
Rationalising the Political: The Concept of Interest in Postmodern Public Law

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To cite this article:

Oleksandr Vodiannikov. Rationalising the Political: The Concept of Interest in Postmodern Public Law. *International Journal of Law and Society*. Vol. 6, No. 2, 2023, pp. 144-154. doi: 10.11648/j.ijls.20230602.15

Received: March 17, 2023; **Accepted:** May 4, 2023; **Published:** May 17, 2023

Abstract: References to public interest are abundant in legal scholarship, jurisprudence, and legislation. However, the meaning of interest still remains rather a common sense idea without legible standards or criteria. The article offers to conceptualize it in a broader socio-historical context, as this concept cannot be treated in isolation from the evolution of the Western scientific paradigm that aspires to rationalize the world, to rationally explain and construct a cognitive map of both social and natural environments. To explore the history of “interest” in law means to grasp and reconstruct the phases of the fundamental revolution that legal thought has undergone since the mid-XVIII century. The article offers a bird-eye view of how the concept of interest gained currency and infiltrated law. This evolutionary perspective could explain certain coherence and similarity of various meanings proposed for the concept of interest in case law and scholarship. The article argues that interest becomes socially recognizable and viable when it is perceived and interpreted as such. It acquires validity in legal argumentation if it fits into the cultural schemata of legal framing. The article purports to deconstruct interest as a category. It argues that three key assumptions underpin the concept: (1) interests are social constructs; (2) interests are generated by argumentation (to qualify as interest an existing or perceived good, purpose, motive, aspiration, or claim requires argumentation that triggers “frames of interest” - cognitive representations and constructs); (3) interests are vehicles whereby normative ideas of justice, society, and the world, generated and validated by other normative orders, are adapted, legitimized and incorporated into law. The article discusses the practical implications of these assumptions. In a judicial proceeding, public interest analysis should explore the central organizing idea of a public interest argumentation against three analytical components: (1) substantive (refers to the interest analysis); (2) quantitative (refers to the “society”/ “public” analysis); and (3) qualitative (refers to analysis focusing on whether the argumentation triggers cognitive representations and constructs that reference moral principles). Finally, the reconceptualization of interest as a social construct can shed new light on legal argumentation and the so-called “five I-s of legal reasoning”: intuitiveness, incidentality, indeterminacy, ideology, and irrationality. Though indeed often intuition-driven, interest as a social construct that fits into legal framing is not incidental, indeterminate, or irrational. Incrementing and unfolding via interaction and competition with discourses and legal frames, interests bring in certainty, predictability, and determinacy to open-ended concepts of law.

Keywords: Interest, Public Interest, Interest Jurisprudence, Legal Argumentation, Frame Analysis

1. Introduction

Though the concept of interest has become cross-cutting in law, as well as in various other fields of knowledge – sociology, anthropology, political science, psychology, history, etc., – its meaning remains elusive and contested. It is treated as self-evident and in little need of a commonly agreed definition [1-3].

The enigma of interest is perpetuated by diversity and

pluralism in scholarship, jurisprudence, and legislation: ‘public interest’, ‘social interest’, ‘interest of the society’, not to mention ‘state interest’, ‘national interest’, etc. But any attempt to posit a definition encounters insurmountable difficulties. The UK Parliament’s Joint Committee on Privacy and Injunctions while noting that the concept of the public interest was mentioned in a number of statutes, but still lacking a comprehensive statutory definition, did not recommend any statutory definition, “as the decision of where

the public interest lies in a particular case is a matter of judgment” [4]. The Australian Law Reform Commission also opted for not providing any definition of public interest [5]. There seems to be a tacit consensus among law reform bodies from various jurisdictions that any statutory definition of public interest should be avoided, that due to the diversity of senses attached to public interest in various contexts positive law is unfit to offer a workable definition or explanation. As in the case of other open-ended concepts, the term should be left for case-by-case determination.

However, unlike justice, liberty, privacy, or the rule of law, public interest is too pervasive a concept to be left to decision-makers’ discretion without any legible standards or criteria. To provide such legible and principled standards we need to conceptualize the concept in a broader socio-historical context. It cannot be treated in isolation from the broader evolution of the Western scientific paradigm that aspires to rationalize the world, to rationally explain and construct a cognitive map of both social and natural environments. To explore the history of ‘interest’ in law means to grasp and reconstruct the phases of the fundamental revolution legal and political thought has undergone since the mid-sixteenth century.

Despite its omnipresence in scholarly debates, jurisprudence, and statutory enactments – or perhaps partly because of the easy appeal of the term – there appears to be still no consensus on what qualifies as an ‘interest’ either in practice or in theory.¹ As a result, the concept is often used (or misused) as a ‘common sense’ idea.

According to Alexander J. Bělohávek, public interest “... is perhaps better understood as an abstract institution (or abstract category), which attains determinateness only when is juxtaposed with a specific legal rule – i.e. in particular, the purpose or objective of that specific rule” [10]. Bary Bozeman, noting the ambiguity of the concept, argues that this is “the conundrum that has faced us since ancient times: that nearly everyone is convinced that the public interest is vital in public policy and governance, but there is little agreement as to exactly what it is” [7]. Jane Johnston describes the public

interest as ‘mutable’, ‘ambiguous’, and ‘mercurial’ [2] and J. A. W. Gunn as ‘protean and all-pervasive’ [11]. Albert O. Hirschman speaks of ‘the interest paradigm’ [12]. The ambiguity of the term has led some researchers to conceptualize it as a ‘proto-concept’ in Robert K. Merton’s sense,² i.e. a term that is used without awareness and conceptual precision thus not fulfilling its function as a social science concept well [1]. Therefore, each time when the term is used, its meaning and various senses are reinvented, redefined, and reinterpreted.

