From Confusion of Interests to Conflicts of Interests

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In Pouvoirs 2013/4 No 147 , pages 5 to 15
Publisher Le Seuil

ISSN 0152-0768
ISBN 9782021135077
DOI 10.3917/pouv.147.0005

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FROM CONFUSION OF INTERESTS TO CONFLICTS OF INTERESTS [1]

Analyzing conflicts of interests immediately raises a preliminary question: why is France so indifferent to them? [2] Why is it that those involved do not even realize such a conflict exists (as demonstrated by the astonishment and surprise of those accused of conflicts of interest …), and that instead of a confusion of interests, holding multiple offices is often presented as a strategic advantage, an opportunity not to be missed, and carried out, of course, in good faith and honorably?

We cannot help but wonder about the French exception as compared to the practices of several democracies. Even though many countries are far from perfect in this respect, there are very few in which there is such strong cultural resistance to tackling the problem.

While I admit there is the potential for error, I will try to offer a few partial, and therefore tentative, hypotheses. The history of politics and government may shed some light on the question. If, broadly speaking, we examine the values that have dominated our culture (expressed in texts, institutions, and behavior), it is striking that an attitude that transcends differences, oppositions, and centuries has continued for so long, namely, that we have a weak stomach for pluralism. Whether under the Ancien Regime or after the Revolution, diverse points of view, behavior, and opinions have always been viewed with suspicion.

1. This article is dedicated to the memory of Guy Carcassonne, who suddenly passed away on May 26, 2013. Until the eve of his death, Guy led the fight against holding multiple offices, the ultimate and unfortunately still legitimate form of conflicts of interests. On May 13, 2013, Guy testified on this issue before the National Assembly's Commission of Constitutional Law.

2. Yves Mény, *La Corruption de la République* (Paris: Fayard, 1992).

Even though differences are tolerated at times, they must always bow to the superior interest of the state, whether monarchic, despotic, or republican. Montesquieu and Tocqueville were not prophets in their own country. Theoreticians of absolutism have the upper hand. As a result, conflicts of interest make little sense, because the only valid interest is the superior interest of the state.

Of course, in France, as in many countries under the Ancien Régime, the performance of public functions was often mixed up with private interests. Commissions were bought (with the hope to profit from them), offices were distributed, territory was given away, and only gradually was the royal treasury separated from the state budget. Conflicts of interest could not help but exist, since as Richelieu dispassionately put it: "It is normal that ministers should watch over their fortune at
11 the same time as that of the state." [3] Mazarin, his political successor, would successfully put this statement into practice … The only limit was unsustainable excess, especially during lean years; Fouquet would pay the price. The gradual distinction of public interest from interests concretely involving state commissions could have put an end to this confusion and finally validated recognition of a society whose opinions and interests differed from those of the government.

In fact, the Hobbesian view should have disappeared with the Revolution, which, very conscious of past abuses, proclaimed that "all citizens … are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents." The foundations of meritocracy and elitism (which later would be called Republicanism) were laid, but they co-existed with the rampant exploitation of positions of power by some revolutionaries who shamelessly enriched themselves. Those who could not be corrupted were few and in any event ended up guillotined. In principle, then, the basis for a new relationship between public office and private interests was established. But only in principle.

The Revolution would quickly introduce a principle that had a much more enduring impact, even though it would eventually be rejected: the prohibition of organizing to defend "alleged common interests." In other words, everything returned to the state, which would absorb and dominate private interests and was the only judge of the general interest. Conflicts of interest did not exist, since the state and its representatives were the only ones who had an interest that mattered – the general interest.

3. Quoted by Martin Hirsch, *Pour en finir avec les conflits d'intérêts* (Paris: Stock, 2010).

Ultimately, this general interest could be defined only by its source: the general interest is what the representatives of the people decide, that is, in a kind of domino effect, the government, state employees, and so on. Any potential contradiction was denied, as if this concern might compromise the dignity of the definition of general interest.

