

THE MEANING AND CHARACTERISTICS OF PUBLIC POLICY IN INTERNATIONAL ARBITRATION

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Abstract

Public policy (PP) doctrine, being a substantial concept in many jurisdictions, is also among the evasive concepts given the contrary to practical application in the case law and complicated literature that is argued before many judges at different multinational levels. As a notion, PP has a vital impact on the execution of ICA awards in many adaptable ways.

Keywords: arbitration; international commerce; public policy.

Introduction

The notion of PP, being ambiguous in nature itself, is difficult to identify. ^[18] Many of researchers declared the doctrine of PP term as multi-faceted notion with triple distinct constructive logics. Three diverse notions about public can be classified as the public security, morality and interest which are described in **Figure 1**. Accordingly, different national courts may vary in their decisions on matters that involve consideration of PP.

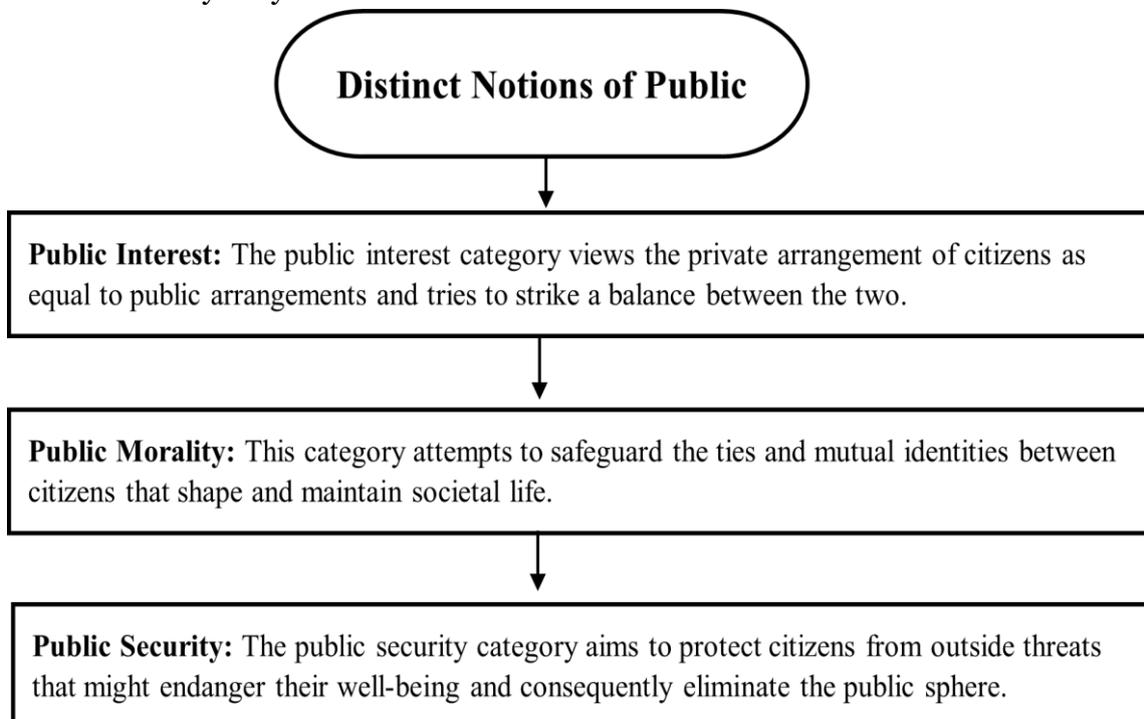


Figure 1. Three distinct notions of public

Many researchers define the notion of PP with their own understanding. Different authors and judgments have been enlisted in **Table 3**, elaborating the distinct notions of this ambiguity with different aspects. Accordingly, PP rules are essential in protecting substantial rights and principles of the community that have major political, moral, economic and social importance. The rules that contain these rights are mandatory and should prevail over any other rule. [26] After deep analysis about researchers review, following important questions arises:

- What can be considered as a PP rule for a community?
- How can we distinguish between PP rules and other legal rules?
- How a court can decide that a specific rule has an important value for the public?

Firstly, it should be considered that these rules of law must have a significant importance and should be mandatory in their application.

