5.

THREE PROBLEMATIC ASSUMPTIONS ABOUT PUBLIC INTERESTS IN LAW

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1. INTRODUCTION

Just like trump cards can decide a lot of games, arguments based on public interests can dominate legal disputes by outranking competing considerations. In order to learn whether one has the public interest card up her sleeve, we need to understand why some legally protected interests are regarded as public interests and why other interests are not so regarded. To this end, as will be argued in this chapter, at least three problematic assumptions obscure our understanding of public interests in law and thus complicate the envisaged game.

First, it is often thought that the concept of public interest is well-established, even though no satisfactory definition of the concept exists. Typically, legal sources and scholarship confuse the claims about the public, the type of interest that the public has in certain matters, and the matters which are in the public interest.

Second, it is often thought that matters of public interest can be identified by asking what it is that the members of the public have common concern for, even though it is in the public interest to protect some matters in which some members of the public do not have their stake. For example, privacy is protected by the law as a matter of public interest even if some members of the public have nothing to hide, and freedom of speech is in the public interest even if some citizens have nothing to say.

Third, it is often thought that public interests need to be contrasted with private interests as if they were mutually exclusive categories, even though most legally protected interests cannot be classified as either public or private. For example, it would be incorrect to argue that privacy or freedom of speech cannot be classified as private interests because they are in the public interest.

In order to address these problematic assumptions about public interests, this chapter suggests that we strictly distinguish the questions about how the concept of public interest is to be defined, how public interests are to be identified, and what matters are in the public interest. The following three sections (Sections 2 to 4) of this chapter examine each of the three assumptions in turn. Section 5 summarises the lessons learned and argues that the notion of public interest does not serve as an objective statement of fact about whether something is or is not a public interest, but a highly contextual label that marks the distinct normative consequences associated with the conclusion that something is to be regarded as if it were in the public interest. The arguments in this chapter are based on English law and general philosophy of law.

2. ASSUMPTION ONE

The concept of public interest is regarded as well-established. The legislators, for example, do "not attempt to define what is meant by '*the public interest*' … [because they believe] this is a concept which is well-established in the English common law".[1] While I agree that cases clearly tell us that some matters are in the public interest, for example national security[2] or standards of commercial morality,[3] and that the deployment of public interests as a legal tool (think of the trump card) is relatively well-established, it is far from clear that the concept of public interest is well-established.

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1 Explanatory Note to the Defamation Act 2013, [30] (emphasis in original).

2 *R. (Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin), [2009] 1 WLR 2653, [34] (discussing various means of protection of "the identified public interest" of national security).

3 *Abacrombie & Co., Re* [2008] EWHC 2520 (Ch) [5] (ruling that activities of a company are contrary to "a clearly identified public interest" if they do not meet "a minimum standard of commercial morality").

On the contrary, case law evidence suggests that the courts use the notion in a vague sense. For instance, English courts interchangeably refer to "public interest in matters X",[4] "a public interest in matters X",[5] and "matters X that are in the public interest".[6] Such parlance, however, invites unclear thinking, because it does not determine whether it concerns a claim about the public (as in "The public is interested in X"), a claim about the interest in X (as in "There is interest in X and the interest is public"), or a claim about X (as in "X is a public interest").

From a scholarly perspective, this vagueness is inexcusable. From a practical viewpoint, it also matters that we maintain distinctions between different types of claim, because statements about the public, about matters which are deemed in the public interest, and about the nature of our interest in those matters cannot be justified equally. The arguments and evidence put forth in defence of each of these claims would be different. A claim about the public would probably require some empirical grounding; a claim about the interest in X would require some theoretical, legal and conceptual argumentation; and it is fair to assume that a claim about X would require a combination of all the previous methods. The point made here is that when scholars, lawyers and courts discuss "public interests", it is highly desirable that they are transparent about the type of claim that they have in mind.

Turning from case law to legislation, it can be observed that the UK legislator employs the notion of "public interest" in many variations, but never tells us what the concept means. Sometimes, for example, courts are asked to "promote the public interest recognised by the [legislation]", such as in the case of tax laws.[7] In those cases, the legislation specifies the public interests as if the concept of public interest were co-determined by the matter X as specified by the legislative provision. Sometimes, the legislation identifies considerations according to which public interests should be protected. These considerations include the number of people affected in the given case or whether some constitutional values are at stake.[8] In those instances, it is unclear whether the legislation relies on some undefined concept of public interest or whether the concept is in fact fully defined by the enumerated considerations. Crucially, the important thing in all those cases is how it is to be authoritatively determined that some matters X are in the public interest, not what the concept of public interest means or whether matters X are public interests. Sometimes, the legislation mentions the public interest as a key consideration for the application of a statutory provision but again does not specify what the "public interest" means.[9] In those cases, it seems that the concept of public interest is co-determinative of whether matters X are to be treated as public interests.

