

Conflicts of interest in senior public administration*Conflicto de intereses en la alta administración pública**Conflitos de interesse na alta administração pública***Tricia Bogossian¹**

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¹Universidade Estácio de Sá. Rio de Janeiro, Brazil.*Corresponding author: E-mail: tricia.bogossian@hotmail.com**Abstract**

This study analyzes the legal framework governing conflicts of interest in Brazilian public administration, focusing on the Law of Conflicts of Interest No. 12.813/2013 (LCI). The research, both theoretical and qualitative in nature, is based on a doctrinal review and legislative analysis to examine the constitutionalization of the public interest and the limits imposed on administrative discretion. It was found that the LCI, a product of international anti-corruption commitments, expanded the catalog of acts of administrative misconduct by defining situations of conflict between public and private interests. The law establishes a broad concept of conflict of interest, enumerates specific situations in which it may occur during or after the exercise of public office, and provides for severe sanctions, including dismissal and subjection to the Administrative Misconduct Law. The law represents a fundamental advance in the protection of administrative morality and the implementation of the constitutional principles of impartiality and the exclusive pursuit of the public interest, requiring state officials to conduct themselves with loyalty and transparency.

Descriptors: Conflict of Interest; Public Administration; Legislation; Administrative Probity; Corruption.**Resumen**

Este estudio analiza el marco legal que rige los conflictos de intereses en la administración pública brasileña, con énfasis en la Ley de Conflictos de Intereses n.º 12.813/2013 (LCI). La investigación, de naturaleza teórica y cualitativa, se basa en una revisión doctrinal y un análisis legislativo para examinar la constitucionalización del interés público y los límites impuestos a la discrecionalidad administrativa. Se encontró que la LCI, producto de los compromisos internacionales anticorrupción, amplió el catálogo de actos de mala conducta administrativa al definir situaciones de conflicto entre intereses públicos y privados. La ley establece un concepto amplio de conflicto de intereses, enumera situaciones específicas en las que puede ocurrir durante o después del ejercicio de la función pública y prevé sanciones severas, incluyendo la destitución y la sujeción a la Ley de Mala Conducta Administrativa. La ley representa un avance fundamental en la protección de la moral administrativa y la implementación de los principios constitucionales de imparcialidad y la búsqueda exclusiva del interés público, exigiendo a los funcionarios estatales una conducta leal y transparente.

Descriptores: Conflicto de Intereses; Administración Pública; Legislación; Probidad Administrativa; Corrupción.**How to cite this article:**Bogossian T. Conflicts of interest in senior public administration. Glob Clin Res. 2024;4(2):e56. <https://doi.org/10.5935/2763-8847.20210056>

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Resumo

O presente estudo analisa o regime jurídico dos conflitos de interesses na administração pública brasileira, com foco na Lei de Conflitos de Interesses n.º 12.813/2013 (LCI). A pesquisa, de natureza teórica e qualitativa, baseia-se em revisão doutrinária e análise legislativa para examinar a constitucionalização do interesse público e os limites impostos à discricionariedade administrativa. Verificou-se que a LCI, fruto de compromissos internacionais anticorrupção, ampliou o catálogo de atos de improbidade administrativa ao tipificar situações de conflito entre interesses públicos e privados. A lei estabelece um conceito amplo de conflito de interesses, enumera hipóteses específicas de sua ocorrência durante/após o exercício do cargo público e prevê sanções severas, incluindo a demissão e a sujeição à Lei de Improbidade Administrativa. A norma representa um avanço fundamental na proteção da moralidade administrativa e na efetivação dos princípios constitucionais da impessoalidade e da exclusividade do interesse público, exigindo dos agentes estatais uma conduta pautada pela lealdade e pela transparência.

Descritores: Conflito de Interesses; Administração Pública; Legislação; Probidade Administrativa; Corrupção.

Introduction

The Inter-American Convention against Corruption, internalized by Decree No. 4410 of October 7, 2002, established a systematic discipline on conflicts of interest in the field of preventive and repressive actions against corruption. Its Article III establishes the obligation to create and strengthen "standards of conduct for the correct, honest, and appropriate performance of public functions" with the aim of "preventing conflicts of interest" and, as a result, "preserving confidence in the integrity of public servants and the public administration"¹.

