UCL CENTRE FOR ETHICS AND LAW

LEGAL SERVICES REGULATION

THE MEANING OF 'THE PUBLIC INTEREST'

Stephen Mayson

SECOND SUPPLEMENTARY REPORT of the Independent Review of Legal Services Regulation

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INDEPENDENT REVIEW OF LEGAL SERVICES REGULATION

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Preface

"Ultimately, the root of the problem lies in the loss of understanding of the profession's public interest role."[a]

It is now more than four years since the Final Report of the Independent Review of Legal Services Regulation was published (Mayson 2020). The catalyst for the Review was the market study carried out by the Competition and Markets Authority (CMA 2016). The CMA concluded that the legal sector was not working well for consumers. So, too, did the Final Report.

The Supplementary Report to the IRLSR two years later (Mayson 2022) set out to address the challenge that a core goal of regulation – protection for consumers from harm – faced some under-developed but important challenges for effective regulation. These were: the *types* of consumer harm in legal services; the *causes* of that harm; the *consequences* of experienced harm; and the particular *remedies* that might be available for it (depending on its nature and who caused it).

In affirming the conclusions and recommendations of the Final Report, the Supplementary Report advocated for a shift in emphasis in legal services regulation. Primarily, it sought a move away from the pursuit of a negative (the avoidance of consumer harm) to a positive, that is, a state of 'legal well-being'. This would be a state in which citizens can more comfortably pursue or defend their legal rights and obligations and, consequently, play a full and fulfilling part in society.

The principal (and first) recommendation of the Final Report was that the primary objective for the regulation of legal services should be promoting and protecting the public interest (2020: 82). In making this recommendation, the Report adopted some earlier work of mine on the meaning of 'the public interest'.

Given the central importance of the concept of the public interest in the regulatory objectives of the Legal Services Act 2007 and in the recommendations of the Final Report, this report revisits the earlier paper (see footnote 1 below) and is a substantial update and revision of it. The definition of 'the public interest' in paragraph 5.2 below has not changed (and was adopted by the Scottish Government in 2023[b]). However, the implications and implementation of it are explored in much greater depth than before.

In particular, the idea of the public interest as a way of thinking about specific circumstances, that leads to an invitation to make the thinking process and its conclusions explicit through articulation, accessibility and accountability, are key take-aways from this report. Recent developments that have attracted public attention about the part played by lawyers (and have frequently then led to criticism or condemnation) have spurred the wish to add some further substance to the analysis in the earlier work.

a. Stuebs & Wilkinson (2010: 27).
b. See Scottish Government (2023: paragraph 69).

These developments have included the representation of supposedly undesirable or unworthy clients (such as kleptocrats) or causes (such as activities that lead to environmental harm), the use of abusive non-disclosure agreements or threats of litigation intended to hide illegal or questionable behaviour or silence public investigation or critics, or the successive revelations about the role of lawyers in the Post Office's pursuit of those wrongly accused of financial crimes in sub-post-offices. In many cases, the proffered justification that the lawyers involved are simply pursuing their professional duty to act in the best interests of their clients does not sit well with the outcomes.

In judging these actions by lawyers, the foundation of law as a profession is critical. The privilege of professional status has its origins in the permission or licence granted to an occupational group by the state *on behalf of the public*. It is a key component of that foundation that there is a reciprocal obligation on professions *to serve the public* (as represented or characterised by the public interest).

This duty is best captured in the concept (affirmed here) of law as a 'public profession'. In this conception, the duty to the public always outweighs any conflicting duty to the client: in short, the public interest trumps client interest. Unfortunately, this understanding does not appear to permeate modern legal practice. It needs to be restored.

The conclusions of this report are:

(1) It is possible to give 'the public interest' practical meaning, and that can be used as a frame of reference for decisions that need to be made when regulators or practitioners need to be seen as, and to justify that they are, 'acting in the public interest'.

(2) The definition emphasises two principal factors, namely, supporting the fabric of society (including the rule of law and the administration of justice) and the legitimate and equal participation of citizens in society (including access to justice and the absence of arbitrary or intimidatory behaviour).

(3) It is just as useful to conclude that certain actions or behaviour are *not* in the public interest (because they undermine or deny either or both of the principal factors above). In other words, it is as valid to assess 'acting in the public interest' by exclusion as by inclusion.

(4) Lawyers are not just ordinary market participants whose foremost obligation is to act to secure their clients' interests. Instead, they are members of a public profession and owe a primary duty to society to secure the public interest ahead of clients' interests and self-interest.

(5) The structure and enforceability of private transactions and property rights in accordance with the law are enabled and sustained by the public nature of the rule of law, the administration of justice and the role of lawyers. Accordingly, subject to the strict and appropriate application of client confidentiality and legal professional privilege, even otherwise *private* matters can be a legitimate *public* concern when those matters offend the public interest.

(6) The public nature of the obligation to act in the public interest is not served by silence or mere assertion but should be explicit and transparent. This requires

articulation (in public), accessibility (by the public), and accountability (to the public).

The concept of the public interest is therefore pivotal in many ways. First, it encapsulates the essence of a fair society, and the accountability of public institutions for the legitimate participation of citizens in it. Second, it is central to the regulation of legal services by virtue of being a regulatory objective. Third, it offers the foundations of a profession that exists to promote and support it. A fundamental conclusion of this report is that any claim by lawyers to be a 'professional' and part of a 'profession' cannot credibly be taken seriously unless and until the members of that group are standing on, and not beneath, the minimum floor that is set by and maintained in the public interest.

Stephen Mayson[c]
19 September 2024

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CHAPTER 1

INTRODUCTION

1.1 The regulatory objective

The Legal Services Act 2007 sets out a regulatory objective of "protecting and promoting the public interest" (section 1(1)(a)). Interestingly, the public interest had not been identified by Sir David Clementi as a key objective (Clementi, 2004: 15-20) – even though he referred to it several times in his final report. Nor was it included as a regulatory objective in the Bill as originally introduced (though the regulators would have been required to 'have regard to' it in discharging their regulatory functions).

The notion of the public interest is thought by some to be too nebulous a concept to be useful in practice. Others consider that it is simply a 'rolled-up' version of many other, more specific, aspects of importance to society (such as the rule of law, and the administration of justice), such that identifying it separately is, again, of limited value.

Nevertheless, the 2007 Act explicitly and separately includes the public interest as a regulatory objective, and so this report[1] looks in more detail at the concept[2] and its role and influence in the regulation of legal services. It does so on the basis that the lack of definitional precision does not inevitably mean that the concept has no value at all. On the contrary, the legal profession can only benefit from a foundational concept that recognises its own emergent, dynamic and context-dependent nature. Such a concept is more likely to endure societal and professional pressures and be able to adapt to new or unexpected circumstances.

The first conclusion of this report is that a workable definition of 'the public interest' is possible. Further, in the context of the regulation of legal services, that definition can be used to affirm the obligations of those who provide regulated legal services in such a way that the regulatory objective to 'protect and promote' the public interest can be realised in a meaningful way. In this sense, the definition becomes just a part of the process of thinking about how best to be – and to be seen as – 'acting in the public interest'.

In this context, it can be just as valuable to realise that, without over-analysing the limits of the public interest as a concept, a practitioner knows that certain decisions and

1. The report is a revised and updated version of a paper with the same title first published in 2011 and last updated in 2013 (available at: https://stephenmayson.files.wordpress.com/2013/08/mayson-2013-legal-services-regulation-and-the-public-interest.pdf). I am particularly grateful to Professor Richard Moorhead (University of Exeter), Guy Beringer (chair, Institute of Business Ethics taskforce on business ethics and the legal profession), and Jenifer Swallow (former general counsel) for comments on an earlier draft of this revision. Responsibility for the final version is, of course, mine alone.
2. I have been greatly helped in this by the work of Feintuck (2004), Satz (2010), and Corning (2011).

actions are manifestly *not* in the public interest. This might be case, for example, where the client's proposed intentions are unarguably illegal, or where the court would be knowingly misled. With clarity about what is beyond the public interest, the debate about whether certain other decisions and actions are consistent (or not) with the expectations of ethical professional behaviour can be confined to narrower territory.

The second conclusion is that 'the public interest' that needs to be protected and promoted also reflects the premise that the privilege and licence to be a professional is granted on behalf of 'the public'. It is in this sense that law can be judged as a 'public profession', where there is a consequential obligation on members of such a profession to be accountable to the public for securing (or not) the public interest. For lawyers, loyalty to the public interest is then not an optional 'add-on' required by regulation: it is inherent in the very essence of being a member of a public profession.

1.2 The scope of this report

The report begins by examining, in Part 1, the general role and meaning of 'the public interest' as a value statement about society and citizenship that should guide decisions and actions taken in the name of the public. In Part 2, it explores the consequences of regulating legal services in the public interest, with an emphasis on the rule of law, the interests and administration of justice, and the role of lawyers as 'public professionals' who owe wider duties than simply (or even mainly) to their clients.

The report then considers in Part 3 how the public interest might be navigated in problematic and concerning aspects of legal practice where the morals and integrity of clients or their lawyers (or both) in respecting the public interest as they each pursue their goals might be called into question. It ends in Part 4 with some conclusions about regulating and acting in the public interest, and how greater clarity (and articulation of justifications) when claiming to be acting in the public interest could bring some welcome transparency, accessibility and accountability into professional decision-making and activities.

The report seeks in the main to be analytical. It examines how different professional behaviours can be identified by inclusion (that is, it is in accordance with the public interest) and by exception (that is, they are not). Hopefully, a more meaningful conversation about the scope and consequences of 'acting in the public interest' can then follow. However, I acknowledge that in many places I adopt a normative view about the public interest, the role of the legal profession and the behaviour of lawyers on the basis of what I believe (as a lawyer) we *should* aspire to and to be.

PART 1

GENERAL ROLE AND MEANING OF 'THE PUBLIC INTEREST'

CHAPTER 2

THE FOCUS OF REGULATION

2.1 A context of competing objectives

Using 'the public interest' as an objective for regulation is common in many fields, and at one level difficult to argue against. But it does beg a fundamental question that many have tried, and continue, to grapple with: what exactly do (or should) we mean by 'the public interest'? Is it some form of Benthamite greatest good for the greatest number, where majority views prevail? Is it some inchoate notion of what is in society's 'best' interests, for 'the common good'[3] or even for 'the good of all'?

In the absence of any clear sense of its meaning, emphasis and parameters, the concept might well be hijacked by narrower interests as a justification for the promotion of those interests. Further, in any decisions or actions (including those relating to regulation), someone's interests are likely to be more influential than others'. Contenders for influence in the regulation of legal services will include the State (as represented by Parliament or the government of the day), politicians, judges, consumers, clients, the professions, providers of services, the media, and the regulators themselves. However, none of these (or even all of them), to my mind, is necessarily synonymous with 'the public interest'.

In addition to the public interest, the Legal Services Act also has references to other interests within the opening section on regulatory objectives to "protecting and promoting the interests of consumers" (section 1(1)(d)), requiring *authorised* persons to "act in the best interests of their clients" (section 1(3)(c)) and (if exercising rights of audience or conducting litigation) to comply with their duty to the court[4] to act with independence "in the interests of justice" (section 1(3)(d)). The Act also refers to the representative functions of approved regulators relating to "the interests of the persons regulated by it", usually a profession (section 27(2)).

There are, therefore, a multiplicity of 'interests' that are relevant to the framework of legal services regulation, suggesting that the public interest is to be regarded as separate and distinct from the other interests to which the Act refers. It is clear from the debates during the passage of the Bill through Parliament, that it was recognised that "the consumer interest and the public interest may not always coincide".[5] Although the then government "expected to see a healthy tension between individual objectives", it

3. Some writers treat the public interest and the common good as synonymous (see, for example, Simm, 2011; Etzioni, 2018; Wendel, 2021); others distinguish between them (see, for example, Jennings et al, 1987; Killian & O'Regan, 2020).
4. In addition, solicitors explicitly become 'officers of the court' by virtue of section 50 of the Solicitors Act 1974: and see, further, footnote 76.
5. Baroness Ashton of Upholland, *Hansard*, 16 April 2007, Column 12: see https://publications.parliament.uk/pa/ld200607/ldhansrd/text/70416-0002.htm#0704165000003.

had "deliberately not ranked the objectives",[6] choosing to leave that to the regulatory bodies.

While the regulatory bodies have generally shied away from a formal hierarchy in the regulatory objectives, there have been some indications of priority over the years. For example, the Legal Services Board (LSB) has been clear that the duty to protect and promote the public interest actively requires the Board to place it "higher than sectional interests of the particular consumers or professional interests".[7]

The Solicitors Regulation Authority (SRA) is also quite clear that where any of its Principles (relating to the fundamental ethical behaviour of solicitors) come into conflict with each other, "those which safeguard the wider public interest (such as the rule of law, and public confidence in a trustworthy solicitors' profession and a safe and effective market for regulated legal services) take precedence over an individual client's interests".[8]

There are, accordingly, circumstances in which regulators take the view that the public interest should and will take precedence over other interests (see further paragraph 6.3 below).

2.2 The challenge of definition

In many senses, therefore, we can recognise the importance and power of 'the public interest', but nevertheless still struggle to articulate clearly its meaning, who represents it, and the values it promotes.[9] We feel able to adopt the phrase, and use it to support an argument or conclusion, but yet not be sure that everyone has understood it to mean the same thing or to have the same implications. This is potentially an unsound basis on which to justify public policy or regulatory intervention. Indeed, we need to be careful not to give force to Sorauf's observation of nearly 70 years ago that the vagueness of the concept in practice renders it unusable.[10]

Most commentators acknowledge the challenge of finding a definition, even though they then begin to tease out elements or directions that might lead to some agreement. For example, Lippmann has offered (1956: 40): "The public interest may be presumed to be what [people] would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently." Here, the elements of rationality and absence of

6. Baroness Ashton of Upholland, *Hansard*, 16 April 2007, Columns 12 and 15: see https://publications.parliament.uk/pa/ld200607/ldhansrd/text/70416-0002.htm#0704165000003.
7. Legal Services Board (2010: 3).
8. See https://www.sra.org.uk/solicitors/standards-regulations/principles/.
9. This could be because the expression "may also be nothing more than a label attached indiscriminately to a miscellany of particular compromises of the moment" (Schubert, 1960: 223).
10. Cf. Sorauf (1957: 638): "Its willingness to serve all parties makes it useful to none"; Box (2007: 585-6): "The uncertain meaning of public interest allows it to be used to justify individual or group preferences or undemocratic use of public power and its fuzziness makes it awkward as a practical guide to daily affairs"; Bitonti (2020: 3): it is "an empty label used by interest groups (all claiming to support the Public Interest) in order to advance their respective (subjective) preferences"; and, importantly therefore, Morgan (2001: 153): "How do we know the public interest when we see it?"

arbitrariness start to emerge as important features.[11] However, Lippmann's formulation arguably focuses more on *how* meaning might be found in the concept and *by whom* rather than on its *content*. This is also a crucial perspective for Rekosh (2005: 175; emphasis in original): "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."

In a similar vein, Box writes (2007: 586):

> In a strong, 'ideal' model, the public interest might be a relatively stable substantive vision of the good society. It would be agreed upon by most, if not all citizens, people who are well informed about the current situation and alternatives for the future and are capable of rationally choosing the 'best' alternative. It would be more than the short-term aggregated desires of stereotypical self-seeking individuals and it would lead to a better future, however that is defined. Not surprisingly, finding such a public interest has proven challenging, except at a broad level of generality ('the nation should be defended'; 'we should have good schools').

Not all writers are dismissive or discouraged, however. Lewis, for example, believes that "the breadth (and hence ambiguity) of the public interest concept underlies its power" (2006: 695). She is also one of a number of writers who believe that "public interest is a process – an exploration – rather than an immutable or even identifiable conclusion" (2006: 699). In that spirit, this report therefore continues the process of exploration.

In my view, 'the public interest' is necessarily a broad concept, and even in the context of regulating legal services must not be narrowly confined to any sectional interests or to apparently more relevant (that is, legal) territory. In other words, even in the context of regulating legal services, we should not limit our conception to a notion of the public interest that supports or justifies that regulation, but should instead look at the way in which the regulation of legal services can 'protect and promote' the broader public interest. After all, section 1 of the Act is not expressed as justifications *for* regulatory intervention but rather as objectives to be achieved *through* regulation.

The quest, therefore, should perhaps not be so much for a definition as for an understanding of the process through which those subject to regulation can be said – by themselves and others – to have decided or acted in a way that 'protects and promotes' the public interest. In short, the focus should be more on *behaviour* that is claimed to protect and promote than merely on the meaning of the concept to be protected and promoted. Even so, the nature and scope of the concept of the public interest still needs to be understood.

11. Cf. footnote 44 below.

CHAPTER 3

THE PUBLIC INTEREST AND THE IMPORTANCE OF VALUES

3.1 The nature of 'the public'

Notwithstanding the broader expression of the regulatory objectives, one of the central issues here (and in the context of regulation generally) is that 'the public interest' becomes a foundation on which regulatory intervention in otherwise private activities is justified. In other words, the ability of individuals or organisations to behave as they wish is constrained in some way to achieve broader objectives valued by society ('the public'). We ought therefore to be clear about the basis on which that intervention takes place.

It is naturally tempting to portray the public, and therefore the public interest, in contrast to narrower sectional interests (such as consumers or providers, or – in the case of legal services – perhaps clients, lawyers, or judges). Clearly, the public interest requires a collective or aggregate notion that takes us beyond sectional interests. But how is that collective best expressed: 'the public', 'society', 'the community'? Debate in recent years about the use, purpose and efficacy of (for example) super-injunctions, non-disclosure agreements,[12] strategic litigation against public participation (SLAPPs),[12] and about press regulation, has arguably served to demonstrate that the public interest cannot simply be equated with matters in which 'the public' show an interest.

Regulation also typically results from and in an interplay of politics, law and economics. Politicians generally decide on behalf of society that regulatory intervention is required; the legal system and lawyers give effect to the political intention; and increasingly economics has provided the lens through which regulators justify their actions. It is not clear, however, that each of these disciplines understands the need, intention or consequence of regulation in exactly the same way. Indeed, the 'democratic' intention of politicians might well be misinterpreted by lawyers, economists and professional regulators to result in very different outcomes to those intended by the policy-makers.

Nevertheless, it seems to me that the interplay of politics and law provides a helpful starting point. Politicians in a democracy require an electorate, and law is confined to a jurisdiction. In both cases, there is an element of territorial belonging. There must be a 'society' whose members are affected by the behaviour in question, which gives politicians a mandate to act on its behalf, and over whose members the law can claim jurisdiction. This must, initially at least, provide a real sense of who 'the public' must be conceived to be in any notion of the public interest.

12. Considered further in paragraph 9.4 below.

Further, on this view it cannot be simply a majority of 'the public' to whom we refer (thus potentially excluding minority interests[13]): ascertaining 'the public interest' is not a head-counting exercise. Nor should it refer only to those currently within the society, but must somehow take account of those who will or might join at some point in the future (for instance, from later generations, or from different societies).[14]

There must, then, be some sense of a collective or society to which we can attach the idea of 'the public interest'. Though this is not without difficulty, the remit of the regulatory application in question will help to clarify the extent of the community to which we must attach 'the public interest'. While we could not refer only to local communities in the context of national regulation (say, of utilities or legal services), we might do so in relation, for instance, to the regulation of footpaths or waste collection.

There is a final point to be made here relating to the public interest being a public matter. If any behaviour (action, activity or decision) is to be justified (by anyone) as being in the public interest, that justification should be 'made public', that is, it should be articulated as such.

Such articulation would mean that there is:

(i) *transparency*: the justification is made explicit;

(ii) *accessibility*: 'the public' are aware of the justification in their name and can find it; and

(iii) *accountability*: with an articulated and accessible justification, the behaviour can be evaluated.

I return to these factors in paragraph 10 below.

3.2 The values of markets

Much regulation is aimed at addressing 'market failures'. These are overtly *economic* considerations used to justify the regulation of private actions and property rights in the public interest. Thus, the underlying belief of market economies is that competition is a good thing and will lead to the more effective allocation of resources and profit-maximising behaviour, which will in turn increase utility for consumers and wealth for producers. This often results in regulation to prevent or restrict behaviour that is likely

13. Lewis refers to "the potential for degradation into the tyranny of the majority ... with little or no protection or voice for minority positions" (2006: 696); and cf. Morgan (2001: 157) and Box (2007: 595).

14. This is a reflection of Edmund Burke's view of society as "a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born. Each contract of each particular state is but a clause in the great primeval contract of eternal society" (Burke, 1999: 368). However, this view brings challenges – as current debates about, for instance, climate change, demonstrate so well. For example, Lewis writes that (2006: 698; emphasis in original): "it is widely accepted practice to extend the *public* for whom the public interest is being explored to encompass future generations. The moral responsibility here rests on future generations' vulnerability to current decisions with irreversible repercussions.... Extending the public interest to include the future is not without its problems, and two concerns are particularly acute. The first is that future needs often must be traded for current interests, and they are a feeble voice for advocating current sacrifice."

to interfere with effective markets and competition: externalities and monopolistic actions are discouraged; transparency and symmetry of information are encouraged.

But self-interested profit-maximising behaviour, while good for some, might not be inherently good for all. Even regulated economic activity is quite capable of undermining or damaging the institutional fabric and well-being of society (as the global financial crisis of 2007-9 demonstrated only too well).[15] As Feintuck puts it (2004: 15 and 17):

> If the activities of private entities in practice result in damage to the democratic fabric of society, by restricting the ability of others to act as citizens, they should expect such activities to be challenged or indeed curtailed, and economic forces should not remain unconstrained…. In so far as corporate activity and other exercises of private property rights cut across the fundamental democratic expectation of equality of citizenship, the legitimacy of the exercise of such power becomes highly questionable, and the need for regulatory intervention justified…. There is no pressing reason why … private economic interests should be allowed to override automatically a democratically grounded concept of public interest … but, unfortunately, the citizenship-oriented account of the public interest has been far well less articulated than the economic version.

This quotation encapsulates well the discomfort felt by many at the time in the emphasis placed by the Department for Constitutional Affairs (a forerunner of the Ministry of Justice) in its 2005 White Paper on legal services – 'putting consumers first'.[16] To put consumers or the private economic interests of consumers first could lead, in Feintuck's terms, to the economic view overriding the citizenship or democratic view. Indeed, it also runs the unfortunate further risk of translating "the language of need, vulnerability or harm into the language of market failures or market distortion" (Morgan, 2003: 3).

Feintuck continues (2004: 18):

> The challenge now … is to move beyond a model of 'socially ignorant markets' to a situation where social responsibility finds a position in the marketplace as a non-commodity value with a standing equal to other more readily quantifiable economic or monetary values…. This … must imply the existence of a set of moral values and principles underpinning the polity, which look beyond the calculation of private interests, and assumes the existence of a legitimate public sphere of activity … [and establishes] the institutions of the state, as opposed to the institutions of the market, as the legitimate forum in which conflicting claims and interests are to be resolved in the interest of the community.

