

Conflict of Interests in the Public Sphere
Law, Culture, Ethics, Politics

Editors: Daphne Barak-Erez, Doron Navot, Mordechai Kremnitzer

 The Israel Democracy Institute  Nevo Publishing

Abstract

The involvement of public officials in situations of conflict of interests is both commonplace and disturbing. Family ties and business connections of those in positions of power can, and sometimes do, not only affect the decisions they make, but also undermine the trust of others in those decisions. For this reason, the legal starting point for addressing this issue is that people who have an additional interest in the subject matter of the decision that is not germane to their official capacity are disqualified from making a decision on the matter in question. This view is considered a common and fundamental principle of both public and private law, and it also has ramifications for criminal law.

At the same time, at least some of the legal prohibitions on the use of government power in circumstances involving conflict of interests are considered controversial among legal scholars and social scientists. One of the major critiques against the practical aspects of the rule against conflict of interests argues that they undermine processes of decision making. In addition, it has been argued that these prohibitions bar the involvement of talented people in matters within their areas of expertise; deter those in positions of power from taking responsibility for matters in their charge; and lead to excessive “legalization” of governmental and political activities.

The prohibition against conflict of interests has been thrust into the eye of the storm following several events that resulted in accusations against politicians and senior officials of involvement in matters in which they or those close to them had personal interests. These incidences have been debated in both the public and the legal arena (concerning the validity of

* Translated by Karen Gold.

decisions from an administrative law perspective and the liability of those involved in these decisions from a criminal law perspective). This has led to an increasing awareness of the importance of applying and enforcing the prohibition against conflict of interests,¹ as well as to criticism concerning the allegedly excessive enforcement of this prohibition, especially with regard to the imposition of criminal liability for conflict of interests in the framework of the criminal offense of fraud and breach of trust.²

Conflict of Interests in the Public Sphere seeks to explore the issue of conflict of interests in public life and the questions it raises in its broader context. The book focuses on situations of conflict of interests in public life and public service (as well as in the execution of legal responsibilities

- 1 Israel's State Comptroller, Micha Lindenstrauss, who assumed the role in late 2005, attaches special importance to the struggle against corruption, and in this context decided to devote particular effort to exposing high ranking public officials who acted on the basis of a serious conflict of interests. As part of his endeavors, Lindenstrauss issued two reports in 2006–2007, which focused on public officials who allegedly acted in circumstances of conflict of interests under aggravated circumstances. These reports led to the launching of criminal investigations that were still ongoing as of this writing. These reports and investigations make the following questions all the more pressing: Does a conflict of interests necessarily entail corrupt behavior? What are the problems inherent in acting in circumstances of conflict of interests? And when does a conflict of interests become a criminal offense? One report focuses on Advocate Sinai Gilboa, while the other concerns former Minister of Industry, Trade and Labor and later Prime Minister, Ehud Olmert. See State Comptroller, *Audit Report on Local Planning and Building Committee in Petah Tikvah: A Conflict of Interests* (June 4, 2006); State Comptroller, *Audit Report on Conflict of Interests in Actions of the Minister of Industry, Trade and Labor - Silicat Industries (T.S.) Inc.* (April 25, 2007) (both reports appear on the website of the State Comptroller's Office, www.mevaker.gov.il).
- 2 The decision, which led to the formulation of the criminalization of conflict of interests, was rendered in the matter of Shimon Sheves regarding actions he performed for the benefit of friends and associates while serving as the Director General of the Prime Minister's Office. See: F.C.H. 1397/03, *State of Israel v. Shimon Sheves*, P.D. 59(4) 385 (2004).

by lawyers and judges), and attempts to examine them not only from a legal perspective (of public and criminal law), but also through normative and analytical deliberations, which address the legal, ethical and cultural aspects of the matter. As the basis of this endeavor, this introduction is dedicated to a brief review of the evolution of the discourse on conflict of interests over time, followed by an overview of the book's chapters.

A conflict of interests may arise when one person serves as a representative, an agent or a trustee of another. The basic premise underlying this concept is that a person would find it difficult to properly fulfill his or her agency role if he or she has a personal interest in its outcome. In other words, a necessary condition for performing the role of a representative, a trustee or an agent, in a proper and fair manner, is that the person who is supposed to decide for others and on their behalf will fulfill his or her agency with utmost identification with their interests, and without being influenced by the results of the decisions at hand; let alone not be motivated by an aspiration to advance his or her own personal interests.³ A conflict of interests arises if and when an official has an additional interest related to the performance of one's position, or an interest influenced by it, that may cause the official to execute his or her agency in a less satisfactory manner than he or she would have in the absence of this additional interest.⁴ Accordingly, rules regulating conflict

3 Regarding the absence of personal interest on the part of the representative or agent as a prerequisite for performing his duties, see also JOHN RAWLS, *A THEORY OF JUSTICE* 163-167 (rev. ed., Cambridge: Belknap Press of Harvard University Press, 1999).