In turn, the United Nations Convention against Corruption, enacted by Decree No. 5,687 of January 31, 2006, also emphasized the legal discipline of conflicts of interest, determining in its Article 7 that each State party must adopt systems to facilitate transparency and avoid such conflicts².

In compliance with these international commitments, Brazil approved Law No. 12,813, of May 16, 2013, called the Law of Conflict of Interest (LCI), which specifically addresses the issue in the exercise of office or employment in the Federal Executive Branch³.

The aforementioned diploma expanded the list of actions classified as administrative misconduct, subjecting the civil servant who performs the acts provided for in its Articles 5 and 6 to the sanctions of Law No. 8,429/1992 (Administrative Misconduct Law - LIA)^{3,4}. The introduction of this special legislation has improved the protection of administrative morality, enhancing the effectiveness of the constitutional principles that should guide the actions of public servants.

This study aims to analyze the LCI under the auspices of the constitutional system to facilitate the interpretation and application of its important legal provisions.

Methodology

This article uses a theoretical and qualitative research methodology, based on documentary analysis and doctrinal review. The relevant legal texts were analyzed, such as the 1988 Federal Constitution, Law No. 12.813/2013, Law No. 8.429/1992, and regulatory decrees, as well as

internalized international treaties. The theoretical foundation is based on classical and contemporary doctrine of Brazilian Administrative Law, examining concepts such as public interest, administrative discretion, morality, and improbity. The approach consists of a systematic and teleological interpretation of the legislation, aiming to understand the LCI as an integral part of the legal-constitutional regime for oversight of public administration and the promotion of ethics in state functions.

Results and Discussion

The public interest under the constitutional paradigm

It is well known that the concept of public interest is also subject to constitutionalization, becoming guided by fundamental rights. Thus, the public interest is no longer limited to the concept of the administrative interest—as it was previously under the absolutist state—or even to the interest of management, and therefore can no longer be invoked, in general, to justify the arbitrary actions of those in positions of power within the state⁵.

From a constitutional perspective, Marçal Justen Filho proposes the concept of "personalized public interest," which opposes the idea of broad and unlimited administrative discretion. By the word "personalized," the author means that the issue of human dignity must be guided by the public interest in specific cases, so that such interest addresses "the realization of fundamental legal values" and fulfills "the needs of the population, at a specific time, with pleasure, to implement fundamental values." In this context, the author states: "No ruler can legitimize their decisions by pure and simple reference to the public interest. It will always be necessary to demonstrate how the specific consequences of the decision will lead to the realization of the principle of human dignity in accordance with the spirit of the legal system"⁵.

In such a scenario, the notion of discretion as *carte blanche* for the administrator is lost. Indeed, it is no longer necessary to speak of a binary system of mandatory acts/discretionary acts, but rather of "degrees of legal binding." The administrator retains a certain freedom, but this will be conditioned by the constitutional axiological horizon and will serve that same horizon. Undoubtedly, the



assessment of opportunities and conveniences will always be focused on the realization of basic rights and the promotion of human dignity. Indeed, Binenbojm addresses the public interest under the constitutional paradigm: "the definition of what constitutes the public interest and its declared supremacy over the interests of the particular, ceases to be entirely at the discretion of the administrator, becoming dependent on judgments regarding the proportional weight between fundamental rights and other constitutionally enshrined meta-individual values and interests." Regarding discretion, he states: "discretion ceases to be a space for free choice by the administrator and becomes a residue of legitimacy that must be filled with the technical and legal procedures provided for in the Constitution and the law to optimize the degree of legitimacy of the administrative decision"⁶.

In a similar conclusion, Maria Sylvia Zanella di Pietro argues that the principles and values enshrined in the constitution limit administrative discretion. According to di Pietro, discretion is conceptualized as the ability that allows the administration to evaluate and choose, in a specific case, based on criteria of feasibility and expediency, one decision over another, equally legally valid. What happens with constitutionalization is that expediency and expediency must be aligned with the public interest, which is based on fundamental rights⁷. Regarding the force with which constitutional values radiate until reaching the administrative act, Agustin Gordillo argues that: "The principle establishes the direction of the evaluation, in the axiological sense, of the evaluation, spirit (...). The principle demands that both the law and the administrative act respect their limits and that, furthermore, they have the same content and follow the same direction, fulfilling the same spirit"⁸.

