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ABSTRACT

This article analyzes public interest law in the context of Central and Eastern Europe from two perspectives: its conceptual foundation and the practical implications for strategies to protect human rights and promote democracy. The article ultimately concludes that the meaning of public interest is less important than the question of who gets to participate in the process of defining it and through what means.

The article generalizes beyond the American case and differentiates three overlapping conceptions of public interest law: social, substantive and process-based. A number of strategic objectives derive from that analysis: developing greater use of legal instruments by civil society organizations in order to strengthen discourse in the public sphere; bringing together theory and practice in higher legal education; and fostering cooperation among different stakeholders, such as bar associations, courts, state bodies and NGOs, in order to strengthen the provision of free legal assistance in the interest of equal access to justice for all. [Original article in English.]

WHO DEFINES THE PUBLIC INTEREST?

Public Interest Law Strategies in Central and Eastern Europe*

Edwin Rekosh



In Central and Eastern Europe – as in continental Europe more generally – the term “public interest law” is not commonly used. But it is starting to be used by some, and more importantly, an increasing number of legal professionals and activists are starting to adopt public interest law strategies, regardless of whether they actually call them public interest law strategies.

In sorting out how public interest law relates to Central and Eastern Europe, I would like to address two particular aspects of the term: First, it’s conceptual foundation – which is admittedly problematic; and second – and more importantly – the practical implications concerning strategies for protecting human rights and promoting democracy and the rule of law.

It has become commonplace among those who have studied the public interest law phenomenon in the United States and elsewhere to throw up their hands when it comes to providing a definition of the term that is at all generalizable or carries any intellectual precision whatsoever. Many like to follow the lead of what US Supreme Court Justice Stevens famously said about pornography: “I know it when I see it”.

Instead of trying to strive for a universal definition, I believe it is more useful to examine the multiple layers of

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meaning implied by the term. There are at least three different conceptions of “public interest” and “public interest law” worth exploring. The term public interest law comes originally from the United States, so that is a good place to start. One of the first persons to articulate the conceptual underpinning of public interest law in the US was Louis Brandeis, who was a pioneering public interest lawyer – many years before such a notion was widely adopted – and later became a Supreme Court Justice. In a celebrated address to the Harvard Ethical Society in 1905, Justice Brandeis said: “Instead of holding a position of independence between the wealthy and the people, prepared to curb the excesses of either, able lawyers have to a large extent allowed themselves to become adjuncts of great corporations and have neglected their obligation to use their powers for the protection of the people” He further stated: “The great opportunity of the American bar is, and will be, to stand again as it did in the past, ready to protect also the interests of the people”.¹

1. L. Brandeis, “The Opportunity in the Law”. *American Law Review*, vol. 39, 1905, pp. 55-63.

Justice Brandeis’ reading of history may be open to question, and he provides scant theoretical justification, but these two sentences nonetheless capture the essence of how American public interest lawyers would begin to define themselves decades later.

It took about sixty years, but the social turmoil of the 1960s did finally create the conditions for widespread adoption of Justice Brandeis’ dictum. In the late 1960s and 1970s, large numbers of American law graduates began to define themselves as public interest lawyers in order to distinguish themselves from the “corporate adjuncts” referred to by Justice Brandeis. They conceived their role as representing the poor and other underrepresented interests in society, partly as a corrective to the disproportionate influence of economically powerful interests.

But if some American lawyers can be said to practice public interest law, then where can one find this body of public interest law they are applying? Where is public interest law codified? This question – which would probably sound silly to a lot of American public interest lawyers – is not an invented one. More than one Eastern European lawyer has listened to me explain some of the key concerns of the public

interest law community in the United States and elsewhere only to ask, at the end of the discussion, for a model public interest law, so that they could promote the adoption of such a law in their own country.

How can one define the concept of “public interest”?

So if public interest law does not refer to a body of law, then what is it? The answer to that question in the United States lies in the origins of the term. It was not adopted to describe a particular field of law; rather, it was adopted to describe **who** the public interest lawyers were representing. Instead of representing powerful economic interests, they chose to be advocates for – in Justice Brandeis’ words – the “people”. This is not to say that all public interest lawyers in the United States see themselves as advocates for the poor. The American public interest law field has come to be understood as encompassing a multitude of objectives: civil rights, civil liberties, consumer rights, environmental protection and so on. But the origin of the term comes most directly from the notion of counter-balancing the influence of powerful economic interests in the legal system, and regardless of their objective, public interest lawyers in the United States continue to be infused with the ethic of “fighting for the little guy”. I will call this the **social** conception of public interest law.