Judicial approaches to the determination of public interest are of little help as well. Despite the pervasiveness of the concept in judicial reasoning, it has never been clearly defined in jurisprudence. Judicial opinions link public interest to public good, good order, the welfare of society, and the well-being of its members. Public interests here serve as inputs necessary for the achievement of some ideal order or state of affairs. Therefore, public interests are never ideologically neutral.

Richard Swedberg concludes that “... there does exist a certain coherence and similarity to the many meanings with which the concept of interest has been invested, during its multiple uses in Western thought” [1]. References to public interest in judicial reasoning indeed reflect a certain transnational consensus on substance, meaning, and conditions of an ideal order. As Anthony Gordon argues, “... increased references to the public interest reflect a constitutional reality that often places judicial review at the intersection of national, supranational and international legal norms” [14].

The argument I advance below is that although during the late eighteenth and nineteenth centuries, the concept of interest was transformed under pressure from a new modern state paradigm, its core idea, its *raison d’être* remained. Only by grasping this *raison d’être* can we make sense of the concept in its current multiple settings. Despite the terminological variety in case law and scholarship, there exists a certain coherence and similarity to the many meanings proposed for the concept of interest. Interest becomes socially recognizable, acquires social viability, and being when it is perceived and interpreted as such; it acquires legal meaning if it is incorporated and integrated into the cultural schemata of legal framing. The paper deploys poststructuralist methodology to deconstruct interest as a category. It distills three key assumptions that underpin the concept: (1) interests are social constructs; (2) interests are generated by argumentation (to qualify an existing or perceived good, purpose, motive, aspiration, consideration, or claim as interest requires argumentation that triggers “frames of interest” - cognitive representations and constructs); (3) interests are vehicles whereby normative ideas of justice, society, and the world, generated and validated by other normative orders, are adapted, legitimized and incorporated into law.

¹ Barry Bozeman, noting the diversity of treatments of the public interest and following Clarke Cochran suggestion, [6] endorses fourfold typology of major approaches to the public interest: abolitionist, normative, consensual and process [7, see also 2].

The first approach rejects the scientific value and meaning of the concept: “... there is no public-interest theory worthy of the name and that the concept itself is significant primarily as a datum of politics. ... it may also be nothing more than a label attached indiscriminately to a miscellany of particular compromise of the moment” [8, see also 9].

Barry Bozeman and Jane Johnston explain how the normative approach focuses on the ‘common good’. Normative theories treat the public interest as “an ethical standard for evaluating public policies and as a goal public officials should pursue” [7, 2].

Consensualist-Communitarian approach fuses majority interest and negotiated consensus. It relies on governments having ‘basic rules’ and carrying out ‘fundamental social policies’ which are understood and followed by the majority of the citizenry [2].

Process theories include three related approaches (aggregative, pluralist and procedural) that have in common the notion that ‘the public interest’ can represent many interests.

² According to Robert K. Merton, ‘A proto-concept is an early, rudimentary, particularized, and largely unexplicated idea... [while] a concept is a general idea which once having been defined, tagged, substantially generalized, and explicated can effectively guide inquiry into seemingly diverse phenomena’ [13].

Interest remains a key cognitive device in rationalizing social reality as it was half a millennium before when the concept first appeared in literary discourses. As such it still functions as an analytical category related to the ‘common good’, ‘good order’, and ‘welfare of organized society’. Despite its ambiguity and mutability, the concept is not vague and elusive as it may seem.

This paper has three parts. The first part offers a historical account of the emergence, evolution, and development of the concept of interest. Historical deconstruction of interest as a political category offers a new vision of its content, functions, and meaning. It situates the concept into its primal cognitive structures, the original *police* paradigm where its evolutionary trajectories kicked off. The second part applies the analytical framework to understand the concept of interest via the lenses of the theory of frames and social communication. In an attempt to ‘codify’ the concept in the Mertonian sense, it is conceptualized as an argumentational device underpinned by three assumptions (interest as social construct, interest as generated by argumentation, and interest as medium for other normative orders). The third part proceeds with some practical implications of this argumentational theory attempting to deconstruct the logic underpinning the recognition of public interest in law. It argues that legal reasoning as to the existence of a public interest in the concrete judicial proceeding should explore the central organizing idea of argumentation against three analytical components: (1) substantive (refers to the interest analysis); (2) quantitative (refers to the ‘society’/‘public’ analysis); and (3) qualitative (refers to analysis focusing on whether the argumentation triggers cognitive representations and constructs that reference moral principles).

Reconceptualization of interest as a social construct can shed new light on legal argumentation. Though indeed often intuition-driven, interest as a social construct that fits into legal framing, is not incidental, indeterminate, or irrational. Incrementing and unfolding via interaction and competition with discourses and legal frames, interests bring in certainty, predictability, and determinacy to open-ended concepts of law.

