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## Conflict of Interest Regarded as Unethical Conduct

**Abstract:** *The paper explains the phenomenon of the conflict of interest and correlations between the conflict of interest and corruption. The criminological aspect has been supplemented by an analysis of legislation in the Republic of Serbia pertaining to the prevention of the conflict of interest in the public service (particularly the police). The objectives of the paper are to explain why the conflict of interest can be regarded as corruption in the broader sense, how it can be prevented and why legal provisions and ethical codes are not always effective in doing so. The paper applies sociological and legal methods. The theoretical analysis is based on the notions of the theory of social constructivism, which allows for the explanation of the impact of the cultural factor on corruption. Using the example of social circumstances in Serbia as the starting point, the author proves the hypothesis that the legal superstructure (including the codes of ethics) has no significant effect on the prevention of corruption if applied in a society where corrupt practice is considered to be morally acceptable.*

**Keywords:** *conflict of interest, corruption, code of ethics, police, international standards.*

### Introduction

Any situation in which there are mutually inconsistent interests, desires or expectations, among which only some are to prevail, presents a conflict of interest at a theoretical level. When we speak about the conflict of interest and its relation with corruption, it is necessary to clarify what is meant by the terms ‘interest’ and ‘the conflict of interest’ and how the conflict of interest is manifested in the work of public authorities, wherein it is considered to be harmful as it leads to corruption. The need for this arises from the fact that the most important international legal instruments related to the prevention of corruption at the same time refer to avoiding the conflict of interest, and it is to the same effect that the relevant national legislation of the Republic of Serbia has incorporated provisions pertaining to the conflict of interest.

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The example of our society shows that legislation aimed at combating corruption frequently remains 'deal letter', which indicates a possible discrepancy between what is proclaimed to be illegal by the laws and the generally accepted view regarding moral permissibility of corruption. This attitude partly results from economic factors and insufficient rule of law, but it may even more stem from the cultural influence (therefore being more difficult to eradicate), so the strategy of preventing corruption (including the conflict of interest) should take into account the importance of this factor.

### ***Interests and the conflict of public and private interests***

The term *interest* always indicates that someone is preferred because of special circumstances (social status or influence, economic power, close relationship, occupation, etc.). In German and French, the word *interest* suggests specific property or ownership interests than an individual, a social group or a class may have. But in English, the word *interest* extends beyond this basic meaning of advantage based on real property or other rights and thus allows the expression 'the conflict of interest' to have multiple meanings, depending on the user.

Sociologically speaking, the conflict of interest can be observed at the micro, medium and macro levels (Мрвић-Петровић, Ћипрић, 2004:12). At the micro level, conflicts of interests occur as internal, when they concern individuals, or external, when the conflict is manifested in the personal relationships among individuals. At the medium level (within a society or in international relations), the conflicts of interests are a common phenomenon in the class-stratified or socially stratified societies, because social groups always have different interests, frequently quite conflicting. At the macro level, the conflict of interests always has characteristics of an international conflict.

The level at which a conflict occurs, the nature of conflicting interests and the basis of the conflict determine the possibility and ways of preventing it. The conflicting interests are resolved by peaceful or violent means. The violent means always involve the use of force by the stronger party, to which the weaker party has to submit. Peaceful ways present a greater challenge, as they always involve establishing relationships of cooperation and negotiation (political, using mediation services – arbitration or courts). But it should be borne in mind, first and foremost, that a peaceful settlement of the conflict of interest depends on which of the conflicting interests - one or more of them - is or are estimated to have unconditional priority or - if they are of equal significance - how they are to be harmonised.

Functionalist conflict theory teaches us that the results of the conflict of interest can be positive if they lead to social cohesion, behaviour in accordance with the norms and generally contribute to the stabilisation of the system or ne-

gative (destructive) if they violate social structures and threaten a system. Democratic societies resort to institutionalisation of the conflict of interest because it is the most suitable solution that helps the settlement of conflicts in peaceful ways and can contribute to the stabilisation of society and prevent more serious social disorders.