Rare attempts exist to explain what individual instances of public interest (not the concept of public interest) are, yet these explanations are not very helpful either. For example, in a defamation case *Flood v. Times Newspapers Ltd.*, Lord Phillips observed that "it will not always be in the public interest to publish matters which are of public interest".[10] He then went on to employ Lord Bingham's definition of matters which are of public interest to the community:

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4 Recently, see, e.g., *Maugham v. Uber London Ltd.* [2019] EWHC 391 (Ch), [2019] Costs LR 521 [56]: "because there is public interest in issues illustrated by and surrounding this case does not mean that the issues actually raised in these proceedings are themselves of general public importance"; *Bates v. Post Office Ltd. (No. 3)* [2019] EWHC 606 (QB) [586]: "Post Office understands that there is public interest in promoting the transparency and understanding of matters which are of interest to the public."

5 See, e.g., *Discover Land Co. LLC v. Jirehouse* [2019] EWHC 2249 (Ch) [90]: "There is a public interest in ensuring that proceedings to enforce orders and undertakings are not brought unless they pass a threshold of seriousness."; *Moher v. Moher* [2019] EWCA Civ 1482 [45]: "There is a public interest in the proper maintenance of the wife by her former husband".

6 See, e.g., *R. (Kuzmin) v. General Medical Council* [2019] EWHC 2129 (Admin) [19]: "it was in the public interest for doctors to provide a response (including oral evidence) to serious allegations made against them"; *Health and Care Professions Council v. Selvaraj* [2019] EWHC 2195 (Admin) [10]: "the interim order is necessary for the protection of members of the public and is in the public interest".

7 *R. (Whistl UK Ltd. (formerly TNT Post UK Ltd.)) v. Revenue and Customs Commissioners* [2014] EWHC 3480 (Admin), [2015] STC 1077 [59]. See also, e.g., Investigatory Powers Act 2016 (identifying, protecting and promoting numerous specific public interests); ss 117A and 117B of the Nationality, Immigration and Asylum Act 2002 (determining public interest in relation to decision made under the Immigration Acts); sch. 1, para. 1, ss. 21(4) and 52(6) of the Digital Economy Act 2017 (identifying and promoting "the public interest in access to a choice of high quality electronic communications services").

8 See, e.g., s. 84 of the Fair Trading Act 1973 (no longer in force); ss. 88(6)–(8) of the Criminal Justice and Courts Act 2015; ss. 26(2)–(6) of the Data Protection Act 2018.

9 See, e.g., s. 84 of the Law of Property Act 1925; s. 213(2) of the Enterprise Act 2002; s. 4 of the Defamation Act 2013; s. 84 of the Criminal Justice and Courts Act 2015; sch. 1, para. 4, s. 31(2) of the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017/385.

10 *Flood v. Times Newspapers Ltd.* [2002] UKSC 11, [2012] 2 AC 273 [33] (affirming Lord Hobhouse's position in *Reynolds v. Times Newspapers Ltd & Others* [2001] 2 AC 127 (HL)).

> [By matters of public interest] we mean matters relating to the public life of the community and those who take part in it, including within the expression "public life" activities such as the conduct of government and political life, elections … and public administration, but we use the expression more widely than that, to embrace matters such as (for instance) the governance of public bodies, institutions and companies which give rise to a public interest in disclosure, but excluding matters which are personal and private, such that there is no public interest in their disclosure.[11]

This general definition of matters of public interest remains impracticably vague. Lord Mance, in a different context, has recently criticised the possibility that the

> [c]ourts would be required to make a value judgment, by reference to a widely spread mélange of ingredients, about the overall "merits" or strengths, in a highly unspecific non-legal sense, of the respective claims of the public interest and of each of the parties.[12]

In summary, we can argue that the concept of public interest is not well-established in English law, because as far as case law and legislation are concerned we do not even know how the concept is to be defined. Instead, it seems that the concept of public interest is used as a "vague, impalpable but all-controlling consideration" in delivering justice, as Judge Felix Frankfurter famously said.[13]

Let us turn to scholarship. The situation there is not much different. The English-language literature sometimes addresses the so-called "public interest law", i.e. law concerning group or public interest litigation.[14] This typically concerns environmental issues, social issues, product liability issues, competition law cases and other matters of public interest. Yet the literature does not define the concept of public interest or how to identify relevant public interests in those cases. To this extent, the literature does not advance the inquiry.