2. Public Interests: Origins of the Concept

When exploring such fluid and elusive concepts as interest, justice, liberty, etc. there can be no pithy grasp of their meaning, save against the background of their histories, their continuities, and interpenetrations in intellectual traditions, both past and present. Tracing the vestigial presence of such concepts in discursive archive augmented through centuries is not an easy task as many such concepts taken as self-evident today have very obscure origins that can puzzle any modern scientist. This is more so as many of them do not have a clear strand of intellectual thought, but emerged and evolved in random and misty junctions of seemingly unrelated concepts or ideas. However, identifying, understanding, and making

salient these histories seems useful to reconstruct the true meaning(s) of a concept, to chart the course of its evolution, survival, and innovation.

When looked at from such a perspective, it seems not surprising that the modern meaning of interest emerged from the long history of colliding, intermingling, and juxtaposing various diverging and indeterminate concepts like ‘police’ (and historically and semantically related concept of ‘policy’), ‘passions’, ‘citizenship’, ‘*res publica*’, ‘civility’, ‘*oeconomy*’, etc. in public discourses and narratives. The foray into the historic mapping of such junctions, of the process wherein the modern concept of interest matured unveils a turbulent history of the process whereby Western societies generated certain insights into their own workings, into their ‘social self-knowledge’ [15].

The evolution of the concept of interest was by no means linear. It is commonly assumed that the term originated from Latin *inter-esse* or, properly, *inter-sum* which means, among other things, ‘to be between’, ‘to lie between’, ‘to be different, differ’, ‘to be present, take part, attend, assist, intervene’ [16, 17]. However, there is no clear lineage between Roman law and the concept of interest as it reemerged in the political thought of the High Middle Ages.

At the very beginning, the term acquired three distinct trajectories. First, in continuation of Roman law tradition interest meant (and still means) a charge on borrowed money.³ Within this trajectory *intérêt* in old French meant injury and loss (wherefrom the contemporary *dommages-intérêts* [18] in French civil law developed). The second trajectory relates to interest as a legally cognizable claim over tangible property or proceeds. It seems that this connotation of *Interessis* is present in the 1229 Charter of Hugo IV of Burgundy.⁴ English charters as early as of mid-fifteenth century used the term to denote possession of a share in or a right to something.⁵ The third trajectory brought about ‘interest’ as a political category that later infiltrated into legal discourses.⁶

3 Frank Knight observed: “The modern term comes from the Roman law expression for an indemnification for damage due to the delay in the interval (*interesse*) before repayment, one of the chief forms under which payment for loans came to be tolerated by canonical and civil courts. Interest in the modern sense was in the Middle Ages merely an important type of usury; since then the term usury has become specialized to mean interest at exorbitant or illegal rates” [19].

4 “Volo et concedo, quod carta, quam Odo pater meus fecit de Interessis Episcopi Lingonensis et Ducis Burgundiæ distinguendo apud Castellionem et in pertinentiis stabilita sit et firma” [20].

5 A deed of sale dated 1499 speaks of the vendor and “all other Perfones havynge eny Interest, Right, or Title in the seyde Maner and Meses” [21]. Few decades later a Deed of Lease made by Henry VIII in 1528 with certain Sir Thomas Cawarden contained specific clause to protect “any tenaunt or tenants having lawfull interest, with out knowledge and agrement of the said Mr. and Counsaill for the tyme being” [21].

6 Interest in legal terminology started appearing in the seventeenth century England: ‘legal interest’, ‘landed interest’, ‘monied interest’ etc. [1]. This legal currency of the term drew on political discourses where the term interest proliferated at that period in English political pamphlets and discussions. According to John Gunn, “Interests, in the modern sense, were widely discussed in the period of the English Civil War, when these were the City, the Army, and various religious sects. The landed and trading interests were soon added and later the monied interest, to describe investors in the funds” [22].

This third ‘political’ trajectory is of particular significance for the present discussion, as it culminated in the jurisprudence of interest in public law. This is more so as it mirrors the intellectual development of Western social thought. As Vera Keller aptly encapsulated, “The transformation in social mores via new concepts of interest is of course linked to much broader shifts concerning the body politic and its relationship to the structure of the world and knowledge” [23].

2.1. ‘Policey’, *Caveat Dominus and Interest*

To understand the origins of the concept of interest, the best starting point seems to be the structure of thought and textuality in the scholastic age. The scholastics divided learning into three branches: (1) speculative or theoretical (physical science, mathematics, metaphysics, conflated); (2) practical (philosophical practices that guide human behavior, including ethics, *Hausväterliteratur* and *oeconomie*, and political philosophy), and (3) rational philosophy, or logic [24]. Though schemata of the disciplines in scholasticism varied, the organizing idea stemmed from the universality of knowledge or, in Mary Franklin-Brown’s words, from prolegomena to encyclopedism [24].

The concept of interest arises from two major intellectual lines of ‘practical’ thought: (1) literary genre of ‘courtliness’, some written in Latin, others in the vernacular, that became popular since the thirteenth century, (e.g. the *Liber Urbani*, the *Facetus*, Thomasin de Zerklare’s *Der wälche Gast*, Bonvesin della Riva’s *De quinquaginta curialitatibus ad mensam*, and later *De civilitate morum puerilium* by Erasmus of Rotterdam) [25, 26] and (2) *Hausväterliteratur* [27] - literary genre on household advice – that evolved from medieval genre of *speculum* (e.g. *Furstenspiegel*, *Sachsenspiegel*, Vincent of Beauvais’ *Speculum maius*) into early modern political thought of Jean Bodin, Theodore Beza, Niccolò Machiavelli, etc. The combined impact of both lines of thought generated the third – ‘political’ – trajectory of ‘interest’ and produced ethical and political dimensions of the concept.