In other words, regulatory intervention on economic grounds to encourage competition is legitimate; but so is intervention to control competitive behaviour which undermines

15. Tudor (2013: 934) describes this crisis as "a massive failure of the struggle between private and public interests at the expense of the latter". O'Flynn observes (2010: 300) that we should take account of "the extent to which democracy requires us to take a broader view of public issues than simply focusing on our own special interests in them [and] the extent to which it requires each of us to develop a more mature sense of responsibility for our actions, including a greater willingness to reflect on and take into account the consequences of those actions for others.... For example, our recent economic predicament is in no small measure the result of a failure to take a larger or more encompassing view of the lives of rich and poor alike."
16. The Legal Services Act, in s. 1(1)(d), has "protecting and promoting the interests of consumers" as just one of nine regulatory objectives. On the 'hierarchy' of these objectives, see paragraph 6.3 below and Mayson (2020: paragraphs 4.2.1 and 4.2.2).

the fabric of society.[17] To encourage the latter is to expect a values-based or moral foundation for intervention alongside – or even to supersede – a strictly economic one.

On this view, there would be 'a' public interest in protecting and promoting the interests of consumers but not at the expense of protecting and promoting 'the' public interest in citizenship and the democratic fabric of society. There is a public interest in competition and consumerism, but these might lead to behaviours or outcomes that are not ultimately *in* the public interest.

A value judgement might therefore conclude that regulation to protect or promote 'the' public interest is required even though such regulation prohibits or curtails certain economic or competitive activities. Equally, a value judgement might conclude that it is a legitimate promotion of the public interest to allow those activities to continue. But we should be clear that it is very much a value (or moral) judgement.

17. As Long puts it (1990: 172), there is "a need for some regulative principle to take the place of the market in shaping the activities in the public sector to the common good. That principle in common discourse could only be the public interest".

CHAPTER 4

THE PUBLIC INTEREST AND A MORAL COMPASS

4.1 Markets and morals

The issue of the public interest being underpinned by a set of values is therefore important. The challenge is perhaps not so much that the public interest cannot be conceived without an understanding of the values that underpin it, but that it is too often prayed in aid without any attempt to articulate exactly and explicitly what those values are.

It seems to me that this points to a real dilemma in the regulation of legal services. Part of the reform process instituted by Sir David Clementi and the Legal Services Act was intended to give greater sway to market forces and consumerism in the delivery of legal services. We should therefore understand whether (and the extent to which), in the context of legal services, the values that underpin those forces contribute positively or not to the broader public interest. My view is that they do not represent a complete encapsulation of all the foundational values for legal services.

In 2009, Blond noted: "Since markets are essentially amoral, it follows that they should be directed by a moral account of what we want them to achieve".[18] On this view, allowing markets to determine behaviour (with regulatory approbation) would, without that moral account, at best reflect values of amorality. However, it would seem to me that such an approach to the public interest would represent a rather partial[19] project – especially if, as Feintuck suggests, market behaviour (as in the global financial crisis) might in some respects damage the fabric of society.

I should prefer to think that there would be no considered articulation of the public interest that required us to take that risk. Rather, I would advocate that any moral judgement made from a broader view of the public interest than simply endorsing market competition would undoubtedly suggest that any such damage to the fabric of society should *not* be tolerated.

Again, Feintuck highlights the nature of the contest (2004: 61):

> In the present era, it is a virtually unquestioned belief that market forces are the best way to deliver goods and services. That said …, the manner in which markets operate will, by their nature, tend to produce results more favourable to those who are able to exert most power in the marketplace. Thus, in an era in which market principles are increasingly

18. Satz suggests a different view (2010: 65; emphasis in original): "some people think that the great strength of a market is *moral*: the way that it holds people responsible for their own lives and choices. On the moral view, the market holds each of us responsible for our market choices, while at the same time ensuring that the benefits we obtain from these choices depend on the costs and benefits of those choices to others". I am less persuaded by this view.
19. In both its 'biased' and 'incomplete' meanings.

> adopted in the supply of services which relate intimately to the ability to act as a citizen (for example health care, education,…[20]) it will be necessary to ensure that the operation of such markets, or quasi-markets, does not tend to reproduce or exaggerate inequalities in the ability to enjoy expectations of citizenship.

The previous familiar (and widely accepted) underpinnings of rationality and the efficient markets hypothesis have been shown to be fundamentally flawed by the work of behavioural economists and the experience of the global financial crisis. I believe, therefore, that it is right to question the potential dominance or influence that markets, competition or consumerism – and their underpinning values – might otherwise have on the determination of the public interest in regulation.

4.2 Markets alone cannot protect or promote the public interest

Adopting a notion of a 'moral compass' should require us to take a broader view than the merely economic, particularly if the amoral effect of those market forces might result in damage to the wider fabric of society. As Rekosh observes (2005: 178-9):

> [T]he market alone will never address many important aspects of the public interest.
>
> One example of this kind of market failure relates to access to the services of lawyers.... [W]here 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.

Rekosh's example shows how market forces in legal services have indeed led to outcomes that are detrimental to some citizens. We must then question whether such outcomes are 'in the public interest', as well as the role of regulation in them. Kershaw & Moorhead also suggest that (2013: 60) "the economics of lawyering mean that public interest concerns generated by transaction lawyering are unlikely to receive much of a hearing within an economically rational law firm".

Not only this, but the drift to market failure is of longstanding origin. More than a century ago, the great American lawyer (and later justice of the Supreme Court) Louis Brandeis said (1905: 12):

> 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 the obligation to use their powers for the protection of the people.

Indeed, Brandeis attributed the fall in the public standing of the legal profession to this neglect of the 'public interest' focus in the behaviour of so many practising lawyers.

This in turn leads Satz to argue that a revised and broader conception of markets is now required (2010: 34-35):

20. We should, in my view, add "access to justice or legal aid" to emphasise the same point in a legal context.

> [W]e must expand our evaluation of markets, along with the concept of market failure, to include the effects of such markets on the structure of our relationships with one another, on our democracy, and on human motivation.

Consequently, if the market cannot be relied on to promote the public interest of, say, maintaining the rule of law, the effective administration of justice, or equal access to justice, then the public interest must be secured by other means. This may lead us to the regulation *of* markets – or even regulation *instead* of markets – because the usual mechanisms of the market are not sufficient, or are not complete. This might be particularly so in relation to market efficiency.

Box writes (2007: 591):

> It is to be expected that the efficient use of resources to accomplish goals will be an important concern in government at the micro, operational level, but efficiency at the operational level has become confused with broader matters of governing. This displaces important matters such as founding values, constitutionalism and law, citizen self-governance, the role of the public service practitioner in a democratic society, the public good, and social equity.

In other words, while market forces can deliver some benefits to society and consumers, they cannot necessarily be trusted to deliver *all* expected public good benefits – especially, perhaps, in relation to some of society's founding or fundamental values.

Satz also picks up on the belief that markets typically reflect the virtues of allocative efficiency and individual freedom of choice (2010: 17). However (2010: 16, emphasis in original):

> [M]arkets ... are socially sustained; *all* markets depend for their operation on background property rules and a complex of social, cultural, and legal institutions. For exchanges to constitute the structure of a market many elements have to be in place: property rights need to be defined and protected, rules for making contracts and agreements need to be specified and enforced, information needs to flow smoothly, people need to be induced through internal and external mechanisms to behave in a trustworthy manner, and monopolies need to be curtailed....
>
> For this reason it is mistaken to consider *state* and *market* to be opposite terms; the state necessarily shapes and supports the process of market transacting.... The fact that laws and institutions underwrite market transactions also means that such transactions are, at least in principle, not *private* capitalist acts between consenting adults ... but instead a *public* concern of all citizens whether or not they directly participate in them.

Satz concludes that "in order to understand and fully appreciate the diverse moral dimensions of markets, we need to focus on the specific nature of particular markets and not on the market system" (2010: 17). She makes a very important point in these passages: even the otherwise private contracting behaviour of citizens is, in her terms, 'underwritten' by law. Accordingly, those private actions – and, by implication, the behaviour of the legal advisers who support and enable them – become matters that touch the public interest (and see Dorasamy 2010: O54 in paragraph 7.1 below).

Consequently, however it is expressed, it would not be unreasonable to suggest that the effectiveness of markets in regulating the behaviour of market actors is incomplete. In addition, therefore, there needs to be (again, however it is expressed) a higher,

values-based, moral or public good dimension that sits above, and moderates otherwise unconstrained, market forces and private transactions.

4.3 The public interest as an expression of 'higher' values

Corning encourages us to look beyond markets, and to consider that "reciprocity, a sense of fairness, and even some degree of altruism are bedrock human values that also shape our economic and social behaviour…. Indeed, some of what we do routinely – like aiding others in need – could be considered highly irrational from a conventional economist's perspective" (2011: xi).

Corning (2011: 153) offers an attractive view about the 'deep purpose' of a fair society, which takes us further along the journey of seeking a moral compass (or, at least, a societal one):[21]

> The deep purpose of a human society is not, after all, about achieving growth, or wealth, or material affluence, or power, or social equality, or even about the pursuit of happiness…. It is about how to further the purpose of the collective survival enterprise.[22] It … requires us to give priority to the overriding importance of social cooperation without denying the contingent benefits of competition. However, it is also important to recognize differences in merit and to reward them accordingly.[23] Finally, there must also be reciprocity, an unequivocal commitment from all of us to help support the survival enterprise, for no society can long exist on a diet of altruism. Altruism is a means to a larger end, not an end in itself, as some of our theologians and moral philosophers would have us believe. It is the emotional and normative basis of our safety net.

These lines of thinking lead inevitably to the inference that we should not regard market forces, competition, or consumer interests as complete encapsulations of the public interest – even in areas of activity where those factors might be thought to be the principal objectives.

I do not believe that law (the rule of law, the institutions of law, the administration of justice, access to justice, and authorisation to practise) can have those market factors as their principal objectives. It follows that the pursuit of 'the public interest' in law and legal services must seek a broader foundation – *even if* some elements of the fabric of society might be improved by the effects of competition.

These broader foundations are well expressed by Mates & Barton (2011: 180), who refer to the public interest as

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21. Others have also written and spoken about the (moral) limits of markets: see, for example, Kuttner (1996), Sandel (2012) and Plant (2012).
22. To be clear, Corning also intends this to include a shared biological objective of survival and reproduction (2011: 153).
23. In a later passage that would have some resonance in discussions about bankers' and executive pay, Corning writes (2011: 157; emphasis supplied): "merit, like the term fairness itself, has an elusive quality: it does not denote some absolute standard. It is relational and context-specific, subject to all manner of cultural norms and practices. In general, it implies that the rewards a person receives should be proportionate to effort, or investment, or contribution…. Indeed, in the economic sphere merit is not simply a matter of what the recipient thinks is fair treatment but reflects what is socially acceptable. As with fairness in general, merit very often has to split the difference. *When you are asking others to reward you for your efforts, they are entitled to be stakeholders in the decision*".

> 'higher objective values' which are protected for the benefit of society (the public), even though this benefit may currently be different from the mere sum of the individual interests of the members of society. This is a concept that makes it possible to modify the view of the democratically elected majority in the interest of 'higher goals'. Yet these 'higher goals' do not correspond with the current sum of goals of individuals; they must be distinguished and defended by an authority independent[24] of the momentary sum of individual interests.

Advancing competition and consumer interests might therefore unleash market forces and behaviour that achieve some 'public interest' benefits (such as easier and more widespread access to better, perhaps cheaper, legal services). But if those benefits are achieved at the expense of other public interest objectives (such as the democratic fabric of society, where the rule of law is ignored or undermined, where some citizens are excluded from participation, or where some are denied access to services because of greater imbalances of power and resources resulting from competition[25]), then one should conclude that those 'public interest' benefits are not, in fact, *in* 'the public interest'. They are (or should be), in effect, overridden by higher objective values.

24. On the nature of independent authority, see further paragraph 6.2 and footnote 56 below.
25. This idea of 'displacement' was raised by Box (2007: 591), recorded in paragraph 4.2 above; see also the quotation of US Supreme Court Justice Brandeis, also in paragraph 4.2 above.

CHAPTER 5

A GENERAL MEANING OF 'THE PUBLIC INTEREST'

5.1 Core elements of the public interest

From a review of the literature, I discern two key components in any discussion about a broad meaning of 'the public interest': the institutional fabric of society (with its notion of 'citizenship'), and the ability of citizens to exercise the rights and responsibilities inherent in legitimate participation in that society.

As Feintuck writes (2004: 210): "By definition, citizenship … seems to imply membership of a political community,[26] the continuation of which can be considered to be a value greater than and beyond the aggregated interests of individuals"; and (2004: 214) it "might properly be characterized as 'the right to have rights': not an end in itself but rather a compact whereby the individual, in return for acknowledging responsibilities towards the collectivity that is society, can claim civil, political and social freedoms and powers to serve their own best interests".

Feintuck (2004: 17, see paragraph 3.2 above) regards equality of citizenship as a fundamental democratic expectation. The ability of citizens to interact as equals is also important to Satz's conception of markets. She writes that equal status is dependent on formal legal freedoms and a set of social rights (including health care and education), and says (2010: 100-102):

> Citizenship gives to all within its ambit a single set of rights, irrespective of their wealth or family origin. While markets can be supportive of equal citizenship understood in this sense, whether or not they are so depends on the background circumstances, property rights, and regulations within which they operate….
>
> If our concern is with avoiding outcomes that undermine the conditions for citizens to interact as equals, then there is a powerful argument for guaranteeing access to a certain level of goods – education, health care, opportunities, rights, liberties, and physical security[27] – even if some citizens would prefer to trade and sell these goods, or the opportunity to access these goods, to the highest bidder.

From these key components, we can move towards a working definition of the public interest.

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26. As Satz neatly puts it (2010: 102): "the regulative idea of democracy is that citizens are equals engaged in a common cooperative project of governing themselves together".
27. This list refers to public goods (of the kind that will form part of my own definition of 'the public interest' in paragraph 5.2 below, though I disagree that 'opportunities' should be included, since they are a broad and nebulous idea): I would, however, suggest that the rule of law and the administration of justice are implicit in Satz's view here.

5.2 A definition of 'the public interest'

In order to develop a sufficient articulation of 'the public interest' based on the analysis so far, it would seem that it should:

- represent interests that are collective rather than merely sectional (paragraph 3.1 above);
- necessarily be contextually bound by territorial connection, constituency and culture (paragraph 3.1 above);
- take account of the interests of all – including future – citizens (paragraph 3.1 above);
- promote objectives and values that extend beyond those which are principally economic, competitive or market-based (paragraph 4.3 above); and
- be connected in some way to the 'fabric' of society as well as to citizenship and equality of legitimate participation within it (paragraph 5.1 above).

It is also important to acknowledge that, as a consequence of these factors, the nature and content of the public interest will change with, and over, time. In fact, it is important to recognise this 'conditionality' in the concept, given that it will reflect a current set of societal values and preferences. As Mates & Barton express it (2011: 187):

> When considering the issue of public interest, there will also be a subconscious tussle between egoism and altruism, between individualism and collectivism, and on a political level between a liberal and social (or patriotic) approach, between rightist and leftist values, and between a conservative and liberal approach to human rights. Assessments of the content of the concept of 'public interest' are thus inextricably bound up with the assessor's[28] inner preferences.

Indeed, Rekosh goes further (see also paragraph 2.2 above) and emphasises the location of the preferences (2005: 170):

> 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.

I do not take 'inner preferences' and 'subjective determination' in these quotations to indicate personal, arbitrary or improper, choices. They are more of a recognition that *someone* (or some body) will have to make a decision on occasions about what is in the public interest, and that the decision is rarely capable of *objective* discernment. Instead, it must be founded on a reasoned value judgement. The reason and values must be explicitly articulated and connected to the factors that opened this paragraph.

28. See further their views in footnote 56 below of the critical role played by an independent judiciary in making such assessments; and cf. Leveson on the role of government (2012: 69), recorded in paragraph 5.4 below.

Against this background,[29] my articulation or definition of 'the public interest' would be as follows:[30]

> **The public interest concerns objectives and actions for the collective benefit and good of current and future citizens in achieving and maintaining those fundamentals of society that are regarded by them as essential to their common security and well-being,[31] and to their legitimate participation in society.**

In 2023, this definition was quoted and adopted by the Scottish Government in the policy memorandum that accompanied its draft Bill for reform of the regulation of legal services.[32]

5.3 The fabric of society and legitimate participation in it

On this definition, the public interest has two principal dimensions: the fabric of society itself; and the legitimate participation of citizens in society. Consequently, any claim to be protecting or promoting (or acting in) the public interest would require a process, or articulation (cf. paragraph 3.1 above), of the justification for behaviour that is founded on one or both of these dimensions.

The fabric of society is maintained by fundamental issues such as national defence and security; public order, the rule of law, and the administration of justice;[33] protection of the natural environment; effective government;[34] and a sound economy (including the free movement of people and capital).[35]

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29. I also stop short of Mates & Barton's conclusion that "An exact definition of 'public interest', reached purely by formal legal procedures, is evidently impossible" (2011: 187).
30. This conception of the issues has been helped by Bell (1993: 34), Corning (2011: chapter 5) and Leveson (2012). The 2011 paper in which this definition was first proposed was cited by Baroness Deech of Cumnor as "the best attempt at [filling the gap left by statute and regulatory reviews in not giving regulators a single goal to pursue] I have come across" (Deech, 2012). She also suggests that "the value of having a definition and sense of the good that services and professions are meant to uphold, is that one can argue against a hijacking of the phrase 'public interest' by narrower interest groups … and one can also dismiss the notion that economic regulation is the major, or only form of regulation".
31. There must be a public interest in ensuring that the basic needs of all citizens are satisfied.
32. See Scottish Government (2023: paragraph 69).
33. In my view, the administration of justice is necessary to maintaining the rule of law and securing access to justice. It is therefore a public interest objective in its own right, and is separate from what might be regarded as a broader consumer or user interest in *cost-efficient* administration (cf. Box (2007: 591) quoted in paragraph 4.2 above. The Leveson report also helpfully refers in this context to "the proper independence and accountability of law enforcement agencies" (2012: 70).
34. Cf. footnote 50 below for the implications of context and culture on government.
35. Long adopts a very similar list, which he describes as "the values that our common sense tells us rank among the most important dimensions measuring the quality of people's lives" (1990: 177). He then notes that (1990: 177): "The rank-order of these values may vary at times and places and for different people but all would be considered important by most people. The consequences that are projected to stem from a policy can be evaluated as they have their impact on some or all of these dimensions in the lives of the relevant public." A similar approach is adopted by the International Federation of Accountants in their definition of the public interest (2012: 3): "In the broadest respect, 'interests' are all things valued by individuals and by society. These include rights and entitlements (including property rights), access to government, economic freedoms, and political power. Interests are things

Participation[36] is then secured and encouraged by personal and public health,[37] education, and welfare (including shelter and nurturing of children and dependents); access to justice;[38] the protection of physical safety, human rights, and freedom of expression,[39] and equality;[40] and reliable personal, public and commercial relationships.[41] Just as the public interest should take account of future citizens, so participation must protect minority or weaker interests as well as promoting the activities of the majority.[42]

Participation might also be expressed as a quest for personal autonomy[43] that is (Pepper, 1986: 616-617)

> founded on the belief that liberty and autonomy are a moral good, that free choice is better than constraint, that each of us wishes, to the extent possible, to make our own choices rather than to have them made for us. This belief is incorporated into our legal system, which accommodates individual autonomy by leaving as much room as possible for liberty and diversity.... [In] a highly legalized society such as ours ... first-class citizenship is dependent on access to the law.

The 'elevation' or primacy of human rights in recent years is a noteworthy dimension to the public interest. In principle, I suspect that few would argue that the conception of human rights reflects a welcome and proper recognition of certain basic needs. What is problematic is not the statement or achievement of these rights, but their presumed status as natural or absolute rights.

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we seek to acquire and control; they may also be ideals we aspire to, and protections from things that are harmful or disadvantageous to us."

36. The Leveson report emphasises "the public interest in self-determination" (2012: 70).
37. This includes physical and mental health; sleep; reproduction; water; respiration and clean air; waste elimination and disposal; nutrition; and thermoregulation (i.e. the ability to maintain body temperature).
38. On access to justice, see for example Boyle (2022: 1): "access to justice begins with the violation of a right and ends in an effective remedy for that violation". Pepper also observes (1986: 613): "If law is a public good, access to which increases autonomy, the equality of access is important."
39. The Leveson report refers to freedom of expression as "an aspect of a broader public interest in the autonomy, integrity and dignity of individuals [which] is a dimension to the public interest which has a very ancient history in the UK and a special place in public imagination. It underlies the iconic status of *habeus corpus* as an early guarantee of personal liberty, and it underlies the special importance of freedom from interference in home life: 'an Englishman's home is his castle'." (2012: 73).
40. The Leveson report would probably add privacy, including the protection of personal data. As Lord Nicholls of Birkenhead said in *Campbell* v. *MGN Ltd* [2004] 2 AC 457, HL: "A proper degree of privacy is essential for the wellbeing and development of an individual", and therefore (I would add) to their legitimate participation in society.
41. Leveson would also include confidentiality, and the protection of reputation and of intellectual and other property rights (2012: 70).
42. Mates & Barton suggest (2011: 183): "Although there are no universally accepted criteria, reasons for which one party might be described as weaker include the economic circumstances of the contracting parties, their professional skills, and the fact that one party has no choice but to enter into the contract": this becomes highly relevant in the context of 'abusive' behaviour or litigation (see paragraph 9.4.2 below).
43. Meaning that "individuals must have a sphere in which they can exercise individual choices without interference from others (including the state)": Leveson, 2012: 73.

Corning expresses the point in this way (2011: 154-155):

> [O]ur basic needs are not a matter of free choice. A failure to provide for these needs inevitably causes 'harm.' If there is 'a right to life,' … it does not end at birth: it extends throughout our lives. Life is prior to liberty, and prior to property…. Life comes first, and we cannot be free if our basic needs are not satisfied. We therefore have a sacred obligation to provide for the basic needs of all members of our society.
>
> Should a moral claim on behalf of our basic needs be considered a natural right?.... As many critics have pointed out, any claims for natural rights are, in reality, only social constructs – norms or codified laws that are socially accepted. So if we agree to accept the principle that there is a mutual obligation to ensure that the basic needs of all our people must be satisfied and that we will do so collectively for those who are unable, for whatever reason, to provide for their own needs, then it can rightly be treated as a social rather than a natural right.

The implications of this are that human rights and other basic needs are not absolute and immutable but are, like other areas of the public interest, context-specific, and dependent on prevailing culture and values that give rise to social acceptance. These can change with time and circumstances.

5.4 A fair society and balancing competing interests

The overriding values in my conception of the public interest lie in the preservation of society and natural resources for the future benefit of all, and in belief in the rule of law, equality of citizenship, and full participation in society based on fairness and a balance in relationships such that one person cannot inherently take advantage of another.[44]

This is a conception that is consistent with Corning's notion that a 'fair society' is underpinned by *equality* in the meeting of basic needs, *equity* (based on merit[45]) in the distribution of any surplus resources beyond those required to meet the basic needs of all, and *reciprocity* in the proportionate contribution by citizens to society in accordance with their abilities (2011: 154).

Indeed, it is the notion of fairness (encapsulated in the achievement of equality, equity and reciprocity) which might be most needed when different aspects of the public interest are in conflict: this is the basis of the moral or societal compass referred to in paragraph 4 above.