The confrontation of personal or group interests, in situations where individuals cannot decide which of the interests should prevail, certainly indicates difficulties in the process of decision-making and actions of the individuals involved. Each of us faces such situations in life, but the choice that an individual makes does not - as a rule - concern other members of the society, but the ones closest to them. Only if such conduct of individuals would endanger legally protected interests of others or bring into question the achievement of general interests, does it become relevant whether the individual has previously been in a situation of internal, psychological conflict of interests. Such cases occur when the individual is assigned to public function as a political official, or when he is given official or public authority, since this may involve a conflict between public and private interests (Кечић, 2012:135. This immediately raises the question: what is the public interest?

Nor can the meaning of the term 'public interest' be clearly defined. It is a common knowledge that class societies regard the public interest (general interest or general welfare) as the narrower interest of a class or the social group in power. In addition to this, ideological changes and different social circumstances (international and domestic) ensure that the understanding of the public interest is adjusted to this. The public interest should be the interest of a social community and it is not always equal to the national interest. The interests of the community should be protected by the public servants who are in power or are granted public authority to act on behalf of the citizens, because this exercise of public authority is entrusted to them by the citizens, so that they should govern for them and for their benefit and not for personal benefit or in the interest of the social groups they belong to. But the trouble is that in the conditions of social stratification, the public interest always has characteristics of the majority interest (and not that of all members of the society). This is why political activities reveal the interests of social elite (Вуковић, 2003: 90; Ненадић, 2003: 5), even when politicians hide behind common interests and universal values.

The public interest is served through political activities and the functioning of relevant authorities. Democratic systems not only insist on the protection of the public interest, but also emphasise that the main mission of 'good governance' and political institutions is to 'serve' in the public interest, which is in line with the expectations of citizens (OSCE Recommendation on guidelines for Managing Conflict of Interest in the Public Service 2003:2). Serving the public interest should be the concern of both administrative authorities and

the judiciary. They are subject to particular, not only legal, but also professional accountability for any omissions in their work. Not only do they have to act lawfully, but also properly (that is, professionally and efficiently) to protect the citizens' rights. Therefore any fact that may be regarded as grounds for doubting possible bias and partiality on their part is reason to exclude any public official or judge from making decision in the given case or even to cause them to leave the position or function they perform.

The root of the conflict has always been associated with efforts to implement the prevalent interest. In a situation of conflict between public and private interests, the priority is given to the private (personal or group) interests rather than the public ones, which should come first, not only because they are in the interest of the majority, but also due to the specific official position that an individual occupies in the system of government and that is entrusted to him by the citizens. It is therefore perhaps more appropriate to speak of the conflict between the public duty performed by the civil servant and his private interests.

With respect to time of occurrence, the conflict between the public and private interests may be current (existing) and imminent (future, potential). In the former case, the individual is already acting in a situation that can be characterized as a conflict of interest and – depending on his behaviour – can become subject to sanctions (disciplinary, summary, criminal). Such conduct can also be 'sanctioned' by the measures that are envisaged within the so-called codes of ethics and essentially amount to disciplinary measures related to violation of duty: suspension from work, transfer to another job, firing, etc. In the cases of impending conflict of interest, such interventions are neither possible nor appropriate, because one does not have to be aware of the existence of circumstances which are yet to bring about the conflict of interest. One may perform his duties extremely conscientiously and yet find himself in a situation that is referred to as a conflict of interest. Moreover, the realization of any private interest does not necessarily entail harm to the public interest that the individual is supposed to give priority to. But since the potential conflict presents imminent danger to the achievement of the public interest, the individual must be aware of his specific situation. There have been situations in which the actions taken by the officials, although lawful and proper, harmed the reputation of the state authority and hampered the public trust in the functioning of the state government. The civil servants are therefore encouraged to resolve the situations of conflicting interests themselves or to indicate the reasons due to which conflicts may arise between the public and private interests in the cases in which they are engaged.