Table 3. Description of notions on PP in terms of its applicability

Author Name/ Judgment Name	Description of notions on PP
Parke B. in Egerton v. Brownlow (1853) ¹	<ul style="list-style-type: none"> • PP is an ambiguous term which actually gives calculated extent of uncertainty after its application. Despite of understanding of this term in various senses, the most common sense of understanding is the common beneficial interests of any society.
Lord Davey [27]	<ul style="list-style-type: none"> • PP can be considered as the most deceitful, uneven and unstable base for any sort of legal decision which made safe by a fair decision.
Kekewich, J. ² in Richardson v. Mellish ³	<ul style="list-style-type: none"> • PP can be exemplified as a rowdy horse which once start its riding, you never have idea in which direction it will carry you. PP term can never be confined within a boundary and not easy to explain.
Lord Denning in Enderby Town Football Club Ltd. v. The Football Association Ltd ⁴	<ul style="list-style-type: none"> • One can easily control the unruly horse by having an expert saddle man and it can easily jump over obstacles.
Mark A. Buchanan [28]	<ul style="list-style-type: none"> • Notion about domestic PP can be represented as those domestic values and set of rules which cannot be altered by parties' private agreements.
Julian Lew [27]	<ul style="list-style-type: none"> • PP rules include the fundamental basic rights like moral, economic and social rights of a state or multi-national state but it varies in accordance with the structure and social values of each state.
John Donaldson MR in D.S.T. v Rakoil (1987) ⁵	<ul style="list-style-type: none"> • PP being a vague and ambiguous term is very difficult to define exhaustively but it could be explained with wider boundary limits.

¹ Egerton v. Brownlow, (1853) 4 H. L. C. 1, p.123[Z], Supreme Court of Canada on Appeal, 1853. [2021-01-30]. <https://lawlegal.eu/egerton-vbrownlow/>.

² Davies v. Davies, (1887) Ch. D. 36., p.364[Z]. Court of Appeal. Royal Courts of Justice, London, 1887. [2021-01-30]. <https://casetext.com/case/davies-vdavies-17>

³ Supra note 17.

⁴ Enderby Town Football Club Ltd. v. The Football Association Ltd. (1971) [Z]. Court of Appeal. [1970] EWCA Civ J1012-4. England & Wales, 1971. [2021-01-30]. <https://www.casemine.com/search/in/enderby%2Btown%2Bfootball%2Bclub%2Bltd>

⁵ Deutsche Schachtbau-Und Tiefbohrgesellschaft Mbh v. Ras Al Khaimah National Oil Company [1987] [Z]. Court of Appeal. 3 WLR 1023. England and Wales, 1987. [2021-01-30].

Furthermore, basing on scholars' opinions it is obvious that PP term can be discussed in four major contexts as shown in **Figure 2**.