But this begs a related question: should we speak of 'the public interest' or a number of 'public interests'? The Leveson report refers to 'competing public interests' (2012: 69):

> The 'public interest' is therefore not a monolithic concept…. It will often be a matter of balancing a number of outcomes which would be for the common good, but which cannot all be achieved simultaneously. In a democracy, this is principally a role for Government[46] that is, for example, used to grappling with a balance between the public interests in

44. The ability to take advantage could relate to an imbalance or asymmetry of power or information (seen as a market distortion by economists, for example). Equally, "a free debate cannot happen if some participants simply drown out others and prevent them from speaking" (Leveson, 2012: 72). It might also arise from the arbitrary exercise of power (cf. Kim, 2023: 787, paragraph 8.2 below).
45. Cf. footnote 23 above.
46. The issue of whose role it is to determine the public interest is considered in paragraph 5.5 below.

public spending and in low taxes, in liberty and in security, in high accountability and low bureaucracy.

The Leveson report does not seek to define the meaning of 'public interest'. It accepts (as I do) that it is a multi-faceted concept and that elements of it might sometimes be in conflict or tension with each other. Part of the balancing that would be required to determine which aspect of the public interest should prevail in any given conflict or tension would still result in an expression of 'the public interest' (including the public interest that a particular element should prevail).

I am not therefore persuaded that it is necessary to distinguish between 'the public interest' (with one or more elements that might at different times and in different circumstances prevail over other elements) and multiple 'public interests' one of which might similarly prevail.

That said, in my own conception, if there is a conflict or tension between maintaining the fabric of society and securing the legitimate participation of citizens in it, the former should prevail. This is because, without the fabric of society, participation is less meaningful and secure. In simple terms, therefore, interests in freedom of expression and personal autonomy must be subordinate to national security, public order and the administration of justice.

Where there are conflicts within elements of the public interest, then it seems to me that Corning's notions of equality, equity and reciprocity might provide a basis for resolution.

5.5 Who decides?

As paragraph 5.4 above shows, it is quite possible that there will be understandable disagreements about the meaning *of* elements of the public interest as well as conflicts *between* those elements. To resolve these disagreements and conflicts, a decision will need to be made by some person or body with the authority to do so on behalf of society.

The view taken by citizens of what is regarded by them as fundamental will change over time; and of course whether something is for the collective benefit or good of society (in the sense of a continuing political community) is itself a matter of judgement.[47]

47. This leads Long to suggest that (1990: 179): "The bottom line of the appraisal of a policy's being in the public interest is its impact on the important dimensions of the lives of the individuals who make up the relevant public". This emphasis on consequences and the exercise of judgement is important (1990: 177): "The policy will be seen to have consequences that have favorable and unfavorable impacts on the critical dimensions of the lives of people making up the relevant public. To determine wherein the public interest lies, a balance has to be struck among frequently competing values. This balance is not subject to conclusive demonstration. Rather, it takes the form of a structured argument in which the agreed impacts of policy on the critical dimensions of the lives of the relevant public are weighted and ... 'good reasons' are given for maintaining that a particular policy serves the public interest." I take 'good reasons' to refer to the presence of reason (rationality) and the absence of arbitrariness or abuse of power in the decision-making process (cf. paragraph 2.2 above). Long's sense of the need to balance competing values is also implicit in the definition of the public interest

Certainly, it is entirely possible that no one person or institution will be fully aware, at any given time, of all the factors that contribute to the fundamentals of society and citizens' participation in it.

Nevertheless, governments, judges and regulators are, putatively, elected or appointed as the transitory arbiters of that judgement,[48] provided that they are:

(i) taking a sufficiently broad and balanced view of their remit, as elaborated here;

(ii) not being 'illiberal', that is, in Claassen's terms (2023: 6, see further paragraph 7.4 below), they are respecting the basic principles of constitutional democracy; and

(iii) sufficiently accountable for their judgements and actions and that their exercise of this privilege is not arbitrary (cf. Kim, 2023: 787, in paragraph 8.2 below).

The Leveson report, quite rightly, emphasises the role of the media in both dimensions of the public interest. A 'free press' is important in "acting as a check on political and other holders of power" (2012: 65); it carries out a 'watchdog role' in securing greater transparency and accountability, and so plays a part in maintaining the integrity and the fabric of society. It also plays a role in informing and educating the public, to improve their understanding and decision-making, and so improves the nature and quality of citizens' participation in society.

It is very important, however, to recognise that the media fulfil their roles within the broader objective of the rule of law, which protects the public from the exercise of arbitrary power (Leveson, 2012: 66): "All who have the privileges and responsibilities of holding power to account, including police, politicians and press, must themselves champion and uphold the accountabilities they proclaim for others. The rule of law, in other words, 'guards the guardians' and is a guarantor of the freedom of the press, not an exception to it".[49]

However, the report is also at pains to emphasise that the public interest in a free press does not subordinate all other expressions of the public interest to the assessment of the media – in other words, it is clear that the totality of 'the public interest' cannot be determined and represented only by the judgement of the media. For example (2012: 71):

> The democratic rationale for freedom of expression in relation to individuals is also different from the democratic interest in a free press. It encompasses the individual's right to receive information, impart his or her own views and participate in democracy on an informed basis. Democracy benefits from a free press where the press, taken as a whole

proposed by the International Federation of Accountants (2012: 2): "The net benefits derived for, and procedural rigor employed on behalf of, all society in relation to any action, decision or policy".

48. Cf. the quotation from Rekosh (2005: 170) recorded in paragraph 5.2 above.
49. Kim (2023: 787), quoted in paragraph 8.2 below, emphasises the restraint of arbitrary power in a 'thick' conception of the rule of law (a point also made by Claassen (2023: 19).

(a sum of partisan parts), communicate a plurality of views and provide a platform for public debate.[50]

50. The appearance of 'democratic' and 'democracy' in this passage is interesting. Effective government is a key part of my conception of the public interest (see paragraph 5.3 above). However, it is important to emphasise the point made above about the context-specific nature of the public interest, as well as the effects of culture and time on it. Thus, while in 21st century Britain, we might regard democracy as the most effective form of government, democracy is not inevitably regarded as such by all societies or at all times. Consequently, 'democracy' will not necessarily always be a facet of the public interest, while 'effective government' will.

PART 2

REGULATING LEGAL SERVICES IN THE PUBLIC INTEREST

CHAPTER 6

LEGAL SERVICES REGULATION AND THE PUBLIC INTEREST

6.1 Particularising for legal services

In the context of regulating legal services, a number of statements can be found which offer a definition of the public interest. For example, Lord Hunt in his final report on regulation in legal services referred (2009: 32) to "an aggregation of the individual and corporate interests of everyone within a given territory within which it must be the role of government and its agencies to arbitrate as and when those interests conflict or collide". This definition emphasises the importance of territory (cf. paragraph 3.1 above), recognises the likelihood of conflict or competing interests (paragraph 5.4 above), and includes the nature and role of a decision-maker (cf. paragraph 5.5 above). However, in light of the comments by Mates & Barton in paragraph 4.3 above, it might be less convincing in the reference to the 'aggregation' of interests.

The LSB, in its statement of the meaning of the regulatory objectives in section 1 of the Act, states (2010: 3) that the public interest "includes our collective stake as citizens in the rule of law and in society achieving the appropriate balance of rights and responsibilities". This definition also emphasises the collective (cf. paragraph 3.1 above), the rule of law (cf. footnotes 27 and 33 above), and the need for balance (which I take to refer to fairness and equality of participation: cf. paragraph 5.4 above).

I believe that both of these definitions are encapsulated within my broader definition offered in paragraph 5.2 above.

Applying the notion of the public interest articulated in paragraph 5 above, the regulation of legal services would be protecting and promoting the public interest when it:

(1) positively upholds those elements that protect, preserve or promote the *fabric of society*; and

(2) protects or enhances, or removes or reduces impediments to, the ability of citizens, on an equal basis, to exercise their claims to civil, political or social freedoms and *legitimate participation* in society.

In the context of the regulatory objectives in the Legal Services Act, this would primarily lead to the view that the fabric of society is underpinned by supporting the constitutional principle of the rule of law (section 1(1)(b)), including the administration of justice, as exemplified by the professional principle of acting with independence in the interests of justice (section 1(3)(d)), and promoting the prevention and detection of economic crime[51] (section 1(1)(i)).

51. On this particular regulatory objective, see further paragraph 9.4.1 and footnote 100 below.

In relation to the public interest in the legitimate participation of citizens in society, the regulatory objectives that are particularly engaged are: improving access to justice (section 1(1)(c)); encouraging independent, strong and effective legal advice and representation (section 1(1)(f)), and increasing public understanding of citizens' legal rights and duties (section 1(1)(g)).

These are all specifically 'legal' outcomes of the regulatory objectives. They are founded on a view of the law as a set of rules for society and participation and a system for upholding them. However, beyond this, society also needs to encourage reliability and stability in social relationships (which are central to good social order and commerce).

I would therefore go further and suggest that the public interest should extend to promoting and protecting the UK and its justice system as a legal forum, as well as to advancing the economic interests of 'UK plc' (which, in the context of this report, refers to the commercial interests of an economy and the integrity of the UK financial system[52] that are underpinned by the rule of law and a respected system of justice). Like maintaining the rule of law and preventing economic crime, these interests are at the heart of securing systemic integrity and benefits for the whole of society.

There is an important point of geography or territorial connection here. Although 'the public' in whose name and for whose good the concept of the public interest operates needs to be connected to a territory and a constituency (see paragraph 5.2 above), the interests of that public can extend internationally. So, for example, the reputation and standing of the UK's political, financial and legal systems (and of the practitioners within those systems) is an important aspect of the public interest. But so also is that reputation and standing in the eyes of those beyond the jurisdiction: the effects and consequences on who have cause to use, or experience the performance, behaviour or integrity of, those systems and practitioners are as much a matter of the public interest as they are to those within the UK.

The definition of the public interest offered in paragraph 5.2 and elaborated in paragraph 5.3 above is deliberately expressed in wide terms that are not restricted to the legal sector. Given the title of this report, its emphasis in Parts 2 and 3 is consequently on the narrower range of the behaviour and regulation of those who practise in the legal sector. Nevertheless, I should emphasise that there is still scope for practitioners and law firms to promote and contribute to the wider meaning.

They might do this, for example, by taking action within their practices to protect the natural environment and tackle climate change (through, say, the implementation of policies relating to energy efficiency, carbon offsetting, and procurement), or to offer pro bono legal services to vulnerable local communities. They may choose to

52. Cf. the 'integrity objective' given to the Financial Conduct Authority by section 1D of the Financial Services and Markets Act 2000 (as substituted by section 6 of the Financial Services Act 2012). In this context, 'integrity' includes: the soundness, stability and resilience of the financial system; the system not being used for purposes connected with financial crime and not being affected by behaviour that amounts to market abuse; the orderly operation of the financial markets; and transparency of price formation in those markets. For my purposes, these all affect the fabric of society (through the financial system) and the legitimate participation of citizens in that system.

undertake these actions, not because regulation or professional ethics requires that they do, but because it is good practice as a business and as an employer to do so.

I would characterise these initiatives as a matter more of *business ethics* than professional ethics, because they are relevant to the firm or practitioner in their capacity as a business or employer rather than in their capacity as a legal professional. They are still important as contributions to the realisation of the public interest. However, they do not fall within the narrower remit or scope of the regulatory or professional obligations that arise from being a practising lawyer, which are the focus of the remainder of this report (and see paragraph 7.1 below).

6.2 Systemic integrity

A similar view can be taken about the need to maintain public trust and confidence in the legal system and in legal services.[53] If society loses faith in the purpose and integrity of those who uphold the rule of law and who enable and protect the legitimate pursuit or defence of citizens' legal rights, the rule of law and social stability will be threatened.

This seems to be consistent with the position of the Financial Reporting Council that, when considering taking action in the public interest, considers and asks itself (2022: 2-3):

(a) Is there a need to take regulatory action to maintain justifiable public confidence (including in the regulated professions and their activities)?

(b) Does the nature, extent, scale and gravity of the matter give rise to a serious public concern and does it currently or potentially concern a body of systemic importance, affect a significant number of people, cause (or have the potential to cause) significant harm, or relate to criminal, illegal, fraudulent or unethical behaviour?

(c) Is it proportionate to undertake the action or activity, and has consideration been given to whether relevant regulatory action is being taken by another regulator?

The structural integrity of the financial system is as important to society as the integrity of our system of law and justice – and this transcends national boundaries, too. There is much evidence that, in the global marketplace, the UK is regarded as a 'safe' place to do business, and English law is often the governing law of choice in multinational

53. I am purposely taking a wider view here than the usual formulation of 'trust and confidence in the legal profession' (for example, as in the duty in the SRA's Principle 2 to uphold "public trust and confidence in the solicitors' profession": https://www.sra.org.uk/solicitors/standards-regulations/principles/, or the Bar Standards Board's (BSB) Core Duty 5 for barristers which refers to behaviour "likely to diminish the trust and confidence which the public places in ... the profession": https://www.barstandardsboard.org.uk/for-barristers/compliance-with-your-obligations/the-core-duties.html). I do this because trust and confidence in the *legal system* is a much broader issue than trust in the *professions*, and because the structure of regulation in the Legal Services Act 2007 does not restrict legal practice only to those who are members of a legal profession; the Act's public interest objective must therefore have a much wider reach.

commercial transactions. That this is the case was emphasised in May 2011 by the Secretary of State for Justice when he said:[54]

> There are few areas where Britain is stronger than in the law. Whether it's in the provision of legal services, the use of our courts for the resolution of disputes, or the application of English law for contracting, the UK is truly a global centre of excellence. People turn to us because they know they will find world class, highly specialised practitioners and expert judges in the specialist courts. They understand that a decision from a court in the UK carries a global guarantee of impartiality, integrity and enforceability.

This was also emphasised at the same time by the Minister for Trade and Investment, who said: "The UK's stable legal and regulatory environment is one of the main reasons that so many overseas firms choose to invest here. It is an area in which we truly are world-leading." The Minister also spoke of the need to ensure that the legal professions "remain at the core of the UK offer and that we highlight the key role they have to play in our future economic growth".

There can therefore be no doubt that public policy requires that the legal system is protected and promoted, and that accordingly the public interest would insist that the underpinnings of this system are preserved from market and other forces that might undermine them.[55] Genn expresses this point very well in the following paragraph (2010: 3-4):

> [T]he machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, for enforcing legal rights and for protecting private and personal rights. The civil justice system provides the legal architecture for the economy to operate effectively, for agreements to be honoured and for the power of government to be scrutinised and limited. The civil law maps out the boundaries of social and economic behaviour, while the civil courts resolve disputes when they arise. In this way, the civil courts publicly reaffirm norms and behavioural standards for private citizens, businesses and public bodies. Bargains between strangers are possible because rights and responsibilities are determined by a settled legal framework and are enforceable by the courts if promises are not kept.

Confidence in the English legal system is therefore critical to our continuing social stability, global competitiveness, economic success and tax revenues. In part, this confidence stems from the UK's adherence to the rule of law, as well as from its reputation for an independent and impartial judiciary[56] and the standing of the professional qualifications, performance and integrity of its lawyers.

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54. The quotations in this and the following paragraph are taken from a Ministry of Justice press release of 16 May 2011 (UK cements position as 'centre of legal excellence'). These pre-date the Ministry of Justice's later 'Legal services are GREAT' project of 2017, but the messages remain substantially the same: see, for example, https://medium.com/legal-services-are-great/why-uk-legal-services-are-great-d94cc7d5b20e. Recent data supports these claims (Law Society, 2024) recording that: London remains the leading international centre for the resolution of complex commercial litigation and maritime disputes; English law is frequently chosen by parties as the governing law for international commerce and in international arbitration; and exports of UK legal services continue to grow.
55. Cf. footnotes 63-65 below for evidence of instances that seriously undermine the legal system.
56. This underpinning of independence and impartiality is emphasised by Mates & Barton (2011: 180): "A key role in the protection of this concept of 'public interest' will therefore be played by the judiciary, particularly in the protection of fundamental rights; a necessary condition for this role is the principle of judicial independence and the non-removability of judges by other branches of state power."

6.3 Primacy of the public interest

Systemic integrity therefore necessitates obligations to the 'higher objective values' of society and the public interest (cf. paragraph 4.3 above). My belief, therefore, is that regulatory intervention in the public interest is justified:

(1) to secure an outcome for the benefit of society as a whole (expressed in terms of building, protecting or maintaining the fabric of society or of 'UK plc': cf. paragraph 6.1 above) and its systemic integrity; and

(2) to promote and secure the legitimate participation of individual citizens in society.

In terms of legal services regulation, this requires focus on the regulatory objectives (also referred to in paragraph 6.1 above).

However, there is still scope for conflict or tension between different elements of the public interest (cf. paragraph 5.4 above). For example, the potential conflict between market forces and other guiding principles can only be resolved by a very clear sense of what 'the public interest' is seeking to protect, preserve or promote.

It might be argued that the regulatory objectives in section 1 of the Legal Services Act are, in their various expressions, all aspects of 'the public interest' to be advanced by regulators and others in the implementation of the Act. However, there is also a potential for conflict among those objectives. Indeed, the separate articulation of a public interest objective and a consumer interest objective inevitably suggests that the two are not coterminous,[57] and that the public interest is not entirely represented by the consumer interest (or vice versa).

Where any conflict of regulatory objectives materialises, its resolution must presume that some interests prevail over others. Supported by views already expressed by the LSB and SRA (cf. paragraph 2.1 above), there can be no doubt in my mind that the prevailing interest must always be the public interest. This is why, despite ministerial reluctance to prioritise the regulatory objectives in the Act, "protecting and promoting the public interest" in section 1(1)(a) should be the predominant objective to which all others are subordinate.[58]

The prioritising of objectives is not merely a theoretical exercise, but very much one of setting the 'moral compass' of the regulatory framework to avoid the amorality of markets or the adoption of any other regulatory philosophy or normative preference that fails to identify its underlying values (cf. paragraph 4 above). As Feintuck says (2004: 23):

> The extent to which some … factors are prioritized over others will determine the objectives for regulation, though it is possible that the original justification, or more likely combination of justifications for regulatory intervention, may be only a hazy memory by the time regulatory objectives and strategies are determined and implemented. In the

57. This was recognised in the Parliamentary debates on the passage of the Legal Services Bill: see paragraph 2.1 and footnote 5 above.
58. This is the recommendation made in the Independent Review of Legal Services Regulation: Mayson (2020: paragraph 4.2.1 and Recommendation 1).

> absence of some prominent overarching value system, there is a significant risk that regulatory intervention will become subjective and unpredictable.

The absence of such an 'overarching value system' from the policy deliberations of an oversight regulator (in the case of legal services, the LSB) would be deeply disturbing. Where the regulator's remit covers the very structure of society in terms of its legal and justice system, such an absence runs a substantial risk of damage to the 'democratic fabric of society'. Indeed, Feintuck goes so far as to suggest that (2004: 27): "Where public or private policy conflicts with fundamental democratic interests, then it may meaningfully be said to run counter to the public interest".

It seems to me, therefore, that to prioritise 'the interests of consumers' in regulatory philosophy and policy is (at least in relation to legal services) wrongly to conflate consumer and public interests, and therefore to risk not fully protecting or promoting the public interest. This, in turn, begs a further question about how far and in what respects the public interest differs from or extends beyond the consumer interest. The question is important because it is in an understanding and articulation of the overarching value system encapsulated by the expression 'the public interest' that we must find the moral compass that guides the regulation of legal services beyond a narrow, atomistic, sectional, or market-based, conception.

CHAPTER 7

THE PUBLIC INTEREST AND THE ROLE OF LAWYERS

7.1 Not just ordinary market participants

The analysis of the public interest in this report suggests that, for lawyers to play their proper part in the legal and justice system, their actions and behaviour must support both the democratic fabric of society and the legitimate participation of citizens in society.

Their particular role in supporting the rule of law, the administration of justice and access to justice suggests that regulatory 'intervention' or guidance should be expected in order to protect and promote this support. Thus, the professional obligations placed on those who provide legal services to act with independence, honesty and integrity, and to fulfil their duty to the court, then assume a position and importance that would appear to elevate the assessment of their endeavours beyond the usual expectations of 'ordinary' business or economic actors in a market for services (cf. paragraph 4.3 above).

Whether these expectations are encapsulated within a statutory or formal regulatory framework or within a broader context of professional ethics, aspirations and culture should not really be of significance.[59] What matters is that the appropriate behaviour should follow. In part, this requires that actions or behaviour that might be considered acceptable (or even expected) from 'ordinary' actors must be constrained in lawyers because of the 'higher objective values' referred to by Mates & Barton in paragraph 4.3 above.

Whether such higher objective values or principles are unique to lawyers might be debated.[60] The following passage from Dorasamy suggests that there is a much broader 'business obligation' to subordinate self-interest – though, even if this is true, its sentiments should nevertheless resonate strongly with members of the legal profession (2010: 054; emphasis supplied):

59. Technically, the regulatory objectives in section 1 of the Legal Services Act 2007 apply directly to the regulators (see, for example, sections 3(2)(a) and 28(2)(a)), not to practitioners. However, there is a statutory duty under section 176 that those individuals and entities who are regulated under the Act must comply with the regulatory arrangements of their regulator. Those arrangements must, in turn, be compatible with the regulatory objectives (hence many of the professional codes of conduct explicitly adopt the language of the regulatory objectives in setting standards and requirements), and must be approved by the LSB.
60. Tapper & Millett are clear that they – or at least certain of them – are (2015: 2): "General ethics is too general to be the sole basis of professional ethics, as it applies to anyone anywhere, whereas professional ethics has to be specific to the professional situation. Professional ethics has to specify what the professional must do, *qua* professional, that is it must differentiate the obligations of professionals from the obligations of non-professionals."

> A concern for maintaining the social order reflects a higher level of moral reasoning which is additional to self interest. It shows a positive responsibility for doing good which is in contrast to a business just not doing things which society regards as wrong, a situation of passive avoidance.
>
> The debacle of Enron, the largest energy trader in the world, in which the company *with the assistance of lawyers*, rating agencies, investment bankers and accountants engaged in several private partnerships to conceal Enron's high debt and inflate its stock price ... affected employees, shareholders and communities. The Enron case is evidence of moral reasoning that was motivated by self interest and a lower level of moral thinking, thereby failing to promote ethical behaviour....
>
> It can be argued that if business is viewed as a social reality then it should contribute to public interest since society determined the special rights, powers, privileges and benefits for businesses[61] on the understanding that businesses will fulfil their purposes beyond self interest ... underpinned by an intrinsic motivation to do the right thing.

On balance, I read this not as suggesting that businesses generally share the same moral imperative to abide by higher objective values as lawyers, but that businesses should be responsible for behaving other than in accordance only with self-interest. To my mind, lawyers should then be held to an even higher standard than that – not only (negatively) not to act in self-interest but also (positively) to act in the public interest.

This distinction might also be relevant to assessing the contribution of lawyers and law firms to the broader public interest in their capacity as responsible and responsive businesses and employers (cf. paragraph 6.1 above), where they might well be judged on a comparable basis to other businesses. This is different to assessing the behaviour of those same lawyers and law firms in relation to their 'higher objective values' as regulated legal practitioners (on this, see further paragraph 7.4 below).