A second conception of public interest law can be thought of as the **substantive** one. This approach starts with the question: “What exactly is the ‘public interest’ that public interest lawyers are presumably protecting, and what are the substantive, doctrinal implications?”. Well, even if there is no code of public interest law in the United States, there are numerous references to the “public interest” in the legislation and jurisprudence of the US and other countries. In fact, a quick database search of US federal law turned up more than 300 statutes that employ the term “public interest”.

On a whim, I decided to look up “public interest” in a couple of law dictionaries, and I was almost surprised to find that the dictionary editors had dared to define it. This is certainly an indicator that the term “public interest” has doctrinal implications. When I went to law school (in the

United States), every student owned a copy of Black's law dictionary. Here is how that esteemed dictionary defines public interest: "(1) The general welfare of the public that warrants recognition and protection; and (2) Something in which the public as a whole has a stake; especially an interest that justifies government regulation".²

2. Bryan A. Garner (ed.),
Black's Law Dictionary. 7th ed.,
St. Paul, Minn.: West
Publishing Co., 1979.

It is hard to imagine a definition that is more tautological. This means little more than saying that a public interest is a legal interest of the public. Does any of this really get us anywhere?

Another legal dictionary – Barron's – provides a definition which yields a bit more meaning. Like the previous definition, it claims that the public interest is "that which is best for society as a whole", but then adds it is "a subjective determination by an individual such as a judge or governor, or a group such as a ... legislature of what is for the general good of all people" (emphasis added).³

3. Steven H. Gifis, *Law
Dictionary*. 4th ed. New York:
Barron's Educational Services,
1996.

While this is not a very rigorous definition either, at least it acknowledges an important practical truth. When a legislative body adopts a law that includes the term "in the public interest", it is essentially code for judicial or executive discretion. It signals that an executive or judicial authority should take into account, in their decision on a particular issue, a necessarily subjective determination of what is in the best interests of the public generally. A commonly applied example in the United States is the provision in our Freedom of Information Act which requires administrative officials to waive or reduce fees charged to cover the cost of duplicating requested documents if "disclosure ... is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester".⁴

4. Freedom of Information
Act, 5 USC, paragraph 552
(a)(4)(A)(iii).

It would of course lead to many arbitrary and inconsistent results if government bureaucrats were unconstrained in their interpretation of such broadly defined criteria. But their decisions are subject to judicial review, which shifts a good deal of the discretionary authority ultimately to the courts. And the courts have their own ways of limiting arbitrary and inconsistent decision-making.

Public interest in Central and Eastern Europe

So what does all this have to do with Central and Eastern Europe? The way in which the term “public interest” is applied as a matter of substance in the US provides a counter-example to one of the general shortcomings in how the rule of law is developing in many countries in Central and Eastern Europe. I don’t know how many times the term “public interest” appears in the legislation of the countries of Central and Eastern Europe, but there are certainly parallel terms that have substantive significance there. For example, many criminal procedure codes in the region contain a provision stipulating that courts should ensure that defendants are represented by a lawyer without charge if “the interest of justice” so require. What does the term “interests of justice” refer to if it is not also code for discretion in the same way in which “public interest” is used in the United States?

A public interest law approach, in this sense of the term, would imply the exercise of discretion by executive authorities – as well as by judges – in pursuing abstract notions of general welfare, such as justice. But this raises a serious institutional blind spot that has developed during the last decade or so of reform. While the state administration arguably has less rule-making authority than under the socialist regime, with the legislative process firmly within the competence of the parliament, legislative changes have increasingly provided governmental agencies with discretionary latitude in making decisions. Yet, there has been little attention focused on relevant standards and practice to guide individual public officials in exercising their discretion. The result has been uneven implementation of the law and a lack of effectiveness in mechanisms intended to keep government accountable to the public.⁵

The situation is similar with respect to the judiciary because the exercise of discretion on the part of judges is also extremely underdeveloped in Central and Eastern Europe. Ewa Letowska, the first ombudswoman of Poland and now a judge on the Supreme Administrative Court of Poland, has tersely explained how this is rooted in the socialist legacy: “The courts [under socialist law] were not only bound

5. See E. Rekosh (ed.), *The Vicious Circle: Weak State Institutions, Unremedied Abuse and Distrust*. Budapest: Open Society Institute, 2005.

6. Ewa Letowska, Response to Questionnaire for: *Guidance for Promoting Judicial Independence and Impartiality*. Washington, DC: USAID 2001 (on file with author).