It should be emphasized that the classic elements of administrative acts were subject, object, and form. However, it was in the search for solutions that were substantively appropriate to the constitutional order, and not merely formally legal, that theories of abuse of power and determining motives evolved to include reason and purpose as two other elements of administrative action. As can be seen, the possibility of monitoring the effectiveness of administrative acts is precisely one of the new paradigms that emerged as a result of constitutionalization. Such control will operate precisely through purpose and reason, subordinating discretion to the public interest based on fundamental rights, as every administrative act must, to a greater or lesser extent, aim to protect and/or promote such rights⁷.

In other words, public administration can no longer refer to the abstract concept of public interest—which is facilitated by the historical crystallization of the idea that administrators have the authority to act at their own discretion, and their decisions are not subject to review based on merit—as a rhetorical key to convey demands exclusively against the government or even interests unrelated to the common good. The public interest will emerge from this order of values, shaped by fundamental

rights, so that it cannot be used as a mere formal justification to the detriment of those governed^{5,7}.

There is not always an identity between the public interest and the interests of the administrator—and/or management—of course, the former refers to the beneficiaries of administrative activities, while the latter concerns the demands of those who perform administrative activities. The State administration "is not the owner of public interests, but merely their guardian; it must ensure their protection. Hence, the principle of the inaccessibility of the public interest." Furthermore, the Administration is not even the sole guardian of public interests⁷. The public interest implies recognizing the instrumental nature of the powers of the State and state agents. Indeed, such powers serve society, without interfering with the specific interests of any one person, or any part of society, or even the current government⁵.

In Brazil, thanks to its historical roots, the State was equipped, remaining protected precisely by its acceptance of the general concept of collective interest, inherited from the authoritarian origins of administrative law. In this context, Sergio Buarque de Holanda explains that for a long time in Brazil—most notably in the 19th century—the State was theorized as a kind of extension of the family circle, obeying the same private logic as homes. This way of thinking about administration, which generates clientelism and paternalism through the exchange of services, profoundly marked the history of the Brazilian State. The aforementioned author outlines an ideal type, an archetype called the "domestic employee," to deal with the abuse of public office: "For the 'patrimonial employee,' the official political administration itself is the object of his special interest; the functions, positions, and benefits received from them relate to the employee's personal rights, and not to objective interests, as occurs in a truly bureaucratic state, where specialization of functions and the desire to provide legal guarantees to citizens prevail"⁹.

Conflict of interests in Brazilian legislation

Article 37, §4, of the 1988 Federal Constitution establishes that acts of administrative misconduct will result in sanctions such as suspension of political rights, loss of public office, forfeiture of assets, and restitution to the public treasury, in the manner and gradation provided for by law, without prejudice to applicable criminal proceedings. This provision is regulated by Law No. 8,429/1992 (Administrative Misconduct Law - LIA), which describes and establishes sanctions for the practice of misconduct. Law No. 12,813/2013 introduced a new list of administrative offenses that deserve systematic interpretation. Article 12 of the LCI states that "the public official who performs the acts provided for in Articles 5 and 6 of this Law is guilty of administrative misconduct, in accordance with Article 11 of Law No. 8,429 of 1992, when none of the conduct described in Articles 9 and 10 of that Law is characterized". Thus, the LCI is a new legal norm that introduces new types of improper acts^{3,4}.

Article 3, item I, of the LCI defines a conflict of interest as "a situation arising from a conflict between public



and private interests that may put the collective interest at risk or unduly harm the performance of public functions"³. A conflict of interest, therefore, is an antagonism of interests that exists between the private sphere, in the case of a public agent or third party, and the public sphere to which the agent is linked by virtue of their function, which can jeopardize collective interests and compromise loyalty, impartiality, and impartiality in the exercise of public office. As Pimenta Oliveira explains: "[...] a conflict of interest is a legal and functional situation in which a State agent places themselves in a certain position that may impair the loyal, impartial, and impersonal performance of public functions due to the emergence or presence of a private interest (their own or that of a third party), which may distort the administrative action, in accordance with the principles and rules of the Brazilian legal-administrative system. It is not necessary that the situation created lead to some form of illicit enrichment of themselves or others, or activities that cause damage to public assets"¹⁰.

