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978-1-107-02932-3 - Conflict of Interest in Global, Public and Corporate Governance

Edited by Anne Peters and Lukas Handschin

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## CONFLICT OF INTEREST IN GLOBAL, PUBLIC AND CORPORATE GOVERNANCE

Conflict of interest occurs at all levels of governance, ranging from local to global, in both the public and the corporate and financial spheres. There is increasing awareness that conflicts of interest may distort decision-making processes and generate inappropriate outcomes, thereby undermining the functioning of public institutions and markets. However, the current worldwide trend towards regulation, which seeks to forestall, prevent and manage conflicts of interest, has its price. Drawbacks may include the stifling of decision-making processes, the loss of expertise among decision-makers, and a vicious circle of distrust. This interdisciplinary and international book addresses specific situations of conflict of interest in different spheres of governance, particularly in global, public and corporate governance.

ANNE PETERS is Professor of Public International Law and Dean of Research of the Law Faculty at the University of Basel and the Vice-president of the board of the Basel Institute on Governance. She is also a member of the Council of Europe's Commission for Democracy through Law (Venice Commission) in respect of Germany, and she currently serves as the President of the European Society of International Law.

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# CONFLICT OF INTEREST IN GLOBAL, PUBLIC AND CORPORATE GOVERNANCE

Edited by

ANNE PETERS

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## PREFACE

The city of Basel's statute on the recusal office holders and on disenfranchisement for elections to city bodies dates from 1872.<sup>1</sup> It stipulates, for example, that a member of the Great Council, the '*Grosser Rat*' (the legislative body of the city) must abstain from voting in matters of personal interest to himself or to a spouse or family members. In cases of other involvement, the recusal is 'left to his [the Council member's] conscience'.<sup>2</sup> Why did the city and canton of Basel adopt such a statute as early as 1872? Switzerland and its federal sub-entities, the cantons, were already at that time mature democracies. Because of the small number of people involved, local government must more than any national government deal with many 'tangled loyalties'.<sup>3</sup> Specifically, Basel had been governed almost since the Middle Ages by a few families,<sup>4</sup> colloquially referred to as 'the dough' (*der Teig*) of Basel.

This interdisciplinary study moves far beyond the narrow confines of a particular city and of a particular type of governance, and reaches out to national, global, and corporate and financial governance. The self-reflexive and analytical process promoted through the comparison of conflict of interest arising in different spheres of governance and in different branches allows us to reach a better understanding of what conflict of interest actually is, which problems it causes, and whether and how it should be addressed by politicians, regulators and judges.

This volume was made possible by diverse personal and financial contributions. For their essential financial contributions we wish to

<sup>1</sup> 'Gesetz betreffend den Austritt in Behörden, die Beschränkung der Stimmgebung bei Wahlen und die Ausschliessung der Wählbarkeit von Verwandten zu Mitgliedern von Behörden' of 4 March 1872 (SG 138.100).

<sup>2</sup> 'Im Falle von anderweitiger Beteiligung bleibt der Austritt seinem Gewissen überlassen.' (Sec. I. b) § 2.2. of the city of Basel's statute.

<sup>3</sup> Shapiro, *Tangled Loyalties*.

<sup>4</sup> See on nineteenth-century Basel, which still 'did indeed retain its medieval outline' Gossman, *Basel in the Age of Burckhardt*, Part I (pp. 19–107).

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PREFACE

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We hold in dear memory Jan Richter, our colleague at the Basel Institute on Governance, author of Chapter 13 in this book, who passed away prematurely and will not be able to hold the fruit of our labour in his hands.

*Anne Peters and Lukas Handschin*  
Basel May 2012

ABBREVIATIONS

ABA	American Bar Association
ACC	Anti-Corruption Commission
AI	Amnesty International
AktG	Aktiengesetz (German Stock Corporation Act)
ALMA	Asa Lalana Malagasy
App. Ct.	Appellate Court
APPE	Association for Practical and Professional Ethics
ASG	Assistant Secretary General
ATF	Arrêts du Tribunal fédéral (Decision of the Swiss Federal Tribunal)
AU	African Union
BBC	British Broadcasting Corporation
BGE	Bundesgerichtsentscheid (Decision of the Swiss Federal Tribunal)
BIANCO	Bureau indépendant anti-corruption (Independent Anti-Corruption Office)
BIT	Bilateral Investment Treaty
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (Decisions of the German Federal Constitutional Court)
CartA	Federal Act on Cartels and other Restraints of Competition (Switzerland)
CAT	UN Committee Against Torture/Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment/United Nations Committee Against Torture
CC	Civil Code (Code civil)
CCJE	Conseil consultatif de juges européens (Consultative Council of European Judges)
CCPR	International Covenant on Civil and Political Rights
CDL	Commission for Democracy through Law (Venice Commission)
CEDAW	UN Committee on the Elimination of Discrimination Against Women/Convention on the Elimination of Discrimination against Women
CERD	UN Committee on the Elimination of Racial Discrimination/International Convention on the Elimination of All Forms of Racial Discrimination