7. Jan Hrubala, Response to Questionnaire, id.

8. J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. (Trans. William Rehg) Cambridge: MIT Press 1989, p. 27.

by the statute but also by every normative act ... The system of law was not a system of statutes only, but one of acts created by the administration, too. The courts asserted they were not allowed to [exercise] control over the executive even if it issued unconstitutional law”.⁶

As a result of this background, judicial reasoning in post-socialist countries, compared with other civil law countries, tends to be even more reliant on strict interpretation of positive law and even less willing to address inconsistent, illogical or unconstitutional outcomes produced by literal application of the law. This broad statement of course applies to varying extents in different countries, depending on their current legal culture and other factors. But Slovakia is a good example of a country where this point can be easily demonstrated. Jan Hrubala, former judge and now head of the Slovak Government’s Anti-Corruption Department, describes the situation in his country this way: “In spite of the democratic changes in the society, certain representatives of the judicial profession continue to behave as if the judges were no more than civil servants whose obligation is to fulfill the will of the current power holders and to accept without reservation the decisions of state administration officials”.⁷

This brings us to the third conception of public interest law – the one that is perhaps the most relevant for Central and Eastern Europe – which is best articulated in the process-based notion of the public sphere, a concept closely associated with Jürgen Habermas, who stated:

*Civil society is composed of those more or less spontaneously emergent associations, organizations, and movements that, attuned to how societal problems resonate in the private life spheres, distill and transmit such reactions in amplified form to the public sphere. The core of civil society comprises a network of associations that institutionalizes problem-solving discourses of general interest inside the framework of organized public spheres. [Emphasis added.]*⁸

For Habermas, an open forum for discourse – which he labels the public sphere – is the critical element of democracy. What does this have to do with public interest law? For Central and Eastern Europe, I would argue: quite a lot. For those

who participated in creating a public interest law movement in the United States in the late 1960s and 1970s, the notion of the public sphere, and civil society's role within it, was **not** the key problem they were addressing. Their concerns lied elsewhere: primarily – as I mentioned earlier – with rectifying imbalances in how the work of lawyers favored the powerful economic interests in society.

They were not so interested in addressing the nature of the public sphere because that aspect of American political life was alive and well despite – or perhaps even because of – the social turmoil of the 1960s.

The contrast to European society was first explored by Tocqueville, but a more relevant observer for our purposes was Hannah Arendt. Shortly after she moved to New York, in 1946, in a letter to one of her mentors, Karl Jaspers, Hannah Arendt wrote:⁹ “people here feel themselves responsible for public life to an extent I have never seen in any European country”. As an example to demonstrate her generalization, Arendt cited the storm of protest that followed the detention in concentration camps of Americans of Japanese descent during World War II. In the letter, she recounts her own exposure to this issue. She writes:

I was visiting with an American family in New England at the time. They were thoroughly average people – what would have been called “petty bourgeoisie” in Germany – and they had, I’m sure, never laid eyes on a Japanese in their lives. As I later learned, they and many of their friends wrote immediately and spontaneously to their congressman, insisted on the constitutional rights of all Americans regardless of national background, and declared that if something like that could happen, they no longer felt safe themselves (these people were of Anglo-Saxon background, and their families had been in this country for generations, etc.).

Human rights advocates in Central and Eastern Europe would be pleased but astonished to encounter analogous behavior. In Hungary, for example, the government has adopted an impressive, rights-based educational policy to diminish discrimination against the Roma, a marginalized ethnic minority, by reversing extensive *de facto* segregation of Roma

9. See Lotte Kohler & Han Saner (eds.), *Hannah Arendt/Karl Jaspers: Correspondence*. New York: Harcourt Brace & Company, 1992, p. 30.

10. See Viktoria Mohacsi, "Government Initiatives: Hungary's School Integration Program". In: E. Rekosh & M. Sleeper (eds.), *Separate and Unequal: Combating Discrimination Against Roma in Education*. Public Interest Law Initiative/Columbia University, 2004.

in the school system.¹⁰ The policy is driven primarily by international and European standards, political pressure from the Roma minority itself and the good intentions of a dedicated but small circle of technocrats, educational experts and NGOs. There is a notable absence, however, of proactive support from the majority population.

Until recently, the public sphere in Central and Eastern Europe was dormant for decades or longer. Yet, the "public interest" as a concept was by no means absent from socialist legal theory. Theoretically, the *Prokuratura's* chief function was to protect the public interest, armed with both criminal and civil sanctions. But the principal distinction with the liberal concepts that inform public interest law turns on this notion of the public sphere. Socialist legal theory had no place for alternative voices competing to be heard in the discursive process imagined by Habermas. To the extent general public interests were taken into account, they were determined at the top in a non-democratic process, implemented in a strongly hierarchical manner by executive authorities, and enforced in the courts by the all-powerful procuracy.