Only flagrant abuses are punished (illegal theft of interests, favoritism, corruption). By focusing on the criminal dimension of the problem, conflicts of interest are reduced to a pathology, a serious lapse, which makes it clearer why the political class is reluctant to deal with a concept understood only as the definition of an offense, or more specifically, a crime.

To understand and combat conflicts of interest, we first have to stop dramatizing them. First, conflicts of interest are a part of everyone's daily life: at every moment, we are constantly obliged to make personal decisions between working or relaxing, between doing this or that. Generally, the effects are minor because we are choosing between two exclusively personal interests. It becomes more complicated when the choice is between doing one's duty or not, or when we have to arbitrate between an ethics of conviction and an ethics of responsibility. This shows, however, that conflicts of interest are not limited (as some suppose) to the public and private spheres, but involve all areas of our lives, even the most intimate. It is up to every person to choose freely, depending on ethical, social, religious, and legal norms. It is not surprising that the idea of conflicts of interest has spread in Protestant cultures. To a certain degree, it is up to the individual to ask him – or herself the following question (and to ask this question publicly): Am I in a situation that involves a conflict of interest? If the answer is yes, we have to understand the consequences, which may vary depending on the type of potential conflicts.

By contrast, Catholic cultures are more concerned with the notion of external rules, offenses, and penalties, which leads to criminalization as mentioned earlier. And since the law is unable to predict and codify the thousands of conceivable and possible scenarios, the sparse existing legislation can only ever be a patchwork affair. It is inconsistent and powerless as it tries to confront the root of the problem. It is also essentially reactive, since every new measure is brought about by a scandal preceding it, and no attempt is made to deal with the matter as a whole. An excellent example, following the Woerth scandal, was Nicolas Sarkozy's letter of engagement to the vice-president of the Council of State, Jean-Marc Sauvé. The letter referred to the partial and fragmentary

nature of the existing legislation and implicitly raised the point that the problem was not just a legal one (by recalling the "Caesar's wife" principle: "It is not enough that the Republic should be beyond reproach. It should not be suspected of any reproach at all"). And yet the letter limited the role of the future commission by requiring it to concentrate its analyses and proposals on members of the government, managers of public companies, and senior officials.[4] Members of parliament and local officials did not enter into the picture; the entire civil service was not the focus, and, of course, neither was the private sector. It was all to be done with the greatest urgency: the letter of engagement was dated September 8, 2010, and the absolute deadline was as follows: "You will submit the report of your commission before the end of the year." The challenge was almost met and, in a feat of diligence, the document was submitted on January 26, 2011.

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This might seem anecdotal, except that these processes cruelly reveal the ways in which political ethical problems are dealt with in France. There is a scandal, the need to "do something and quick," the conceptual framing of the issue by a higher authority, the creation of a high-level but limited commission (three presidents from the highest jurisdictions), the material impossibility to carry out large-scale consultations, and, beyond the public sphere, the lack of debate stirring popular opinion, as well as the need to act with the utmost urgency. Parliamentary assemblies undertake *pro forma* consultations, there is a bill that is never added to the agenda – in short, the well-known procedure pioneered by Queuille, who said there was no problem that could not be solved all by itself without finding a solution for it … That is, until a new scandal requires the file to be reopened, praying to God that it was not a Pandora's box! Since the same causes produce the same effects, the Cahuzac scandal proceeded in much the same way.

This method only results in a dead end, creating frustration and a loss of credibility. It does nothing to treat the root of the evil but instead merely sweeps under the carpet an embarrassing problem, a rough patch to get through, dealing only with the tip of the iceberg. To speak slightly more optimistically, it should be noted that these uneven processes nonetheless can lead to incremental progress. The Sauvé report, for example, is by

4. *Pour une nouvelle déontologie de la vie publique* (For a new code of ethics in public life), report of the Commission for the Prevention of Conflicts of Interest, presided by Jean-Marc Sauvé, January 26, 2011, available at http://www.ladocumentationfrancaise.fr/rapports-publics/114000051/.

far the best and most comprehensive document created that addresses this issue. Were its recommendations to be implemented, the progress made, even though partial, would be significant.