Intuitively, one would hope to find a conceptual definition of public interests in the writings on the so-called "jurisprudence of interests" (*Interessenjurisprudenz* in German),[15] but that is unfortunately not the case.[16] Philipp Heck (1858–1943), the founding father of the *Interessenjurisprudenz*, does not define the concept of public interest[17] and neither do his eminent followers.[18]

The common law proponents of the interest theory of law also do not define the concept of public interest. In a relatively marginal part of the work of Roscoe Pound (1870–1964),[19] this American scholar offered a theory of social interests, the process of their origination, and their role in the law.[20] Pound regarded public interests as "claims or demands or desires asserted by individuals involved in or looked at from the standpoint of political life—life in politically organized society".[21] "They are the claims which are involved in the maintenance, the ac-

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11 *Reynolds v. Times Newspapers Ltd & Others* [1998] 3 WLR 862 (CA) 909 (Lord Bingham).

12 *Patel v. Mizra* [2016] UKSC 42, [2016] 3 WLR 399 [206] (Lord Mance).

13 F. FRANKFURTER in H.B. PHILLIPS (ed.), *Felix Frankfurter Reminisces*, Reynal, New York, 1960, p. 72.

14 See, e.g., A. HOMBURGER, "Private Suits in the Public Interest in the United States of America" in A. HOMBURGER and H. KÖTZ, *Klagen Privater im öffentlichen Interesse*, Alfred Metzner Verlag, Frankfurt, 1975; B.A. WEISBROD, J.F. HANDLER and N.K. KOMESAR (eds.), *Public Interest Law: An Economic and Institutional Analysis*, University of California Press, Berkeley CA, 1978; H.W. MICKLITZ and N. REICH (eds.), *Public Interest Litigation before European Courts*, Nomos, Baden-Baden, 1996.

15 The jurisprudence of interests was influential especially in the first half of the 20th century and had its proponents across the common law and civil law world.

16 An English reader may find helpful a translated collection of some of the core texts in J. HALL and OTHERS (eds.), *The Jurisprudence of Interests: Selected Writings of Max Rümelin, Philipp Heck, Paul Oertmann, Heinrich Stoll, Julius Binder, and Hermann Isay*, M.M. SCHOCH (translator), Harvard University Press, Cambridge MA, 1948.

17 Cf., e.g. P. HECK, "Gesetzauslegung und Interessenjurisprudenz" (1914) 112 *Archiv für die civilistische Praxis* 1; P. HECK, *Begriffsbildung und Interessenjurisprudenz*, Mohr, Tübingen, 1932 (most of this text is available in English in J. HALL AND OTHERS, above n. 16); P. HECK, *Begriffsbildung und Interessenjurisprudenz*, Mohr, Tübingen, 1932; P. HECK, *Interessenjurisprudenz*, Siebeck, Tübingen, 1933.

18 Cf., e.g., J. HALL and OTHERS, above n. 16, and G. ELLSCHEID and W. HASSEMER (eds.), *Interessenjurisprudenz*, Wissenschaftliche Buchgesellschaft, Darmstadt, 1974.

19 The issues of social and public interests occupied only 1 out of 34 chapters (or 8 out of 151 sections) of Pound's *Jurisprudence*, vols. 1–5, West Publishing, St. Paul MN, 1959.

20 Ibid., vol. 3. See also R. POUND, "A Theory of Social Interests" (1921) 15 *Papers and Proceedings of the American Sociological Society* 16; R. POUND, "A Survey of Social Interests" (1943) 57 *Harvard Law Review* 1; R. POUND, "A Survey of Public Interests" (1945) 58 *Harvard Law Review* 909. See also E.W. PATTERSON, "Pound's Theory of Social Interests" in P. SAYRE (ed.), *Interpretations of Modern Legal Philosophies: Essays in Honour of Roscoe Pound*, Oxford University Press, Oxford, 1947.

21 R. POUND, *Jurisprudence*, vol. 3, West Publishing, St. Paul MN, 1959, p. 23.

tivity and the functioning of society",[22] he added. But beyond these words, Pound did not attempt to define in writing the concept of public interests as a distinct category.[23]

One possible reason why Pound did not define public interest as a distinct category of legally protected interests may be that his "concept of interest … [was] being inflated to such proportions"[24] that it conflated various perspectives together. Pound stipulated that an interest is "a demand or desire or expectation which human beings, either individually or in groups or associations or relations, seek to satisfy".[25] Arguably, this overgeneralised concept is indeed immune to any rigorous definition when married with another general notion—public. This notion of "public" seems to be an additional characteristics that points to some quality of the interests in question, rather than a restrictive condition that limits the range of particular interests that fit the concept of "public interest".