This state of affairs has implications for the importance of judicial reasoning alluded to earlier as well. The legacy of the socialist legal system erodes our confidence in the discretion of executive authorities, and further justifies the need to encourage and develop the discretionary functions of the judiciary. Furthermore, the legacy of this approach continues to be evident in the limitations of the language itself – in formerly socialist countries – to distinguish between the state and the public. State interest equals public interest, and the vocabulary (in the relevant national languages) for distinguishing public interests from state interests literally does not exist.

Despite the contrastingly healthy state of the public sphere in the United States, this aspect was also present when the field of public interest law was first defining itself in the 60s, and 70s. One exemplar is Thurgood Marshall, who continued the tradition of Louis Brandeis in that he served as the director and chief litigator of the NAACP (National Association for the Advancement of Colored People) Legal Defense Fund, the premiere civil rights litigation organization

in the United States – before becoming a Supreme Court Justice. In a speech to the American Bar Association in 1975, Justice Marshall said: “Public interest law seeks to fill some of the gaps in our legal system”.¹¹ As one might expect, he was emphasizing the law reform aspects of public interest law. He and his predecessors had been taking this approach on behalf of NGOs like the NAACP Legal Defense Fund and the American Civil Liberties Union (ACLU) for many decades preceding the expansion and consolidation of the public interest law field in America in the 1970s. Justice Marshall went on to acknowledge the important contributions that public interest lawyers had achieved for their clients, the underrepresented individuals in society, but he went further to say:

More fundamentally, perhaps, they have made our legal process work better. They have broadened the flow of information to decision makers. They have made it possible for administrators, legislators and judges to assess the impact of their decisions in terms of all affected interests and minorities. And, by helping to open doors to our legal system, they have moved us a little closer to the ideal of equal justice for all.

So at least in Justice Marshall’s understanding of public interest law, enlarging and strengthening the public sphere is an important public interest law objective in the United States as well. The distinction to be drawn in Central and Eastern Europe may be the much more dramatic degree to which the public sphere needs to be created from scratch or revived after decades of dormancy.

Now we’re back to the question of “Who defines the public interest?”. In a liberal society, maybe the answer is: you and me. We all participate in defining what is – and what is not – in the public interest. And the public interest is worked out in the resulting contest of values and opinions. The point is: we don’t need to concern ourselves as much with **what** the public interest is, so much as **who** gets to participate in defining it and through what means.

Here we come to the strategic implications of this conceptual analysis. I have described three different approaches to conceptualizing public interest law: the social,

11. T. Marshall, “Financing the Public Interest Law Practice: The Role of the Organized Bar”. *American Bar Association Journal*, v. 61, 1975, pp. 1487-1491.

the substantive and the process-based conceptions. Taking them in reverse order, let's start with the process-based concept of the public sphere.

Process-based conception. The notion of the public sphere has tremendously important strategic implications for lawyers and activists working on human rights and other public interest issues in Central and Eastern Europe. If we accept that a critical element of democratic development is the further expansion of the public sphere, that implies an approach to the law that is radically different from – at least historically – the dominant trend in the region. Law is one of the main pillars of governance. But if we accept that law should be a product of public sphere discourse rather than a monolithic entity received from some higher authority, then we must provide opportunities to contest the law. Law, then, becomes instrumental, not just for state authorities, but for everyone. It is no longer merely an instrument of state control; it is a forum for resolving conflicts and working out competing notions of what is in the public interest.

What does this mean in practice? It means NGOs pursuing broad social goals, such as human rights, can and should add law to their arsenal. And we can see clearly that this is taking place. Law is being used strategically and instrumentally by NGOs most obviously through the mechanism of the European Court of Human Rights.

But over-reliance on the European Court of Human Rights as the key forum for reconciling the public interest through application of international norms creates its own set of problems. The Court covers a huge and still increasing jurisdiction. It is simply not practical for it to be the sole battleground for working out the public interest. We need to strengthen the ability of national legal systems to cope with competing public interest claims in the same way that the European Court does; if it were otherwise, the legal component of the public sphere would not be a public sphere at all, but rather a public outpost all the way in Strasbourg.

This means that NGOs must be creative in finding ways to, paraphrasing Marshall, open the doors to their own legal systems. This means putting pressure on the ordinary courts to consider constitutional analysis and international law in

applying national laws, making better use of constitutional courts and forums for judicial review, broadening public participation in administrative proceedings, and securing greater access to information that rests under state control.