4 Compare: "A conflict of interests is a set of conditions in which professional judgment concerning the primary interest (such as a patient's welfare) tends to be unduly influenced by a secondary interest (such as a financial gain)." Dennis F. Thompson, *Conflicts of Interest in Medicine*, in *RESTORING RESPONSIBILITY: ETHICS IN GOVERNMENT, BUSINESS, AND HEALTHCARE* 290 (2005) (originally published as: Dennis F. Thompson, *Understanding Financial Conflict of Interests*, 329 *NEW ENGLAND JOURNAL OF MEDICINE* 573-576 [1993]).

of interests seek to reduce the possibility that trustees and agents will attempt to abuse their authority in various ways – by preventing situations in which there is a conflict of interests from the outset, transferring the decision making power to a party that does not have a conflict of interests, and introducing norms of transparency, to name a few.

The term “conflict of interests” is somewhat misleading. In a situation of conflict of interests, an individual is not necessarily confronted with a clash between two interests or with a conscious psychological conflict. The conflict is between the official’s obligation to perform his or her duty without bias and the fact that one’s additional vested interest in the subject matter is liable to cause one to fail to carry out one’s duties properly. This problem may exist even if the official has no intent to commit a breach of trust and even if, ultimately, he or she is in no way influenced by the additional personal interest (meaning that the official did not resort to irrelevant considerations, nor alter the way in which he or she balanced the various considerations due to the additional interest). Accordingly, conflict of interests should not to be confused with the problem of irrelevant considerations, much less with actual corruption. An individual may be operating in circumstances of conflict of interests without acting in a corrupt manner (although performing one’s role in a situation of conflict of interests may give rise to suspicions of corruption and is even liable to lead to corrupt behavior).⁵

Although it is difficult to define what constitutes an “interest,” it is obvious that every individual and, consequently, every agent has a

5 It can be argued that anyone who introduces extraneous considerations, which derive from a personal interest, or acts in a corrupt manner due to a personal interest, is involved in a conflict of interests, but the opposite argument is not necessarily true. Claims of public officials of the nature of “I was not engaged in a conflict of interests,” or “I did not act in a manner involving conflict of interests,” even when it is obvious that such was indeed the case, can be understood accordingly. It would seem that what they mean to say is: “I did not apply extraneous considerations.”

range of “interests,” including familial, social, financial and ideological ones. Certain interests are considered objective in the sense that they do not derive from one’s emotional response to them (for example, one’s interest in consuming healthy food), while others are totally related to one’s emotions (for instance, the attitude of a football fan toward his or her favorite team). The special challenge posed by the law of conflict of interests is the prevention of the influence of the interests of the agent on the fulfillment of his or her mission, without denying the reasonableness and even appropriateness of the entitlement of every individual to have personal interests.⁶

Some of the interests that an individual might have, both objective and subjective, are not related to the performance of his or her duties, while others are likely to have some sort of a connection to this performance; that is, they may affect the manner in which the agency is fulfilled. The difficulty in conceptualizing the problem of conflict of interests is not limited to defining the interests of the agent who is executing the action; it is also expressed in the need to distinguish between legitimate interests, which are related in some way to the performance of the task, and interests that are liable to impair it and are, therefore, illegitimate. A problem that makes it even more difficult to differentiate between legitimate and illegitimate interests is that, at times, an agent’s additional interests in carrying out a task, including the fact that one’s future may be affected by one’s performance, is relevant to the way the task is executed and may, in fact, be beneficial to it. Consequently, any discussion of matters that

6 Thomas Nagel believes that the problem of the correct balance between the personal standpoint and the impersonal standpoint of every individual has yet to be resolved, and that this is one of the central problems in the area of normative political theory. According to Nagel, this problem is part of the reason why Western society has not succeeded in shaping and consolidating institutions, which take into account the rights of all citizens without imposing unacceptable demands on individuals. See THOMAS NAGEL, *EQUALITY AND PARTIALITY* 5 (New York: Oxford University Press, 1991).

Conflict of Interests in the Public Sphere

may lead to a conflict of interests for the agent requires distinguishing between a number of situations: those in which the personal interest is a legitimate decisive factor for the execution of the agency (for example, when a member of an administrative body is appointed to represent a particular sector); those in which the choice of the agent to carry out a task is not based on an additional personal interest even though it seems likely that this interest may contribute to the successful execution of the task or, in any event, it is not at clear that it will jeopardize it (for instance, when a member of a committee acting in the area of art is an art collector); and those in which the nature of the influence of the agent's interests on the performance of his or her duty is unclear, but there is a likelihood that it will have a negative impact on the execution of the task.