7.2 Increasing public concern

Regrettably, however, there seems to be increased questioning, both within and beyond the legal sector, of the ethics and behaviour of lawyers – of the apparent lack of motivation or obligation to 'do the right thing'. Specific examples of some of the most justified concerns are explored in paragraph 9.4 below. However, in other cases, the criticism might be no more than misguided public, media or political comment that, for example – whether intentionally or for want of informed insight – castigates judges for the decisions they make or lawyers for the work they do or the clients they serve.

This concern can manifest itself, for instance, as:

- public criticism for representing unpopular clients or causes (such as murderers, rapists, tobacco and energy companies[62]);

61. These could include, for instance, the availability of separate legal personality and limited liability. These private rights, along with the ability to enter into the 'private partnerships' referred to earlier in the quoted extract, are examples of the ways in which *private* actions and transactions are nevertheless the legitimate concern of the *public* interest: cf. Satz (2010), in paragraph 4.2 above.
62. Cf. Vaughan (2023).

- describing senior judges as 'enemies of the people';[63] and
- branding certain legal advisers pejoratively as 'lefty lawyers' when they are pursuing available and legitimate legal remedies on behalf of their clients, but who in doing so are perceived or misrepresented as frustrating government policy.[64]

In many cases, these comments have been made by senior politicians – including even members of the Cabinet[65] – and national media. As such, their comments can be distributed widely and carry weight within society.

More generally, this public undermining of the role of lawyers and the courts, and therefore of the public interest in the rule of law, is sometimes described as 'democratic back-sliding'. In this context, it is an inverse form of 'undermining public trust and confidence' and of 'bringing the profession into disrepute' (albeit now from outside the profession instead of within it). However, it presents a significant concern when democracies "have suffered gradual but significant erosion in the power of those crucial institutions that check the executive branch (e.g., parliament, judiciary, media) and of civil liberties" (Kim, 2023: 786; and cf. Kerew's warning that (2024: 1451-1452) "liberal, constitutional democracies ... are collapsing by legal death, not by coup ... through legal reforms focused on giving the executive more power by limiting or eliminating the constitutional check on the executive's power").

In this context, it is legitimate to ask whether it is in the public interest for lawyers and judges (as with anyone else) to be criticised for simply going about their work.[66] Such criticism can surely only be warranted if there is some foundation to it, namely in our

63. See the accusation made against judges by the *Daily Mail* at https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html and some response at https://www.reuters.com/article/idUSKBN1701BA/.
64. See, for example, https://www.dailymail.co.uk/news/article-12333013/Immigration-law-firms-LIE-authorities-win-asylum.html, https://www.legalfutures.co.uk/latest-news/government-ramps-up-focus-on-crooked-immigration-lawyers and https://www.legalfutures.co.uk/latest-news/sunak-undermining-trust-in-lawyers-says-bar-council.
65. See, for example reactions to Liz Truss's failure as Lord Chancellor to defend the judiciary in the 'enemies of the people' episode (footnote 63 above) (see https://publiclawforeveryone.com/2017/03/22/she-is-constitutionally-absolutely-wrong-the-lord-chief-justice-on-the-lord-chancellor/, Suella Braverman KC's negative comments about lawyers when Home Secretary (see https://www.lawgazette.co.uk/news/academics-call-on-braverman-to-end-lawyer-attacks/5117156.article), and both Boris Johnson (at https://www.lawgazette.co.uk/news/pm-renews-attack-on-left-wing-criminal-justice-lawyers/5109387.article and https://www.lawsociety.org.uk/topics/immigration/pms-misleading-and-dangerous-attack-on-lawyers-undermines-the-rule-of-law) and Rishi Sunak (at https://www.lawgazette.co.uk/news/sunak-criticised-for-startling-ignorance-over-lefty-lawyer-attack/5115357.article) as Prime Minister. Although it pre-dates the events in question, the following extract from Elcock is instructive (2012: 117): "The existence of a common public interest requires ... four virtues: accountability, legality, integrity and responsiveness.... The second essential virtue, legality, demands that all citizens from the Prime Minister down must respect and obey the laws passed by elected legislatures as well as the moral precepts that underpin those laws."
66. United Nations (1990: paragraph 18) suggests not: "Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions." This is sometimes referred to as the principle of non-accountability: see further paragraph 7.3 below.

case that the lawyers concerned are *not* merely carrying out their professional functions but are, supposedly, doing so unethically or contrary to the public interest.

Unfortunately, other parties, actors, and civil society might feel entitled to suggest that, even if the regulated practitioners whose decisions and actions they are questioning were, technically, complying with their duties to their regulator, they had nevertheless still failed to give any or sufficient attention to other dimensions of the situation they faced. In other words, this begs a prior question of whether a higher objective value or principle was (or should have been) engaged that means that they have not faithfully acted in the public interest. In other words, might it be suggested that they have behaved *professionally* but not truly *ethically*? And is it, in truth, a public disdain of their own making?

7.3 A higher objective value or 'special moral commitment'

The conclusion in paragraph 4.3 above is that higher objective values are (or should be) engaged in determining what is in the public interest. To a large extent, the commitment by lawyers to any higher objective value has perhaps been perceived as a voluntary undertaking. As Jennings et al expressed it some time ago (1987: 5):

> To set themselves apart from the unvarnished entrepreneurial orientation of other occupational groups, the professions place a great deal of emphasis on their special moral commitments.... But ... in building their social persona on the language of ethics and not just the logic of commerce the professions generated expectations and demands in the public mind that they be held to a 'higher standard.'

This might become a question of 'be careful what you wish for' because success in generating those expectations means that, in order for the public to continue to trust and rely on professions "it is essential to hold them accountable to public as well as private duties" (Jennings et al, 1987: 3). Those public duties emanate from the 'special moral commitment' referred to by Jennings et al. This commitment necessitates "the centrality of good character and ethical behaviour in the concept of a profession ... and that the sum of their actions as a professional serve to support the public good" (Tapper & Millett, 2015: 15).

Put another way, Tapper & Millett explain that for us "to explore how the idea of a profession might have coherence ... there needs to be a core element, and that core element ... will be some higher-order function" (2015: 13). It seems most likely that any such core element or higher-order function must be a moral commitment to act in the public interest.

This is a challenging position because, so often, lawyers will seek to justify their decisions and actions by claiming that there is no personal 'moral' dimension to them at all – and, indeed, should not be one. This, the argument would go, is because any special moral commitment to act in the public interest displaces or overrides any personal moral commitment that lawyers might otherwise hold. They will claim that their professional standards, or their duties to the court, *require* them to act in a non-

judgemental way without imposing their own moral view of the client's position or motivation.[67]

On this view, it is the court's or a jury's responsibility to determine an issue that is in dispute; the lawyer is simply putting forward the best version of the client's case. Dare explains the lawyer's role in this way (2004: 31; emphasis in original):

> In effect, they do for clients things that clients would do for themselves were the legal system not so complicated. If clients wish to avail themselves of the rights allocated to them under the legal system, their lawyers, insofar as they act on the client's behalf, must assist them to do so. That is what it *is* to act on the client's behalf with respect to the legal system.

This view, in expressing the traditional view or the 'standard conception' of the legal profession, incorporates the principles that lawyers should be neutral (and non-accountable) and partisan (Postema, 1980: 73; Kim, 2020: 1665[68]). Neutrality and non-accountability are linked. On neutrality, lawyers must not allow their "own view of the moral merits of the client's objectives or character to affect the diligence or zealousness with which they pursue the client's lawful objectives"; consequently, this moral detachment (non-accountability) means that "lawyers are not to be judged by the moral status of their client's projects, even though the lawyer's assistance was necessary to the pursuit of those projects" (Dare, 2004: 28).

It is this combination that often justifies assertions that a lawyer's role is 'amoral': "As long as what the lawyer and client do is lawful, it is the client who is morally accountable, not the lawyer" (Pepper, 1986: 614), not least because a "client's autonomy should be limited by the law, not by the lawyer's morality" (1986: 626).

It is the second principle that more recently has attracted controversy. The notion of partisanship is often expressed as 'zealous representation'. Too often, this is interpreted as a lawyer being "concerned not merely to secure her client's legal rights, but to pursue any advantage obtainable for her client through the law" (Dare, 2004: 30). However. Dare describes this interpretation as representing 'hyper-zeal'.[69]

He suggests that zealous representation, properly understood ('mere-zeal') requires lawyers to pursue those interests of clients that are protected by law, bringing to bear all of their professional skills to secure the client's legal rights, but they are under no obligation to pursue anything else which happens to be in the client's interests (or indeed anything in which the client happens to be interested) that go beyond the law (2004: 30). Dare also elaborates (2004: 30, and 34-37) that 'going beyond the law' in

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67. Cf. Ross (2024): "client-centered lawyering calls for not judging the client's goals according to the lawyer's values, but instead helping the client achieve those goals. Client-centered lawyering has therefore been described as nonjudgmental, accepting, or neutral": see further, paragraph 8.1 below.
68. These obligations of neutrality and partisanship only arise *after* the lawyer has accepted the client retainer: subject to the cab-rank rule for barristers in criminal matters (cf. footnote 71 below), professional autonomy and discretion exist to give freedom – and, some argue, accountability – in the choice of clients and causes (see Freedman & Smith, 2023, this paragraph, below).
69. Bassett would agree (2005: 757): "The subjugation of justice and the public good for a client's selfish interests is not necessarily honorable as a general matter, and certainly does not appear to promote the public interest"; and so does Rhode (2000: 18): "The fact that clients have a legal right to pursue a certain objective does not mean that they have a moral right to do so or that justice necessarily will be served by zealously representing their interests."

this context does not mean only something that is illegal, but extends even to an otherwise *lawful* goal or collateral advantage where that is not a proper goal of the particular proceedings. This would apply, for instance, to using delaying or oppressive tactics or issuing 'intimidating' proceedings in the hope of securing a temporary bargaining advantage (cf. abusive litigation in paragraph 9.4.2 below).

As the instances of public and political indignation recorded in paragraph 7.2 above show, while the obligation to respect the public interest is not being diluted, the values-neutral approach of the standard conception is increasingly being challenged – from within and beyond the profession.

Indeed, arguably, lawyers are adding to their own challenges here by strategically identifying with the organisations and work of various market sectors that they actively seek as clients,[70] or even making public statements about the sort of clients that they will *not* act for.[71] Freedman & Smith are quite clear that this is a moral decision (2023; emphasis in original):

> Turning down clients on moral grounds (as distinguished from suggesting moral considerations to a client) can be costly and therefore can require considerable courage. However, the decision of whether to represent a client is the point at which the lawyer has the most scope for exercising autonomy....
>
> Lawyers *are* morally accountable. A lawyer can be 'called to account' and is not 'beyond reproof' for the decision to accept a particular client or cause. Also, while representing a client, the lawyer should counsel the client regarding the moral aspects of the representation. If a lawyer chooses to represent a client, however, it would be immoral as well as unprofessional for the lawyer, either by concealment or coercion, to deprive the client of lawful rights that the client elects to pursue after appropriate counseling.

Freedman & Smith present a clear dividing line here. The time for a lawyer's personal morality to be engaged is *before* the lawyer-client relationship is established. After that, the lawyer's professional duty to be partisan in the proper pursuit of the client's interests is also clear – at least for the purposes of the client's *lawful* endeavours.

Whether client acceptance is described as a 'moral' decision (or one of conscience, or of strategy) probably is not decisive: the point is that a decision *is* being made (absent, say, the application of the cab-rank rule – although even then decisions may still fall to

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70. To some observers, "greater identification with clients ... can account for much of the ethical misconduct by attorneys" (cf. Ross, 2024). Such deliberate identification certainly makes it harder to maintain any public perception of neutrality and non-accountability.
71. See, for example, the 'declaration of conscience' published by a number of lawyers in 2023 that they would withhold their services in relation to supporting new fossil fuel projects, and taking action against climate protesters exercising their democratic right of peaceful protest: https://planb.earth/wp-content/uploads/2023/01/DECLARATION-FINAL-LAR.pdf. There is a clear moral basis to this position: if lawyers are willing to articulate a moral stance on who they will *not* act for (and why), it is but a short stretch to suggest that the same should logically hold for explaining who they *are* willing to act for (and why). Both positions have implications for neutrality and non-accountability and, for barristers, are inconsistent with the Bar's cab-rank rule (BSB Rule C29), under which self-employed barristers must accept instructions that fall within their experience, seniority, and field of practice, irrespective of a client's identity, of the nature of the case, of whether the client is funded privately or publicly, and of any belief or opinion the barrister may have formed about the client's character, reputation, cause, conduct, guilt or innocence.

be made), and the lawyers involved ought to be able (and be expected) to explain and justify it.

Perhaps Davis hit the nail on the head when he wrote nearly 40 years ago (1988: 343): "The claim of professionalism is primarily a moral claim. To be a professional is to have obligations one would not otherwise." Similarly, Gabbioneta et al record that the professions often claim to be "distinguished from regular businesses and trades by their superior moral fibre" (2019: 1709). In other words, however practitioners might try to present their decisions as not having a moral element, the mere fact that they wish to be treated as professionals means that they have necessarily entered a moral domain and must accept the consequences.

Where a possibly widespread misunderstanding seems to arise, though, is that the moral concerns here in the context of the public interest and professionalism do not originate with individual lawyers but are those of *society* in the operation of the legal system. As Dare puts it (2004: 38; emphasis in original):

> The fundamental function of the institutions of law in modern constitutional democracies ... is to mediate between the range of views to be found in [pluralist] communities on fundamental questions such as what constitutes human flourishing, what basic goals are intrinsically most worthy of pursuit, and what is the best way for individuals to live their lives. The law allows the advocates of very different views on these matters to live together despite their differences. Note that these are *moral* considerations. Hence, though the standard conception calls upon lawyers neutrally to represent their clients, the standard conception is not amoral. It is grounded in fundamental moral concerns. Those concerns show both why lawyers should maintain neutrality, and where the boundaries of legitimate advocacy are to be found.

In summary, there are higher objective (moral) values that are engaged in the provision of legal advice and representation to protect the fabric of society and secure the legitimate participation of citizens in society. They certainly constitute a moral dimension to the role and activities of lawyers, but are the values and expectations, not of lawyers, but of society (as expressed in 'the public interest').

7.4 Law as a 'public profession'

The higher objective value or special moral commitment discussed in paragraph 7.3 above is the obligation owed by members of the legal profession to the public interest.

Any definition of 'a profession' – with whatever characteristics or attributes that particular definition adopts – will typically include the legal profession. Although some might now question whether the description remains valid for lawyers and other providers of legal services (cf. Stuebs & Wilkinson, 2010: 27 and Bassett, 2005: 756 in this paragraph, below), to avoid a circular argument at this point in the report, I shall, for now, take the inclusion as a given. For my purposes, the more important question at this stage is the nature of a 'public profession' and its application to legal services.

Bassett explains (2005: 750-751):

> Clearly a 'public profession' is something more than a mere 'profession,' but what does the reference to 'public' add? For some, ... the term is used as a synonym for a stewardship of the public interest....
>
> Thus, the notion of a public profession contemplates more than merely serving clients, more than merely acting as officers of the court serving justice in the most general of senses, and more than merely doing what is proper under the law. A public profession requires acting affirmatively in a manner beyond what is necessary to earn a living. In particular, to claim law as a public profession requires a broader expectation of, and performance of, public service.

This is because being regarded as a profession in the first place (especially an entirely or substantially self-regulating one) rests on the grant or permission to be so by the state, and so the privilege is conferred on behalf of the public. The relationship between a profession and the public (society) is therefore reflexive: society grants the privilege,[72] and in return the profession is expected to serve society.

Claassen explains this in terms of public professionals having 'a double fiduciary relationship'. The first is clearly a direct fiduciary relation to their clients. He then continues (2023: 10):

> However public professionals also have a fiduciary relation to the public at large, which is mediated by the state. The public is vulnerable to these professionals as well, because they provide a service from which not just the direct clients but also the public benefits. Partly this is because members of the public are potential clients, and they have an interest in an infrastructure of public service being available. But even when they never become clients themselves, members of the public profit from the positive externalities of having a functioning legal system....

In short, it is the essence of a public profession that its members have obligations to the public from whom they ultimately derive the legitimacy and licence to practise as professionals. These obligations on professionals can variously (but, I suggest, synonymously) be described as being to 'society', 'the public', 'the public (or common) good', and 'the public interest'. As Claassen expresses it (2023: 18; emphasis in original): "If they accept that they are *public* professionals, they should accept the embeddedness of their profession in a democratic context. They have a duty of loyalty to the public."

Campbell elaborates (2011: 141; emphasis in original, and continuing his distinction between ethics and professionalism: cf. footnote 94):

> [I]n return for obtaining a license to practice law, lawyers agree to ensure that their actions service the public good (even if those interests conflict with those of an individual client). In short, professionalism is defined not as what a lawyer must do (obey ethics rules while acting zealously on behalf of a client), but by what a lawyer *should* do to protect the integrity of the legal system.

72. Bassett says that "an occupation maintains the status of a 'profession' at the pleasure of society" (2005: 774). Claassen explains (2023: 18): "First, the public authorises the state to act on its behalf (where the state itself is represented by a government and its officials). Second, the state authorises professionals to provide a professional service ... ultimately, on behalf of the public".

> The focus of professionalism is different not only from ethics, but also morality. While morality focuses on a lawyer's obligation to bring his personal beliefs of right and wrong to bear in his practice, professionalism is concerned with broader concerns of how the lawyer's actions will impact the profession itself...: morality represents a *personal conscience*, whereas professionalism represents a *social conscience*.

Baron & Corbin summarise (2017: 156):

> The lawyer holds a privileged position of power, influence and responsibility. If lawyers behave poorly, there is a real likelihood that they will bring the legal profession and the administration of justice into disrepute. So it is important that lawyers, and the legal profession more generally, retain the public's trust, by acting honourably and with good character....
>
> Of course, lawyers have long been subject to legal ethics codes or rules of professional responsibility. But it has been accepted that there are circumstances in which lawyers need to apply their own personal principles or morals to situations they encounter in practising law;... rules alone are not effective in and of themselves to determine lawyer conduct – or at least that they constitute a minimum standard, and the ideal is that lawyers will seek to behave at a much higher standard than that actually stated in the rules.

In sum, lawyers – at least for as long as they wish to be seen as professionals – must accept that they are subject to higher objective values in the performance of their roles.

What emerges from any consideration of the public interest is a consensus that, although a precise definition might not be possible (or even desirable), there is agreement that it has moral – or, at least, normative – foundations. It encapsulates the underlying values of Ferriss's (2010) notion of quality of life requiring 'a good society' (in my terms, its fabric) and 'a good life' (in my terms, the legitimate participation of its citizens).

Alongside this, the common and essential features of a 'profession'[73] are that its members have an obligation to the public interest and that they are bound by a code of ethics. In short, there is both a higher objective value (encapsulated in 'the public interest') and a potential moral expectation to fill in unforeseen or unexpected gaps.

It is sometimes thought that the ethical requirements imposed on lawyers have been derived mainly from the particular circumstances of advocacy – and even more particularly from criminal defence. From this starting point, it is perhaps harder to relate these more public- or system-facing obligations to legal practice focused on corporate and commercial clients. However, Gordon exhorts all lawyers (1990: 258) "to lift their eyes from day-to-day deals, to understand the social effects of their practices taken as a whole, and then to discipline each other to act collectively to counsel corporate clients to observe, rather than subvert, their obligations". It is, in short, to recognise that the whole of legal practice is the pursuit of a public calling.

73. Cf. Abadi et al (2020).

With echoes of Brandeis (cf. paragraph 4.2 above), Gordon continues (1990: 258; emphasis supplied):

> The ideal of law as a public profession ... supposes that lawyers will develop some vision of the common good or public interest, and try to realize it in their practices, *if necessary against the immediate wishes of their clients*.

If this is so, then the obligation of a public profession and professionals is to protect and promote the foundations and values of the public interest "in a manner that makes them true to their professions and the democratic ideals and that maintains values of moral and social responsibility, while engendering public confidence at the same time" (Meyers, 2016: 4). Consequently: ethical values "like honesty, integrity, fairness, and justice, then, constitute the conduit to serving the public interest" (2016: 4).

There is another perspective that might bear consideration here. Advising on the meaning and application of tax legislation is undoubtedly the 'provision of legal services'. However, such legal advice is not a reserved legal activity under the Legal Services Act 2007 (cf. section 12 and Schedule 2) and consequently does not have to be provided by someone who holds a legal professional title. In practice, much tax advice is given by accountants and other dedicated tax practitioners who, collectively (along with some specialist tax lawyers), can be regarded as a distinct 'tax profession', though still part of the wider network of legal services.

In recent years, the provision of tax advice – whether by those who are legally qualified or not – has been subject to public scrutiny and criticism where it has strayed into what is usually described as 'aggressive tax avoidance'. This tends to involve complex and often artificial structuring of transactions, the use of tax havens or shelters, and exploitation of loopholes, all of which claim to respect the literal meaning of the legislation while offending the obvious or assumed intention of it. Put another way, the arrangements comply with the letter of the law (or 'form' of tax law) but not its spirit (or 'substance').

That such arrangements engage the public interest is explained by Bennett & Murphy (2017: 12):

> [S]ociety as a collective anticipates that the tax system represents public rather than private interests ... and a tax profession that promotes such a system. The effective operation of this system usually hinges on compliance with laws and regulations. Society may be regarded as a latent stakeholder; it demonstrates legitimacy as it bears risk if the profession promotes aggressive tax avoidance to the extent that collective societal interests are adversely impacted.

When describing the use of aggressive tax shelters, Stuebs & Wilkinson conclude (2010: 25 and 26):

> Firms emphasized customer-driven commercialism and client service rather than public-spirited responsibilities to the public or state.... This shift from professionalism to commercialism signals a shift from 'service interest' to 'self-interest,' and is consistent with the commercialization trend ... [and] demonstrates a disregard for substantive compliance with the tax system and signals a primary concern for commercial self-interest over the public (and even clients') interest.

For these authors, the wider tax profession (whether of legal or accounting origins) has lost sight of its true responsibilities (2010: 13 and 27):

> [T]he problem arises from the tension inherent in tax practice between serving the client and maintaining the public interest focus that is an integral and defining feature of a profession.... [T]he tax shelter industry ultimately undermines the public confidence in the tax system and in the tax profession. For a profession grounded in the public trust and the responsibility to promote the public interest, this is a significant cost. By placing pursuit of personal gain ahead of client advocate and public interest responsibilities, firms lost the trust of clients, employees, and the public.... Ultimately, the root of the problem lies in the loss of understanding of the profession's public interest role.

Indeed, in a condemnatory conclusion (2010: 27): "current practice has deviated so far ... as to call into question the ability of tax practitioners to claim professional status". This analysis and line of thinking about tax practitioners (who come from different occupational backgrounds) mirrors exactly what is being said about lawyers (whose backgrounds tend to be more homogenous).

For my purposes, then, the notion of 'a public profession' becomes important, and can be applied in multi-disciplinary contexts. It signifies a privilege that is greater than being a member of 'a profession' because it imports a higher 'public' duty to society and, in our case, to the integrity of the legal system itself.

It is important, though, to be conscious of the true nature and limits of the privilege or licence granted to professionals. In terms of 'pure' self-regulation, all elements of licensing, control and discipline tend to be claimed by the profession. Even in the 'hybrid' approach represented by the Legal Services Act 2007 with its separation of regulation from representation and the use of an oversight regulator, the claims are still advanced. They are then used to resist as much (in Claassen's terms) 'mediation by the state' as possible, in the cause of necessary 'independence' from state interference and because – it is asserted – only professionals themselves have the required expertise and can understand the issues and decisions involved.