The concept of interest originated at the intellectual junction of behavioral ethics or ‘courtliness’ and the mediaeval ‘*police*’ paradigm that crystallized in *oeconomie* genre. This *oeconomical* literature reflected the idea of power in mediaeval society as household management [26]. The ruler was perceived as the master of a big household exercising discretionary and unlimited power over human and non-human resources constituting his household. Within this genre, *police*⁷ meant good order in the household. Mark Neucleus rightly argues that “... even a cursory glance at the content of the early police idea reveals that central to the original police mandate was ‘good order’, in the broadest possible sense, and that policing took the form of a range of

institutions concerned with far more than crime” [28]. The prevailing meaning of the term, as evidenced from the early sixteenth century, stemmed from the combination of ‘police and good order’ or ‘good police and order’ [29], i.e. the term denoted regulation of community life to promote the general welfare and good order, to regiment social life, to direct and manage members of a civic or territorial community – all these falling under ‘*Policey Ordnung*’, or ‘*Polizeiordnungen*’. These are roots not only for ‘police’, and ‘politesse’ but also for ‘policy’ [30].

The concept of *police* fitted neatly into the *oeconomie* of the state⁸ as a quasi-household. *Hausväterliteratur*, incrementing on Xenophon and Aristotle, *speculum* literature and courtliness genre, developed into a new strand of ‘police’ science focused on the public household management, coordination of its operation (via bureaucracy, reporting, accounting, etc.), and recommendations on good governance (including peace, security, order, justice, education, morals, religion, health care, industry, natural resources, etc.).

The new science was inaugurated by the pioneering work of Machiavelli.⁹ Machiavelli did not use the term ‘interest’, though the idea that later became the core of the concept of interest is salient in his work. However, the doctrine enunciated in *Prince* swiftly brought about into currency initially synonymous terms ‘*interesse*’ and ‘*ragione di stato*’, which came into widespread use in the second half of the sixteenth century [32].

In this intellectual tradition the term ‘interest’ appeared as a political concept of countering ‘passions’ of rulers, as an opposition between interests of men and their passions [32]. In 1634, the Huguenot statesman, Duke Henri de Rohan published his treatise *On the Interest of Princes and States of Christendom* which became popular in many European countries. The treatise opens with an emblematic statement: “*Les princes commandent aux peuples, et l’intérêt commande aux princes*” (princes command people, and interest commands the princes) [32].

The term gained currency in discussions on improving the quality of statecraft. Its formation was inextricably linked to the Enlightenment paradigm of *ratio*, rationality, and the rule of reason. Since divine providence was replaced by human reason and certain transcendent laws, equally valid for both nature and society, the Enlightenment thinkers sought to explain the driving forces, both for natural phenomena and for human condition. The Scientific Revolution and Enlightenment revolved around a simple proposition that the world is a single system that could be described and rationally explained, therefore all human knowledge represented a

8 In eighteenth century William Blackstone in his *Commentaries* considered *police* and *oeconomie* as related and synonymous terms:

“By the public police and *oeconomy* I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations” [31].

9 Machiavelli’s *Prince* was originally translated into German, in 1694, as Machiavelli’s *Policei* [30].

7 The term originated from Burgundian dialect of old French (*policie*) in XV century and swiftly spread across Europe with differing spellings (‘Policei’, ‘Pollicei’, ‘Policey’, ‘Pollicey’, ‘Pollizey’, ‘Pollizei’, ‘Politzey’, ‘Pollucey’, ‘Pullucey’) [28]. The term ‘*Policey*’ was first found in city ordinances (‘*Regiment und Pollicei*’) in Würzburg in 1476, in Nuremberg in 1482 and 1485, in the Electorate of Mainz (‘*Regiment und Pollucey*’) in 1488 [29].

unified system of all the sciences, natural and humane [33].

These developments should be viewed in a broader context of modern state evolution, wherein the late mediaeval political idea of *caveat dominus* – that equated the power of the sovereign with the authority of a householder – gave way to the idea of popular sovereignty and the new republican body politic. The continental idea of the rule by law or *Rechtstaat* emerged as an opposition to *Polizeistaat* [34, 35] in juxtaposing the Enlightenment conception of the ‘state of reason’ [35, 36] and the reality of the absolutist state. *Rechtstaat* in this sense appeared as a denial of the state’s moral monopoly on defining what is ‘good order’ and ‘well-organized society’: the Enlightenment idea of human rationality postulated the individual as an autonomous moral entity capable of independent self-determination. *Caveat dominus*, based on a clear distinction between the ruler and the ruled, became incompatible with the concept of people’s sovereignty and the new vision of the state as a body politic comprising equal and self-governing citizens. The Enlightenment offered new conceptions of political legitimacy, public order, and legislative state in contraposition with the *Polizeistaat* of the preceding period.