In contrast to these manifestations of the so-called actual conflicts of interests, where the public interest undoubtedly cannot be ignored or 'covered up' by the achievement of the private one, there may be cases of the so-called

apparent conflicts, when the existing circumstances create an appearance of a conflict of interests where, actually, there is none.

The cases of conflicting interests are most clearly identified when the use of power correlates with actions motivated by self-interest: prospective property gains, services or benefits. It is however, possible that the conflict of interests is caused by some non-material interests, for instance, the chance to gain a reputation in a society, to join a social group, the need for social respect and recognition, and the like. In order to identify these, we need to know to which particular group or association (religious organisation, sports club, cultural organisation, etc.) a civil servant belongs to, as this may be important if he finds himself in a position to decide on the material support for these institutions. It is possible that the biased attitude of the civil servant in such cases is influenced by completely irrational reasons, such as sympathy or antipathy towards someone, hatred, envy, jealousy, malice, and the like.

The conflict of interest most frequently results from personal relationships and circumstances in which the civil servants may find themselves. Since the man is a social being, growing up, acting and living in contact with other members of certain social groups (family, school, workplace), a conflict of interest most often occurs indirectly, when the work of a civil servant is affected by his striving to serve the interests of the third persons with whom he is emotionally closely related (family members, relatives, friends, former classmates, and the like).

Due to all of this, it is not easy to identify a conflict of interests. The reasons for this are related to the covert nature and complexity of the phenomenon and to the cultural factors that shape social consciousness of the (un)acceptability of action in a conflict of interest.

Decision-making or activities of civil servants that are motivated by serving private interests rather than the general welfare are, as a rule, defined as inappropriate or unlawful actions. Difficulties arise in the event of exercising power by using discretionary powers, which is characteristic of state administration. The officials are allowed to adjust their actions in a given situation to the general (and imprecise) rules, so that there is a greater possibility for them to act in a conflict of interests, which is more difficult to spot. The situation is facilitated by the practice of "the gray cheque" with respect to discretionary power of decision, when a sort of 'carte blanche' approvals are given for the individual practices of the authorities, especially if there is a 'system of mutual protection' between the political system and the state authority which acts on discretionary powers (Милосављевић, 1998: 1053). Yet when it comes to discretionary actions of the government, due to the hierarchical structure, it is possible to implement control of the legitimate and proper operation of the civil servants.

Acting in the conflict of interests is usually evident when an official is in a position to authoritatively decide on the merits of the case. An instance of this is when someone uses one's discretionary powers to ensure advantage to their family members or close friends upon employment in the public sector or when deciding on the promotion of subordinates. These are obviously the situations in which the conflict of interests derives from nepotism (Latin: *nepos*, *nepotis* - nephew, descendant) or cronyism (from the English word *crony* – friend, companion). It is less widely known that the conflict of the public and private interests may affect the work of an official who is not authorised, but only takes certain administrative actions. In addition to this, the consequences of his actions are noticed much later, for example, as errors or omissions in finding out or establishing important facts which influence later decisions (for example, when investigating an accident in such a way that another officer will not be able to file criminal charges).

A special kind of the conflict of interest occurs with the development of the administration. Since more and more of certain administrative actions nowadays are transferred to nongovernmental organisations, which have become equal partners for administration, the areas of incidence of conflicts of interests have been expanded. Public servants may be engaged by the nongovernmental organisations for specific activities in the same capacity in which they perform as part of their public service or they may be engaged in providing advice or services to individual clients or agencies that cooperate with companies over which the same civil servants or the agencies which hire them are supposed to carry out administrative supervision.