However, Claassen offers a different interpretation (2023: 14):

> [A]ll these judgments are not as impenetrable from outside criticism as is often depicted by professionals themselves. There is a core set of technical issues in every professional practice which can't be judged by outsiders.... But many classificatory, diagnostic and organisational aspects of professional practices are essentially open to non-expert judgment. Professionals have systematically blurred this distinction between technical and non-technical aspects, so as to get maximal authority over all aspects of their practice. However, once we look properly at the matter ... this proves nothing but a strategy to monopolise decision-making authority....

Claassen then notes, perceptively, that as a consequence of the double fiduciary relationship described earlier in this paragraph a tension can emerge from this monopolisation over both technical and non-technical aspects of practice whereby (2023: 10) "public professionals can get into a conflict situation when the public's demands (through the regulatory power of the state) differ from those of their clients" – and, I might add, those of the profession.

He continues (2023: 14-15; emphasis in original):

> [A]ll these non-technical aspects, because of their controversial nature, *require* democratic legitimation in the case of public professions. And this is exactly what the state offers when it regulates public professional practice, on the basis of a democratic mandate. Thus, public professional resistance against state decisions about their practice, which are based on properly executed democratic procedures, betrays a fundamentally undemocratic attitude. Public professionals revolting against the popular will, misunderstand the basis and limits of their position within the public system.

So as not to overstate Claassen's meaning here, this extract needs to be read in the context of his distinction between technical and non-technical aspects of professional practice. He is not asserting that *any and every* intervention by the state is justified by the democratic mandate, only those that (i) are properly executed (rather than being, in his terms, illiberal[74]) and that (ii) relate only to non-technical aspects of practice.

To illustrate the distinction in a more practical way: lawyers often refer to their duty of confidentiality when resisting any attempt to ask them to explain decisions that they have made. As we shall see (in paragraph 9.4.1 below), media commentators and representatives of civil society would sometimes wish that law firms would articulate and explain how they reach their decisions to accept instructions from clients that those outside the firm might consider to be of dubious moral rectitude.

Such a request is consistent with the stance of Freedman & Smith (see paragraph 7.3 above) that lawyers can be 'called to account' for client acceptance decisions. However, the law firm response very often is that they cannot disclose this because of client confidentiality. However, the response that is requested does not invite the firm to divulge anything that the client might have told them (or, as Claassen would characterise it, relating to technical practice). Instead, the response is about the *process* for client selection and, perhaps, the factors that might influence that decision (or the non-technical aspects of practice). These processes and factors are not subject to client confidentiality and so the claim to be prevented by professional ethics from talking about them is to misrepresent professional duties.

Again, in Claassen's terms, the enquiry relates to something that is open to non-expert judgement (that is, is not a type of illiberal interference[74]), in respect of which the professionals have deliberately blurred a distinction in seeking to monopolise the parameters of decision-making and protect themselves from unwelcome scrutiny and accountability. It is not the enquiry that lacks democratic legitimation but the claim to be beyond public accountability. These are the actions of an occupational group that values the privilege of professional status, as conferred by and behalf of society, but does not wish to accept the reciprocal obligations that are then due to that society.

In a similar vein, legal professional privilege (LPP) can attach to advice given by a lawyer to a client. The origins of LPP lie in the administration of justice (see *R.* v. *Derby Magistrates' Court* [1996] AC 487, per Lord Taylor of Gosforth LCJ at page 507). The courts' unwillingness to extend LPP to advice given by those who are not lawyers

74. By which he means not respecting the basic principles of constitutional democracy (2023: 6). Indeed, in this sense, Claassen is clear that "public professionals have a *duty to resist* illiberal interpretations of their professional practices by their states" (2023: 24; emphasis supplied).

arguably reinforces the proposition that LPP is a product of the *public* interest in the administration of justice and of lawyers' role within the justice system as members of a *public* profession.

That position is further reinforced, first, by the understanding that LPP is connected to – and can only be waived by – the client, and not to the lawyer (who can be said in this instance to be acting in service of the public interest). In other words, any claim for LPP advanced by a lawyer is in truth made in their capacity as a public professional, protecting the public interest in the effective administration of justice, and is not made merely in the client's interest.

The second reinforcement lies in the 'iniquity exception', namely, that a client cannot rely on LPP if the privilege claimed relates to communications between the client and lawyer that are intended to further an iniquitous (criminal or illegal) purpose. To put it another way, LPP cannot be claimed if the lawyer-client communication in question relates to an action or objective that is itself contrary to the public interest. In these circumstances, one element of the public interest (avoidance of iniquity or criminality) overrides another (the benefit of candid legal advice, based on LPP).

My conclusion here is that a lawyer's obligation to the public interest does not arise because the regulatory objective in section 1(1)(a) of the Legal Services Act 2007 requires the regulators to protect and promote it. It is because that obligation is the *very essence* of being a member of a public profession: it is inherent, not imposed, and it must be accepted, recognised and affirmed as such.

Attempts to avoid external scrutiny of decisions, and accountability for them, by reference to obligations of client confidentiality and legal professional privilege should not therefore be taken at face value and as unquestionably valid objections. Both have their origins in lawyers being members of a public profession, and both are intended to advance the *public* interest in the administration and interests of justice. They cannot, without express justification, be adopted to achieve a more *private*, client-focused or personal, purpose and thereby thwart other legitimate concerns of the public interest.

In summary, law is a public profession and, consequently, members of the profession owe duties to the public and the public interest that transcend clients' interests. These duties have a moral origin, in that they require action by professionals to protect the fabric of society for the good of all and to secure the equal and legitimate participation of citizens in society. To become a member of a public profession is to accept these duties. This has nothing to do with the personal morality of a lawyer, although an individual is free to make an autonomous decision whether or not to join such a profession.

In deciding whether or not to represent a client or cause, then subject to any overriding professional obligations restricting that choice (such as the cab-rank rule: see footnote 71 above), lawyers are free to engage their personal morality in making that decision. However, once accepted, the client's interests and decisions must be pursued – though the lawyer may have a 'moral' conversation about the wisdom of the client's course of action (cf. footnote 83 below).

The opportunity for personal moral engagement is therefore limited to:

(i) the decision to join a public profession;

(ii) the decision to accept a client or cause; and

(iii) persuasion (which may fail) in relation to a client's enlightened best interests in relation to a proposed decision or course of action.

Beyond these, the lawyer has no moral autonomy that is consistent with membership of a public profession and the proper representation of a client's interests.

The implications of failing now to reaffirm the perception and reality of law as a public profession are profound (Bassett, 2005: 756):

> If lawyers are accountable only to their clients without serious regard for the general welfare of society, then law can no longer call itself a profession. We cannot have it both ways: we cannot insist on the respect and independence accorded to professions when in practice we reject the general welfare of society as an impractical platitude, to which we nod and then disregard in favor of client interests, catering to client demands for the purpose of lining our own pockets.

Sadly, this wish to have it both ways comes too uncomfortably close to the truth of modern legal practice, as paragraphs 8 and 9 will now show.

CHAPTER 8

THE PUBLIC INTEREST AND THE BEST INTERESTS OF CLIENTS

8.1 The relativity of clients' interests

The existence of the higher objective value discussed in paragraph 7.3 above creates a particular tension in modern legal practice. It goes to the heart of the 'proper' role of a lawyer, as well as highlighting a potential conflict with the public interest. It also begs a supplementary question of whether lawyers are themselves fanning the flames of the public indignation set out in paragraph 7.2 above.

There have been instances where an emphasis by lawyers on the professional principle in section 1(3)(c) of acting 'in the best interests of clients' has been used as a shield to justify professional actions that have subsequently attracted adverse comment. For example, in giving evidence to the Post Office Horizon Inquiry, one of the external lawyers advising the Post Office said: "in an adversarial system, it is my absolute duty ... to act in their best interest".[75] However, in my view this is a gross mis-reading or misrepresentation of the relevant professional duty.

The emergence of such an extreme view might be attributed to the commercial and cultural pressures of current legal practice – especially in large corporate law firms (and perhaps in-house legal departments). It is often characterised as a consequence of 'client-centred lawyering' or the duty of zealous representation (cf. paragraph 7.3 above). Many lawyers and clients might regard such an approach as a good thing; but its dark side is a 'client is always right' mindset: "According to the client-centered viewpoint, whatever the client wants is the overall or ultimate goal ... [which], in turn, can feed negative public views about a 'morally neutered' profession" (Ross, 2024).

In no sense can the duty to act in a client's best interests be 'absolute'. This is because it is one of a number of duties identified as a regulatory objective. The 2007 Act also requires that authorised persons "should act with independence and integrity" (section 1(3)(a)), and more specifically that those who are involved in the 'adversarial system' "should comply with their duty to the court[76] to act with independence in the interests of justice" (section 1(3)(d)). While these two principles are not necessarily incompatible with acting in a client's best interests, doing so cannot be elevated to an absolute duty that overrides them. As Martinez & Juricic suggest (2022: 247-248):

75. From transcript available at: https://www.postofficehorizoninquiry.org.uk/hearings/phase-4-21-september-2023.
76. In addition, solicitors explicitly become 'officers of the court' by virtue of section 50 of the Solicitors Act 1974. Whether this in fact adds anything that is not already contained within the normally understood duties to the court and duties to the client might be questioned: cf. Gaetke (1989) and Cohen (2000).

> [T]he lawyer is not simply meant to blindly follow their client's every whim. In fact, in some instances, it may be important for the lawyer to push back, to challenge the client, and to conceptualize the concerns of the client within the context of larger societal realities.

Further, in carrying out their work, legal regulators are bound to act in a way which is compatible with the regulatory objectives of the 2007 Act (sections 3(2)(a) and 28(2)(a)). The objectives include (section 1(1)) protecting and promoting the public interest as well as supporting the constitutional principle of the rule of law. It would not be compatible for a regulator to promulgate (or for the Legal Services Board to approve) a code of conduct which included acting in the best interests of clients as an *absolute* or overriding duty.

As we saw in paragraph 7.4 above, these wider obligations are consistent with – and, in my view, derived from – the conception of law as a 'public profession'. Taking client's interests as an absolute priority in the practice of law is fundamentally inconsistent with this conception.

8.2 The rule of law as a higher duty

While the precise meanings of 'the public interest' (as this report seeks to show) and 'the rule of law'[77] might be fluid and contested, they seem quite clearly to be higher objective values or principles in the context of lawyer regulation – or, at the very least, relevant context *within which* the duty to act in a client's best interests must be considered.

As recorded in paragraph 2.1 above, while the government of the day did not seek to impose or suggest any hierarchy among the regulatory objectives in section 1 of the 2007 Act, it did expect the regulators to do so. Whenever statements have been made, a client's interests (best or otherwise) have always been subordinate to the public interest, the rule of law, the interests of justice, or the duty to the court (see paragraph 2.1 above).

The professional and ethical duties of lawyers to uphold the rule of law and their duty to the court, and to act with independence and integrity, are key to maintaining the fabric of society. But, as suggested in paragraph 7.1, these 'higher obligations' do not rest exclusively with lawyers. Where instances of democratic back-sliding occur – especially when caused or condoned by government or powerful media outlets[78] – the rule of law and the fabric of society are compromised.

For present purposes, however, the second limb of the definition of the public interest is equally important: the legitimate participation of citizens in society. This also concerns the rule of law. In this report, I adopt Kim's 'thick' conception of the rule of law,[77] namely, that (2023: 787):

> [T]o live under the rule of law means that law – the legal system responsible for articulating, applying and enforcing legal norms – will restrain all arbitrary exercises of power in the polity.

77. More generally on the rule of law, see Moorhead et al (2023).
78. Cf. footnotes 63-65 above.

Wendel also emphasises (2021: 92):

> Commitment to the rule of law means defending legal rules, procedures, and institutions against gross manipulation in the service of some political end.

Such a broad conception of the rule of law, and the emphasis against arbitrariness and manipulation (which, to my mind, need not only be to a political end but also to a self-interested end) is more salient in the context of this report because, as Kim points out (2023: 785):

> If the duty to uphold the rule of law basically requires lawyers not to break the law and not to help their clients break the law, then the duty adds almost nothing[79] to the lawyer's existing professional obligations.

On this view, adopting a narrow, legalistic view "falls short of respecting and nurturing the rule of law" (Kim, 2023: 788), and would not be compatible with the regulatory objectives in the 2007 Act or the conception of law as a public profession.

Consequently, the full participation of citizens in society cannot be achieved without the underpinnings of, and reliance on, the rule of law. It also requires access to legal advice and representation[80] to enforce and defend legal rights and obligations. Reliable personal, public and commercial relationships, underpinned by the rule of law and access to justice, are part of the minimum conditions for effective participation.

There is, however, a development that potentially undermines these minimum conditions. It arises from the increasing incidence of self-representation (also described as litigants-in-person). As Leitch rightly points out, even the expression 'self-representation' is loaded because (2017: 690) "reference to 'unrepresented' litigants ... presupposes that the continuing norm is legal representation".

A lawyer acting for a party against a litigant-in-person faces additional challenges. Leitch explains (2017: 688):

> Cases involving both a represented and self-represented party possess some of the greatest ethical challenges in terms of ensuring that the process is fair to all parties.... This is not a challenge that can be effectively unloaded on the adjudicator overseeing the particular legal process but must be addressed by the lawyers acting against the self-represented litigants.

The requirement for fair process tests a lawyer's commitment to the rule of law and their own client's best interests (2017: 676):

> While the various professional conduct rules outline a series of responsibilities that lawyers owe to the administration of justice and the public at large, in practice, lawyers often maintain a "heightened duty of partisanship toward their own clients and a [corresponding] diminished duty to respect the interests of their adversaries or of third parties" and the administration of justice. As a consequence, the tension between a duty to one's client and other competing duties is typically resolved in favour of the lawyer's duty to the client. This primacy of the duty to the client is internalized early in a lawyer's practice and informs much of the lawyer's decision-making. Often, in an attempt to

79. Cf. footnote 76 above.
80. The question of whether or not there is a 'right' to representation raises important issues relating to the legitimate participation of citizens in the justice system: cf. United Nations (1990: paragraph 1) and footnotes 71 above and 102 below.

address this tension, duties to the court are reduced to the application of legal rules and checks on behaviour that form the outer limit of acceptable conduct.

I return to this testing of the outer limit of acceptable conduct in paragraph 9.4.2 below in relation to abusive litigation. However, it is clear that litigants-in-person feel that fair process is often not in evidence, and lawyers' commitment to any 'higher duty' to the rule of law can undoubtedly be questioned. As one such person expressed her experience to Leitch (2017: 682): "the rules are there for a reason so that people don't abuse the system which is the ultimate irony because people are using [the rules] to abuse the system."

This perception of abuse (or, less pejoratively, misplaced loyalty) by lawyers has important consequences – for the public interest and the rule of law, for public trust and confidence in the justice system and the legal profession, and for the legitimate and equal participation of citizens in a fair society. Bassett perhaps puts it more bluntly (2005: 774): "The widespread public perception that lawyers obstruct, rather than further, justice undermines law's ability to consider itself a profession, much less a 'public' profession" (cf. paragraph 7.4 above).

8.3 Lawyers' actions as the exercise of arbitrary power

Where the legitimate participation of citizens in society through the pursuit or defence of their legal rights is frustrated or removed by an abuse of power or process, the public interest is not fulfilled. In this context, then, Kim's view of arbitrariness is central (2023: 805):

> [P]ower is arbitrarily exercised if it is exercised according to the powerholder's will or pleasure, without consideration of the relevant perspective and interests of those affected by such power.... By wholly disregarding those perspectives and interests, the powerholder fails to see those affected as persons of equal moral worth. This failure expresses a strong form of disrespect that is demeaning.

In other words, not only is this disrespect undermining the rule of law, it also deprives those who are the object of it of their legitimate and equal participation in society and the processes that maintain its fabric – that is, it cannot amount to protecting and promoting the public interest.

To argue, in the face of this, that lawyers' actions on behalf of 'powerholders' are justified by the 'zealous advocacy' of their clients' best interests is wholly to disregard – indeed, to disrespect and demean – their other obligations to the public interest, to the courts, and to the rule of law.[81] In sum, zealous representation and acting in the best interests of clients are not untrammelled: they must be constrained by a broader sense

81. Moorhead et al describe this as "a tension between zealous advice and the rule of law" (2023: 39). I would go further and describe them, when zealous advocacy is knowingly deployed in the arbitrary way described by Kim, as incompatible. I believe that Dare (2004) would characterise this as (impermissible) 'hyper-zeal'.

of what is compatible with the public interest,[82] duties to the court, and upholding the rule of law.

The deliberate 'gaming' of procedural rules, or intentionally exploiting inequalities of resource, without regard or adjustment for the effect on other parties and the courts would not seem to be consistent with the discharge of a comprehensive conception of a lawyer's professional and ethical obligations to the public interest as a member of a public profession (cf. paragraph 7.4 above) in preference just to client interests.

While it must always be open to a party to argue or take points – particularly in litigation – that might eventually be considered by a court to be unarguable or without merit (cf. *Haddad* v. *Rostamani & Others* in paragraph 9.4.2 below), the 'thick' conception of the rule of law outlined in paragraph 8.2 above would seem to place some limits on this.

A recent example of a course of action that was deliberately pursued and later drew the court's displeasure can be found in *Amersi* v. *Leslie & Others* [2023] EWCA Civ 1468. In the Court of Appeal, Warby, L.J. said that in the High Court, the judge (Nicklin, J.) had identified

> several aspects of the claimant's conduct which gave real cause for concern as to (1) whether his purpose in pursuing the proceedings had been to seek vindication rather than some other impermissible collateral purpose and (2) whether he had sought to obtain vindication at proportionate cost. The Judge identified four matters giving rise to such concern: inadequately explained delay in issuing and serving the libel claim; an exorbitant approach to litigating the issues, which included bringing a data protection claim which the claimant later withdrew; statements evidencing a deliberate tactical decision to proceed with the data protection claim before suing in libel, when "subjecting a person to successive civil claims can be a hallmark of abusive conduct"; and media interviews which "strongly suggested" that the claimant had treated the libel action as a vehicle for pursuing [an] illegitimate collateral objective.

In the High Court, it was not necessary for Nicklin, J. to rule on whether the claim had in fact been an abuse of process, though he acknowledged that the circumstances that justify such a conclusion are rare and that the hurdle is a high one. It may be that such a judicial conclusion is only likely where the action or behaviour in question has no purpose that can reasonably or legitimately be connected to the proper goal of the particular proceedings (cf. Dare, 2004: 36, paragraph 7.3 above). Nevertheless, Nicklin, J. concluded that "by conducting the proceedings in the way I have identified, the Claimant has exhausted any claim he might have on the further allocation of the Court's resources to this action", and the Court of Appeal agreed with his assessment.

The *Amersi* case demonstrates that over-zealous representation might not be consistent with a more enlightened understanding of pursuing a client's *best* interests in litigation.[83] If representation crosses the line – as it did in *Amersi* – it is, in effect, an

82. By which I mean maintaining (or at least not undermining) the fabric of society and securing (or at least not in this context inappropriately negating) the legitimate participation of citizens in it. Also see footnote 83 below.

83. The American Bar Association's *Model Rules of Professional Conduct*, Rule 2.1, provides an interesting observation: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." This suggests (but does not require) a consideration of 'public interest' factors.

exercise of arbitrary power that is not compatible with the rule of law or the wider public interest. It makes no difference whether that power is exercised by the lawyer directly at the client's behest or is the result of the lawyer's own assessment of what the client's interests suggest.

The conclusion seems to be that, although it will always be challenging for one party to prove another party's intention to act abusively, the courts (and regulators) might now be more willing to examine the available evidence relating to motive and intention. There will then be a risk that their conclusions might not be welcome for an over-zealous lawyer. If there is any sense of an illegitimate collateral objective (cf. Dare, 2004: 34-37, paragraph 7.3 above), particularly when combined with actions or tactics that are often associated with abusive litigation (such as delay, taking unfair advantage – especially of vulnerable or unrepresented parties, making allegations without merit, or misleading the court), it is far less likely that a 'win at all costs', or 'scorched earth' approach to litigation will be regarded as appropriately zealous representation or consistent with the principles of a public profession.

The negative effects of over-zealous representation on litigants-in-person are caught by Leitch – in terms which reinforce Kim's comments at the beginning of this paragraph (2017: 694):

> [L]awyers, through their actions and the positions they adopted, often undermined the self-represented litigants' attempts to participate and be heard. The perception by self-represented litigants that they are unable to participate in the legal system has further ramifications both for the legitimacy of the profession that administers and operates within the system and for the decisions made in that system. Moreover, strategic moves to discredit or dissuade self-represented litigants' voices in proceedings devalues their personal dignity and ultimately runs the risk of leaving individuals disaffected from the legal institutions that are meant to serve them.

She therefore concludes that avoiding these effects (2017: 704) "will entail an inquiry into how the adversarial framework in which lawyers operate may require very different normative rules that take better account of self-represented litigants' legitimate participation within the legal system."

The conclusion of this report is that such a re-thinking is needed not only in relation to litigants-in-person but more widely given that, even between themselves, lawyers are known to be exploiting imbalances in power and resources that are deliberately intended to disadvantage an opponent. In too many instances, this leads – as in *Amersi* – to the pursuit of 'impermissible' purposes or even (as in paragraph 9.4.4 below) to actions that frustrate rather than promote the administration of justice. This amounts to disrespect not just for other parties, but also for the rule of law and associated professional obligations (and therefore of the public interest).

Nevertheless, it does mean that it is "completely appropriate for [a lawyer] to explain to a client that the path they are hoping to go down could be bad for the country and democratic norms more generally" (Martinez & Juricic, 2022: 248; and cf. *Simms* v. *The Law Society*, in paragraph 9.3 below).

8.4 The proper context for clients' interests

Against the background described so far, and standing back for a moment, there might be a sense in which the real power in the phrase 'acting in the best interests of a client' should lie in its intention to send a message to regulated practitioners that they must subordinate their own personal and professional interests to those of their clients in carrying out their work (Pepper, 1986: 615 and 616; though not to the extent of compromising their own health and well-being: cf. Short, 2024). It does not mean that clients' interests are then elevated above all others. The argument in this report is that lawyers must also subordinate *their clients' interests* to the public interest (including the rule of law). Client interests are therefore not absolute; nor are they paramount.[84]

Recently, the Charter for Families Bereaved through Public Tragedy (also called the Hillsborough Charter) has been published. Those who sign up to it (including the Government[85] and public bodies) commit – among other things – to do the following: place the public interest above their own reputation; approach forms of public scrutiny (including public inquiries and inquests) with candour, in an open, honest and transparent way, making full disclosure of relevant documents, material and facts, with an objective to assist the search for the truth; avoid seeking to defend the indefensible or to dismiss or disparage those who may have suffered where they have fallen short; and ensure that all members of staff treat members of the public and each other with mutual respect and with courtesy.[86]

These commitments would serve as a welcome guide to both clients and lawyers in their approach to pursuing claims against others, and would represent some tempering of the over-zealous or aggressive representation of client interests. It seems implicit in the Charter commitments that there are indeed higher principles to be adopted and respected in the furtherance of legitimate representation. They are also entirely consistent with the principles that underpin the conception of a public profession (cf. paragraph 7.4 above)

Finally, therefore, 'acting on instructions' cannot be allowed to stand as a free pass to any lawyers who, having in some way acted contrary to the totality of their professional duties, claim nevertheless to have fulfilled their duties and acted in the best interests of their clients simply because that is what the clients told them to do.