The rationalization of public administration and its transformation into a legible and effective process required a concept that would be flexible and comprehensive enough for the cognitive rationalization of social practices and social relations. Thus interest began to be seen as a key concept for explaining human behavior. Not by chance, Claude Adrien Helvétius in his *De l’Esprit* eloquently said:

“If the physical universe be subject to the laws of motion, the moral universe is equally so to those of interest. Interest is, on earth, the mighty magician, which to the eyes of every creature changes the appearance of all objects” [37].¹⁰

However, like most concepts that are rapidly gaining popularity and circulation, the concept of interest has long remained so self-evident that none of the Enlightenment philosophers considered it necessary to define or categorize it. It has become so firmly embedded in the conceptual apparatus, despite its uncertainty, that it has transformed the previous dichotomy passion/ratio, which since Plato directed the study of human motivation, into a trichotomy – passion/interest/ratio.

2.2. Rationalizing the Political

The Great Revolutions of the eighteenth century became a disruptive moment in the history of the concept of ‘interest’. It acquired new connotations outside political moralization or commercial calculus. Prior to the revolutionary events, the understanding of law slowly developed along the strands of the Scientific Revolution. Thus, the common law was perceived as having a certain unamendable core that “... [took] in the Law of Nature, the Law of Reason, and the revealed

Law of God; which [were] equally binding, at All Times, in All Places, and to All Persons...” [38], i.e. it could not be changed either by the consent of the people or by the will of the sovereign. Therefore, the role of statutory law was auxiliary.

On the continent, this paradigm of the Scientific Revolution caused another prevailing phenomenon – *legocentrism* that evolved from *nomophilie* of Enlightenment thinkers [39]. Marie-Laure Duclos-Grécourt names several reasons for such *passion des lois* [40]: (i) societal changes, such as the rise in power of the bourgeoisie and its liberal aspirations, which called for a rationalization of the law and transformation of mores; (ii) psychological causes – the passion for laws was underpinned by *une fureur de la pédagogie* (a spillover and emanation of *Polizeistaat* ideal) – by an analogy with the instructor, the legislator should educate individuals and peoples.

The Great Revolutions opened the floodgates of legocentrism.¹¹ Law as objectivized common will in new body politic needed legitimate explanation beyond the social reality of legal reasoning. The concept of interest therefore being a handy tool to incorporate and accommodate extra-legal considerations swiftly migrated from the purely political sphere to legal discourses. The 1789 US Constitution does not contain the term ‘interest’.¹² French Constitution of 1791 [43] referred to *l’intérêt général de l’Etat* (Art. 9, Titre II), *l’intérêt général* (Art. 10, Titre II), *l’intérêt de l’Etat* (Art. 5, Chapitre III, Section IV), and *l’intérêt national* (Art. 1, Titre VII), all provisions having the term in singular. A closer look at these provisions suggests that revolutionary constitution-makers conceived ‘interest’ as a goal or ideal to which society should strive, and the legislator – to guide citizens.¹³

At the core of the liberal democracy that succeeded feudalism after the Great Revolutions lies the concept of *res publica* as re-interpreted, re-versioned, and re-adapted by the Enlightenment and visionaries of French and American revolutions. The republican tradition that we historically equate with democracy conceptualizes the new body politic as composed of formally equal citizens. Governance in such body politic is conceived as *res publica*, ie as a concern of all citizens, and liberty is secured by law that embodies the general will in the Rousseauian sense. *Res publica*, therefore, is ruled by law and not by men. The rule by law thus serves to

¹¹ Legocentrism means that ‘law is treated as a given and a necessity, as the natural path to the ideal, rational or optimal conflict resolutions and ultimately to social order guaranteeing peace and harmony’ [41].

¹² It is illuminating to trace the term of ‘interest’ in Federalist papers where it employed foremost in conjunction with ‘passion’ and in contradistinction to ‘the public good’ [42].

¹³ This idea is rather salient in speeches and pamphlets of that period. Saint-Just in his essay ‘Sur la Constitution’ of 1793 deliberating on the role of laws and legislator proclaimed that “...public interest must also constantly occupy [people’s] activity, because the legislator must ensure that all the people walk in the direction and towards the goal he has proposed” [44]. In another speech Saint-Just radically contraposed public interest and private interest: “Happiness and private interest violate the social order, when they are not a part of public interest and happiness...” [44].

¹⁰ Helvetius discussing interest felt compelled to explain to his readers: “The word interest is generally confined to the love of money; but the intelligent reader will perceive that I use it in a more extensive sense; and that I apply it in general to whatever may procure us pleasure, or exempt us from pain.” [37].

remove or mitigate the dangers of arbitrariness in the body politic, to protect individuals both from *imperium* (that is, arbitrary power of the state) and *dominium* (that is, arbitrary power of private individuals) [45]. This security, as Richard Dagger observes, “also connects with the republican emphasis on the common interest or public good.”[46]. By virtue of this republican postulate that law and government exist to serve the common interest and the public good [47], the concept of interest emerges as a paradigmatic idea. However, before the concept acquired paradigmatic features it served as a term of political reference, a category to arrange political reality in a legible manner. Its analytical force and political and legal currency stemmed from its close association with the idea of a more enlightened way of conducting human affairs.

