, the more it reshapes political culture. The classic mechanism of self-fulfilling prophecy seems to be in place: conditions for public service are increasingly defined by the widespread presence of COI. A popular expression of such a 'definition of situation' – in Poland, at

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<sup>19</sup> Zybertowicz, Andrzej: *Strukturalny konflikt interesów jako kategoria analizy uwarunkowań przemian instytucjonalnych w Polsce po r. 1989*, unpublished paper, 2009.

<sup>20</sup> Grzymala-Busse, Anna: *Beyond Clientelism. Incumbent State Capture and State*, in: *Comparative Political Studies*, 2008 (Vol. 41), No. 4/5, pp. 638–673.

least – is the proverbial belief that ‘you have to steal the first million’.<sup>21</sup> This snowball effect is not merely symbolic, however: one of its consequences is that it paves the way for more COI situations. Knowledge of an existing COI can provide others with a ‘hook’ to engage in blackmail, thus perpetuating the cycle of favouring private interest over public interest.

Antoni Z. Kaminski summarized the origins of this mechanism when he wrote: ‘The strategy of privatization that was adopted in Poland – through full acceptance, or even conscious evoking of situations of the conflict of interest – created fertile soil for corruption’.<sup>22</sup> This suggests that structural conflicts of interest were created consciously to facilitate the creation of COI situations in other areas. Having launched a chain of cooperation generating ever new conflicts of interest, entrepreneurs of the so-called ‘enfranchised nomenclature’, the former communist elite among the early winners of the free market transformation in Poland, created and thrive in precisely such a system.

Reproduction of COI via the snowball effect results in a systematic loss of self-regulative and self-controlling capacity in the political system. This can be illustrated by the different impact exerted by economic-political affairs and scandals in the West and in the East. Western scholars point to the regulative function of such affairs for public life.<sup>23</sup> Detection of scandals sends a signal that something is not functioning properly, e.g. that there are either gaps in the legal system, in regulations concerning party financing, or in the state of public debate. Exposing a scandal thereby helps to close these loopholes by triggering better regulation, circulation of the elites, changes in social practices and sensibility, or the establishment of new institutions. As Bruce E. Cain, Alison L. Gash and Mark J. Oleszek observed, ‘Most major conflict-of-interest innovations occur in the wake of a highly publicized political scandal for one simple reason: scandals put the political system on the defensive’.<sup>24</sup> For example, the famous Watergate affair of the 1970s drew public attention to the ‘revolving door’ problem in the US political system and brought about complex legal rules concerning the movement of individuals between big business and politics.<sup>25</sup>

The so-called Rywin affair (2002–2003), the largest corruption scandal in recent Polish history, initially seemed to have launched a renewal of political life in Poland. Although no new regulations were adopted in its wake (apart from the comeback of parliamentary investigation committees), public opinion became more sensitive to cases of COI, and the media started looking more closely at other scandals at the intersection of politics and business. The scandal did, however, result in the creation of the Central Anti-Corruption Bureau in 2005. Nevertheless, the subsequent scandals that surfaced after ‘Rywingate’ no longer seemed to have this salutary effect on Polish public life. In 2009

<sup>21</sup> Numerous examples could be cited from other countries, too; see e.g. Della Porta, Donatella / Vannucci, Alberto: *Corrupt Exchanges. Actors, Resources, and Mechanisms of Political Corruption*, New York: Aldine de Gruyter, 1999, for a description of the Italian case.

<sup>22</sup> Kamiński, Antoni Z.: *Korupcja jako system instytucjonalnej niewydolności państwa i zagrożenie dla rozwoju polityczno-gospodarczego Polski*, in: Popławska, Ewa (ed.): *Dobro wspólne, władza, korupcja. Konflikt interesów w życiu publicznym*, Warsaw: ISP, 1997, pp. 23–74, here p. 53.

<sup>23</sup> Trost, Christine / Gash, Alison L.: *Conflict of interest and public life. Cross-national perspectives*, Cambridge: Cambridge University Press, 2008, pp. 4–5.