84. The code of conduct of the (CLC) uses this expression: Principle 3(b) requires that "You keep the interests of the Client paramount", which is an interesting interpretation and conversion of the professional principle in section 1(3)(c), even though it is subject to "(except as required by the law or the CLC's regulatory arrangements)".
85. See https://www.gov.uk/government/speeches/hillsborough-charter-is-legacy-of-victims-families.
86. This final element of mutual respect and courtesy is consistent with the obligation of civility as discussed in paragraph 9.4.2 below.

PART 3

NAVIGATING THE PUBLIC INTEREST IN PRACTICE

CHAPTER 9

LAW AS A 'NOXIOUS MARKET'?

The discussion in Part 2 addresses circumstances in which the regulation of legal services 'in the public interest' should seek to promote and secure higher objective values than would normally be expected of and achieved by 'ordinary businesses' operating in a market economy. In relation to legal services, those public interest objectives relate to the fabric of society (including the rule of law and the interests of justice) and the legitimate participation of citizens (including access to justice, and the absence of arbitrary or abusive restrictions on participation).

Part 2 also recorded concerns about the public perception of lawyers' apparent values and priorities (see paragraph 7.2 above) as well as the rupture between current legal practice and the conception of law as a 'public profession' (see paragraphs 7 and 8 above). I now examine whether, as a consequence of this disconnection, the policy drive to import more recognition of market forces, competition and consumerism into the legal services sector and its regulation has in fact resulted in law becoming a 'noxious market'.

9.1 The nature of noxious markets

The first consideration in how we might expect to see regulation in the public interest avoid or address what Satz describes as 'noxious markets', is to understand that these are markets that (Satz, 2010: 94-98):

(a) produce outcomes which are extremely harmful or detrimental either for the participants themselves or for third parties (such as removing or inhibiting the ability of citizens to rely on society's institutions and processes or to pursue their rights[87]);

(b) are extremely harmful to society, by undermining the social framework (in my terms, the fabric of society) needed for citizens to interact as equals or by undermining the capacities that individuals need to claim rights or participate in society (such as systemically putting access to justice beyond the reach of all but the very rich, or individually and intentionally exploiting an imbalance in power or resources[88]);

87. Thus, while it might be expedient to laud UK legal services as 'great' (see paragraph 6.2 above), as Canadian Chief Justice Beverly McLachlin once put it: "The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve": see https://www.scc-csc.ca/judges-juges/spe-dis/bm-2007-03-08-eng.aspx .

88. Cf. *Amersi*, paragraph 8.3 above.

(c) are characterised by very weak or highly asymmetric knowledge and agency (acknowledging that some degree of asymmetry of information and power is often associated with professional services markets): what would make the market noxious is such a degree of asymmetry that leaves the consumer with no meaningful bargaining power; and

(d) reflect the underlying extreme vulnerabilities of one of the transacting parties (perhaps by providing access to legal services only to the literate or those with technological capacity, or excluding those who are vulnerable, for example, because of lack of education or cognitive development, or of physical or mental ill-health, poverty, unemployment, or homelessness[89]).

In summary, it would seem right to characterise these outcomes as contrary to the public interest. Importantly, Satz then explains (2010: 99):

> [M]arkets raise questions of political philosophy as well as of economics. Markets can damage important relationships people have with one another by allowing people to segment and opt out of a common condition. A central feature of most noxious markets on my approach has to do with their effects on the relationships between people, particularly the horizontal relationship of equal status. For two people to have equal status they need to see each other as legitimate sources of independent claims and they need to each have the capacity to press their claims without needing the other's permission to do so. This requires that each have rights and liberties of certain kinds as well as very specific resources.

In the terms of this report, the question becomes whether those who are engaged in the delivery of legal services are, in practice, *systematically or persistently* able to ignore (and largely get away with ignoring) their 'higher' duty to the public interest in the pursuit of either personal, organisational or client interests, without regard to the wider effect that their actions have on the legal system or sector as a whole or on the collective reputation of their public profession.

The emphasis in the previous sentence is important: it suggests that there is something more *pervasive or structural* than merely a few 'bad apples' who engage in harmful or detrimental behaviour. It is behaviour *by any number of individuals or organisations*[90] (and whether coordinated or not) that undermines the public interest in maintaining the fabric of society or the legitimate participation of citizens in society.

In this context, it is sufficient to identify behaviour that leads to a noxious market (as defined above). The conclusion then follows that such behaviour is undoubtedly not in the public interest. Regulation or other intervention is then justifiable to prevent or discontinue it because the continuation of that behaviour is unacceptable. It is sufficient

89. For a detailed discussion of the nature and universality of vulnerability in legal services, see Mayson (2022: paragraph 3.2.3).

90. In the present context, therefore, the discussion of noxious markets should not focus only on those who are regulated for the delivery of legal services. It should also extend to others – such as politicians and the media – who, by their actions or comments fail to fund adequately the public administration of justice, or who knowingly or recklessly undermine its legitimacy (cf. paragraph 7.2 above), as well as to unregulated providers of legal services who perform in a way which intentionally or even inadvertently causes harm to consumers or the wider public (cf. Mayson, 2020: paragraphs 3.9 and 7.3; Mayson, 2022; paragraphs 4.3 and 7.2).

to address the adverse outcomes of a noxious market without needing to define what form of non-noxious market should replace it.

9.2 Distinguishing professional misconduct and noxious markets

The 'bad apple'[91] case can be illustrated by reference, for instance, to recent reports of the actions of certain immigration lawyers in supposedly making fake asylum claims and exploiting illegal migrants for profit.[92] It seems to me unarguable that these actions could be treated as being anything other than contrary to the public interest. However, they are isolated incidents of misconduct that have been identified and dealt with by taking the appropriate enforcement steps against those who have transgressed. In other words, they are evidence of distinct activities that the regulatory framework has properly addressed, rather than of pervasive or structural indicators that would suggest a noxious *market*.

Similarly, the consequences of the collapse of Axiom Ince could be considerable in that, because it is thought to arise from (though so far unproved) allegations of dishonesty and breaches of the solicitors' accounts rules,[93] claims on the SRA Compensation Fund are likely to result in the pay-out of large amounts to affected clients. Any proven dishonesty or breaches of professional rules would undermine public trust and confidence in the sector and the legal profession. As such, it would clearly demonstrate a departure from the higher objective values of a public profession that underpin the discussion of the public interest in this report. Nevertheless, again, this represents another specific instance of wrongdoing that regulation can adequately address, rather than suggesting a noxious market.

On the other hand, there are presently other examples in the legal sector that have given rise to significant questions about the underlying ethics and behaviours of those

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91. Gabbioneta et al adopt a distinction between bad apples, bad barrels and bad cellars (2019: 1711-1712). The bad apple case arises from a rogue individual acting in their own personal interests. The bad barrel leads to misconduct from "more systemic causes including dysfunctional cultures, practices and structures. A clear example is misaligned incentive systems in organizations ... that reward undue risk taking and lessen fiduciary obligations" (2019: 1712; and cf. footnote 117 below). The distinction between apples and barrels can, as footnote 117 and paragraph 9.4.4 below illustrate only too well, be important: the "'bad apples' ... models of professional wrongdoing ... have been criticized for detaching the individual from the collective, portraying wrongdoers as 'rogues' unrepresentative of the profession as a whole" (Harrington, 2019: 1469). Bad cellars lead to misconduct as the result of professional boundaries at a higher level, where different communities (such as lawyers and accountants), different national jurisdictions, and different stakeholders (such as clients, and employers), create opportunities – or even traps – for factors at the intersection of the boundaries leading to unquestioning passivity, over-reliance, responsibility-shifting, client capture, and loss of independence that undermine professional scope and judgement. All can be seen in the examples that will be considered in paragraph 9.4 below.
92. See, for example, https://www.dailymail.co.uk/news/article-12333013/Immigration-law-firms-LIE-authorities-win-asylum.html, https://www.legalfutures.co.uk/latest-news/government-ramps-up-focus-on-crooked-immigration-lawyers and https://www.legalfutures.co.uk/latest-news/sunak-undermining-trust-in-lawyers-says-bar-council.
93. See https://www.sra.org.uk/sra/news/press/axiom-ince-intervention-and-impacts/ and https://www.lawgazette.co.uk/commentary-and-opinion/axiom-ince-is-a-full-blown-crisis-for-the-whole-profession/5117602.article.

who provide legal services. They can be seen as mounting evidence of members of a profession whose commitment to higher standards cannot be taken as a given. It is suggestive of the expectation of wanting to be treated as members of a 'profession' but without wanting the burden of 'professional ethics' or of professionalism more generally[94] (cf. Bassett, 2005: 254, recorded in paragraph 7.4 above). Indeed, arguably, it is reflective of an expedient tautology that lawyers must be "ethical because they were professional and hence must be professional because they were ethical" (cf. Paisey & Paisey, 2020: 5).

In a regulated market for 'professional services', the widespread rejection by practitioners of broader aspects of professionalism or professional ethics (cf. paragraphs 7.3 and 7.4 above) must surely represent (at least the beginnings of) a noxious market and, as such, contrary to the public interest.

9.3 Categories of professional behaviour

In considering examples of potentially noxious markets and their possible relationship with professional behaviour, a number of combinations present themselves. These are based on: (a) the permissible or illicit nature of the client's activities; and (b) the professional or unprofessional behaviour of the legal adviser. With these principal variables, the categories could be articulated as follows:

I. professional behaviour by lawyers in supporting the permissible activities of clients;

II. professional behaviour by lawyers in supporting the questionable activities of clients;[95]

III. professional behaviour by lawyers in supporting the illegitimate activities of clients;

IV. questionable behaviour by lawyers in supporting any client activity;

V. unprofessional behaviour by lawyers in supporting the permissible activities of clients;

VI. unprofessional behaviour by lawyers in supporting the questionable activities of clients; and

VII. unprofessional behaviour by lawyers in supporting the illegitimate activities of clients.

In these Categories, 'professional behaviour' is a reference to complying with the law and professional ethics. The reference to lawyers 'supporting' client activities is intended to go beyond advising clients on their legal rights and duties, which I would

94. This might explain the following observations by Campbell (2011: 137): "Today when lawyers speak of 'ethical' conduct, the most likely connotation is the minimal behaviour required to avoid sanction – not whether the conduct is morally right or wrong." In this case, he would then draw a distinction between ethics and professionalism (2011: 139): "ethical obligations can be seen as the shall-nots of lawyering, and professionalism as creating affirmative obligations of the lawyer to the broader society."

95. As Ross points out (2024): "Lawyers can be described as amoral when they see nothing wrong with representing a client with immoral purposes." Category III moves beyond immorality to illegitimacy.

regard as acceptable and professional behaviour in all circumstances envisaged by the seven Categories. Accordingly, I would not characterise as 'unprofessional behaviour' a lawyer advising their client that their prospective activities or wishes are contrary to the law (or even, in the context of this report, contrary to the wider public interest and therefore not in the client's *best* interests: cf. paragraphs 7.3, 7.4 and 8 and footnote 83 above).

Part of the rationale for legal professional privilege is to allow clients to be open with their lawyers and to be given independent and objective advice about their legal rights and duties (cf. paragraph 7.4 above). To my mind, it must then follow that it is in the public interest for lawyers to give such advice in circumstances where what the client contemplates is, or might be, illegal or questionably so.

However, once the lawyer, having given such advice, then proceeds to support the client (in ways often described as 'enabling' or 'facilitating': cf. paragraph 9.4.1 below) in achieving an illegal or questionably legal outcome, in my view a line is then crossed and that support becomes unprofessional. The following passages from Kershaw & Moorhead explain (2013: 54):

> The act of simply informing a person of their legal position does not help or assist wrongdoing even though the advice may be taken into account by the client in deciding to commit a wrong. Reactive advice does not facilitate or enable the client's act but simply informs them of the law's understanding of the proposed act as described by the client....
>
> Advice that informs a client is conceptually distinct from information that assists in the commission of an act.... Whilst we may have qualms about advice which increases the probability of wrongful acts, it is distinct from active assistance not only conceptually but also from a moral and policy perspective: the moral agency involved in active assistance is greater whereas the rule of law motivations for permitting advice are stronger.

This report proceeds on the basis that unprofessional or even questionable behaviour by legal advisers will never be in the public interest (because it will fail to maintain public trust and confidence in those who provide regulated legal services and in the legal and justice system generally). Depending on the context of the behaviour, it would variously undermine honesty and integrity, the rule of law, the interests and administration of justice, and access to justice. In those diverse ways, such behaviour would therefore fail to promote and protect the public interest in the fabric of society and in the legitimate participation of citizens in society.

Consequently, the first three categories above are of most relevance to the discussion in the following paragraphs, given that they are all predicated on *professional* behaviour by the legal adviser. The principal question will be whether the questionable or illegitimate activities *of the client* can be said to affect the perception or character of the behaviour of the adviser such that the combination of behaviour and activities no longer reaches the public interest threshold.

There is, however, a further question that must be asked in relation to the application of the Categories above and the judgements that flow from that: From whose perspective do we define professional misconduct?[96] This might be answered by reference to

96. This is a contextual question posed by Gabbioneta et al (2019).

conformity with accepted norms, such that behaviour can be regarded as misconduct when it "appears to *counter wider public interest*, and hence undermines the normative basis of professionalism" (Gabbioneta et al, 2019: 1711; emphasis in original).

However, we also have to recognise that "professional norms can be at odds with societal norms, so that behaviours that are perceived as unethical or illegal by the general public are acceptable – and even desirable – within a professional context" (2019: 1717). In these circumstances, the public interest is effectively contested.

Accordingly, the public might accept that lawyers "are not acting illegally" but still wish to assert that they "may be acting unethically as they are not considering how technically and legally sound advice may have unintended consequences and raise undue risks" (2019: 1711). On the other hand, professionals might respond that legality matters most, and they may, indeed, even have sought to recategorise their actions as legitimate, value-neutral behaviour (cf. Harrington, 2019). These are the factors that go to the essence of law as a 'public profession' – of lawyers being more than 'hired guns' (cf. paragraph 7.4 above).

Taking tax avoidance as an example, Harrington demonstrates that, although "tax avoidance involves reducing fiscal obligations to the state through legally accepted means..., these practices have become controversial and are increasingly classified as professional misconduct" (2019: 1465); see also the discussion of tax avoidance in paragraph 7.4 above. Now, not only is tax avoidance contentious, "but the professionals associated with it have been labelled 'immoral'" (2019: 1470). This is, to some extent, founded on the view that tax avoidance "requires fastidious compliance with the letter of the law, while violating its intent; this creates the appearance of legitimacy without the substance" (2019: 1470).

In this context, Bogenschneider offers a somewhat challenging description of the work of a tax practitioner (2016: 779, 794 and 795; emphasis in original):

> [T]he corporate tax 'planner' takes one set of given facts, where the application of tax law appears to determinately result in the payment of tax under the law, and prospectively changes these facts to a *second* set of facts, where the application of the tax law is indeterminate. The 'manufactured' facts are thus presumably not within the boundaries of settled law, and are *by some degree* potentially illegal because the application of law to the new set of facts is unknown. In these circumstances, the tax attorney thus acts to transition the situation *toward* indeterminacy. This push toward indeterminacy is unusual in the practice of law since most of the time lawyers act to enhance or foster determinative legal outcomes, and not vice versa....
>
> Nonetheless,... any lawyer is certainly able to advise the client that one fact pattern results in tax and another not, just as any lawyer is able to advise a client that one course of action is lawful and another not....
>
> However,... everyone agrees that the tax lawyer cannot affirmatively create *unlawful* options for the client. So, the ethics of tax law hinges entirely on the significance of 'potentially' unlawful (i.e., indeterminate) as opposed to *determinatively* lawful if the attorney is to assist at all.... The question then arises as to why any tax lawyer would think they might be able to counsel toward potentially unlawful tax avoidance.

The problem with Bogenschneider's position is that, traditionally at least, tax avoidance – as opposed to tax evasion – has not been regarded as unlawful. Consequently, even

if the tax planning referred to is potentially unsuccessful, it would be presumptuous to describe it as unlawful (unless it involves dishonesty and amounts to evasion). However, Bogenschneider arguably makes a wider point by asserting that "assistance with tax planning for a client is not rendered ethical merely because it is (or might conceivably be) legal" (2016: 804; and that "to create indeterminacy is to undermine or *corrupt* the application of tax laws" (2016: 803; emphasis in original), by undermining public confidence in the tax system.

In this sense, a lawyer, by participating in the deliberate creation of indeterminacy through a manufactured second set of facts, and "thereby increasing the uncertainty of application of the tax law," is engaging in "*presumptively* unethical attorney conduct" (2016: 803; emphasis in original). The lawyer is undermining the (tax) law, irrespective of the lawfulness or otherwise of the outcome. Such a conclusion could only be sustained by the existence of a higher duty to the public interest, as captured by the conception of law as a public profession.

To many observers, therefore, the advice and actions of many tax practitioners will appear to be morally suspect and perhaps raise questions about their integrity. As such, this will raise questions about professionalism and professional misconduct – because the claimed justification privileges, as it does, the client's interests and the professional's fees over the public interest.

For tax specialists, then, the characterisation of their work as 'misconduct' "has come as a particularly destabilizing shock to the profession's understanding of itself and its work" (2019: 1471). Even so, this characterisation of their conduct can be resisted "by recategorizing it as a form of professional service in the public interest"[97] (2019: 1483). Consequently (2019: 1490):

> Rather than representing a form of misconduct, such practitioners assert, their activities provide a valuable public service or represent 'respectable' ... professional neutrality. In this way, vice can be transformed into virtue. This transformation grants professionals the justification necessary to persist in work considered disreputable.

The perceived drawback of the impersonal, distanced approach of the neutral expert is that it "can also lead to 'moral unawareness' ... – a deliberate refusal by professionals to reckon with the impact of their practices" (2019: 1486). The challenge for practitioners is that (2019: 1488):

> [T]he authenticity of professional claims to wield knowledge in a disinterested and value-free way ... or of claims to provide service motivated by 'superior ethics, altruism and civic conscience' ... is difficult to assess. As a result, those two aspects of professional

97. This is sought by, for instance, claiming that it is taxation that is morally and socially wrong as an illegitimate (or illiberal: see Claassens, 2023, at footnote 74 above) exercise of state power (particularly in supposedly 'corrupt' states), and therefore that tax avoidance is morally justified: Harrington (2019: 1483). In addition, as technical experts, practitioners seek to present themselves as providing morally neutral expertise: practitioners "may be tainted by proximity to bad people (e.g. the clients) [and] are legitimating themselves and their practices not just by drawing on the norm of professional neutrality, but by using it to distance themselves from the world of interests and values to which (they imply) misconduct properly belongs" (2019: 1485): on neutrality, see further paragraph 7.3 above.

> legitimacy may be subject to shifting perceptions both from inside and outside the profession.

It is difficult to avoid the conclusion at this point that "professional wrongdoing – especially when it does not clearly violate any laws – remains largely in the eye of the beholder" (2019: 1467). In this case, the ultimate 'beholder' who would be called on to determine on which side of a line professional behaviour might fall – and whether or not it is consistent with the public interest – would be a regulator or judge (cf. paragraph 5.5 above). I venture to suggest that self-interested re-categorising of professional behaviour is not likely to find favour in the context of the obligations of public professionals.

Some support for this position can be found in the decision of the Solicitors Disciplinary Tribunal (as recorded in *Simms* v. *The Law Society* [2005] EWHC 408):

> In cases of professional misconduct, the behaviour of a solicitor is not only to be considered in the context of the legality or otherwise of the subject matter of the advice and assistance given. The Profession has a reputation to defend and maintain. A solicitor who involves himself in transactions which he knows or suspects or should have known or suspected could have involved illegality or impropriety or gives such transactions credibility cannot but appreciate that his behaviour will be perceived as affecting his integrity and trustworthiness and affect the integrity of the Profession. The duties of a lawyer as [an officer of the court] are not simply owed to the client but also involve the respect which the Profession owes to the law itself and justice....
>
> A solicitor is independent of his client and having regard to his wider responsibilities and the need to maintain the Profession's reputation, he must and should on occasion be prepared to say to his client "What you seek to do may be legal but I am not prepared to help you do it".

It seems quite clear from this extract that regulation expects solicitors to have regard to a higher objective standard and, indeed, in that sense, to exercise a moral judgement – not, it must be said, as an exercise of personal morality, but as a member of a public profession and as part of their consequential duty to the public interest. As Claassen expresses it (2023: 20): "The requirements of the rule of law ... form the moral requirements which are constitutive of the citizen-state relation" – in which case, a lawyer's membership of a public profession and the consequent fiduciary relation to the public must impose a moral obligation to uphold the rule of law.

However, as the conclusion of paragraph 7.4 above shows, the opportunity for such moral engagement is limited. Indeed, in the case of client intentions that are legal, but not morally acceptable to the lawyer, it is restricted to the decision to accept the client or cause.

9.4 Recent instances of significant concern

Four of the more problematic and recent examples of lawyer behaviour that give rise to significant concern will now be considered. In each case, the key question for this report is whether, in carrying out the activities giving rise to these (and related or similar) concerns, the lawyers in question were doing so in ways that were, or were not,

consistent with their professional duties and ethics and therefore did, or did not, protect and promote the public interest.

9.4.1 Enabling or facilitating kleptocracy and grand corruption

In the context of kleptocracy and grand corruption,[98] 'enablers' refers to those professionals who "have the knowledge, expertise, and authority to launder money or move proceeds of crime in an anonymous way", and "lawyers are among the group of professional service providers that are key in facilitating the illicit flow of capital by obscuring accountability and using legal means to evade regulations, primarily through securing access to finance, real estate, and visas or citizenship" (Elliott, 2024: 186 and 189; and cf. the 'deliberate creation of indeterminacy' in paragraph 9.3 above).

Kleptocracy and grand corruption often involve "obtaining and moving corruptly-gained money across country borders with the help of financial and legal professionals" (Elliott, 2024: 187), as a result of which public assets and resources are appropriated[99] for private gain. To the extent that this kind of corruption "has a significant impact on society – it creates inefficiencies and distorts a population's economy, is a driver of poverty and disease, and impedes sustainable development" (Elliott, 2024: 188), it both undermines the fabric of society and restricts or denies the legitimate participation of citizens in society. Further, "where corruption thrives, it throws the scales of justice out of balance" (Kukutschka, 2024). Corruption is, on any view within this jurisdiction, contrary to the public interest.

This raises again the issue of territorial connection as an element of the public interest (cf. paragraph 5.2 above). In the present context, the connection lies in the lawyers' connection with a UK jurisdiction or profession. The public interest is with the behaviour, reputation and standing of UK legal practitioners (and with it of the legal system itself) arguably being tarnished by the association with known or questionable corruption in another country or countries.