Some would argue that these legal strategies are more appropriate to the common law system than to the civil law tradition. But I would argue first of all that this distinction is usually overplayed since common law and civil law approaches have been converging for decades, and more importantly, I believe that such measures are a necessary corrective to decades-old habits formed within a weakened public sphere.

Substantive conception. Another component of the strategic agenda of putative public interest lawyers and activists in Central and Eastern Europe has to do with what I have labeled the substantive conception of public interest law. Incorporating explicit areas of discretion into the law becomes a key complement to the strategic objectives just mentioned. That, in turn, depends upon administrators and judges reconceiving their role and adopting new, less familiar modes of reasoning. In short, in many of the countries of Central and Eastern Europe, this requires a major cultural shift.

How might this come about? Many claim that a chief obstacle is the so-called mentality of judges. In other words, the legal culture is not conducive. Well, if we agree that judicial reasoning is tied up in the legal culture, then it would make sense to target the law faculties. Law faculties are also legal culture “factories”. It is where future lawyers, prosecutors and judges learn how to think like future lawyers, prosecutors and judges.

It follows that the key strategic goals within the law faculties ought to be improving the critical thinking skills of law graduates, as well as injecting the practical aspects of law as applied, in order to challenge the myth that law is best conceived as a monolithic and positivistic realm of pure theory. Fortunately for public interest lawyers, there is a tremendous hunger within law faculties for bringing theory and practice closer together. Students and teachers alike see a growing disconnect between how law is perceived within the placid environment of the law faculty and the way it

actually exists in the turbulent world outside. The rapid growth of clinical legal education, in which students learn about the law by providing legal assistance to actual clients, is but one indicator of this trend.

Similar strategies are warranted for schools of public administration and other programs designed to train and increase the professional competence of public servants. A particular challenge in this area is that administrative law and practice has not received the kind of attention that has been focused on the judiciary during the last decade or so of reform in Central and Eastern Europe. As a result, there is a preliminary need to study and understand the way in which administrative decision-making is actually operating and to determine what sorts of training would be most effective.

Social conception. Finally, the social conception of public interest law is starting to have strategic relevance in Central and Eastern Europe as well. One need look no further than the musing of the staunch free marketeer, George Soros, to find evidence of this. First in a controversial article he entitled “The Capitalist Threat”,¹² and then in subsequent books including *Open Society: Reforming Global Capitalism*, Soros is starting to sound a bit like Justice Brandeis. In the introduction to *Open Society*, he writes: “Market fundamentalists hold that the public interest is best served when people are allowed to pursue their own interests. This is an appealing idea, but it is only half true. Markets are eminently suitable for the pursuit of private interests, but they are not designed to take care of the common interest”.¹³

The gap that George Soros and others have identified in Central and Eastern Europe is the same gap that Justice Brandeis was calling attention to in the United States at the turn of the last century. Law and lawyers in the service of what Soros calls “market fundamentalism” are at risk of becoming nothing more than the corporate adjuncts that Brandeis decried. Of course, few would disagree with George Soros’ opinion that the public interest is in part served by individuals pursuing their own private interests. But as Soros has pointedly argued, the market alone will never address many important aspects of the public interest.

One example of this kind of market failure relates to

12. G. Soros, “The Capitalist Threat”. *The Atlantic Monthly*, February 1997, v. 279, n. 2, pp. 45-58.

13. G. Soros, *Open Society: Reforming Global Capitalism*. New York: Public Affairs 2000, p. xii.

access to the services of lawyers. In Central and Eastern Europe, where lawyers' services are becoming increasingly subject to the rules of the free market, an increasing number of individuals are getting second-rate treatment by the legal system. In other words, we are drifting further from the ideal of equal access to justice for all.

The strategic implication for public interest lawyers and activists is that more attention needs to be focused on mechanisms – from both state and private sources – that provide greater opportunities for legal aid to those who are priced out of the market.

In conclusion, we can identify a number of strategies that are critical for supporting the web of values and ideals present in the concept of public interest law. First, NGOs can and should make more effective use of the law as an instrument for achieving social purposes, and this will contribute to the development of a more vibrant public sphere. In addition, legal educators – who are based at the legal culture factories – must continue to bring theory and practice closer together in an effort to improve the critical reasoning of future judges and other legal professionals. In conjunction with that effort, there is a need to understand the operation of administrative processes better and to develop tools to improve the exercise of discretion by public servants as well. And finally, bar associations, courts, state bodies and NGOs must explore new ways of collaborating to ensure adequate legal aid, bringing us closer to the ideal of equal access to justice for all.