Prima facie, one would assume that the person empowered to act is in the best position to know which interests might impair his or her judgment. Who would know better whether one's decision to approve a zoning change was influenced by the fact that the property in question was owned by a neighbor; whether the fact that a good friend was hired as an accountant at a certain company affected one's decision about purchasing its products; or why a person promoted a public project in which a relative was involved. Nevertheless, the decision in such cases cannot be left to the person with the vested interest. First, people find it difficult to decide in personal matters without bias, which also makes them unfit to decide which interests are liable to impair their judgment, or to what extent they are able to overcome the potential negative influence of an additional interest. Second, an additional interest can sometimes affect people's judgment regarding the preliminary question of whether they are faced with a conflict of interests. Third, involvement in a conflict of interests is sometimes only the tip of the iceberg of a corrupt behavior of someone who is performing his or her duty in a situation of conflict of interests. Under such circumstances, leaving the decision of whether or not there is a conflict of interests to the individual is akin to leaving the fox to guard the henhouse. Fourth, beyond the fear of the actual impact of a conflict of interests on the decisions of

interested parties, there is the additional concern that their decisions will not be considered trustworthy. Consequently, the decision of whether in certain circumstances there is a likelihood of conflict of interests cannot be left to the agent who may be in such a situation. Of course, it is preferable that the agent be the first to avoid acting in circumstances of conflict of interests, and society may expect the agent to try to the best of one's ability to act fairly and in accordance with one's fiduciary duties. Nonetheless, the determination of a conflict of interests does not end in the decision of the agent or trustee; it is not left to his or her judgment alone and, in any event, it is subject to judicial review.

The issue of conflict of interests is complex and necessitates addressing several questions. The primary question is whether the discussion should be based on a subjective or an objective approach.⁷ The former focuses on the likely impact of various interests on the decisions of a given official. This approach relates to the individual's private world and attempts to understand what is likely to influence that person, taking into account his or her personal abilities, preferences, experience, etc. By contrast, the objective approach seeks to define situations that should be considered problematic in terms of the likelihood of bias – based on past experience, common sense, theoretical knowledge and normative perception. This approach guides the legal discourse on the matter. However, even this approach does not completely eliminate the conceptual quandary sparked by the debate over conflict of interests. The application of the general criteria must take into account the personal circumstances of the decision makers, including the society in which they live and the cultural context in which they function.

The complexity of this phenomenon is also due to the fact that a conflict of interests does not necessarily reveal itself explicitly in external

7 ANDREW STARK, *CONFLICT OF INTERESTS IN AMERICAN PUBLIC LIFE* 4-6 (Cambridge: Harvard University Press, 2000).

reality or even in internal consciousness. People can act in circumstances of conflict of interests even when they are not influenced by their additional interests; all the more so when they do not seek to abuse the trust placed in them. They can even act in a situation of conflict of interests and, at the same time, be utterly convinced that they are not. On the other hand, public officials who find themselves in conflicts of interests may be motivated by extraneous personal considerations. There is, indeed, a sequence of cases of different levels of severity, which are all part of the category of "conflict of interests." In a minor case of conflict of interests, the conflicting interest does not have any effect on the official who fulfils his or her duty in good faith; in the worst case, the conflict of interests is only the tip of the iceberg of breach of trust and even corruption, and it is an integral part of a corrupt practice.

Accordingly, an external observer would often find it difficult to know whether the public official acted in a situation of conflict of interests and whether the additional interest indeed influenced him or her. How, for example, can it be known with certainty if a public official who advances a construction project, which benefits the public interest and at the same time also serves the interests of his or her close friends, does so with the aim of promoting the public interest, furthering the interests of his or her friends, or due to a combination of motives? Is it possible to know with certainty what decision this individual would have taken had one's friends not been involved in the project?

Thus, there may well be a situation in which the agent approaches the task at hand with the sincere intent to fulfill one's duties in an honest and trustworthy fashion, but the agent's additional interest causes him or her to bring in extraneous personal considerations, ultimately leading to a defective performance of one's duties. Moreover, an act involving conflict of interests might, in fact, be part of a corrupt process; but at the same time, it can also be carried out in good faith, without any irregularity or harm to the public interest (besides the infringement of the norm of conflict of interests itself, the harm to the appearance of integrity, and maybe even

to the public's trust in government). In any event, it is possible that no one, including the agent, knows with absolute certainty the psychological reality of the decision.⁸