Two other notable intellectual traditions teach us about public interests. They are associated with Jeremy Bentham and Jean-Jacques Rousseau.[26] The Benthamite tradition, also labelled as "aggregative", sees public interests as sums of individual interests. The second tradition, sometimes labelled as "unitarian", claims that public interests consist of universally shared private interests.[27] Yet such definitions do not convey much information beyond the fact that public and private interests overlap.

At the end of the day, it may be that the concept of public interest is indeed so broad and vague that it cannot be successfully defined. As Mike Feintuck wrote, after surveying the debates regarding definitions of the concept of public interest, "what is meant and understood by the term 'the public interest' is extremely fluid, the term itself remains persistently part of political, legal and regulatory discourse".[28] There thus seems to be a consensus that no single overarching definition of what the concept of public interest means can be achieved.[29]

I disagree. It is my contention that a definition of the concept of public interest *must* exist, because it is analytically necessary that we know how the concept of public interest is to be defined before we can tell how it is to be determined what matters are in the public interest and before we can tell what matters are in the public interest. Since we know that the courts consider some matters to be in the public interest, a definition of the concept of public interest must exist. Let me explain this in more detail.

If we want to know what matters are in the public interest or how it is to be determined what matters are in the public interest, we must necessarily know how the concept of public interest is to be defined. The literature that discusses public interests and tries to define the concept of public interest is vast,[30] but it often confuses these three questions: (1) how is the concept of public interest to be defined?; (2) how is it to be determined what matters are in the public interest?; and (3) what matters are in the public interest? The point here is not to explore when exactly and why the existing literature does not distinguish between the three questions,[31] but that the these need to be distinguished.

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22 Ibid., pp. 23–24.

23 Cf. ibid., pp. 16, 23–24, 337, 342–343.

24 H. ISAY, "The Method of the Jurisprudence of Interests: A Critical Study" in J. HALL and OTHERS, above n. 16, p. 316. Similarly, e.g., P. OERTMANN, "Interests and Concepts in Legal Science" in J. HALL and OTHERS, above n. 16, p. 75; G. COLM, "The Public Interest: Essential Key to Public Policy" in C.J. FRIEDRICH (ed.), *Nomos V: The Public Interest*, Atherton Press, New York, 1962, p. 115; F.J. SORAUF, "The Conceptual Muddle" in C.J. FRIEDRICH (ed.), *Nomos V: The Public Interest*, Atherton Press, New York, 1962, pp. 183–190; M. FEINTUCK, "The Public Interest" in *Regulation*, Oxford University Press, Oxford, 2004, pp. 1–34.

25 R. POUND, above n. 21, p. 16.

26 For an overview, see T.M. BENDITT, "The Public Interest" (1973) 2 *Philosophy and Public Affairs* 291.

27 S. PETER, *Public Interest and Common Good in International Law*, Helbing Lichtenhahn Verlag, Basel, 2012, p. 10.

28 M. FEINTUCK, above n. 24, p. 34.

29 E.g. P. HÄBERLE, *Öffentliches Interesse als juristisches Problem: Eine Analyse von Gesetzgebung und Rechtsprechung*, Athenäum Verlag, Bad Homburg, 1970; V. HELD, *The Public Interest and Individual Interests*, Basic Books, New York, 1970; J. BELL, "Public Interest: Policy or Principle?" in R. BROWNSWORD (ed.), *Law and the Public Interest*, Franz Steiner Verlag, Stuttgart, 1993; A. BĚLOHLÁVEK, "Public Policy and Public Interest in International Law and EU Law" (2012) 3 *Czech Yearbook of Public & Private International Law* 117; M. LEE, "The Public Interest in Private Nuisance: Collectives and Communities in Tort" (2015) 74 *Cambridge Law Journal* 329, 331–334, 343.

30 See, e.g., in C.J. FRIEDRICH (ed.), *Nomos V: The Public Interest*, Atherton Press, New York, 1962; R.E. FLATHMAN, *The Public Interest: An Essay Concerning the Normative Discourse of Politics*, Wiley, New York 1966; V. HELD, above n. 29; R. BROWNSWORD (ed.), *Law and the Public Interest*, Franz Steiner Verlag, Stuttgart, 1993 and the sources mentioned therein.

31 Benditt and Held give illustrations of writers failing to distinguish between stages (1), (2) and (3) in order to demonstrate that the confusion is real and a problem (although they do not exactly use my language and my specific three-fold distinction). See T.M. BENDITT, above n. 26, pp. 292–97; V. HELD, above n. 29, pp. 12–13.

Although the third question (3) is central for delivering a particular judgment, we must realise that question (3) can only be answered by providing answers to (1) and (2). In the process of judicial decision-making, the answer to (3) can be seen as a result of the court's reasoning and a conclusion of an argument the premises of which include (1) and (2). For instance, if the court authoritatively decides that it is in the public interest not to burn down the Brazil rainforest and that the defendant should thus pay damages for destroying part of the forest that grew on the claimant's indigenous land, the court can only do so if it follows certain procedures (2).