How Can Conflicts of Interest Be Defined?

Most definitions that shape the debate (those of the OECD,[5] Transparency International, the Council of Europe, and the Sauvé report) focus solely on public/private conflicts of interest, which is understandable given that this is the most difficult knot to undo and the source of the biggest scandals, since a private and personal interest outweighs the public or general interest. While from an operational point of view this limitation is understandable, it is nonetheless unfortunate. There actually are different scenarios that are worth treating in their entirety. Aside from public/private conflicts, there are private/private and public/public variations.

Even if private/private conflicts remain in the shadows, because they attract less media attention and provoke fewer scandals, the problem is just as serious and at least as widespread. It is not for nothing that multiple affairs sprang up in the City of London and in international banking circles. It is not for nothing that certain major French capitalists have been described as "godfathers" because they were (and are) on (too) many boards of directors in spite of conflicts of interests between the different companies. It is not for nothing that people are regularly surprised by the reader-editors of author collections who simultaneously are judges on literary panels and who are supposed to recognize the good authors from "good" publishing houses. Another example of the same kind of problem beyond the scope of the law may be found in the case of a professor who would like to help a relative or friend during an exam: it would be a public/private conflict in France because university professors are public servants, but a private/private conflict at a private institution of higher education (*école supérieure*). The dividing line can shift and exists more in form than in substance.

The public/public conflict may seem less serious since the conflict would be limited to the realm of the general interest and does not – in principle – involve personal interest. This is a flawed approach. First of all, very real personal or private interests may lurk under the cover of public interest. We have seen ministers appear particularly attentive and generous towards certain cities or regions … where they were going to

5. Organization for Economic Cooperation and Development.

run for office! No embezzlement, no illegal taking of interest, no misappropriation of funds, and yet … Second, this reasoning is specious because an official is elected to defend certain specific local, national, and European interests. To sacrifice one for the benefit of another in the case of holding multiple offices means not only failing at one of the tasks entrusted to them but trampling on fundamental principles such as equality, impartiality, and so on. It goes without saying that, holding multiple offices creates a conflict of interest at the most elementary and immediate level, namely, absenteeism (locally or nationally). This also strongly underscores the degree to which the perception of a conflict of interest must be separated from culpability and systematic criminalization. In principle, there is no criminal offense, and of course no penalty, if an elected official fails to fulfill one of his or her mandates (at most there
VI are a few financial penalties, rarely applied). We still remember Marcel Dassault whose main – not to say only – activity in Parliament was to open the first session by virtue of his age …

The deeply rooted tradition of holding multiple offices[6] in France so fully saturates our political culture that almost no one has raised it as an issue. Instead, there was a natural and physiological antidote to the central concentration of power. In the political realm, one of the rare critics of this practice was Michel Debré in 1947 under the pseudonym Jacquier-Bruère, a voice that went unheard and unheeded at the time. In the academic sphere, it would be an American scholar, Mark Kesselmann, who, like a Huron, discovered this unusual French practice and fixed his attention on it continuously since the 1970s. In the interim, the old particularism practiced by city officials had become systematic and "universal." For reasons both political (the decline of parties under the Fifth Republic and the humbling of Parliament) and technical (the multiplication of inter-community and regional local functions), holding multiple offices at the end of the 1970s was not only extremely widespread but had become pathological (the clear champion remains Jean Lecanuet with five offices!).