The birth of the modern legislative state had a profound impact on the role and function of legislation. It seized to be a philosophical or literary genre [39] and evolved into an ‘educational’ tool of social engineering. Europe entered the period of written constitutions and great codifications with their effect of symbolic disruption with the past, completeness, and integrity.¹⁴ In common law, the previously prevailing idea of unamendable core declined with the advent of statutory law as the principal form of law¹⁵

The rationalization of governance culminated in the *Interessejurisprudenz* of Rudolf von Ihering that was eagerly received and taken on board in US constitutional thought of the late nineteenth – early twentieth century (Roscoe Pound, Oliver Wendell Holmes, Benjamin Cardozo) and interbellum jurisprudence of the US Supreme Court. Ihering is credited with the conceptualization of the purposefulness of law. He explained that “The concept of Interest made it necessary for me to consider Purpose, and ‘right in the subjective sense’; led me to ‘right in the objective sense’ [49]. Law in his interpretation “is the sum of the conditions of social life in the widest sense of the term, as secured by the power of the State through the means of external compulsion” [50]. Therefore, the overarching task of law is to reconcile competing interests, to secure ‘the good of society’ [50].

On the other shore of the Atlantic Oliver Wendell Holmes argued that judges are under the ‘duty of weighing considerations of social advantage’ (i.e. public interests): “The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious...” [51]. Roscoe Pound in

his theory of sociological jurisprudence eloquently develops the need of “a weighing or balancing of the various interests which overlap or come in conflict and a rational reconciling or adjustment”; and such “adjustments or compromises of conflicting individual interests in which we turn to some social interest, frequently under the name of public policy, to determine the limits of a reasonable adjustment” make up the body of law [52].¹⁶ Benjamin Cardozo, later to become a Justice of the US Supreme Court, in his seminal treatise *The Nature of the Judicial Process* argued that the nature of public law litigation was the identification and balancing of social interests:

“My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are forces which singly or in combination shape the progress of the law. Which of these shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired” [53].

The US Supreme Court incrementing on Holmes’ and Cardozo’s intellectual heritage acknowledged the legitimacy and largely followed the jurisprudence of interests [54]. After WWII, these methodologies of the jurisprudence of interests informed the jurisprudence of the German Constitutional Court [55] and the European Court of Human Rights [56].

‘Migration’ of the concept of interest into public law, foremost constitutional jurisprudence, and its further enunciation in judicial balancing unfolded in the 1940-50s. To explain why this happened we need to look at a broader context of social and political thought of the war and post-war periods. Both the world community and various nations hit by the WWII disaster faced the dilemma of re-conceptualizing the immediate past and founding a new political order that would ensure a safer, more just future and establish safeguards against the reoccurrence of both democracy’s majoritarian doom and totalitarian governments. Post-WWII constitutionalism, both national and international, thus, emerged as an alternative to the liberal democratic and secular constitutionalism of the interbellum period. Within the tenets of this postmodern constitutionalism, the concept of interest acquired a new meaning.

Balancing of interests, values, and principles emerged as one of the key methods in theories of constitutional interpretation that are based on the identification, valuation, and comparison of competing interests, as a central element in the map of postmodern constitutional jurisprudence: “Balancing represents a different kind of thinking. The focus

14 According to Jean Carbonnier, “The Civil Code, indeed, had closed in France the time of legislative passions. We might think that it was a mechanical effect: because the country was replete with texts, it being no longer thirsty; all laws seemed to be made and well made, for a long time it was possible to give leave to legislation. But it would be superficial view on the 1804 event: before being saturated with rules, codification had been the choice of a legislative method and this choice implied the exclusion of legislators out of passion” [39].

15 It is illuminating how the US Supreme Court carved out common law jurisdiction in criminal cases. In *United States v. Hudson* the Supreme Court endorsed the principle of no crime without law by stating that ‘The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense’, thus ruling out all exercise of criminal jurisdiction in common law cases [48].

16 His classification of interests includes three categories: individual interests, public interests, and social interest [52]: “As I should put it, individual interests are demands or desires involved immediately in the individual life asserted in title of that life. Public interests are claims or demands or desires involved in life in a politically organized society and asserted in title of that organization. They are commonly treated as the claims of a politically organized society thought of as a legal entity. Social interests are claims or demands or desires involved in social life in civilized society and asserted in title of that life. It is not uncommon to treat them as the claims of the whole social group as such”.

is directly on the interests or factors themselves. Each interest seeks recognition on its own and forces a head-to-head comparison with competing interests” [57].

This short historical excursion into the genesis of the concept of interest in law offers a conducive background for exploring various meanings and senses attached to it. It would not be an exaggeration to say that to study the history of the concept of interest means to reconstruct, in effect, those phases of the deepest revolutions which legal thought has undergone since the second half of the eighteenth century. When choosing as the object of research an elusive and indeterminate interdisciplinary concept, it is necessary to take into account those diverse and competing discourses in which it arose and circulates, its cultural and historical context, because only within this holism can we correctly understand its many meanings and senses.

3. ‘Codification’ of Interest Theory

Albert O. Hirschman’s remark on the ‘interest paradigm’ seems to be a very useful starting point to conceptualize the concept, and to provide a basis for its codifying.¹⁷ The foregoing tells us that the concept of interest has its histories. Codification, therefore, aims at situating the logic of procedure, the array of assumptions, concepts, and basic propositions that are hiding under its umbrella, and the relationships between them in a legible and meaningful manner.

The mapping of the concept of interest meanings, histories, and assumptions means the deconstruction of its cognitive construct. We need to grasp the process whereby we assemble the meanings and concepts in our discourses, i.e. how we constitute the semantic content of our linguistic communication. Incrementing on Jean Piaget, Silvio Ceccato, George A. Kelly, and Ernst von Glasersfeld, we should proceed from the assumption that what “we ‘perceive’ or ‘know,’ and that is the objects and events we refer to when we communicate linguistically, are constructs or, in other words, are results of mental operations” [59]. Our perception and understanding of concepts, objects, and events are generated by active abstraction from a sequence of experiences in such a way as to keep stable a finite/definite but flexible constellation of characteristic features [60].