Deliberations focusing on the impact of the personal interests of public officials on the decision making process are not new and can even be found in ancient texts. In Jewish law, the prohibition against conflict of interests on the part of public officials stems from their equation to judges (*dayanim*),⁹ who are expressly barred from perverting justice for personal reasons.¹⁰ The origins of political thinking on the issue of conflict of interests may be traced to the teachings of Plato. Granted, Plato never used the term “conflict of interests,” but the ideas presented in his book, *The Republic*, indicate that the problem was of great concern to him. Thus, for example, he proposed that the “guardians” (government officials who are not the primary decision makers) be denied the possibility of owning private property (e.g., the guardians were not supposed to own their residences, and any person would be allowed to enter them). Plato also held that the guardians would not be permitted to form a family unit in order to secure their loyalty to the public and, therefore, their children were supposed to be raised jointly.¹¹

8 Dennis Thompson demonstrated clearly that, at times, even a public official, who acted in circumstances of conflict of interests, does not know himself whether he had introduced extraneous considerations or not. Dennis F. Thompson, *Mediated Corruption: The Case of the Keating Five*, 87(2) AMERICAN POLITICAL SCIENCE REVIEW 369 (1993).

9 “The leaders of the community, who are responsible for tending to the needs of the public or of individuals, are likened to judges.” Commentary of R. Moshe Isserles (the Rama) on Shulhan Arukh, Hoshen Mishpat 37:22.

10 “It is forbidden for a *dayan* [religious judge] to judge someone whom he loves...or someone whom he hates.” Maimonides, *Hilkhot Sanhedrin* 23:6.

11 Plato also feared a situation in which holders of government office might exploit their public positions in a way that would directly harm the public itself. In other words, he

The fact that conflict of interests had been recognized as a problem can be deduced from the forms of governance practiced in earlier times. For example, the arrangements customary in the cities of 11th century Italy were designed to limit the risk of harmful influences arising from conflict of interests. The *podestà*, public officials who held a great deal of power, were chosen from among citizens who did not reside in the cities in which they served so that they would not be influenced by local ties or loyalties, which were liable to harm their ability to fulfill their duties without bias.¹²

A more sophisticated discussion of the problem of conflict of interests was developed only later, beginning in the 15th century, when a more formalized understanding of the concept of “interest” took shape. The term became central to political discourse in the 17th century, when a clear distinction was made between desire, self-love and interest. As opposed to desire, which was considered wild and insatiable, or self-love, which was thought to be an expression of selfishness, interest was viewed at the time as a legitimate motivating factor. Actions taken for the purpose of advancing a certain interest were deemed objective and predictable, and accordingly, people who acted on the basis of personal interests were not considered likely to cause harm to others unless this would promote their own benefit. By contrast, people motivated by desires were perceived as unpredictable individuals who could not be presumed to act in a rational manner. Thus, at that particular point in the history of political thought, during a period of economic upheaval and aversion to violence, “self-interest” came to be

was concerned about a situation in which a public official would not only find himself in a conflict of interests, but would abuse his authority and exploit the public to satisfy his personal desires and ambitions. PLATO, *THE REPUBLIC* 416a-416b (G.R.F Ferrari, ed., Tom Griffith, trans., Cambridge: Cambridge University Press, 2000).

12 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 3 (Cambridge: Cambridge University Press, 1978).

considered desirable and beneficial.¹³ Along with the development of the concept of “interest,” an awareness of the possibility of a conflict between interests emerged. Initially, the concept of “conflict of interests” referred to a conflict between the aims of different groups in society that could lead directly or indirectly to clashes between them, or at least to internal tensions. Machiavelli, for example, focused extensively on the conflict between the public majority and the ruling minority.¹⁴ An additional meaning of the term “conflict of interests” subsequently developed with reference to a situation in which the judgment of an agent would likely be impaired due to his or her interest in the subject matter of agency.¹⁵

The writings of John Locke also demonstrate an awareness of the problems that may arise when a person judges matters in which he or she has a personal interest. The concern regarding bias and conflict of interests is one of the rationales provided by Locke for the transition from a state of nature, in which people also make decisions that touch on their own interests, to the formation of organized society.¹⁶ For Locke, the fear of

13 See J. A. W. Gunn, “*Interest Will Not Lie*”: *A Seventeenth-Century Political Maxim* 29(4) *JOURNAL OF THE HISTORY OF IDEAS* 551 (1968); ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* (Princeton: Princeton University Press, 1977).

14 According to Machiavelli, the ruling minority consists of ambitious individuals who enjoy having power over others, whereas the majority of the public, which do not govern and are not particularly involved in politics, have an interest in not being ruled. See NICCOLO MACHIAVELLI, *THE DISCOURSES ON LIVY* (Harvey C. Mansfield & Nathan Tarcov, eds. & trans., Chicago: University of Chicago Press, 1996).