<sup>24</sup> Cain, Bruce E. / Gash, Alison L. / Oleszek, Mark J.: *Conflict-of-Interest Legislation in the United States. Origins, Evolution, and Inter-Branch Differences*, in: Trost, Christine / Gash, Alison L. (eds): *Conflict of Interest and Public Life*, Cambridge: Cambridge Univ. Press, 2008, pp. 101–123, here p. 102.

<sup>25</sup> Green, Jeffrey: *History of Conflicts Law*, in: *Hamline Law Review*, 2002 (Vol. 26), No. 3, pp. 556–600, here p. 555.

alone we learned about several major political-economic scandals (the so-called annex affair, as well as gambling, shipyard, and wiretapping affairs), and over the past several years it was also revealed that major political figures (including the vice-prime minister; ministers of public health, sports, justice, internal affairs, defence, and treasury; and the chief of one of the secret services), were involved in COI situations. These revelations somehow failed to spark any systemic reactions (and sometimes, not even individual sanctions) that could prevent the emergence of COI in the future. We seem to be witnessing the same mechanism that has operated in lustration cases: news about the collaboration of ever more public figures with the communist secret services does not meet with public condemnation.

This situation illustrates the ‘corrosive effect’ of structural COI, i.e. when subsequent cases of COI that make headlines cease to contribute to the reform of the system and instead intensify the snowball effect. We already mentioned one consequence of this corrosive effect – the creation of new COI situations; another would be the undermining of public trust in the state and its representatives, as well as in other public figures. Interestingly, while many scholars discuss the importance of social trust for the quality of democracy and governance, it is not easy to find analyses that take the existence of COI and reactions to it into account.<sup>26</sup> The justice system, the media, the public health system, moral authorities and pundits, state authorities, and the scholarly community all require a certain level of public trust; all of them are also repeatedly involved – in different ways – in various COI situations.

In the legal arena, COI is usually defined as a relationship between two and only two actors: the decision-maker and the agent to whom the former is loyal at the expense of the public interest. In fact, COI can be a much more complex tangle of relationships and mutual dependency. What is more, in treating the phenomena of corruption, nepotism, and illegal lobbying separately, one neglects what unites and largely explains them: COI situations. In other words, each particular instance of COI (e.g. corruption) can be just one element of a more complicated operation, which might consist of forgery, fraud, tax extortion, false evidence, and so on. Treating each case of COI as a discrete dual scheme of good vs. evil or victim vs. perpetrator obscures the network character of COI.

Most scholars (and lawmakers) dealing with COI assume that actors are individuals. Cases where formal institutions can be implicated in COI thus tend to be pre-emptively excluded. A number of scholars stress the need to examine situations in which COI involves whole institutions or their segments.<sup>27</sup> This advice is especially important in the context of structural COI, which by definition affects key state institutions. Research on institutional COI concentrates mainly on the study of science, particularly medicine and pharmacology. Nils Hasselmo, who investigates institutional COI in regard to American universities, suggests the following definition:

*An institutional financial conflict of interest may occur when the institution, any of its senior management or trustees, or a department, school, or other sub-unit, or a related organization (such as a university foundation) has an external relationship or financial interest in a company that itself has a financial interest in a faculty research project. Senior managers or trustees may also have conflicts when they serve on the boards of (or otherwise have an official relationship with) organizations that have significant commercial transactions with the university. The existence (or appearance) of such conflicts can lead to actual bias, or*

<sup>26</sup> A notable exception is Della Porta, Donatella / Vannucci Alberto: *Corrupt Exchanges. Actors, Resources, and Mechanisms of Political Corruption*, New York: Aldine de Gruyter, 1999.

<sup>27</sup> See Emanuel, Ezekiel J. / Steiner, Daniel: *Institutional Conflict of Interest*, in: *New England Journal of Medicine*, 1995 (Vol. 332), No. 4, pp. 262–268.

*suspicion about possible bias, in the review or conduct of research at the university. If they are not evaluated or managed, they may result in choices or actions that are incongruent with the missions, obligations, or the values of the university.*<sup>28</sup>

Hasselmo's definition pertains to COI in the academic world but could also be applied to other milieus affected by institutional COI. Universities are just one example of institutions that can be taken over and made to pursue other interests than those publicly declared. This take-over process could be called 'third degree control'<sup>29</sup>, whereby a given institution's resources and personnel can be mobilized toward goals that foster private interests of a group or individual that are inconsistent with this institution's declared purpose. A model example would be using 'friendly' tax control officials to fight business competition with prolonged, overly detailed inquiries. Third degree control can also arise within the institution itself, resulting in the emergence of informal cliques, interest groups and networks among its members. In effect, this institution ceases to fulfil its statutory function and becomes subservient to the strongest interest groups.