Interest becomes socially recognizable, acquires social validity, and existence when it is perceived and interpreted as such; it acquires legal meaning if it is incorporated and integrated into the cultural schemata of legal framing. This brings afore the issue of legal argumentation. Therefore, we need to look at cognitive structures that govern the perception and interpretation of reality, at Goffman’s frames [61],¹⁸ that

are generated within communicative processes and unconsciously adopted.¹⁹

The histories of interest, its cultural schemata, and intellectual archive enable us to conceptualize interests as argumentational devices that serve to signify ‘inputs’ or ‘cognitive structures’ that reference the prevailing ideal of public order and a well-organized society. This perspective allows positing of three assumptions that underpin the concept of interest.

The first assumption is that *interests are social constructs*. David Hume considered that “though men be much governed by interest; yet even interest itself, and all human affairs, are entirely governed by opinion” [63]. In the late twentieth century, Pierre Bourdieu aptly encapsulated:

“Anthropology and comparative history show that the properly social magic of institutions can constitute just about anything as an interest, and as a realistic interest, i.e., as an investment (in the double meaning that the word has in economics and in psychoanalysis) that is objectively paid back by a specific “economy” [64].

Thus, interests are constructed, and not merely discovered, recorded, or brought on. As social constructs, they conceptualize concerns, motives, claims, or considerations via the continuum of experience, a socially constituted system of structured and structuring dispositions, mental frames, and cognitive representations. From this perspective, there is a gap between why an interest has been constructed and what it constitutes; between the ideal sought and the input needed to approach it.

This assumption leads to several inferences. First, the content of the public interest may change over time²⁰. Jane Johnston observes:

“Most definitions have emerged out of case law, legislation or from within regulatory systems, oftentimes balancing one interest against another. Essentially, however, both the scholarly literature and legal and regulatory systems propose the public interest should be identified on a case-by-case basis, defined within specific, time-framed contexts, rather than reduced to a single definition” [3].

Second, there are no unconscious interests - interest as a social construct, i.e. as a product of social relations, or rather social communication, becomes part of the cognitive map of reality through the mental processes of information processing. Interests do not exist outside the cognitive map of the human world.

Third, interests as social constructs by their very nature are hierarchically structured. These hierarchies due to temporal fluidity are not stable. The process of legal argumentation objectivizes these hierarchies. This objectification is ever

17 Codification is used here in Mertonian sense as “... the orderly and compact arrangement of fruitful procedures of inquiry and the substantive findings that result from this use” [58]. In effect, this arrangement entails conceptualizing of what has been implicit in work of the past rather than the invention of new findings.

18 Goffman characterized frames as follows: “I assume that definitions of a situation are built up in accordance with principals of organization which govern events [...] and our subjective involvement in them; frame is the word I use to refer

to such of these basic elements as I am able to identify” [61].

19 Todd Gitlin has summarized frame elements: “Frames are principles of selection, emphasis and presentation composed of little tacit theories about what exists, what happens, and what matters” [62]

20 Megan Carter and Andrew Bouris argue that “[I] legislators and policy makers recognise that the public interest will change over time and according to the circumstances of each situation’, therefore legislative indeterminacy is intentional [65].

present in judicial reasoning that frames such categories as *pressing social/public interest*, *compelling social/public interest*, and *pressing social need*. Interests are time-bound and factual.

Fourth, the law as normative order has an impact on interests' hierarchies and interplay. From this perspective, the objective order of values in constitutional law should be conceptualized as the setting of certain important interests at the highest levels of hierarchy, thus ruling out any of their downgrading under the pressure of public discourses. At the same time, the law as an open system sustains a reverse impact. Continuous interaction of frames can attach more weight to certain interests in judicial balancing in some countries, while not in others. Thus, balancing freedom of expression and the right to privacy has distinct results in the jurisprudence of the German Constitutional Court, the US Supreme Court, and the European Court of Human Rights [66, 67].

The second assumption is that *interests are generated by argumentation*. To be perceived or qualified as interest an existing or perceived good, purpose, motive, aspiration, or claim requires argumentation that triggers 'frames of interest' - cognitive representations and constructs.²¹

Recognition of interest depends upon argumentation in social communications. Thus, interest is constructed as such in the process of communication that triggers framing devices that suggest how to think about the issue as implying interest. Such triggering requires framing the issue (argumentation) via references to the continuum of experience of the addressee(s). Good, purpose, motive, aspiration, or claim becomes an 'interest' when it is interpreted and acquires meaning within a cognitive scheme.

The third assumption is that *interests are vehicles whereby normative ideas of justice, society, and the world*, generated and validated by other normative orders (ethics, morals, tradition, politics, religion, scientific knowledge, etc.), *are adapted, legitimized, and incorporated into law*. Barry Bozeman argues, "... the most useful conception of public interest is a pragmatic one, based on deliberative processes shedding light on an ideal, but not seeking to attain an ideal that is either intersubjective or consensual" [7]. Interest as an ideal that may only be approached imports into legal argumentation, legitimizes and legalizes those social values, moral sensibilities, cultural specificities, and ideological elements that are alien to law. Thus, interest as a vehicle for extra-legal considerations serves to define interpretive choices in judicial proceedings or decision-making.