Besides, the adequacy of our answer to how it is to be determined what matters are in the public interest (2) needs to be tested against an idea of what the public interest means and how it is to be defined (1), which idea and method must be independent of the methods dictated by an answer to question (2).[32] This is crucial because otherwise we would find ourselves defining the concept of public interest by the process that leads to its determination. Whoever has the procedural powers and authority would be able to stipulate which matters are in the public interest, because the concept of public interest would be fluid due to its dependence on (2) and, relatedly, on (3). This would import circularity and arbitrariness that would not allow us to test the required adequacy. Therefore, the answer to (1) must dictate the adequate methods of determining public interests (2), and not vice versa. If that were not the case, public interests could be anything that comes out of a prescribed law-making process and would be rather a formal category.[33]

3. ASSUMPTION TWO

It is believed that matters of public interest can be identified by asking what it is that the members of the public have common concern for. In other words, it is believed that public interests are interests of the public, interests that are collectively held by the members of the public. Much like private interests are considered to be aspects of individuals' well-being, public interests are regarded as aspect of public well-being. For example, under the Benthamite view, public interests are sums of individual interests, and on the Rosseau's view public interests consist of universally shared private interests, as was explained above. This would mean that public interests are constituted by actual interests of members of the public. Some thinkers go as far as to claim that "something is in the public interest if, and only if, it is in the interest of each and every member of the public".[34]

This appears to be a very problematic assumption. The fact that some interests are legally protected as public interests does not imply that those interests must be common to all members of the public. Privacy protection, for example, is in the public interest even if some people have nothing to hide. Likewise, it is a problematic assumption because even if all members of the public would sometimes like to disobey legal rules—think of speeding, for example—, it is clearly not in the public interest that they do so. It is thus difficult to believe there is any necessary link between the idea of legally protected public interests and interests common to all members of the public.

Moreover, it is difficult clearly to define the relevant group of members of the public. Does it only include nationals? Does it include also foreign workers, or even foreign tourists? How about minors? Do children and their parents have an equally strong title to have their interests protected? And how about interests of members of future generations who will pay the environmental debt we are presently creating? Should "the public interest" be defined by counting also interests of our ancestors or should they be excluded from the exercise? These important and difficult questions have not yet been satisfactorily answered in the literature, but they already reveal how unhelpful it is to view legally protected public interests as universal interests *of* the public. Public interests need not be defined by recourse to some anterior individual interests of all members of the public, that is as interests that are shared universally. Such a broad conception would ignore the fact that we almost always need to discriminate against some groups because most public interests are not universally shared across communities and generations, perhaps with the exception of the most fundamental interests such as freedom of thought or the right to life. But the notion of public interest spans categories far beyond these fundamental rights, as was shown in the black-letter law review above, and so we should accept that the legal notion of public interest cannot spring from this second problematic assumption.

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32 Similarly, see T.M. BENDITT, above n. 26, p. 293.

33 The "public interest as process" is further discussed e.g. in J. BELL, above n. 29, p. 29.

34 T.M. BENDITT, above n. 26, p. 295 (interpreting B. BARRY, *Political Argument*, Humanities, New York, 1967).

A better way of testing that something is in the public interest is to ask whether that interest is legally protected *for* all members of the public. The burden here shifts onto the individual who claims to be a member of the public and, therefore, a rightful beneficiary of the protections that is granted to such public interest. Freedom of religion or freedom of speech are in the public interest even if some individuals do not believe in God or have nothing to say. The key idea here is that everyone can choose to exercise these freedoms and all those who consider themselves members of the public can claim to be legally entitled to do so. It is this sense in which the public interest is a universal interest—it is protected *for* all members of the public. True, there might be disputes over particular entitlements that certain groups or individuals have on the basis of the public interest so construed, but that does not undermine this idea and the perception of public interests as trump cards. For public interests to benefit all members of the public, it suffices that those interests are posited by the law. From that moment onwards, everyone shall respect them, and from that moment onwards every member of the public is entitled to some stake in the legally protected public interest.

Interestingly, one does not need to believe that some interests are protected for all members of the public, i.e. that these are protected as public interests, if she wants to claim her stake in these interests. Thus, regardless of whether the individual claimant believes it is in public interest that state officials do not abuse their power, she can—as a member of the public—hold the state officials liable for such conduct under the doctrine of punitive damages (oppressive, arbitrary, and unconstitutional acts by the servants of the government[35]). Similarly, for example, we can say that the Data Protection Act 1998 duties also exist to the benefit of all data subjects, not just to the benefit of those who believe that their data cannot be processed without their consent. In this regard, however, the claim that something is in the public interest does not seem to add anything to the claim that such interest is legally protected, because all interest are (in certain sense) protected for the benefit of all citizens. Everyone can benefit from the rule of law and its protection.