15 The second meaning of the term “conflict of interests” did not replace the first, and there are still those today who use the term “conflict of interests” to address a clash between interests of various groups in society. This is true, for example, of Thomas Nagel, who writes: “Alleviation of urgent needs and serious deprivation has particularly strong importance in the acceptable resolution of conflicts of interest” (*supra* note 6, at 12). See also the article by Daphne Barak-Erez in this book.

16 “It is unreasonable for men to be judges in their own cases that self love will make men partial to themselves and their friends. And on the other hand, that ill nature,

conflict of interests also serves as an important argument for supporting the principle of separation of powers.¹⁷ At a later stage, during the 18th century, concerns regarding conflict of interests arose with regard to the possibility that members of parliament might be involved in matters that would bring them gain, or cause them loss.¹⁸ Jeremy Bentham, who was troubled by the problem of conflict of interests, considered representative democracy to be a means of addressing it. He thought that although public officials have an interest to promote their private benefit (on behalf of the public interest), their self-interest in being reelected would give them an incentive to act for the public interest. Bentham also held that public education would enable individuals in society to consider and formulate opinions regarding the manner in which officials perform their public duties.¹⁹ From the second half of the 19th century onward, the problem of conflict of interests was also at the center of U.S. discourse concerning public service.²⁰

passion and revenge will carry them too far in punishing others. And hence nothing but confusion and disorder will follow [...] government is the proper remedy for the inconveniences of the state of nature.” JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 275 (Cambridge: Cambridge University Press, 1988).

17 *Ibid.*, 364.

18 See HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 157 (Berkeley: University of California Press, 1967). The framers of the American Constitution, for example, stated that “no man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.” See ALEXANDER HAMILTON, JAMES MADISON, & JOHN JAY, *THE FEDERALIST* 56 (New York: Random House Inc., The Modern Library, 2000).

19 See DAVID HELD, *MODELS OF DEMOCRACY* 95-100 (2nd ed., Stanford: Stanford University Press, 1996); Michael James, *Public Interest and Majority Rule in Bentham’s Democratic Theory*, 9(1) *POLITICAL THEORY* 49 (1981).

20 FRANK ANECHARICO & JAMES B. JACOBS, *THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE* (Chicago: Chicago University Press, 1996).

The modern legal prohibition against conflict of interests is related to the evolution of thought on this issue, as described above. The history of the concept of “interest” in British law, which served as a source of inspiration for public law in Israel, can be traced to the 15th century. Initially, the term “interest” was used to describe a situation in which an individual had a connection of some sort to legal proceedings or to a legal right of an objective nature. Over time, however, the concept came to encompass interests of an emotional nature, that is, interests in the subjective sense.²¹

Inspired by British law, the legal prohibition against conflict of interests has been debated since the early days of the Israeli legal system in the context of the prohibition against bias, one of the principles of natural justice,²² since bias can stem (*inter alia*) from a state of conflict of interests. Later on, as the debate became increasingly sophisticated, a more specific discussion of the problem of conflict of interests evolved with the increasing use of this term (which in many instances, although not all, replaced the use of the earlier term of “bias”).²³ Concurrently, a complex debate emerged concerning whether an action involving conflict of interests should be deemed a criminal offense – a form of fraud and breach of trust.²⁴

21 See Pitkin, *supra* note 18.

22 See for example, HCJ 174/54, *Schimmel v. Competent Authority and Appeals Committee for the Emergency Land Requisition Law*, P.D. 9 459 (1955).

23 HCJ 531/79, *Likud Faction in the Petah Tikvah Municipality v. Petah Tikvah City Council*, P.D. 34(2) 566 (1980).

24 §284 of the Criminal Law, 1977. As early as Cr.A. 151/66 *Geisler v. State of Israel*, P.D. 20(2) 477 (1966), Justice Etzioni noted that breach of trust can take place even when the damage to the public is not concrete. To exemplify this damage, he referred to the public’s trust in government, which might be harmed when a public official is found to be in serious conflict of interests. In the same vein, in the matter of the *Likud Faction* (*supra* note 23), Justice Barak expressed the opinion that in certain circumstances, the sanction for actions involving conflict of interests would be a

These dilemmas have prompted the work on *Conflict of Interests in the Public Sphere*. We hope that the range of perspectives presented here will fill the vacuum in existing research on conflict of interests in its broader context, as well as contribute to public discourse concerning this matter. All the articles have been written with this express purpose in mind, and they are being published for the first time in this book.