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CFI	Court of First Instance (European Union)
CFO	Chief Financial Officer
CIM	Centre for International Migration and Development
CJ	Chief Justice
CO	Code des Obligations (Swiss Code of Obligations)
CVP	Christlichdemokratische Volkspartei (Christian Democratic Party, Switzerland)
DCGK	Deutscher Corporate Governance Kodex (German Corporate Governance Codex)
EC	European Commission
ECHR	European Court of Human Rights/European Convention of Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECJ	European Court of Justice
EP	European Parliament
ESCS	European Coal and Steel Community
ETS	European Treaty Series
EU	European Union
EVP	Evangelische Volkspartei (Evangelical People's Party, Switzerland)
EWCA Civ	England and Wales Court of Appeal (Civil Division)
FDP	Freisinnig-Demokratische Partei (Free Democratic Party, Switzerland)
FIFA	Fédération Internationale de Football Association
GA	General Assembly
GAC	Governance and Anticorruption
GAL	Global Administrative Law
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GesKR	Gesellschafts und Kapitalmarktrecht (German Companies and Capital Market Law)
GPS	Grüne Partei Schweiz (Green Party of Switzerland)
GRECO	Groupe d'Etats contre la corruption (Group of states against corruption)
GTZ	Gesellschaft für Technische Zusammenarbeit (German Society for Technical Co-operation)
HGB	Handelsgesetzbuch (German Commercial Code)
HRC	Human Rights Committee
IAS	International Accounting Standards
IBA	International Bar Association
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce/International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice



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ICSAB	International Civil Service Advisory Board
ICSC	International Civil Service Commission
ICSID	International Centre for Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the former Yugoslavia
IDA	International Development Association
IFC	International Finance Corporation
IFRIC	International Financial Reporting Interpretations Committee
IFRS	International Financial Reporting Standards
IIC	Independent Inquiry Committee into the United Nations Oil-for-food Programme
ILM	International Legal Materials
ILO	International Labour Office/International Labour Organization
IMF	International Monetary Fund
IOM	Institute of Medicine of the National Academies, US
IUMI	Institut Universitaire de Management International (Institute of International Management)
JCC	Japanese Commercial Code/Shôhô
KB	King's Bench
LCD	Loi fédérale contre la concurrence déloyale (Swiss Federal Law against Unfair Competition)
LCIA	London Court of International Arbitration
LTF	Loi sur le Tribunal fédéral (Swiss Federal Supreme Court Act)
MFN	Most-favoured nation
MiFID	Directive on Markets in Financial Instruments
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Agreement
NASDAQ	National Association of Securities Dealers Automated Quotation
NDI	National Democratic Institute
NGO(s)	Non-governmental organisation(s)
NR	Nationalrat (National Council, Switzerland)
NYSE	New York Stock Exchange
ODA	Official development assistance
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal (of the European Union)
OR	Obligationenrecht (Swiss Code of Obligations)
PCA	Permanent Court of Arbitration
PDG	Président-directeur général (chief executive officer)
PIGs	Public interest groups
PUMA	OECD, Public Management Service
QI	Qualified intermediary
SCC	Swiss Criminal Code (Code pénal suisse)
SE	Societas Europaea

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SFAS	Statements of Financial Accounting Standards
SFBC	Swiss Federal Banking Commission (Eidgenössische Bankenkommission)
SJ	Semaine Judiciaire (Judicial Week)
SP	Sozialdemokratische Partei (Social Democratic Party, Switzerland)
SR	Ständerat (Council of States, Switzerland)/Systematische Rechtssammlung (Classified Compilation of (Federal) Legislation, Switzerland)
Stat	Statutes at Large, United States
StPO	Strafprozessordnung (German Code on Criminal Procedure)
SVP	Schweizerische Volkspartei (Swiss People's Party)
SZW	Swiss Review of Business and Financial Market Law
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UCITS	Undertakings for Collective Investment in Transferable Securities Directives
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UN-	United Nations Office of the High Representative for the Least
OHRLS	Developed Countries, Landlocked Developing Countries and Small Island Developing States
UNTS	United Nations Treaties Series
UPR	Universal Periodic Review
USAID	United States Agency for International Development
USC	United States Code
US\$	United States dollar
WB	World Bank
WHO	World Health Organization
WTO	World Trade Organization
ZPO	Zivilprozessordnung (Swiss Code of Civil Procedure)