### ***A conflict of interest as unlawful and unethical behaviour***

Conflicting public and private interests create certain circumstances which, in the event of inadequate resolution of the conflict, can lead to corruption (bribery). Corrupt officials realise that their private interests differ from the public ones, which they are supposed to serve, and – consciously opting for the private interests – make decisions detrimental to the public interest. However, the conflict of interests may begin as unethical conduct that does not necessarily have to deteriorate into corruption. The conflict of interests is clearly not the same as corruption, but the former precedes the latter and enables it. A (subsequent) occurrence of corruption is by far the most important indication that, in a given case, personal or group interests have been given precedence over the general interests (Doig, Riley 1997: 49). In a corrupt relationship, it is always possible to identify a conflict of interests, which is often equated with corruption in the so-called broader sense (Мрвић-Петровић, Тирић, 2003, 30). Hence the documents of international organisations state that, besides bribery, corruption involves any abuse of power for private gain, and this concept has been accepted in the legal definition of corruption in the Act on

Agency for Combating Corruption (The Official Gazette of the RS, no. 97/08, 53/10 and 66/11 – the decision of the Constitutional Court) in which corruption is defined as a relationship based on abuse of official or social position or influence, in the public or private sector, in order to obtain personal benefit or benefit for another person.

This is the main reason for the prevention of corruption to start by inventing the mechanism for resolving conflicts between public and private interests and for paying special attention to strengthening of ethics (Нинчић, 2011:127). Examples of legal provisions on the prevention of the conflict of interest and corruption in public administration show that ethics strives to take the shape of legal norms, which is obvious proof that the missing ethics in contemporary consumer society in which money is recognised as the most important value seeks to secure itself from the ‘outside’ by legal sanctions, which are not sufficiently effective.

Since corruption is recognised nowadays as a topical and universal issue that occurs across countries but also in the bodies of the United Nations or the European Union, for example, it is not surprising that one of the mechanisms for its prevention recommended by the acts of international organisations is reinforcing accountability of public servants by introducing the so-called codes of ethics. The codes of ethics should provide solid guidance for the public officials, as they are aimed at avoiding situations of conflicting interests that may lead to abuse of power and bribery (Божовић, 2012:339).

Accepting international standards and including them in the Serbian legislation, the Civil Servants Act (*The Official Gazette of the RS* no. 79/05, 81/05, 83/05, 67/07, 67/07, 116/08, 104/09) dedicates the entire Chapter Three (Articles 25-31) to the prevention of the conflict of interest. Thus Article 25 prohibits acceptance of gifts (other than occasional) and taking advantage of employment with the state authorities, whereas other articles envisage prohibitions of the establishment of private companies and public services, membership in the managerial bodies of legal entities and provide for the obligation to report the impending situations of conflicting interests, as well as the conditions under which additional engagements can be accepted by the civil servants or officials. Meanwhile, Article 23a has been added, applying to the matter of Chapter Three, although it does not formally belong to it. It envisages the duty of civil servants or employees to notify their immediate superiors or managers if in the discharge of their duties they find out that any act of corruption has been performed by any official, civil servant or employee in the state authority they work for and such a “whistleblower” is guaranteed protection by law. At the same time, acting in the conflict of interest, corrupt actions and the abuse of notification of the existence of corruption (as per Article 23a) are defined as serious breaches of duty under Article 109 of the Civil Servants Act. On the basis of these general provisions of the Civil Servants Act and the

Police Act (*The Official Gazette of the RS* no.101/05, 63/98 – Constitutional Court decision, 92/11) and the European Code of Police Ethics contained in the Recommendation (2001) No. 10 of the Committee of Ministers of the Council of Europe (of 21 September 2001), a Code of Police Ethics was adopted (*The Official Gazette of the RS*, no. 92/06). Along with several other proclaimed objectives, Article 19 of the Code emphasises the obligation to combat corruption within police.

Such rules should constitute a ‘legal impediment’ to acting in conflict of interest within government authorities, including the police, which acts by threatening to use disciplinary and other public law sanctions against the violators. However, whether the individuals will respect them in practice depends on the circumstances under which they operate and the effectiveness of control. In addition to this, in the circumstances in which rules are not clear, when public and private are not distinctly separated as opposites, there can be no firm position regarding ethical inadmissibility of corruption, which is supposed to be the first, ‘internal’ dam against its occurrence. Therefore what the codes of ethics achieve is only to point out to police officers and employees what their specific duties are and what tasks they are to perform in the public interest. How a police officer reacts in a particular situation will depend less on legal prohibitions and more on his personal moral stance, which does not have to be in agreement with ethical rules of the code, since the personal moral stance is shaped under the influence of the social group to which the individual is socialized.