The first section of the book is devoted to a conceptual discussion of the term “conflict of interests”. The first article, “The Prohibition against Conflict of Interests,” by Aharon Barak, presents the basic legal principles in this area. It expands the author’s classic article published 25 years ago on the subject (based on a lecture he delivered to the graduates of the Hebrew University Faculty of Law), which remains the most influential

criminal prosecution. Justice Barak expanded the discussion on this issue in Cr.A. 884/80 *State of Israel v. Grossman*, P.D. 36(1) 405 (1981), which was considered, until recently, a legal precedent with regard to the offense of fraud and breach of trust. The assertion that conflict of interests is liable, under certain circumstances, to be considered a breach of trust was reconfirmed in Cr.A. 5046/93 *State of Israel v. Hochman*, P.D. 50 (1) 2 (1996). Ultimately, as noted (*supra* note 2), the Supreme Court (in an expanded panel of nine justices) decided in 2004 that a public official engaged in a conflict of interests is liable, under certain circumstances, to commit breach of trust, even if there is no proof that he acted improperly or harmed the public interest. In this decision, Shimon Sheves, the Director General of the Prime Minister’s Office during Rabin’s tenure as Prime Minister, was convicted of breach of trust. Sheves was found guilty of the said offense despite the fact that the Court could not establish that he acted with the intent of advancing the interests of his friends and associates based on his friendship with them, and not with the aim of advancing the public interest, which may have been consistent, in the events in question, with the interests of his friends. The prohibited act committed by Sheves was functioning in circumstances of conflict of interests, which, given the background facts and his high-level position, was characterized as an act that caused material harm to the values protected by the criminal offense of breach of trust. See *Sheves* case, *supra* note 2. See also the article by Mordechai Kremnitzer and Doron Navot, and the article by Miriam Gur-Arye in this book.

text in the area of conflict of interests in Israeli law.²⁵ This article examines the foundations of the prohibition against conflict of interests; the origins of the principle; the ramifications of infringing it; the ways to prevent such infringements; and the remedies available when they are infringed.

The second article in this section, “Officials and Interested Parties,” by Yotam Benziman, offers a nonlegal conceptual discussion of the matter. The article begins with a definition of the word “interest” accompanied by examples of each of its alternative meanings, and focuses on the definition of interest as “concern” or “attention.” Benziman then explains what constitutes a conflict of interests, concluding that it should not always be considered an ethical failing. He argues that, in fact, we should aspire to a situation in which public officials are responsive to the concerns of the people affected by their decisions, take an interest in them, express sensitivity and empathy toward them, and identify with their standpoint because officials who have no interest in this sense are liable to be cold and detached.

The second section of the book is devoted to exploring the cultural background of the discourse on conflict of interests. In his article, “The Psychology of Conflict of Interests,” Yuval Feldman analyzes the relevant psychological approaches for predicting the behavior of an official in a situation of conflict of interests, and examines to what extent there is a basis for the fear that officials will refrain from acting to promote the public interest when they have a competing interest – particularly when that interest is a personal, and not merely an institutional one. The article presents the range and complexity of psychological factors likely to influence the judgment of officials in situations of conflict of interests. Among other things, Feldman claims that since the individual is not aware of the influence of self-interest on his or her behavior, and given the

25 Aharon Barak, *Conflict of Interests in Performance of Duty*, 11 MISHPATIM 10 (1980).

public's perception of the "untainted" nature of such behavior, the judicial approach that seeks to offer preventive measures is justified.

Aviad Hacoheh's article, "The Prohibition against Conflict of Interests in Jewish Law," advances the exploration of the cultural background of Israeli law through a comprehensive review of the prohibition against conflict of interests in Jewish law. Hacoheh compares Jewish law with contemporary legal systems in order to examine whether it is possible, or even desirable, to introduce rules regarding conflict of interests as formulated in Jewish law into the emerging framework of the Israeli legal system. He demonstrates that the general principles of the prohibition against conflict of interests are rooted in Jewish law, revealing the tension between the positive rules in this area and the way the desirable norms are depicted.

The article by Gad Barzilai, entitled "Connections or Capabilities: On the Logic of Favoritism and the Fight against It," offers another perspective on the cultural background of the debate over conflict of interests. Barzilai argues that favoritism (*protektsia*) is not only a cultural trait, but a phenomenon which characterizes the State and is intertwined with the political power of the central mechanisms of the State. Accordingly, the proper way to discourage favoritism should be primarily by cultivating a sense of social awareness that emphasizes the grave damage favoritism inflicts on democracy. Barzilai traces the regulatory attempts to address the spread of certain aspects of favoritism. Likewise, he cites examples of the (relatively few) successes of the legal and public systems to prevent instances of favoritism. As a rule, however, he argues that legal initiatives for dealing with the problem of favoritism are not enough. Instead, he proposes that the State Comptroller's Office attend to the problem. In the same vein, he advocates administrative regulation of the matter (including administrative sanctions) for dealing with instances of favoritism in the workplace and in the bureaucracy. Such regulation should be broader than the scope of area covered by criminal law. Along these lines, Barzilai also

proposes to include this subject in the school curriculum, and to raise the general public's consciousness of it through the media.