Some may take issue with the idea that holding multiple offices should be considered a potential conflict of interest, especially since conflicts of

6. There are countless articles, analyses, and standpoints on holding multiple offices. I will only refer to Guy Carcassonne's opinion: "Cumul, une exception française?," in *Les Hommes politiques*, ed. Évelyne Pisier and Pierre-Henri Tavoillot (Paris: Presses universitaires de France, 2002), 157-64; and "Dix constitutionnalistes répondent à deux questions concernant le cumul des mandats, *Revue du Droit Public et de la Science Politique en France et à l'Étranger* 6 (1997): 1551-600.

interest in France are systematically perceived as an offense, a criminal act. These critics are quick to make the following empirical argument: most of those holding multiple offices are persons dedicated to public service, and so on, and so there is no reason to question them, except in certain instances. The problem, however, lies elsewhere. The problem lies in the individual and non-transparent decisions a holder of multiple offices makes in a hierarchy of contradictory and competing interests.

The denial of the problem – when a conflict arises from holding multiple offices – is coupled with an argument in favor of political or functional advantages. In political terms, the argument put forward is that holding multiple offices provides a counterweight to French centralization, which has been established historically, but does not constitute a justification or an excuse. In terms of function, the apparent virtues of holding multiple offices are emphasized: easier coordination, the ability to "synthesize" contradictory positions, and so on. The conflict argument is turned inside out: not only is there no conflict, but there is a convenient solution to the conflicts that a variety of actors and interests would tend to exacerbate.

Prevention Rather Than Criminalization

Armed with this line of argumentation, which also applies to many other areas of social and economic life, French society in general and French politicians in particular have first shown a complete lack of awareness of the issue and then, once it began to come up in public debate, resorted to diversionary or delaying tactics. The fact is that in 2013 there is still no comprehensive legislation or regulation worthy of the name. Even worse is that when progress is made, it concerns the conflicts that receive the most media attention, the most scandalous, the most obvious, and so on. This reinforces the idea that it is "their" problem while it is in fact an ethical question that concerns *all* individuals, even if a conflict manifests itself in daily life to varying degrees and with greater or lesser likelihood. The approach taken until now has shown how awkward such questions are for elites: for ministers, senior officials, members of parliament (but in this last case, it is up to them to address the issue as if it were a regional or corporate problem that a commission, the executive, or public opinion would not have known about).

Awareness of conflicts of interest must pervade all society for prevention to be effective. When society as a whole is concerned, conflicts of interest become a kind of social taboo, or at least a question to ask ourselves

concerning our actions: can I accept this function or responsibility if I am performing another one that may appear incompatible? (This could concern a finance minister who at the same time is the treasurer of the party in power, or a professor who has to correct the exams of a close colleague's son.)

With such a broad definition of conflicts of interest, it may be tempting to counter with an argument concerning the danger of an Orwellian system of surveillance and control. The complete opposite is what needs to be promoted. Conflicts of interest should be a question that all persons who face them should constantly and generally ask themselves. To help make things clear and make decisions (because solutions are rarely clear cut), some basic information is needed: ethics charts in every administration, company, and organization, written based on models but adapted to the specific needs of each situation; transparency by declaring conflicts of interests, and so on. Then, it is up to every individual to draw conclusions for his or her actions. If there is a violation, the persons involved know the situation they have put themselves in and what penalties may be incurred. It is only at this point that the potential conflict of interest becomes a reality that is potentially reprehensible. It is in fact unrealistic to try to codify every type of situation that may result in a conflict of interest. We fall into the French mistake of excessive and scattershot legislation that can never cover the entire breadth of possibilities. The Sauvé report is an exception in this area because, unlike many other position papers or commissions, it insists on a global approach and a preventative strategy. It puts a great deal of emphasis on the difficulties of grasping the problem by stating that conflicts of interest carry not only the appearance or the potentiality of a conflict, but also the reality; that a conflict may vary in intensity; that it involves a personal interest (*lato sensu*); and that it takes place over time (before, during, and after holding public office, as the case may be). In other words, the materiality and substance of a conflict of interest are difficult to establish as an offense. What generally causes problems and creates scandals is the after-the-fact discovery of even innocuous situations that are retrospectively viewed with suspicion. The latest manifestation of such a situation can be seen in the Bettencourt scandal, when it was discovered that the investigating judge was a friend of the doctor commissioned to perform the medical examination of L'Oréal's owner. With a media that seeks out scandals and conspiracy theories, this relationship appeared to be a serious issue even though each person individually may have carried out their responsibilities with