It is important to note that the moral and the ethical do not have to match. Unethical conduct is inconsistent with the universal values and universal human standards of behaviour, whereas immoral conduct involves what is not good for a given community or state. Unethical acts are usually immoral, but history does provide examples of situations in which unethical conduct of experts was not morally reprehensible, as it was considered beneficial for the community: for example, declaring political opponents mentally unsound under dictatorships or forced sterilization of the mentally ill and sex offenders, etc. (Кецмановић, 2012: 170). It may therefore happen that unethical conduct in the conflict of interest in a particular society is not condemned because it is not regarded to be immoral. This calls for an explanation of the impact of cultural factors on the occurrence of corruption.

### ***Cultural causes of corruption (occurrence)***

The impact of culture on moral acceptance of corrupt practices in the society is particularly prominent in the conflicts of interest where – as is the case with other forms of corruption in a broader sense (or the co-called ‘soft’ corruption) – sight may be lost of the clear delineation between permissible and impermissible conduct. Besides, the social understanding of what is regarded

as corruption may change over time, along with the moral attitudes regarding its (in)admissibility. Thus we nowadays speak about corruption in the sphere of private business, which in the times of liberalism was the domain of free operation of the market economy and certainly could not have been recognized as morally unacceptable behaviour. Or we suppress acting in a conflict of interest, which in the past only in (limited) part coincided with unacceptable practices of nepotism in public administration. We are not always aware of the changes in the field of ethics because we repeatedly speak of the crisis of morality in terms of the dissolution of the former values, while we have difficulty noticing that the socio-economic changes are accompanied by the establishment of a new morality, which may be in discrepancy and even in conflict with the traditional morality. There are numerous examples of the changes in moral standards, and the most obvious are, for example, the ones concerning children, adultery, sex life or sexual preferences, understanding privacy, etc. Similarly, the economic crisis has caused changes in the value orientations of people – a morality of the crisis develops, which frequently contradicts the prohibition of corruption proclaimed by legal rules. Only an agreement between moral imperatives and legal superstructure regarding the harmfulness of corruption and the need for its prevention can create a good social foundation for curbing corruption (Ћирић, 2009: 233; Вуковић, 2005: 27).

The passing of appropriate legislation and adoption of ethical codes in the police has been estimated to contribute to combating corruption in the current Draft National Strategy for Combating Corruption in the period from 2013 to 2018 but it has at the same time been pointed out that there is a need for strengthening integrity and mechanisms of internal control in order to prevent corruption in the police sector (*Предлог стратегије - Draft Strategy*, 2010: 12). This task cannot be achieved without long-term actions aimed at improving the conditions in which the police work and without changing the perception of corruption in the social environment in which they work. The Draft Strategy envisages a variety of activities to improve the legislative framework for combating corruption and creating conditions for their practical implementation, but the impact of cultural factors on the occurrence of corruption in the Serbian society has been underestimated. This is not the case with the Global Programme against Corruption of the United Nations Convention, which emphasises that cultural factors may hinder the prevention of corruption. It therefore points out to the need to suppress the bureaucratic attitude towards citizens in the structures such as the military and the police, as well as to the need to reinforce observance of ethical principles, along with improving financial situation and the status of public servants, providing them with adequate working conditions (Global Programme, 2004: 15-16). The acts of the regional European organisations also take this element into consideration (Мрвић-Петровић, 2001) just as the legislations of the foreign countries (Мрвић-Петровић, 2002).

Nicholas Onuf (Onuf, 1989) is considered to be the founder of the meta-theory of constructivism, which explains why it is necessary to take into account cultural influences on the occurrence of corruption. This theory, applied to social relationships, facilitates understanding of the joint effects of political, economic and cultural factors that are conducive to the persistence of corruption in modern society.