As shall be clear, this difficult assumption conflates (just like the first assumption) claims about the public that may (or may not) be interested in matters X, with claims about the type of interest in matters X, and claims about matters X. If the three types of claim are separated, it becomes clear that the "publicness" of public interests is not constituted by the fact that members of the public are interested in matters X. At best, it may serve as a method of determining that some matters X will be protected as public interests. This fact may legitimise their protection, but it does not explain what the "publicness" of the public interests means and why public interests, unlike private interests, can be used as trump cards in a legal dispute.

4. ASSUMPTION THREE

It is commonly thought that public interests need to be contrasted with private interests. In other words, matters of public interest and matters of private interest are regarded as clearly distinct. Accordingly, it is believed that we could compile an authoritative list of matters which are in the public interest and that this list must be different from a list of matters which are in people's private interests. This belief suggests that the "publicness" and "privateness" of interests is somehow determined by the matter X in which we are interested.

However, legally protected interests cannot always be classified as public interests or private interests *tout court*. For example, it would be incorrect to argue that privacy or freedom of speech cannot be classified as private interests because they are in the public interest. It seems more likely to be the case that interests can be regarded as public or private relative to what implications this has for the underlying legal obligation that protects the relevant interest. A violation of privacy might result in compensatory damages that protect the victim's private interests, but also in an administrative fine that sanctions public interests in privacy as protected by data protection legislation.

Can we say that some matter X is in the public interest because of what X is? To do so would be highly contentious. To say that X is in the public interest because it is the public interest does not get us anywhere, because it already presupposes that we know what the concept of public interest means (which we do not know) or that we have a ready-made list of matters of public interest. Besides, as we have just seen, the same matters (e.g. privacy) can be characterised as private interests as much as public interests. So even the list of public interests does

[35] *Rookes v. Barnard* [1964] AC 1129 (HL) 1223, 1226.

not separate matters of public interest from matters of private interest. Besides, non-public interests and private interests are not necessarily conterminous. Pound, for instance, argues that "interests fall conveniently into three classes, individual interests, public interests and social interests".[36] If Pound is right, the dichotomy between public and private interests is false.

In the following section, we will see in more detail why legally protected interests are not protected as public interests merely because of the matter X that the law so protects. Here it suffices to state that a matter X is not in the public interest because it is a public interest, but it can be regarded as a public interest because it is in the public interest that we do so. In other words, we can classify some interests as public only *after* we know that it is in the public interest that we do so. This again confirms that we first need to know how the concept of public interest is to be defined, before we can determine that something is in the public interest.

5. THE LESSONS LEARNED

The discussion in previous three sections teaches us several important lessons about public interests in law. Let me highlight four of them. First, we should distinguish amongst: (1) claims about the concept of public interest (and, relatedly, about public interest in some matters); (2) claims about the method by which it is to be determined that some interests are public (and, relatedly, about the public being interested in some matters); and (3) claims about the matters that we classify as public interests (and, relatedly, about the matters that are in the public interest). We should make this distinction if we do not want to fall into the difficulties described in the previous three sections. The ideas presented in those lessons were shown to be flawed, because they do not reflect the fact that claims (1), (2), and (3) are not synonymous even though they are inter-dependent, as was argued in Section 2 above.

The second lesson is that public interest appears to be a prescriptive notion, rather than a descriptive one. The notion of public interest does not serve as an objective statement of fact that is either true or false, but rather a highly contextual label that marks the distinct normative consequences associated with the conclusion that an individual matter is to be regarded as a public interest. Consider the following example. In *R. v. Brown*,[37] a group of sado-masochists, willingly and enthusiastically participated in the commission of acts of violence against each other for sexual pleasure. It was held by the House of Lords that despite the consent of the participants, "it would not be in the public interest that deliberate infliction of actual bodily harm during the course of homosexual sado-masochistic activities should be held to be lawful".[38] Accordingly, it was ruled that Mr Brown's own interests—as demonstrated by his consent to engage in these sexual activities—had no relevance as to whether the law will consider the conduct contrary to public interests. By invoking the notion of public interest, the court has justified a special type of legal ordering. When the court ruled that something is in the public interest, it was not so much making a descriptive claim about some social reality as signalling how that social reality will be protected by the law. In other words, public interest is a notion that prescribes the type of authoritative power by which the law will protect some matters.