## 7. Structural conflict of interest in Central and Eastern Europe

Regardless of the antipathy that public administrations might harbour toward attempts at establishing external norms and institutions to control their work and counter possible COI, European countries are slowly moving away from the idea of self-control and internal evaluation systems and replacing them with specialized institutions.<sup>30</sup> Examples of this tendency include the Lithuanian Investigative Service (STT), founded in 1997; the Corruption Prevention and Combating Bureau (KNAB), established in 2002 in Latvia; and the Polish Central Anti-Corruption Bureau (CBA), founded in 2006.<sup>31</sup>

In Poland, the CBA's activities are supported by the Supreme Chamber of Control, the Ombudsman, courts, the prosecutor's office, and a number of other controlling institutions. Coordination of their activities is especially important in Poland, as well as in other CEE countries, because of the particular nature of existing conflicts of interest there. As noted above, they assume a structural character, and – unlike in the West – share another important feature: they are often based on informal ties dating back to the communist era. As Andrzej Zybortowicz wrote, these ties are characterized by 'high invisibility [...] and cannot be detected with standard institutions and controlling procedures of the democratic social system'.<sup>32</sup> Elsewhere he observed that among top Polish politicians of at least the ministerial level, between 1989–2000,

*at least 18 people had to take into account the activities of past and present secret services or some other informal structures, which had at their disposal information gathered by those services. We are talking here*

<sup>28</sup> Hasselmo, Nils: Individual and institutional conflict of interest. Policy review by research universities in the United States, in: *Science and Engineering Ethics*, 2002 (Vol. 8), No. 3, pp. 421–427, here p. 425.

<sup>29</sup> Zybortowicz, Andrzej: Kontrola społeczna trzeciego stopnia, in: Kwaśniewski, Jerzy / Winczorek, Jan (eds): *Idee naukowe Adama Podgóreckiego*, Warsaw: Wydawnictwo UW, 2009, pp. 152–178.

<sup>30</sup> Suwaj, Patrycja Joanna: *Konflikt interesów w administracji publicznej*, Warsaw: Wolters Kluwer Polska, 2009, p. 41.

<sup>31</sup> For a survey of anti-corruption bureaus in Central Eastern Europe see Dionisie, Dan / Checchi, Francesco: *Corruption and Anti-Corruption Agencies in Eastern Europe and the CIS. A Practitioners' Experience*, 2008, [http://anorage-net.org/content/documents/dionisie-checchi-corruption\\_in\\_ee.pdf](http://anorage-net.org/content/documents/dionisie-checchi-corruption_in_ee.pdf)

<sup>32</sup> Zybortowicz, Andrzej: *Strukturalny konflikt interesów jako kategoria analizy uwarunkowań przemian instytucjonalnych w Polsce po r. 1989*, unpublished paper, 2009.

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*about two presidents, six out of eight prime ministers, two vice-prime ministers, four out of nine ministers of justice, two ministers of foreign affairs and a secretary of state in the cabinet of one prime minister.*<sup>33</sup>

How does the existence of these ties influence the citizens' trust in their representatives? It is not hard to see that politicians with such a background could easily be 'hooked'.

A narrowly legalistic approach has proven insufficient for detecting all cases of COI; a more nuanced, sociological view would broaden the conceptual scope and greatly improve diagnostic capacity. Only by taking into account their complex nature and various forms – not only those where illegality or financial gain is involved – can these structural conflicts of interest be successfully explored and regulated.

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<sup>33</sup> Zybertowicz, Andrzej: Demokracja jako fasada. Przypadek III RP, in: Mokrzycki, Edmund / Rychard, Andrzej / Zybertowicz, Andrzej (eds): Utracona dynamika? O niedojrzałości polskiej demokracji, Warsaw: Wydawnictwo IFiS PAN, 2002, pp. 173–214, here pp. 175–176.