Sociology distinguishes between collective and individualistic societies according to the degree of social organisation. In the so-called collective societies, individuals are socially and economically grouped according to the family, tribe, ethnic or religious relations; they have a greater sense of solidarity and traditionalist political culture which prefers hierarchical organisation (state leadership is entrusted to a small elite). It is difficult to actively confront corruption in such circumstances because – despite the proclaimed democratic principles and norms – authoritarian decision-making persists. This is why, despite strict prohibitions of corruption, there are no developed mechanisms of control, the informal (customary) rules which imply social acceptability of corruption remain dominant. The masses respect them, despite the strong will of the political leadership and social elite to implement different legal rules. According to its characteristics, Serbia would match exactly this theoretical model which is called a hierarchically structured society in the theory of constructivism. For, despite social stratification and the disintegration of the patriarchal, solidarity-driven pattern of social relations, the kinship, countrymen, friendly relations are still the pivot which makes it easier for an individual to cope with the difficulties in life. Socio-economic and political instability, to which our society has been exposed ever since the end of the twentieth century, only contributed to maintaining such ties. A social group that provides support expects from its members who have powers or perform public functions or authority to act in accordance with its interests. Therefore they can hardly be autonomous in decision-making when they make decisions that concern the interests of the group. Members of the society live in the same conditions and understand such relationships, so that significant moral reprimand is absent with respect to the individual who is acting in the conflict of the public and private interests.

The opposite example is that of individualistic-minded societies in which the ties are developed among members of different groups and among individuals. In such societies there are cultural preconditions that ensure respect for legal rules, even when there is no threat of sanctions, because each member of the society has developed awareness that compliance with these rules is beneficial for them (the so-called model of heteronomy). The legal rules are only there to reinforce the importance of these ‘internal’ guidelines adopted by each individual through the process of socialisation. Hence corrupt practices in these societies, such as the liberal-democratic ones, represent phenomena that are comparatively easily detected and prevented (Collier, 2002: 10).

### Conclusion

The discrepancy between the solid legal framework which proclaims the general unacceptability of corruption and informal social rules that tolerate corrupt conduct in everyday life is the result of a cultural milieu prevalent in a particular society. This is why no criminal law repression, ethical codes or activities of supervisory bodies of the state authorities can prevent corruption, which is generated by interpersonal relationships *per se*.

In patriarchal and solidarity-driven societies (such as Serbia, as well as other states of the Balkans and southern Europe) in which an individual is expected to seek support of the social group in crucial life situations, cultural preconditions act towards moral acceptability of corruption. And if such understanding is present at the social level, the actions of 'whistleblowers' and other individuals who oppose such practices and act according to their 'inner moral voice' and in keeping with ethical and legal rules, being committed to the prevention of corruption, will resemble the "tilting at windmills" and will be condemned to failure.

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## Сукоб интереса као неетично понашање

**Апстракт:** У раду се објашњава феномен сукоба интереса и веза сукоба интереса и корупције. Криминолошки аспект допуњен је анализом законских решења у Републици Србији која се односе на спречавање сукоба интереса у раду државних органа (посебно полиције). Циљеви рада су да се објасни због чега се сукоб интереса сматра корупцијом у ширем смислу, који су начини његовог спречавања и због чега законска регулатива и етички кодекси нису увек делотворни у томе. У раду се примењују социолошки и правни методи. Теоријска анализа је заснована на концептима теорије социјалног конструктивизма, која омогућава да се објасни значај утицаја културног фактора на корупцију. На том полазном основу, на примеру друштвених услова у Србији, аутор доказује хипотезу да правна надградња (укључујући и етичке кодексе) нема већег ефекта на спречавању корупције ако се примењује у друштву у коме се она сматра морално прихватљивом.

**Кључне речи:** сукоб интереса, корупција, етички кодекс, полиција, међународни стандарди.