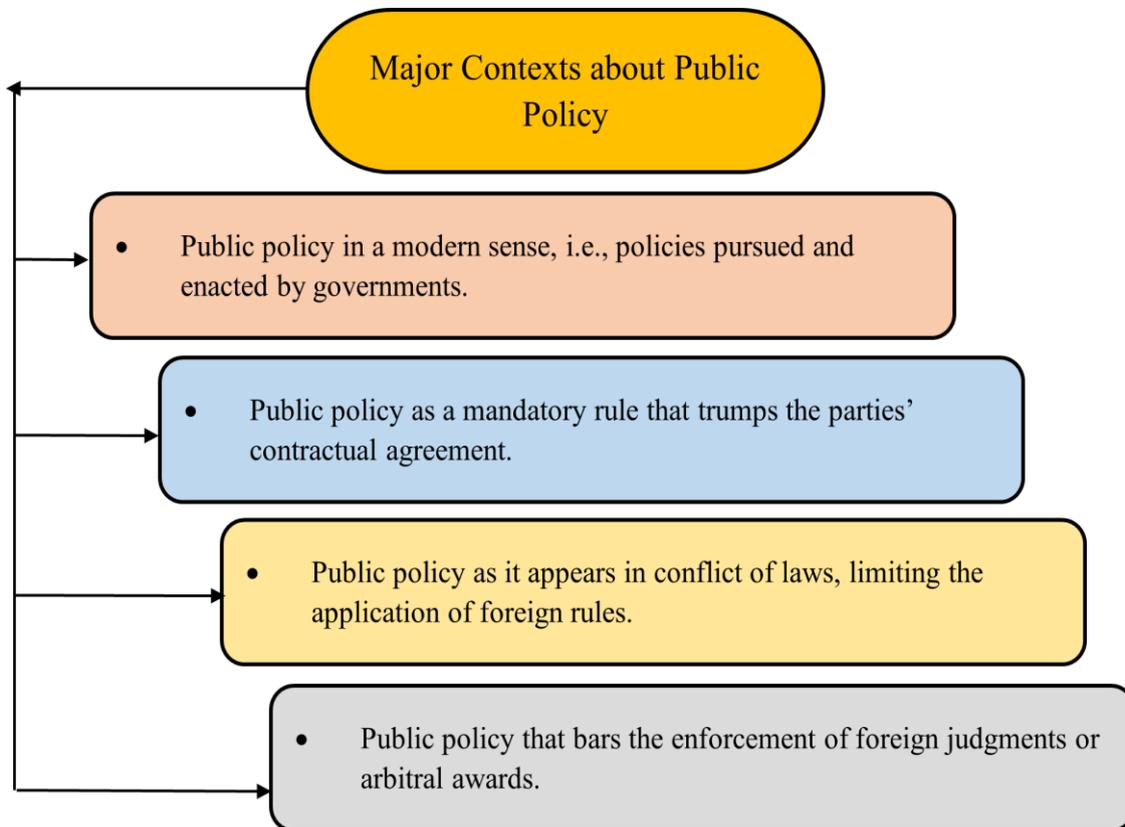


Figure 2. Major contexts of term PP

These are the mandatory rules, which exist in both statutory provisions and in common law rules. [29] In this respect, it is necessary to inspect the extent of the obligatory force of such mandatory rules. A mandatory rule could be restrictively fundamental to the public and, thus, any agreement that violates such a rule will be considered as offensive to the policy of a given community and must be voided. Conversely, as it is not necessary that each mandatory rule contains essential value to the community, so consequently it can be referred that every mandatory rule never constitutes all fundamental principles. According to this, while constructing mandatory rules as a part of PP, it should represent fundamental interests of community. To achieve this balance, an illustration of mandatory rules should take place to understand their limits and to be able to distinguish all basic rules that embody the fundamental issues.

After in depth review about different notions of PP, mandatory norms should also be addressed. Due to cultural versatility of different regions, the norm and applicability of term PP differs in each legal system. Protecting basic interests of a state and protecting public interests are major considerations for declaring PP rule. For ICA process, mandatory norms

and impact of these rules are currently a controversial issue. In the domain of statutory framework, mandatory rules are known to distinguish between the other rules which parties cannot derogate from by their agreement and other discretionary rules. ^[30] In civil law systems, mandatory rules also known as supplementary or directory rules. Supplementary rules are applicable even parties neglect or do not follow them in their agreements. ^[29] Besides, mandatory rules are always applicable and have priority over the parties' agreement. ^[31]

Protection of public and state interests as well as protection of private interests is the main concern of mandatory rules. ^[26] Furthermore, their function is to control parties' autonomy under the penalty of nullification of any agreement that violates or contradicts with such mandatory rules. Usually neither provisions nor statutes contain separate lists for mandatory rules and for supplementary rules but rather the distinction between the two types can be drawn from the way that they have been formulated. Mandatory rules always have an obligatory formula providing an order to do or to forbid certain actions. Due to mandatory nature these norms never let the concerned parties to derogate from them. ^[32] The reason why mandatory rules have such obligatory force is due to the importance of interests that these rules are designed to protect which explains why mandatory rules are usually mixed with PP rules. ^[30] Okezie Chukwumerije addressed the relationship among mandatory rules and PP. ^[33] He explained that mandatory rules embody the concept of PP and according to him mandatory norms would include those aspects of PP which can be expressed in crucial manner because those involve vital economic policies of the concerned state.

From literature it can be analyzed that mandatory rules have a broader application than PP and it is not necessary that each mandatory rule forms PP norm but every PP rule is mandatory. ^[34] This can be recognized for example, in procedural rules where several procedural rules are deemed mandatory although they do not form part of PP of a state. Therefore, the importance of interests which such rules aim to protect should be established, since PP embodies the most essential and fundamental interests in a community. Due to the ever-changing and developing nature of communities and our understanding of what the term community represents, it is entirely understandable that what is deemed appropriate for one community may not be appropriate to other communities. ^[30]

Domestic PP has its applicability in domestic relations only because it will affect the relations in the same territory where they have the responsibility of maintaining and protecting PP of the community from being violated by private agreements. ^[35] IPP enjoys more liberalized attitude. For international relations where foreign elements are involved, a state court of the forum may apply PP for protecting the national fundamental interests of a state from being violated by foreign elements. ^[36] The role of conflict between domestic PP and IPP is illustrated in the following section.

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