the greatest concern for professionalism and independence. Aside from requiring magistrates to visit only with their colleagues and medical experts to do the same, there is no solution to the problem – except a simple solution that requires everyone, when faced with a real situation, to make a declaration of conflict of interest. In this specific case, the doctor's declaration indicating that he knew the judge (not surprising in itself in a small city like Bordeaux …) would have largely sufficed to defuse any future controversies and avoid any suspicion.

I have personally experienced this kind of practice aimed at alleviating doubts and ambiguities when I was asked, along with other European colleagues, to evaluate the University of Gothenburg in Sweden. The first formality was to fill out a brief questionnaire in which each member of the committee had to indicate whether they had any connections with certain colleagues (for example, a book published jointly) or the department (for example, as a visiting professor), or any other relationship that could affect one's judgment or raise legitimate questions concerning the evaluation. In cases where a potential conflict of interest could have arisen, the person involved was required to recuse him- or herself from the deliberations. The simple public nature of the procedure and the sworn declaration provided the necessary safeguards. Of course, if there were a violation of the rules and principles or deliberate dissimulation, penalties were possible, beginning with the most serious, namely, the loss of all esteem and status in the academic community.

This simple, transparent, and public practice contrasts with the French custom by which, paradoxically, there exist both incestuous relationships and, in the present context, the *a priori* suspicion of a conflict of interest without even the ability to defend oneself or be heard.

At the time of the writing of this article, the press was circulating a rumor of a bill concerning "a professional code of ethics and to the rights and obligations of public servants" to be filed in July 2013. The main objective will to set up a system for reporting conflicts of interest inspired by the American practice of whistleblowers. This mechanism, subject to analysis, could be useful and add to the wide array of means to combat conflicts of interest. However, we should not be deceived about its effectiveness. In spite of the promised protections, public servants are wary of disguised penalties (for example, transfers) that "reward" informants of practices that are illegal but accepted by most. But especially, it will be yet another example of favoring criminalization over prevention, unless this tool is accompanied by measures to raise awareness of potential conflicts within public office (for example, by

requiring a preliminary declaration if there is any doubt about a potential conflict). If this repressive path is taken, the reforms will be destined to fail, which is what happened in Italy, where very repressive and systematic criminalization produced only very mediocre results.

What conclusions can be made in the wake of the Woerth and Cahuzac scandals that brought about the measures envisioned by Presidents Sarkozy and Hollande? Unquestionably, progress is now in view, even though deep-seated reluctance remains (as demonstrated by the attitude of members of parliament concerning the issue of holding multiple offices or the transparency of personal assets). But the structures in place to analyze, treat, and resolve conflicts of interest remain fundamentally unchanged. First, there is a scandal, then measures are adopted, and finally they are incompletely implemented, more in form than in substance. No doubt, the problem will once again be put on the agenda …

ABSTRACT

France has long ignored not just the reality but even the very concept of conflict of interests. In the name of the so-called virtues of "synthesis," it has legitimized and defended the practice of holding multiple positions of power in both the private and public sphere. This practice is one of the many symptoms of the lack of interest of French society, and in particular its elites, in pluralism. As a result, conflicts of interests, when they are taken into account, are considered not so much in terms of prevention and awareness as in terms of punishing a few potentially criminal cases. Gradually, under pressure from the media and public opinion and on account of the internationalization of the debate, the French approach is reluctantly edging closer to historically more advanced Anglo-American practices.

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