Indeed, if there is a possibility of putatively corrupt behaviour (that is, questionable or illegitimate client activity in the terms of the categories in paragraph 9.3 above) that takes place and has consequences in another jurisdiction but is supported (again, in the terms of that paragraph) by lawyers in the UK, then the lawyers would fall within Categories VI and VII above.

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98. See, for example, Artingstall (2019), Benson (2020), Heathershaw et al (2021) and Levi (2022). This type of enabling and facilitation might or might not include money laundering: see further Moorhead et al (2023: 35-36). The circumstances of kleptocracy and grand corruption, money-laundering, and enabling the commission of criminal acts must be distinguished from other frowned-on activities ('lawful but awful'), such as aggressive tax planning (cf. Gabbioneta et al, 2019; and cf. the exploration of tax avoidance in paragraphs 7.4 and 9.3 above), complex corporate structuring, or facilitating environmental harm. In a comment that would no doubt resonate with Dorasamy (cf. paragraph 7.1 above), Warburton observes (1998: 95) – in what seems to be a call for 'higher objective values': "The pressure of corrupt influence can only be reduced if business experiences cultural change in a way that elevates ethical values and social responsibility as legitimate competing commercial goals."
99. The issue sometimes is that the position of the client in the country of origin ensures that the appropriation is not a crime there.

Elliott goes further and points out that there is an element here of bringing the profession into disrepute and not upholding public trust and confidence (2024: 191). More than this, though, she also observes that those lawyers who are not involved in enabling corruption "do not seem to be publicly protesting those who may be involved in corrupt schemes" (2024: 191) and so, by their silence and 'ethical distancing', are also complicit in not upholding public trust and confidence.

On many levels, therefore, involvement in facilitating kleptocracy and grand corruption – or even in not calling out the contribution of others who are involved – is contrary to both elements of the public interest as defined in this report. There is also, since 4 March 2024, the additional regulatory objective of promoting the prevention and detection of economic crime (section 1(2)(i)), which sets out clear circumstances that could never be consistent with acting in the public interest.[100] Lawyers cannot therefore claim to be acting in the public interest while enabling, facilitating or, by silence, condoning corruption.

However, the issues are not always clear-cut, as Levi illustrates (2022: 136):

> If they had been acting for apparently licit (however unattractive) clients, few lawyers' actions would be criminal *per se* (though their actions might still have deleterious social consequences): they are 'enabling' commercial behaviour normally unless the extent of the obfuscation puts their conduct beyond the legal pale. However, 'enabling' is often used in a much broader sense to mean assisting money and reputation laundering irrespective of the awareness that funds originated as proceeds of (sometimes contestable) crime. This may be associated with a lack of intensive or even basic due diligence about the genuine identity and connections of the client, but sometimes it appears merely to mean they did not stop the money moving. 'Equality of arms' is usually regarded as a cry of help for resource-poor defendants against the State, but in oligarch or white-collar crime settings, it can be applied to poorly funded and out-skilled State institutions against mega-rich and well-connected defendants or potential defendants, who can rapidly exhaust the tightly budgeted resources of most State bodies or investigative journalists....

Where there is clear evidence of criminal activity or intent by the client, Categories III and VII would apply. Unless the situation involves the proper and professional defence of the client in criminal proceedings (Category III), it is difficult to see how the interests of justice and public trust and confidence can be advanced. The client's activities are

100. Economic crime is very widely defined by section 193(1) of and Schedule 11 to the Economic Crime and Corporate Transparency Act 2023, including the 'listed offences' of cheating the public revenue (including fraudulent evasion of customs duty and VAT, and failure to prevent the facilitation of UK or foreign tax evasion offences); bribery, money laundering, fraud and conspiracy to defraud; theft, false accounting, suppression of documents, forgery and counterfeiting; contravening restrictions on financial promotion, dealing in transferable securities without an approved prospectus, issuing misleading statements or impressions under the Financial Services Act 2012, and misleading the Financial Conduct Authority and Prudential Regulation Authority; certain offences relating to fund-raising, funding arrangements and money laundering under the Terrorism Act 2000; offences under the Proceeds of Crime Act 2002 relating to concealing criminal property, and arrangements facilitating the acquisition of, use and possession of criminal property; failing to disclose knowledge or suspicion of money laundering; and prohibited financial assistance or fraudulent trading under the Companies Act 2006. The definition also includes not only committing a listed offence, but also attempting, conspiring, encouraging, assisting, aiding, abetting, counselling or procuring, as well as doing so outside the UK but where it would be an offence if done in the UK.

illegitimate, and no other public interest factors would seem to justify the adviser's representation.

As Kershaw & Moorhead observe (2013: 44 and 48; emphasis in original): "one finds within equity and the criminal law a theory of consequential responsibility which is applied where the state has a significant public interest in the effects and the prevention of the assisted action.... Accordingly, ensuring lawyerly *fidelity to the rule of law* provides a public interest justification for the extension of consequential responsibility to lawyers."

Where the question of legality is not clear (Categories II and VI), again the proper and professional defence of the client in criminal proceedings could pass the public interest threshold. Although there is no right to legal representation in civil matters, it might be difficult to justify a decision not to represent a client in those circumstances (placing the behaviour in Category II and therefore consistent with the public interest). Nevertheless, a moral decision not to accept the client or matter *before* instruction would be defensible (cf. paragraphs 7.3 and 7.4 above).

However, where the decision to represent the client is founded on turning a blind eye to the underlying question of legality (wilful lack of due diligence), or is taken when the client is known (or ought to be known) to be a serial or repeat transgressor and as suggesting a pattern of behaviour,[101] it is more than arguable that the adviser's conduct is not fully professional (moving it to Category VI and not consistent with the public interest). Representation in these circumstances could well undermine public trust and confidence in the integrity of the justice system.

In circumstances of kleptocracy or grand corruption, client acceptance or supporting clients in furthering their illegitimate aims contributes to law being a noxious market as defined in paragraph 9.1(b) above. As such, it is contrary to the public interest and the values of a public profession.

Finally, I would argue that potential clients who are seeking to engage lawyers to enable or facilitate illicit transfers (at least where the source of wealth or assets cannot be explained or adequate due diligence has not been conducted) should not themselves be regarded as engaging in *legitimate* participation in the UK's fabric of society (specifically, its financial, property or legal systems).

As such, there is no public interest engaged to justify UK legal representation in their transactions (or, to put it the other way, there is a public interest in them *not* having UK

101. See further paragraph 9.4.3 in relation to non-disclosure agreements. Cf. Lord Nicholls of Birkenhead in *Royal Brunei Airlines Sdn Bhd* v. *Tan* [1995] 2 AC 378, at page 389: an honest person does not "deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless". See also the Solicitors Disciplinary Tribunal in the *Simms* case (cf. paragraph 9.3 above): "A solicitor who does not establish the veracity of the transaction and those with whom he is dealing or who makes no proper enquiry or takes on trust extravagant and unlikely claims puts his and the Profession's reputation for prudence, integrity, honesty and trustworthiness at risk. It should come as no surprise to him that his actions are brought into question." For guidance in making these risk-based assessments, see Financial Action Task Force (2019: paragraphs 90-128).

legal representation).[102] This would be an example of Category VII rather than Category III on the basis that it cannot be professional behaviour to support illegitimate participation. This could be explained as an example of a lawyer being expected, in accordance with their 'higher' duties as a member of a public profession, to exercise a professional judgement of social conscience (cf. Campbell, 2011: 141, quoted at paragraph 7.4 above). As Kershaw & Moorhead express it (2013: 27; emphasis in original): a case can be made "for imposing limits on the zealous pursuit of client interests by holding transaction lawyers to account where their actions generate a *real, substantial and foreseeable* risk of client action that is unlawful or 'probably unlawful'."

9.4.2 SLAPPs and abusive litigation

According to a Government factsheet,[103] strategic litigation against public participation (SLAPPs) can be described as

> legal actions typically brought by corporations or individuals with the intention of harassing, intimidating and financially or psychologically exhausting opponents via improper use of the legal system. SLAPPs are typically framed as defamation cases brought by wealthy individuals (including Russian oligarchs) or corporations to evade scrutiny in the public interest. They can occur across a broad spectrum of issues including data protection, privacy and environmental law. Actions are typically brought against investigative journalists, writers and publishers, and are designed to silence criticism.
>
> SLAPPs characteristics include, but are not limited to, large numbers of aggressive pre-action letters, targeting a financially weak defendant and bringing claims simultaneously in multiple jurisdictions. At their heart SLAPPs fundamentally undermine freedom of speech and the rule of law.
>
> SLAPPs are common around the world with claimants relying on many claims in different jurisdictions to cause as many problems for defendants as possible.

SLAPPs, and abusive litigation and behaviour more generally, raise some challenging and critical issues about the role of lawyers and the representation of client interests[104] (cf. paragraph 8 above). The public interest requires us to emphasise, and not lose sight of, the fundamental constitutional importance of the rule of law and the independent, effective administration of justice. This will protect society from the risks not just of ineffective legal representation but also from the harmful effects and costs of *competent*

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102. I accept that the conclusion would be different if a potential client were to be accused of a crime in the UK (and cf. United Nations, 1990, paragraph 1): in these circumstances, the 'right' to representation in criminal proceedings would come into play (particularly for barristers subject to the cab-rank rule: cf. footnote 71 above). Nevertheless, the right to legal representation in criminal proceedings should not inevitably be extended to justify acting for the same (type of) person in a civil or commercial matter where, on the analysis in this report, the activities of that person are (or on reasonable enquiry or due diligence would be seen as) illegitimate and, as such, carry no public interest justification.
103. See https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/factsheet-strategic-lawsuits-against-public-participation-slapps.
104. See Moorhead et al (2023), pages 29-36: there might be more suggestions of SLAPPs than genuine examples of litigation actually intended to stifle public debate; however, there are certainly more instances of litigation that is conducted in such a way as to intimidate other parties or that does not lead to the appropriate and proportionate use of judicial and court resources (see the *Amersi* case, paragraph 8.3 above and https://taxpolicy.org.uk/2023/11/08/worst/).

legal advisers and representatives who pursue specious or aggressive litigation and outcomes on behalf of their clients.

Middleton & Levi (2015) describe 'abusive litigation' as including intimidating, demanding behaviour that is often justified as 'merely acting in the client's best interests'. Leitch emphasises the point (2017: 677):

> Where there is a serious imbalance of knowledge, power, and resources between the parties, and the use of questionable – if legally permissible – tactics to maintain an advantage in litigation, there will be serious consequences for the weaker party. The prioritizing of the partisan commitment to client interests can obscure lawyers' responsibilities to engage in a consideration of their competing responsibilities, or worse, be used as a justification for conduct that may further the client's immediate interests and remain undetected by a party untrained or inexperienced in the process.

The reference to 'questionable – if legally permissible – tactics' suggests that such tactics could bring the legal adviser's behaviour within Categories I-IV, although the context is suggestive of knowingly taking an advantage (cf. footnote 110 below). One of the relevant considerations here might therefore relate to whether that advantage is sought at the client's instigation or on the lawyer's initiative – in other words, whether we are looking at the professional's behaviour or the client's activities.

In their guidance for the conduct of litigation, the SRA cite "examples of where solicitors have failed to balance properly duties owed in the public interest, to the court, to their client and to certain third parties. Some of the situations involve the solicitor improperly prioritising the client's interests above others. They include situations where duties owed to others and to the court have been overlooked. In others, even the client's best interests have not been served".[105] They then refer to: making allegations without merit; pursuing litigation for improper purposes; taking unfair advantage; misleading the court; and conducting excessive or aggressive litigation.

SLAPPs are a particular form of abusive litigation, as the extracts from the *Amersi* case in paragraph 8.3 above show. Neither the general nor the specific can be justified by reference to the 'zealous representation' of a client's best interests. In other words, abusive litigation is not consistent with professional behaviour (or, therefore, with the obligations of a public professional to the public interest). Where, as in *Amersi*, the client is engaged in an 'illegitimate collateral objective', the activities in question are illegitimate and a legal adviser has no professional role in supporting the client in pursuing them (placing the behaviour in Category VII).

However, there may be a fine line between zealous representation and abuse. The following passage from the recent judgement of Fancourt, J. in *Haddad* v. *Rostamani & Others* [2024] EWHC 448 (emphasis in original) bears consideration:

> Solicitors and barristers owe an overriding duty to the court not to mislead it by presenting a case or asserting facts that they *know* to be false or which are manifestly false, or to make serious allegations against another person which are unsupported by evidence or instructions from their client. A lawyer may not make an allegation of fraud or of comparably serious misconduct, such as conspiring to cause harm by acting unlawfully,

105. See https://www.sra.org.uk/solicitors/guidance/conduct-disputes/.

> unless they have distinct instructions from their client to make that allegation *and* there is evidence capable of supporting a finding of fraud or impropriety[106]....
>
> Subject to the overriding duty to the court, the lawyer's duty is to present the facts as their client alleges them to be and advance arguments based on those facts. Importantly for present purposes, a lawyer does not owe the court or another party to the case any duty to investigate the facts, or to ascertain the truth, before advancing the factual case on behalf of their client.[107] That is so even if they have doubts about the likelihood that what their client tells them is true. What the lawyer advises their client confidentially about the strength or weakness of the evidence is of course privileged, and not something into which the court or another party can inquire.[108]
>
> The English lawyer's duty to their client is to seek by all proper professional means to advance the client's case, fearlessly, in accordance with the client's instructions, as long as there is a proper argument capable of being advanced. If the client's case is a weak one, the Court will so decide. Although the lawyers are paid by the client and often work closely with the client in preparing for a hearing or trial, they do not become associates of the client or otherwise identified with the client's interests. They remain functionally independent, and their overriding duties to the court are a cornerstone of that independence.

This passage strikes me as seeking to navigate the fine line.[109] On the one hand, there is fearless representation consistent with all *proper* professional means, including when the lawyer has doubts (which would not require the lawyer, in effect, to pre-empt the court's decision on the merits of a case, and which, to some extent, Martinez & Juricic describe as 'posturing'[109]). On the other hand, the lawyer must fulfil their overriding duty not to mislead the court based on explicit knowledge of inconsistent or baseless facts or assertions, which would amount to *improper* means, or by encouraging or enabling their client to use litigation and court processes to pursue an 'impermissible collateral purpose' (as in *Amersi*) and so consciously waste court time and resources on matters that are not connected to the proper purpose of the proceedings (cf. paragraph 8.3 above).

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106. The behaviour described so far in this extract (subject to the 'unless') clearly points to unprofessional behaviour in Categories V-VII.
107. This view is consistent with that expressed in the Inner House of the Scottish Court of Session by Lord Kingarth in *Council of the Law Society of Scotland* v. *Scottish Legal Complaints Commission* [2010] CSIH 79, at paragraph 27: "the solicitor was acting on his clients' instructions. In the circumstances his duty, acting on those instructions and on information provided by his clients, was to report his clients' concerns.... In no sense could the solicitor, in these circumstances, be said to warrant, or be personally responsible for, the accuracy of what he was told. Nor could it be said that he had any duty to carry out any independent check or checks as to whether the information he received was true." Nonetheless, Kershaw & Moorhead (2013: 52) suggest that the client's answers "must be plausible"; presumably, if the lawyer has, for some reason, been 'put on notice' or otherwise has reason to question the client's assertions, plausibility should reasonably be in doubt (and cf. footnote 101 above).
108. The behaviour described in this paragraph of the judgement clearly points to professional behaviour in Categories I-III.
109. The SRA Code of Conduct requires that solicitors must not mislead (or attempt to mislead) not just the court but also clients and others, either by their own acts or omissions or allowing or being complicit in the acts or omissions of others (including the client): SRA Code of Conduct, paragraph 1.4. As Martinez & Juricic put it (2022: 248): "a lawyer is allowed to engage in a certain amount of posturing while advocating for their client, but there are a number of limits on how far the lawyer can go before posing a threat to the public and rule of law."

In seeking to help practitioners navigate the line, the SRA offers the following guidance:[105]

> The courts have made clear their disapproval of what they consider to be excessive litigation (see for example *Excalibur Ventures LLC* v *Texas Keystone Inc and others* [2013] EWHC 4278 (Comm) [2013]).
>
> They have also criticised the conduct of cases that occupy court time to the detriment of others. Such cases can involve disproportionate valuations of the claim, unduly wide-ranging allegations of impropriety and inappropriate volumes of correspondence.
>
> The courts often accept that such cases have been pursued in accordance with a client's instructions. However, while solicitors are responsible for the strategy of their client's case, they cannot abrogate their responsibility to the court and to regulatory principles and codes, on the basis that they are acting on their client's instructions alone.
>
> Although solicitors are not routinely obliged to challenge their own client's case, they do have a duty to interrogate and engage properly with the legal and evidential merits. They must not advance arguments that they do not consider to be properly arguable and they must have regard to the rule of law and the proper administration of justice.
>
> Equally, taking on or defending weak cases without making the potential costs, risks and merits clear to the client, may mean solicitors fail to act in their client's best interests. They may also be breaching other regulatory principles.

SLAPPs and abusive litigation 'cross the line'. They are not consistent with the proper administration or interests of justice and intentionally set out to deny or undermine the legitimate participation of weaker or more vulnerable parties. Whether the instigator is the client (illegitimate activities) or the lawyer (unprofessional behaviour), the lawyer's behaviour always is or becomes unprofessional. This is because the abuse inherent in the tactics deployed brings the overriding duty to the court into play and displaces any reliance on 'proper means' or 'acting on instructions'.

Carle (2006: 120) advocates taking a broader approach to the role of a lawyer than that of being client-centred (cf. paragraph 8.1 above) – an approach that I would characterise as prioritising the public interest and being consistent with the conception of a public profession. Instead, she would encourage "calling on lawyers representing powerful interests to refrain from exploiting[110] opportunities that would bar adequate consideration of less powerful interests affected by the representation." Such exploitation is contrary to the public interest and lawyers should not support it or clients who wish to act in this way.

Very often the standard conception of the lawyer's role (cf. paragraph 7.3 above) is used to justify advancing autonomous interests in client representation. But, as Kim explains (2020: 1673 and 1680; emphasis in original):

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110. The Code expresses this as not taking actions that would "*abuse* your position by taking *unfair advantage* of clients or *others*": SRA Code of Conduct, paragraph 1.2 (emphasis supplied). As Campbell stresses (2011: 119: "Actions taken solely to delay or to harass, or to gain an unfair advantage in litigation, reflect poorly on the legal profession in the eyes of the public." Not only would such actions therefore be inconsistent with paragraph 1.2, they could also be a breach of SRA Principle 2 that requires solicitors to act "in a way that upholds public trust and confidence in the solicitors' profession and in legal services".

> Moreover, situations where *haves* and *have-nots* directly interact in problematic ways are not exactly rare. Just think about the ubiquity of landlord-tenant, employer-employee, health insurer-insured, retailer-consumer, and manufacturer-consumer relationships....
>
> Given how commonplace such interactions are, it is reasonable (and thus *not* a non sequitur) to implore lawyers for the *haves* to exercise restraint and avoid placing the *have-nots* in situations where they need lawyers but cannot access them. By refusing to forbear and, instead, assisting immoral (but legally permissible) plans, lawyers for the *haves* can aggravate the economic, social, and psychological standing of the *have-nots*. In doing so, lawyers are exacerbating the consequences of economic inequality....
>
> [T]he interaction between the principle of neutrality and the problem of economic inequality can lead to the wholesale divestment of fundamental legal rights of the *have-nots*.... Therefore, those lawyers, who are promoting their clients' goals consistently with the principle of neutrality, are not only depriving individuals of access to the law but are also undermining their autonomy – the very value that defenders of the standard conception claim to embrace. Unless these defenders can offer persuasive reasons why supporting the autonomy of one's own clients morally justifies depriving others of their autonomy, the autonomy-based justifications must fail on their own terms.

This approach is supported by Dare. Where litigation tactics are adopted that are intended to delay, deny, overwhelm or 'grind down' an opponent, the intention is to encourage capitulation or withdrawal before a court has the opportunity to determine the parties' true legal rights. In those circumstances, such tactics avoid the 'proper' outcome of the legal process. Dare explains (2004: 33; emphasis supplied):

> [I]t is the role of lawyers to assist individuals to avail themselves of the rights allocated to them by their communities. This role does not generate obligations or permissions to *avoid* determinations of rights claims. Lawyers who abuse processes of discovery, for instance, to prevent a case coming to court quite simply do not perform that role. An understanding of the duty of zealous advocacy that portrays lawyers as being allowed or obliged to use every lawful tactic to *prevent* the legal system addressing a case is simply mistaken. Note why it is mistaken: it goes wrong because it fails to see how the duties of lawyers are derived from a proper understanding of their roles.

In the terms of this report, citizens availing themselves of the rights allocated to them is 'legitimate participation' (see paragraph 6.1 above), and lawyers' duties derived from a 'proper understanding' of their roles refers to their membership of a 'public profession' with obligations to the public interest (see paragraph 7.4 above).

However, abuse can appear in degrees. The SRA Code of Conduct requires that solicitors must not mislead third parties,[109] must not take unfair advantage of third parties,[110] and must treat colleagues fairly and with respect.[111] It is interesting that the requirement to treat others fairly and with respect is expressed to apply to 'colleagues' and does not obviously extend to third parties (including clients and opponents). As such, these duties appear collectively to amount to a much narrower obligation than the US notion of 'civility'.

The driver for considering civility as an aspect of professional behaviour and ethics[112] is its potentially moderating effect in improving the effective administration of justice and

111. SRA Code of Conduct, paragraph 1.5: this includes not bullying, harassing or discriminating unfairly, as well as (for managers) an obligation to challenge the behaviour of others that does not meet this standard.
112. Campbell, having drawn a distinction between professionalism and ethics (see footnote 94 and paragraph 9.2 above), then claims that the obligations of civility are "quite different from both

the reputation of the legal profession more generally – both of which, in the terms of this report, are significant objectives of the public interest. Campbell quotes from a court opinion on professionalism, in which the court laments – in terms similar in sentiment to those in *Amersi* (cf. paragraph 8.3 above) – that judges can be (2011: 102)

> required to devote substantial attention to refereeing abusive litigation tactics that range from benign incivility to outright obstruction. Our system of justice can ill-afford to devote scarce resources to supervising matters that do not advance the resolution of the merits of the case; nor can justice long remain available to deserving litigants if the costs of litigation are fueled unnecessarily to the point of being prohibitive.

In relation to the reputation of the profession, Campbell records that lack of civility is thought by some to be "the cause of the public's lost faith in the legal profession" (2011: 100), as well as that lawyers "who view their duties as primarily to their client[113] – as opposed to the integrity of the legal system as a whole – increase incivility" within the profession (2011: 104).

Against this background, it is perhaps not surprising that US states should explicitly adopt and affirm codes of civility (see, for example, Supreme Court of Ohio 2023, New York State 2020, and Commonwealth of Pennsylvania 2000),[114] some of which contain the express commitment to "act in a manner consistent with the fair, efficient and humane system of justice". Australia, New Zealand and Canada also have professional rules that emphasise an obligation of courtesy to all others (Baron & Corbin, 2015).[115]

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professionalism and ethics" (2011: 142). Rather, their purpose "is to ensure that the image of the legal process is preserved and respected by the public, and to ensure that disputes are resolved in a timely, efficient, and cooperative manner" (2011: 142). However it is characterised, though, I would propose that civility is nevertheless part of the duty to protect and promote the public interest, consistent with membership of a public profession (cf. paragraph 7.4 above).