The third section of the book is devoted to a discussion of conflict of interests in the setting of public administration. Daphne Barak-Erez's article, "Conflicting Interests and Conflict of Interests in Administrative Law," offers a comprehensive perspective on administrative law as a field that aims to define the norms that should be applied to governmental decision making in areas that necessitate balancing the conflicting interests of individuals or groups. Barak-Erez demonstrates the role of several basic principles of administrative law from the perspective of their contribution to this goal. The article sheds light on the obvious significance of the prohibition against conflict of interests in the administrative context: if an administrative decision is intended to balance conflicting interests, it is undermined in the most profound sense when the decision is reached in a situation of conflict of interests. At the same time, Barak-Erez addresses not only the prohibition against conflict of interests of officials, but also other principles, which should be considered important from the perspective of balancing conflicting interests: the requirement for express statutory authorization for administrative actions, rules regarding public participation in the administrative decision making process, and more.

Yitzhak Zamir's article, entitled "Conflict of Interests in Public Service," offers a detailed review of the evolution of the prohibition against conflict of interests in administrative law, and illuminates the intricate relationship between law and ethics in this context. The article discusses the background of the prohibition against conflict of interests as well as the criteria for its implementation, the scope of the prohibition, the exceptions to it, the consequences of its infringement, and possible solutions for situations of conflict of interests.

The article by Yaakov Ben-Shemesh, "Between Sectoral Representation and Conflict of Interests," focuses on one of the major difficulties raised by the prohibition against conflict of interests in public law: the tension between the aspiration to ensure sectoral representation in public bodies

and the obligation of those bodies to actively promote the general public interest. The article proposes a conceptual and normative framework for solving the problem of conflict of interests in circumstances of sectoral representation in public bodies whose activities are supposed to be guided by the republican model. The purpose of sectoral representation, from the perspective proposed in the article, is not only to promote the status of members of minority groups. The justification offered for sectoral representation, based on the contribution of such representation to the politics of the general good and to the public as a whole, supports the existence of sectoral representation of a permanent nature. The application of the proposed model in the article necessitates considering several pragmatic questions, such as: which sectors are worthy of representation; in which public bodies should they be represented; and how should the representatives of the oppressed minority groups be selected?

The fourth section of the book expands the scope of the discussion to include conflict of interests in public positions outside public administration. The article by Yigal Mersel, “Conflict of Interests of Knesset Members: Loyalty to the Party or to the Public?” deals with one of the classic questions of representative theory: the conflict of interests of parliament members (in Israel – Knesset members). The article focuses on the threefold relationship between the Knesset members, the public and the parties through which they are elected. At the center of the article is the conflict between the dual roles of Knesset members as trustees of their parties and as trustees of the public at large. Knesset members, at least ostensibly, have fiduciary duties and special relationships not only vis-à-vis the public at large, as “public trustees,” but also vis-à-vis their parties and factions. Thus, the members of the Knesset find themselves caught in a vise of loyalties. This article examines whether it is possible and appropriate to conceptualize the tension between the Knesset members’ loyalty to the public and to their respective parties within the prohibition against conflict of interests. Mersel believes that, in principle, it is not appropriate to apply the prohibition against conflict of interests

to the type of “dual-loyalty” situations in which Knesset members are caught due to the nature of their role as Knesset members, as well as for practical reasons. The conflict between loyalty to the party and loyalty to the public is part and parcel of the role of the Knesset member. Therefore, according to Mersel, it should not be considered a conflict of interests in the legal sense. Nonetheless, the fact that the principle, as such, does not apply to Knesset members under these circumstances does not negate the possibility that they will face specific situations similar in nature to circumstances of conflict of interests, and that in these special cases, there is justification for taking steps to reduce the difficulty engendered.

The article by Limor Zer-Gutman, entitled “Judicial Conflict of Interests: Between Disqualification Law and Ethics,” focuses on conflict of interests of judges. Zer-Gutman explains that an ethical conflict of interests does not necessarily imply the duty of the judge to disqualify himself from deciding the case, but rather subjects him to ethical duties. The article points to two primary duties of the judge in such cases: first, the duty to consult with an internal party, either the president of the court in which the judge resides or the Judicial Ethics Committee, concerning the possibility of transferring the case to another judge; and second, the duty of full disclosure by the judge to the parties in the case regarding the circumstances that give rise to the ethical conflict of interests. Zer-Gutman adds that in order to strengthen and secure public trust in the judicial system, judges must take pains to follow both the law of conflict of interests, which is part of the law of judicial bias and disqualification, and the rules of conflict of interests, which constitute part of their professional ethics.