Importantly, the notion of public interest signals that no member of the public can lawfully interfere with that interest because no individual should be allowed privately to control matters which are in the public interest. As was ruled in *R v. Coney*, while the claimant "may compromise his own civil rights [and interests, he] cannot compromise the public interests".[39] In this sense the public interest is not an interest of all members of the public but an interest that is protected for all members of the public, as was discussed in Section 3 above.

An alternative way to explain this lesson is that the notion of public interest makes better sense from an internal viewpoint of the participants in the legal system (e.g. judges, lawyers, parties, etc.) than from an external viewpoint of the observers of the system.[40] The fact *that* some interests are authoritatively posited in legal sources

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[36] See R. POUND, above n. 21, p. 23.

[37] *R. v. Brown (Anthony Joseph)* [1994] 1 AC 212 (HL).

[38] Ibid., 246 (Lord Jauncey).

[39] *R. v. Coney* (1882) 8 QB 534, 554 (Hawkins J).

[40] The internal viewpoint has been most famously presented by Hart (see, e.g., H.L.A. HART, *The Concept of Law*, 3rd edn., Oxford University Press, Oxford, 2012, ch. 5. See also S.J. SHAPIRO, "What Is the Internal Point of View?" (2006) 75 *Fordham Law Review* 1157;

helps us to determine *that* those interests are legally protected. In this way, we could create a catalogue of all matters that are legally protected, i.e. a catalogue of legally protected interests. However, this would be merely an external descriptive statement about the catalogued interests and about their being listed in the catalogue. Still, this fact that some interest X or Y is legally protected does not convey whether that interest is public, private, or other.

The trouble is that there is nothing in the sources of law (when looked at from the external viewpoint of an observer of the legal system) that would indicate *how* those interests are protected. The posited law, when seen as a static description of the protected interests, does not convey valid information about some matters being protected in the public or private interests, unless explicitly stated.[41] And even if an authoritative source of law identifies the public interest explicitly, it merely tells us *that* the interest is public, but not how it can be protected. For example, the Digital Economy Act 2017 promotes "the public interest in access to a choice of high quality electronic communications services",[42] but this fact does not imply how the interest is protected and what it means from the internal viewpoint of a participant in the legal system. It is not clear, for example, when a violation of that interest would amount to wrongdoing and when it would not. Neither is it clear whether the protection of that interest can be waived by private individuals in their individual dealings or whether its legal protection is non-waivable.

We thus ought to set aside the externalist viewpoint and adopt an internal point of view. The notion of public interest is not determined by an *ex ante* classification of legally protected interests, i.e. whether they belong to the private or public class, as we have learned in lesson three (Section 4 above). Instead, the notion of public interest signifies how these interests are protected and thus whether they qualify to be protected as public interests.[43] From the internal viewpoint, legally protected interests represent a sort of valid legal information for the participants of the legal discourse. This legal information tells the participants how they are (or are not) permitted to interfere with that interest.[44]

Accordingly, the third important takeaway lesson is that the "publicness" of legally protected interests can be identified from an internal viewpoint if we ask which considerations can and cannot determine whether interference with those interests will be deemed wrongful. This is because from an internal viewpoint, the validity of legal information that some matters are in the public interest can only properly be tested when we interfere with those matters. In those situations, the law intervenes to reclaim its authority and to let us know that we have been complicit in some wrongdoing.

In order to identify public interests in law, one thus needs to find a way how to determine that interference with some legally protected interests is wrongful. By contrast, we do not need to ask the abstract question about what interests are legally protected, because that question will ultimately be answered once we determine that interference with some interests is wrongful. This is because the defendant's conduct cannot amount to wrongdoing unless there is a legally protected interest upon which the conduct infringes. But although legally protected interests are conceptually anterior to the idea of wrongdoing, legally protected private or public interests are conceptually posterior to the idea of wrongdoing. In other words, the issue of whether a legally protected interest is public or private is something that can only be determined after we know whether and why an interference with those interests counts as wrongdoing. Note that these important insights could only have been unlocked from the internal viewpoint.

The fourth and final lesson to be taken away is that the concept of public interest can be defined through the distinct normative effects that we associate with public interests in law. Namely, the concept of public interest can be defined as an interest in relation to which the courts are and should be willing to reassert the law's authority regardless of any other interests, most typically regardless of the private interests of the parties involved in a

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C.L. BARZUN, "Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship" (2015) 101 *Vanderbilt Law Review* 1203, 1221, 1245–1253.

41 Interestingly, similar observations about the inability of any static criterion to distinguish between private and public interests were made in the theory of socialist law more than 50 years ago. See O.S. IOFFE and M.D. SHARGORODSKIJ, *Voprosy teorii prava*, Gosudarstvennoe izdatelstvo jurdiceskoj literatury, Moscow, 1961 and J. MACUR, *Občanské právo procesní v systému práva*, Universita JE Purkyně, Brno, 1975, pp. 89, 109–111, 115.