113. In other words, those who subscribe to client-centred lawyering and 'hyper-zeal': see paragraphs 7.3 and 8.1 above.

114. Campbell acknowledges that (2011: 142) "civility is best viewed as a set of core obligations that deal with what may be described as common sense or manners ... intended to provide guidance to lawyers regarding how to conduct themselves in dealings with opposing counsel, clients, courts, and third parties". He distils from the states' published codes ten core concepts of civility (2011: 146), many of which are explicitly or implicitly contained within, say, the SRA's Code of Conduct: "(1) recognize the importance of keeping commitments and of seeking agreement and accommodation with regard to scheduling and extensions; (2) be respectful and act in a courteous, cordial, and civil manner; (3) be prompt, punctual, and prepared; (4) maintain honesty and personal integrity; (5) communicate with opposing counsel; (6) avoid actions taken merely to delay or harass; (7) ensure proper conduct before the court; (8) act with dignity and cooperation in pre-trial proceedings; (9) act as a role model to client and public and as a mentor to young lawyers; and (10) utilize the court system in an efficient and fair manner."

115. Although the SRA Code of Conduct does not refer to courtesy or civility, other jurisdictions have frequently taken the view that lack of courtesy or civility can be so significant as to undermine public trust and confidence in the courts, the legal system or the legal profession: this would be a breach of the Code (cf. footnote 110 above); cf. Baron & Corbin (2015). There seems to be a degree of latitude given in disciplinary proceedings to allow for 'robust communication', but the line will be crossed "where lawyers have become so zealous as to compromise their independence, or have acted out of annoyance or feelings that the actions of others have slighted them personally.... Where lawyers have been sanctioned it is because their conduct is considered to bring the reputation of the legal profession into disrepute or detrimentally affect the administration of justice" (Baron & Corbin, 2015: 23) – or, in other words, where the public interest is undermined.

Campbell goes so far as to suggest that (2011: 119) "lawyers should take steps to avoid costs, delay, inconvenience, and strife – that is, tactics that do not aid in truth-finding or the timely and efficient resolution of disputes" and that (2011: 120) "[this] obligation essentially places a duty of good faith and fair dealing[116] on lawyers in the course of litigation or negotiation". As such, "the principle of justice can require decisions that don't optimize client interests even when the rules of professional conduct don't expressly require those decisions" (Ross, 2024). This would include conduct intended "to annoy or impose additional costs on those involved in the litigation process. Thus, a lawyer should not engage in conduct solely for the purpose of draining the financial resources of the opposing party" (Campbell, 2011: 120).

What emerges from these various considerations is a set of obligations variously owed to different participants in the legal and justice system. Not all of them are separately identified in national codes of conduct (cf. SRA Code, paragraph 1.5 applying only to colleagues). However, all can be considered integral to promoting the public interest and the ideals of a public profession, and Campbell offers this helpful summary (2011: 146):

> In short, ethics addresses minimal obligations placed on lawyers under rules of professional conduct. Professionalism is identified as a lawyer's obligation to society as a whole [that stands] apart from a lawyer's obligations to her client. Civility is identified as those obligations that lawyers owe to other lawyers, their clients, and the court generally.

It might be claimed that obligations of courtesy or civility state little more than good manners (cf. footnote 114 above) and, in that sense, might be thought of as unduly intrusive or unnecessary – or even, for that matter, too difficult at a practical level to supervise and enforce. However, Baron & Corbin make the telling point that (2017: 157) "if lawyers cannot be trusted to adhere to such a basic professional and fundamental social principle as civility, what hope is there for lawyers to adhere to other, more difficult professional values, such as the prioritisation of the public good over the client's interests?".

In observing the heat of modern legal practice,[117] there is often no good answer to Baron & Corbin's question. In that case, "we can no longer be assured of public confidence in the profession in the absence of explicit rules of conduct, even in relation to fundamental values such as courtesy" (2017: 173), such that protecting and promoting the public interest requires more active and explicit action in addressing all

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116. The Supplementary Report of the Independent Review of Legal Services Regulation recommended the introduction of a positive duty of fair dealing (see Mayson, 2022: paragraphs 8.5 and 8.6.2).
117. Although the SRA Code of Conduct confines the professional obligation to treat others fairly and with respect only to colleagues (cf. footnote 111 above), it would seem even here that the legal profession almost universally fails in its duties: "It is, if course, an embarrassment that legal workplaces should be marked by harassment, discrimination and bullying. But such toxic environments also undermine the ability of individual lawyers working in them to conduct their work in an ethical way" (Baron & Corbin, 2017: 171). Further evidence of these toxic environments is apparent from the recent reporting by LawCare (2021) of burn-out, mental ill-health, bullying, harassment and discrimination, and of the just over one-third of lawyers responding to a survey who admitted to 'padding' their recorded time in response to internal pressure or culture: https://www.rollonfriday.com/news-content/third-lawyers-admit-padding-time-sheets#:~:text=35.5%25%20of%20the%20respondents%20admitted,done%2C%20albeit%20%22rarely%22.

forms of abusive behaviour, whether extreme or mild, and whether in relation to third parties or staff.

In light of the increasing scrutiny of litigation tactics by the judiciary, public and media, the regulators of legal services in the UK appear to be paying closer attention to aspects of lawyers' behaviour that edges closer to other jurisdictions' expectations of civility. The SRA's most recent statement on SLAPPs does seem to signal such a move. In guidance published on 2 April 2024,[118] the regulator identifies conduct that might indicate abusive litigation. This includes: allegations without legal merit (that is, that have no basis in law or would stand no chance of being successful in court); threats of exaggerated adverse or legally invalid consequences; writing letters that are overly aggressive, intimidating, harassing or threatening; sending excessive correspondence that is disproportionate to the issues in dispute or to the responses received; and improperly suggesting that there will be adverse consequences of telling others about the correspondence sent (including using labels such as 'private and confidential', 'without prejudice' and 'not for publication', with the intention of misleading the recipient into believing that there would be adverse consequences of any sharing of the correspondence with others).

This guidance very clearly states that the regulator will take into account behaviour by a solicitor that is, in terms of this paragraph, both 'uncivil' and directed at those who are not clients or staff of the solicitor or firm concerned.

The increasing tendency for litigation to be conducted in ways that are aggressive, abusive, improper, threatening or rude is a manifestation of a noxious market as described in paragraph 9.1(a)-(d) above. In all senses, such behaviour is not consistent with truly acting in the public interest or in accordance with the expectations of a public profession.

9.4.3 The use of non-disclosure agreements

Unlike abusive litigation, non-disclosure agreements (NDAs) typically arise in circumstances where there is no existing litigation – though they might often be proposed as a way of 'heading off' potential claims. Used properly, NDAs can be an effective way of protecting sensitive or confidential information (Category I); used with different intentions, however, they are capable of (Moorhead et al, 2023: 34) "improperly stifling the disclosure of misconduct (through inhibiting or preventing disclosure to regulators or courts of relevant illegality, for instance) or enabling serially abusive conduct" (Category VII).

Moorhead et al explain (2023: 35-36):

> As with SLAPPs, lawyers can deploy legitimate legal tools – here, contract – to protect legitimate rights (privacy) and interests (reputation)[119] but can also do so, knowingly or unknowingly, for illegitimate ends (covering up misconduct; making it harder to prosecute

118. See https://www.sra.org.uk/consumers/problems/fraud-dishonesty/legal-threats-solicitor/. See also the description of the actions of the defamation firm Carter-Ruck in its acceptance and representation of the entirely fraudulent operation of OneCoin at https://taxpolicy.org.uk/2023/12/18/carter-ruck/.
119. Undoubtedly Category I.

> or be legitimately litigated by other parties) or in potentially illegitimate ways (excessive definitions of confidentiality; intimidatory use of penalties and clawbacks; excessive or unenforceable inhibitions on proper disclosure).[120] Some of these illegitimate ends and means frustrate, and might pervert in the criminal sense, the administration of justice;[121] and some inhibit the freedoms of those subject to the agreements (to seek medical advice unrestrained, for instance, or to discuss the traumas of the relevant misconduct with their loved ones).[122]

As with many of the issues raised in this paragraph, the assertion by a lawyer that in preparing NDAs, he or she is simply acting on the client's instructions is not sufficient. In light of the negative consequences set out above, adopting this stance is not compatible with 'higher objective values' – in this case, the public interest in the rule of law and the legitimate participation of other parties in society through the proper exercise and defence of their legal rights, as discussed earlier in this report.

Moorhead et al properly observe (2023: 35):

> A reputable professional might be expected to have growing concerns each time the same client comes back with a case necessitating an NDA for alleged misconduct. At some point, a lawyer negotiating NDAs for a client repeatedly accused of wrongdoing might properly recognise that they are likely complicit in or facilitating that wrongdoing, and that legal tools are being deployed to ends that seek to put their client beyond, not within, the rule of law.

This description would seem to mark a lawyer moving from Category I (first NDA – though, if the client knows that they have committed a criminal offence and is trying to cover it up, the lawyer might instead be unknowingly in Category III) to Category VI (at best, if it is not clear that the client's activities are unambiguously illegitimate) or VII (if it has become clear).

As with abusive behaviour, therefore, there are circumstances (and judgements to be made about) when a line has been crossed between legitimate and illegitimate use of NDAs. In terms of this report, the illegitimate side lies where the public interest supersedes the client's interest (or, alternatively, where the client's *best* interests lie in recognising that the public interest is engaged[123] and leads to a conclusion that fulfilling their wishes is not consistent with it; cf. the *Simms* case, paragraph 9.3 above).

This position will arise when the rule of law or administration of justice is being compromised, knowingly or recklessly. Usually, the commission or investigation of potentially criminal or wrongful acts is being denied, or an asymmetry of power is being exploited to prevent or undermine an injured party in the legitimate pursuit of their

120. Undoubtedly Category VII when done knowingly; when done unknowingly, the issue of whether or not the behaviour is unprofessional might be determined by being judged to be the result of wilful or reckless blindness (not asking the right or obvious questions, or not carrying out the necessary due diligence: cf. footnote 101 above).
121. This would be contrary to the public interest by undermining the fabric of society, the rule of law, and the interests of justice.
122. These would be clear examples of seeking to deny the legitimate participation in society of parties to the NDA by exploiting an arbitrary exercise of power and denying the full and proper pursuit of legal rights and, in doing so, undermine the well-being of the affected party (cf. Mayson, 2022: Ch. 5).
123. Cf. footnote 83 above.

legal rights (particularly where there is evidence of a pattern of behaviour by one or more individuals accused of serial wrongdoing[124]).

Again, widespread inappropriate or questionable use of NDAs will shift legal practice into the arena of a noxious market, as described in paragraph 9.1(a)-(d) above, and take such legal advice and representation to a place that is inconsistent with the public interest and the actions of a public profession.

9.4.4 The Post Office Horizon Inquiry and pervasive misconduct

At the time of writing, the Inquiry is still in progress. However, it has raised a number of concerns about the actions and motivations of lawyers who have been advising the Post Office, both in-house and externally. In particular, the "defence of the Bates case[125] was criticised in excoriating terms by the judge, with the suggestion that the Post Office and its lawyers had attempted to frustrate, rather than promote, the administration of justice" (Moorhead et al, 2023: 26; and cf. Bassett, 2005: 774 at paragraph 8.2 above).

The concerns include: the misuse of NDAs;[126] advancing a case that is contrary to the evidence;[127] alleging misconduct without credible evidence; preparing misleading pleadings; failing to disclose relevant evidence;[128] excessive and improper redactions in disclosed documents; unjustified destruction of evidence; presenting misleading evidence and/or misleading the court; failing to make proper checks of instructions and evidence; making litigation as difficult and expensive as possible (by using overbearing techniques); frustrating the administration of justice; and taking unfair advantage of other parties (for example, through unfair contract terms and NDAs). It is difficult to see how the Post Office could sign up to the Hillsborough Charter (see paragraph 8.4 above) and then engage in or justify any of these behaviours.

This list represents a serious indictment of the behaviour of legal advisers in the Horizon cases, and there seems little doubt that each instance represents an example of unprofessional behaviour (by way of a breach of the duty to the court, or of the SRA Code of Conduct, and for being contrary to the interests of justice). While the ultimate judgement of the nature of the Post Office's activities in these cases (permissible, questionable or illegitimate) is not yet known, the lawyers' behaviour nevertheless

124. The use of NDAs in relation to Harvey Weinstein's behaviour might be the best-known example.
125. *Bates* v *Post Office Ltd (No 6: Horizon Issues)* [2019] EWHC 3408.
126. On NDAs generally, see paragraph 9.4.3 above. According to Moorhead et al (2023:34), "NDAs were a critical reason why the Post Office was able to contain criticism of its Horizon Software."
127. On this, Moorhead et al (2023: 26) write: "The tendency of some lawyers and their clients to present facts as they would like them to be seen, rather than as they are, reached an apotheosis in the Post Office litigation with, as Fraser J.'s pithy encapsulation put it, the Post Office's case being run on the basis that 'the earth is flat'."
128. While failure to disclose relevant evidence can seriously undermine a party's case and is contrary to the interests of justice, so too is massive over-disclosure: "It is wrong just to disclose a mass of background documents which do not really take the case one way or another. And there is a real vice in doing so: it compels the mass reading by the lawyers on the other side, and is followed usually by ... trial bundles most of which are never looked at.... [I]t is the downstream costs caused by overdisclosure which so often are so substantial and so pointless. It can even be said, in cases of massive overdisclosure, that there is a real risk that the really important documents will get overlooked": per Jacob, L.J. in *Nichia Corp* v. *Argos Ltd* [2007] EWCA Civ 741, at paragraphs 46-47.

remains unprofessional. As such, it falls within Categories V-VII and is contrary to the public interest.

It might be tempting to see these behaviours as instances of single cases of professional misconduct (cf. paragraph 9.2 above). However, the scale of the injustices, the length of time over which the misconduct occurred, the number of lawyers involved in those occurrences, and the general observation that both the SRA and the BSB have noted an increase in reports of lawyers misleading the courts,[129] all strongly suggest a pervasive and persistent turn in the nature of the legal services market that tends more to the noxious (cf. paragraph 9.1 above).

There is no sense in which the evidence of so much of the lawyers' discreditable actions emerging during the Inquiry can be said to be consistent with the obligations of members of a public profession, with their duty to the public interest and the interests of justice, or (even) with the *best* interests of their client.

129. See Moorhead et al (2023: 26).

PART 4

CONCLUSION

CHAPTER 10

SUMMARY AND CONCLUSIONS

10.1 Regulating and acting in the public interest

This report has sought to show that 'the public interest' can be given substance and meaning in the context of legal services. Unfortunately, the tendency to dismiss it as an unrealistic, vague and impractical ideal that is at odds with the more readily accepted obligation to act in the best interests of clients brings it into direct conflict with another ideal, that of law as a 'public profession'.

This report has also shown that the perception (and, in too many instances, the experience) of legal practice "reveals a far different reality, with the possibility that the public profession of law is more window-dressing than actuality.... Indeed, much of the practice of law looks nothing like a profession, much less a 'public' profession. Law practice today is simply another profit-making business, in which regard for the common good is no more than an afterthought" (Bassett, 2005: 722 and 723).

Part of the debate at the interface of politics, law and economics needs to address the value judgement that the shortcomings or imbalances discussed in paragraph 9.4 above are, or might become, the outcome of noxious or amoral markets that require further regulatory intervention. In this way, regulation in the public interest might, in Corning's terms (cf. paragraph 5.4 above) be able to redress the balance and restore *equality* of relationships, *equity* in the resolution of conflict and disputes, and the proper participation of citizens in society (founded on *reciprocity*) and in their democratic and legal rights, and the fundamental fabric and well-being of society.

The most likely explanation or motivation in circumstances where the public interest is not paramount in lawyers' decision-making or behaviour will probably reflect their pursuit of self-interest (to retain lucrative client relationships and therefore income and profit[130]) or the pursuit of a client's interests to the exclusion of other considerations.

It can certainly be observed that, where self-interest or client interests are pursued as a primary driver for behaviour, such actions are by definition not in the public interest or those of members of a truly 'public' profession. As Bitonti observes (2020: 3): "the expression Public Interest can be more commonly found in contexts of opposition to 'special,' 'particular,' or 'sectional' interests, while positive affirmations of it are usually only vague and generic". In this sense, it could be less important to seek to define and

130. Like Bassett, I ask "only that we look up from counting our gold coins" in the hope that we might "enhance our standing with the public, further the public interest, and reestablish our status as professionals" (2005: 768). This echoes O'Flynn's call (see footnote 15 above) that we should take more responsibility for our actions and take into account the consequences of them on others.

explicitly pursue 'the public interest' as to identify and juxtapose opposing interests that mean that the public interest is necessarily *not* being promoted or protected.

Alternatively, one might suggest that self-interest must always be subordinated to clients' interests *and* to the public interest (including duties to the court and to the interests of justice). Further, client interests must always be subordinated to the public interest. In this sense, the obligation is not merely to act in the client's interests but, as the professional principle makes clear, in the *best* interests of clients. This language emphasises, again (cf. paragraph 8 above), that the duty is not absolute but relative, and is subject to the higher objective values of public professionals.

The public interest is, inevitably, a multi-faceted – and even pluralistic – concept. The view advanced in this report is that it must be connected to a 'society', transcend sectional interests, and be explicitly underpinned by an overarching value system. The value system that I adopt here (based on the quest of a 'fair society' for equality, equity and reciprocity) is not one that is driven by the sectional interests of consumers, and does not privilege a philosophy of economics, market competition or consumerism to the detriment of society as a whole.

Rather, it is one which upholds those elements of collective endeavour that protect, preserve or promote the democratic fabric of society, and which seeks to protect or enhance, or remove or reduce impediments to, the ability of citizens to exercise their equal and legitimate claims to civil, political or social freedoms and participation. This value system is encapsulated within and expressed as 'the public interest'.

Accordingly, the definition which is offered here is that:

> **The public interest concerns objectives and actions for the collective benefit and good of current and future citizens in achieving and maintaining those fundamentals of society that are regarded by them as essential to their common security and well-being, and to their legitimate participation in society.**

Regulatory intervention to protect and promote the public interest in the provision of legal services is then justified if it secures the fabric of society as well as the participation of individual citizens in it. This is most likely to focus on the rule of law, the administration and interests of justice, duties to the court, and access to justice.

10.2 Making the public interest explicit

Following the line of thinking advocated in this report does not mean that there will never be any argument about how regulation to protect or promote the public interest might best be achieved, or that it will be impossible for opposing sides of a regulatory proposition to claim that the public interest supports their (mutually inconsistent) conclusions. As O'Flynn explains (2010: 313):

> The idea of the public interest itself does not specify how particular public interests might be best interpreted or secured. Nor does the idea provide any help when the pursuit of one public interest conflicts with the pursuit of another.... Yet the fact that the pursuit of one public interest may in practice conflict with the pursuit of another does little to undermine the idea of the public interest per se. After all, the values of freedom and

> equality can also conflict. But no one seriously suggests that we should give up on those values simply because of the many tensions that can arise between them....
>
> What ultimately matters is not that 'tricky judgements' will have to be made – that much is both obvious and largely unavoidable – but how they are made.... [W]e should try to take a broader or more encompassing view of public issues than simply consulting our own special interests in them.

However, a more overt consideration of the public interest should encourage better articulation of the basis for any conclusion or action, as well as the motivation that underpins it, and so enable more informed testing of the assertion made. This is surely preferable to a broad-brush assertion that any given proposition is or is not 'in the public interest'.

As SRA Guidance 7.2 requires, practitioners should be "able to justify your decisions and actions in order to demonstrate compliance with your obligations under the SRA's regulatory arrangements." The articulation and recording of a public interest justification for decisions and actions would be a significant step forward. As suggested in paragraph 3.1 above, this would offer the following benefits:

(i) transparency: the justification is made explicit;

(ii) accessibility: 'the public' are aware of the justification in their name and can find it; and

(iii) accountability: having articulated a justification, the behaviour can be evaluated.

10.3 Final thoughts

In summary, the important features of the public interest, and their relationship to the regulation of legal services, are:

- It is possible to develop a definition of the public interest that focuses on the core elements of the fabric of our society and the legitimate and equal participation of citizens in that society.
- These core elements are protected and promoted in the regulation of legal services by and through (principally) the higher objective values and obligations that are inherent in the conception of law as a public profession, namely, the rule of law, the administration and interests of justice, duties to the court, obligations of integrity and civility, and improving access to justice.
- The foundational values that underpin the definition rely on rationality, and the absence of arbitrariness or the exploitation of power so as to protect a minority or the vulnerable.
- A primary goal of regulation in the public interest is to realise and protect the systemic integrity of key institutions in society, including the administration of justice.
- While a definition of the public interest is possible – combined with a positive 'higher value' professional duty on lawyers to protect and promote it – it may be equally important to demonstrate that the motivation behind any questioned

behaviour does not lie principally in other interests (of client, self, organisation, or profession).[131]

- The process of identifying and articulating the underlying public interest values that motivate any decision or behaviour will be important in judging the legitimacy of it and avoiding any 'taint' of self-exculpation.

There may still be scope for debate and discussion about the best way forward for securing the public interest as well as public trust and confidence in the justice system, legal services and the legal profession. However, the examples in paragraph 9.4 above show the significance of the challenges we currently face. Although written in a US context, this conclusion from Martinez & Juricic (2022: 249) warrants careful reflection by anyone who is concerned about those challenges:

> [A] lawyer's duties might begin with the interests of their client but they do not end there. The rules set a floor of minimum conduct with regards to the expectations of lawyers to pursue courses of conduct that will promote the public good. The upper limit of when and how a lawyer should seek to pursue the public good is much more difficult to articulate, but the most recent concerns regarding the actions of some members of the legal profession seemed to violate even the minimal expectation one might have regarding the lawyer's pursuit of the public good.

I suggested in the Final Report (Mayson, 2020: paragraphs 3.7.2 and 6.4, and Recommendation 28) that the proper role of regulation in the public interest is to set, monitor and enforce the minimum floor; it is then up to the professions, their members and their professional bodies to define and promote their aspirational upper limit of professionalism. But I agree with Martinez & Juricic that any claim to being 'professional' and part of a 'profession' cannot credibly be taken seriously unless and until the membership is standing on, and not beneath, the minimum floor that is set by and maintained in the public interest.

Whatever doubts there might be about the precise meaning of 'the public interest', the conclusion of this report is that there is sufficient common ground to be aware of its likely application and consequence – and, more importantly, perhaps, to know when it cannot possibly be being pursued.

Where the public interest is, in any way, undermined or compromised by the behaviour of lawyers, they are not acting as members of a public profession. If such behaviour becomes – or is perceived to be – systematic, persistent, pervasive or structural, then the practice of law will reflect a noxious market (cf. paragraph 9.1 above) and will have lost all legitimacy in claiming to be a profession, let alone a public profession.

I therefore conclude with this trenchant summary from Kerew (2024: 1482):

> Without the rule of law, however imperfect, there is no democracy, there is no system of justice, and there is no role for lawyers. Meaningful change will happen only if we come together in a way that will preserve the profession itself.

131. In other words, where benefits to client, self, organisation or profession arise from behaviour that is consistent with the public interest, those benefits must demonstrably be the *consequence* of the public interest behaviour, not the primary motivation.

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