Law as normative order is premised on the paradigmatic notion of the norm. The rule of norm is pervasive and

fundamental. However, norms alone are not enough in themselves. Judicial decisions, doctrinal discussions of the principles and values explored in the precedents and implicit in legislation, legal custom, and other legal pronouncements – all these and other forms of legal narrative generate, construct, and develop 'legal framing', is a set of cognitive devices of making sense, defining, constructing, and adjusting social reality. Legal framing *qua* legal argumentation invents its own semantic units that nevertheless draw on popular cultures. It imports and borrows frames from other discourses (public media, social media, popular cultures). There is now no clear boundary between legal discourses and public discourses in our media-saturated internationalized societies.

Conceptualizing interest as a social construct can shed new light on legal argumentation and the so-called 'five I-s of legal reasoning': legal argumentation is said to be intuitive, incidental, indeterminate, ideological, and irrational [69]. Though indeed often intuition-driven, interest as a social construct that fits into legal framing, is not incidental, indeterminate, or irrational. Incrementing and unfolding via interaction and competition with discourses and legal frames, interests bring in certainty, predictability, and determinacy to open-ended concepts of national and international law.

4. Public Interest: Practical Implications

The deconstruction of the concept of interest as a theoretical endeavor has its own practical implications. The existence of public interest in a particular case depends on the central organizing idea in legal argumentation that should be assessed within a three-prong test:

substantive which entails three criteria:

- (1) substance (whether argumentative narrative (the text in its context) activates in the recipient's cognition those parts of the "continuum of experience" (knowledge, perception, emotions, or ideas) that correspond to his or her subjective assessment of interest and its relevance);
- (2) praxis (this element fits the argumentative frames into the public discourses and assesses them against the background of social/public communications); and
- (3) rationale (assesses the reasons, intentions, and logic of argumentation);

quantitative that refers to the 'public' in the context of 'public interest'. Under this prong the analysis is focused on:

- (1) the criterion of "society", ie originators of the frame of interest (community as a whole, a nation, social group, or class);
- (2) the criterion of commonality (the interest can be perceived as common to such originators);
- (3) the criterion of typicality (whether the interest is common / shared by all such persons), and
- (4) the criterion of representation (whether the remedy sought or policy proposed will benefit and protect the rights and interests of such persons).

qualitative that draws on the nature of interest. This prong already entails some form of categorization: if a private individual seeking to vindicate his or her right deploys

21 Framing theorists William Gamson and Andre Modigliani define a frame as "a central organizing idea...for making sense of relevant events, suggesting what is at issue." [68] They distinguish framing devices that suggest how to think about the issue and reasoning devices that justify what should be done about it. The five framing devices are (1) metaphors, (2) exemplars (i.e., historical examples from which lessons are drawn), (3) catchphrases, (4) depictions, and (5) visual images (e.g., icons). The three reasoning devices are (1) roots (i.e., a causal analysis), (2) consequences (i.e., a particular type of effect), and (3) appeals to principle (i.e., a set of moral claims) [68].

argumentation that triggers frames of some fundamental ideals (such as, e.g., education as a public good or freedom of speech as indispensable for a democratic society) such private claim transforms into a public interest.

This algorithm seeks to make legible the itinerary of identifying and classifying a public interest. In a practical sense, its purpose is to deconstruct the process whereby something is categorized as public interest. It precedes the balancing of competing interests, which is next in the cognitional exercise that has been explored in abundant scholarship [70-75].

Public interest is central to the idea of public law. Indeed, its utility is based on the concept of balance. It stresses the need to always justify any exercise of imperium and dominium. Frames of interest structure the mind of the judge or decision-maker, and thus add to the objectivity of judicial discretion.

5. Conclusion

In the second half of the twentieth century, the concept of interest emerged as a promising methodological tool in scientific research. It perfectly fits into the Enlightenment scientific paradigm. This paradigm assumes that humans are guided by reason and will, underpinned by (self-) interest [76]. This assumption of human rationality means that their behavior can be studied to explain reasons, motives, and preferences. The concept of interest thus serves to capture a *reason* for such behavior. Law is no exception. In the legal area, the fundamental role of public interest is to rationalize complex and illegible social relations. In legal argumentation, it functions to control and counteract ‘passions’ in their modern understanding – arbitrariness and unreason.

The diverse range of senses attached to public interest makes it difficult to discern theoretical, critical, and analytical frameworks and schemas that could assist in understanding the nature and implications of this concept in the practical field. Jane Johnstone argues that “... there is no formula for determining what is in the public interest. The public interest is at once ambiguous, changing and mercurial, far more complex in theory and practice than the singularity in its name implies” [3]. What is evident is that public interest as a cross-cutting concept controls perceptions, governs expectations, legitimizes, and accounts for political patterns and policy directions. Interests bridge between the ideal and the real in law.

The term ‘interest’ was historically used to conceptualize the way order should be achieved, and to provide meaningful conceptions of legitimacy as the foundation of political power that shapes and orders civil society. ‘Interest’ is therefore as important a concept to social, legal, and political theory as ‘liberty’, ‘sovereignty’, ‘legitimacy’, ‘justice’, and all other concepts regularly used to grasp the nature of power relationships in society. The history of ‘interest’ is no less the history of public power.

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