The basis of the conflict of interest is confidential information received in the exercise of public functions, defined in Article 3, item II, as "information that concerns a confidential matter or is relevant to the decision-making process at the federal level of the Executive Branch, which has economic or financial consequences and is not known to the general public." Therefore, any person holding a public office or position and who, in the exercise of their functions or powers, becomes aware of confidential information, as conceptually defined above, that could bring economic or financial benefit to a public official or third parties, will be subject to the LCI. It follows that the express objective of the Law in question is to attempt to avoid a clash between public and private interests that could jeopardize collective interests, particularly concerning matters of a confidential or relevant nature in the context of public administration discussions^{3,8}.

The LCI must comply with and be interpreted in accordance with the constitutional framework. Considering the conflict-of-interest scenarios listed in Articles 5 and 6, it is stated that the LCI can be applied to all civil servants belonging to the three spheres of government, and to all subjects of the federation, provided that conditions exist for the legal classification of the facts and the existence of a legislative provision regarding this matter. The concept of a state agent subject to the legal regime of liability is defined in Article 2 of the LIA. Therefore, it is concluded that the LCI legal regime applies not only to the individuals listed in Article 2, but to all public officials who meet the LIA definition, which is why public officials who are members of consortia with private law status will be covered by the conflict-of-interest regime^{4,10}.

Conflict situations and sanctions

Chapters 2 and 3 of Law No. 12,813/2013 regulate situations that constitute a conflict of interest during and after management or employment. Seven situations can be considered a conflict of interest in the exercise of official functions, which can be summarized as follows: i) disclosure or use of confidential information (Art. 5, I); ii) maintaining

commercial relations, whether onerous or gratuitous, with any person interested in resolving the issue (Art. 5, II); iii) engaging in activities incompatible with the position (Art. 5, III); iv) acting in the form of so-called administrative advocacy (Art. 5, IV); v) performing acts for the benefit of the legal entity in which the employee or his/her relative up to the third degree participates (Art. 5, V); vi) receiving gifts from any person with an interest in his/her decisions outside the scope of the regulation (Art. 5, VI); vii) Provide services to a company whose activities are controlled, monitored or regulated by an entity to which the public agent is linked (Art. 5, VII)^{3,11}.

After taking office, the Legislature established that the agent: i) may not, at any time, disclose or use confidential information obtained as a result of the activity performed; and ii) must comply with the four-month quarantine period for the situations described in Art. 6, II^{3,12}. The sanctions are provided for in Chapter V; Article 12 establishes that all agents who, in addition to the definition of conflict of interest, are liable for civil wrongdoing, will be subject to the penalties of the LIA if they do not comply with the provisions of Articles 9 and 10 (obligations to provide information and consultations in circumstances that may generate a conflict of interest)^{3,4}. In turn, the sole paragraph of Art. 12 clearly indicates that the sanction applicable to the agent who finds himself in a conflict of interest is the punishment in the form of dismissal from public service provided for in Art. 127, III, 132 of Law No. 8.112/91 or equivalent measure. Art. 13 adds that the provisions of the LCI do not preclude the applicability of the disciplinary regime of Law No. 8.112/1990^{3,13}.

The ordinary legislator assigned the Office of the Comptroller General (CGU) and the Public Ethics Commission (CEP), pursuant to Article 4, §1, combined with Article 8, caput and sole paragraph, of Law No. 12.813/2013, the authority to decide on conflicts of interest. A careful examination of the law school leads to the conclusion that the CGU's jurisdiction is like that of the CEP in all respects, differing only in the hierarchical position occupied by their jurisdictions. Article 10 extends the legal standards to all holders of public offices and positions, obliging them to also behave in a manner that protects confidential information, avoids conflicts of interest, and provides all necessary information to oversight authorities^{3,9,14}.

Conclusion

Law No. 12,813/2013 defines a conflict of interest as "a situation arising from a conflict between public and private interests that may jeopardize collective interests or unduly affect the performance of public functions." This conflict between public and private interests arises only when there is harm to collective interests or public functions, emphasizing that there is no need to regularize damage to public assets or to a public official who has benefited financially from the conflict. The law embodies Brazil's international commitments to combat corruption and enforces constitutional principles such as morality, impartiality, and the supremacy of the public interest. By defining specific conduct and establishing strict sanctions,



the LCI strengthens the legal framework for administrative misconduct and serves as a powerful tool for preventing corruption. The correct interpretation and application of its provisions, always considering the constitutional framework that redefines the public interest based on fundamental

rights, are essential to fostering a culture of integrity and transparency in public service, moving away from the patrimonialist legacy that has historically characterized the Brazilian state.

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