The article by Neta Ziv, “Conflict of Interests of Lawyers and Lawyers’ Ethics – Institutional Dimensions” addresses conflict of interests and ethics with respect to attorneys. The article focuses on the problem of the conflicting loyalties of lawyers – to two clients, or to a client and another individual, to whom the attorney has an obligation of loyalty in his capacity as a lawyer. Ziv examines the legal regulation

of various situations involving conflicts of interests – addressing both the standard of conduct required of the lawyer and the consequences of conflict of interests. The article deals with disciplinary, civil and criminal proceedings. As Ziv demonstrates, the relationship between these three types of proceedings is not uniform since the standard for arriving at the legal conclusion regarding the existence of conflict of interests is different in each one in terms of the degree of certainty required: the requirement to determine whether damage was caused; the level of certainty that a damage was indeed caused; and the nature of the damage that was caused. The article explores possible explanations for these differences, indicating two external considerations that influence the application of different legal standards regarding conflict of interests in different proceedings (in addition to other general considerations): the struggle between the Israel Bar Association and the courts concerning seniority in the legal profession, and the tension inherent in the adversarial legal system.

The fifth and final section of the book deals with conflict of interests in criminal law. The article by Mordechai Kremnitzer and Doron Navot, “On the Criminality of Actions by a Public Official in Circumstances of Conflict of Interests,” deals with the question of whether an action taken by a public official in circumstances of conflict of interests should be considered a criminal offense, even if it is not known whether the additional interest impaired his or her judgment. The main argument presented in the article is that under certain circumstances, conflicts of interests influence the judgment of public officials to a degree identical with that of actually taking bribes, and perhaps even more so. An action taken in such circumstances may lead to, or be a part of, a corrupt act and, in any event, poses a substantial danger to the performance of the public role. In other words, under certain circumstances, conflicts of interests significantly threaten the ability of public officials to carry out their public duties properly. To prevent such dangers from materializing, Kremnitzer and Navot believe that an action in such circumstances should be subject to a criminal sanction. They offer a critical analysis of the decision in the

matter of *Sheves*, and then argue that in order to address conflict of interests in the context of criminal law, it is necessary to reform existing law.

The article by Miriam Gur-Arye, “Criminal Liability in Cases of Conflict of Interests: When Is It Justified? – On the Offense of Breach of Trust Following the Additional Hearing in the *Sheves* Case,” is also devoted to the Supreme Court case law regarding criminal liability in circumstances of conflict of interests. Like Kremnitzer and Navot, Gur-Arye also deals with the *Sheves* case and finds it to be flawed, but her conclusions are different. According to her, the judicial assumption that the criminal offense of breach of trust is based on the prohibition against conflict of interests as developed in administrative law ignores the essential difference between criminal liability and administrative means of enforcement. The aim of the prohibition against conflict of interests is to prevent a wrong before it takes place; in other words, it looks to the future. In contrast, generally speaking, criminal liability looks to the past (although in rare cases, criminal law also encompasses several offenses aimed at averting potential dangers). Gur-Arye argues that it is justified to impose criminal liability on a public official who, in fact, favored a competing interest over the public good with which he or she was charged. However, she maintains that in order to prevent the danger that public officials who find themselves in circumstances in which there is a real likelihood of conflict of interests will indeed favor an extraneous interest over the public interest, it is more appropriate and effective to make use of the range of tools developed by administrative law.

The book concludes with an article by Nava Ben-Or, entitled “Conflict of Interests and Corruption in Public Service: Criminal Law in Israel and in the United States – A Comparative Perspective,” which examines the criminal aspect of conflict of interests through a comparison of Israeli and U.S. law. Ben-Or points out that the dominant approach in American jurisprudence views only the act of bribery as constituting corruption, while criminal offenses involving conflict of interests are not perceived as falling under this rubric. Instead, the latter are seen as offenses that target

the prevention of risks, the prevention of inappropriate public appearance or the protection of the public's trust in government. Accordingly, the tendency in the U.S. legal system is not to regard conduct tainted by conflict of interests as grave criminal behavior. The article argues that this approach does not succeed in reflecting the relation between conflict of interests and corruption, nor does it reflect the reality of behaviors that are tainted with corruption beyond the core case of bribery. Ben-Or points out the potential obstacles that interfere with developing a coherent concept of corruption, and offers possible explanations for the difference between U.S. case law and the approach of the Israeli Supreme Court in the *Sheves* case in which actions involving conflict of interests were considered a breach of trust, an offense inherently related to government corruption.

In conclusion, it is our hope that *Conflict of Interests in the Public Sphere* will contribute to a better theoretical understanding of the subject of conflict of interests, as well as to better modes of addressing the questions it raises in the Israeli public sphere. We would like to take this opportunity to thank all the authors who shared with us the fruits of their wisdom; Advocate Tal Sharon-Heffetz, who coordinated the editorial board; Nevo Publishers, Ltd.; and The Israel Democracy Institute, under whose aegis this book is published.