42 Sch. 1, para. 1, ss. 21(4) and 52(6) of the Digital Economy Act 2017. Further examples are mentioned in nn. 7–9 above.

43 A similar observation about the "qualification" was made in A. ERH-SOON TAY and E. KAMENKA, "Public Law – Private Law" in S.I. BENN and G.F. GAUS (eds.), *Public and Private in Social Life*, Croom Helm, London, 1983, p. 83.

44 See, e.g., J. RAZ, "Reasons for Action, Decisions and Norms" (1975) 84 *Mind* 481.

dispute. The significant thing about public interests in law appears to be that when some matter is proclaimed to be in the public interest, no single individual is entitled (from their private position) to pardon the interference with that matter. In other words, in relation to public interests, no single individual can control whether or not an infringement with that interest is wrongful.

To some extent, this definition of the concept of public interest may be disappointing because it does not convey much beyond the fact that public interests are the trump cards in law. The interesting question would be why some interests should be regarded as trump cards, i.e. why some interests should be protected as public interests. There is no room to go into this issue here in more detail, but this section seeks nevertheless to plant some ideas and to call on others to explore the issue systematically.

One possible approach to the question about why the law should protect some interests as public interests links to ethics. If it indeed is the case that public interests are not interests that are necessarily held by the members of the public, but which are nevertheless protected in the name of a benefit for all members of the public (Section 3 above), we should perhaps ask the question: "How do we determine what is good for the public?" Ethically speaking, then, we could justify something as good for the public if it maximises welfare, respects individual autonomy, or promotes justice in the public sphere. In other words, we could justify the public interest protection from a consequentialist, deontological, or virtue ethics viewpoint and we could pragmatically combine these positions.

For something to be justifiably in the public interest, the public good need not to be recognised by members of the public on the basis of the *same* ethical reasons or the *same* individual interests. For something to be in the public interest, it may suffice that "people, from different backgrounds and with different interests, [would argue] for similar conclusions, perhaps even for different reasons".[45] In this light, it is not difficult to see why something cannot be in the public interest simply because of what this "something" is (Section 4 above). Rather, it may be in the public interest because members of the public would draw a similar conclusion regarding the type of legal protection with which this "something" should be provided.

Crucially, whether something amounts to public interest will differ across cultures, geographical locations, and times. Take, for instance, same-sex marriage, seduction of a wife, sexual intercourse between siblings, privacy, or discrimination. All these are but examples of interests in relation to which our position has changed over time. What is good for the public ultimately depends on how we define the relevant public, as was observed in Section 3 above.

6. CONCLUSION

Someone who is neither a legal philosopher nor a political theorist, may think that public interest is a pretty straightforward concept. But it turns out that the notion is used in many different and possibly conflicting ways. This chapter has highlighted three of them: (1) the concept is thought to be well-established, even though the notion is used vaguely in statements about the public, the interest, and the matters that are presumably in the public interest; (2) public interests are commonly understood as interests of the members of the public, even though some matters may be good for the public even if most of us do not consider those matters good and important; (3) public interests are often contrasted with private interests, even though those matters which are protected as public interests are not determinative of whether we protect them in this way.

In law, however, when we have the notion of public interest in mind, it seems there is at least a general agreement over what it requires. In particular, we expect that public interests in law will be protected with the level of authority that does not allow any single individual to trump public interest considerations and freely to interfere with such public interest matters. In other words, if the interest infringement is regarded as wrongful based on what is good for the public and regardless of whether the individual wrongdoer or aggrieved party thinks that infringement wrongful, then the interest is public. The protected interest can thus only be classified as public after one knows on what basis its infringement was deemed wrongful.

Relatedly, we saw that there may be plurality of matters that are in the public interest and that the list of public interests is not immutable. That said, the concept of public interest seems to have a relatively unitary meaning

[45] J. WOLFF, *Ethics and Public Policy: A Philosophical Inquiry*, Routledge, New York, 2011, p. 208.

insofar as it consistently refers to the specific authority with which the law protects those interests. This means the legal protection of public interests will probably be the same regardless of what matters are currently regarded as good for the public. It would thus be a mistake to proceed reversely by looking at what was earlier considered in the public interest and then to refer to that matter blindly as a valid trump card in law. By contrast, we should first bear in mind what it means that something is in the public interest, i.e. how the concept of public interest is to be defined, and that it is to be defined by a distinctly authoritative power by which those interests are protected. Only then should we ask how it is to be determined that something is good for the public and that it is therefore in the public interest; and then finally to answer this question in individual cases in order to tell whether someone has the trump up their sleeve.