The public/private law headache: relief for sufferers?

Tanney, Anthony

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Anthony Tanney

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Name: Anthony Tanney

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ABSTRACT

This thesis concerns the distinction between public and private law in English administrative law, concentrating upon judicial remedies and procedures.

Chapter 1 of the thesis examines the circumstances that led to the decision of the House of Lords in *O'Reilly v. Mackman* (that in some cases public law issues may be raised only by Application for Judicial Review (AJR) under RSC Order 53) and outlines in broad terms the problems for litigants which the decision has posed. Also discussed is the "obverse" of the *O'Reilly* rule, laid down in *R v. East Berks. Area Health Authority, ex parte Walsh* (CA), that disputes raising no public law issue cannot be litigated by AJR.

Chapter 2 examines post-*O'Reilly* cases in which public law issues have been permissibly raised other than by AJR. These are cases in which a public law matter has had to be resolved in order to settle a dispute concerning liability in either private or criminal law. It is concluded that the recent decision of the House of Lords in *Roy v. Kensington Family Practitioner Committee* leaves unresolved some of the uncertainties in this area.

In *O'Reilly*, and in other cases, public law has been defined in terms of the scope of the prerogative remedies. The scope of certiorari is accordingly considered in chapter 3, where it is observed that the courts have effected a significant extension of public law - an extension which may continue into areas once axiomatically "private". Chapter 4 examines when a statutory duty is enforceable by action for damages and when, by contrast, only mandamus or injunction upon an AJR are available.

Chapter 5 concludes with an overview of the problems caused by both *O'Reilly* and *ex parte Walsh*. To the extent that advocates of reform have seen obstacles in their path, those obstacles, it is concluded, are possibly illusory.

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THE PUBLIC/PRIVATE LAW HEADACHE: RELIEF FOR SUFFERERS?

CHAPTER ONE: PREFATORY

Introduction

This thesis concerns the distinction between public and private law in English administrative law, concentrating upon judicial remedies and procedures.

The notion of a public/private law divide is still regarded in many quarters with suspicion. For example Lord Wilberforce, in a well-known dictum[1], has warned against any deployment of the terms public and private law that might give to public authorities some legal advantage denied to the private citizen -"for English law fastens typically not upon principles but upon remedies". However in the sphere of remedies a distinction can, of course, be found. For it is trite law that, whilst the remedy of damages can be obtained in appropriate circumstances against both private citizens and public authorities, it is only certain acts of public authorities that can be controlled by the prerogative orders of certiorari, prohibition or mandamus.

This is not to say that the distinction is in all respects clear between the types of wrong that will attract each sort of remedy. Formerly (for reasons that will be explained[2]) this uncertainty caused no greater embarrassment to litigants than did the question of whether it was worth proceeding at all against a given defendant. Recently, however, the position has been complicated by the fact that public law wrongs must now in some cases be litigated by a specialised procedure incorporating protection for public authorities against tardy or vexatious litigation. If a remedy is sought in proceedings designed to vindicate private rights the claim will fail, even if it is apparent that a claim pursued through the correct mechanism would have been successful. How has this state of affairs come about?

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[1] *Davy v. Spelthorne BC* [1984] AC 262 at 276.

[2] Below, "Defining the problem".

The background to *O'Reilly v. Mackman*[3] - the Law Commission Report, "Remedies in Administrative Law".[4]

The case law of the 1960's and early 1970's brought about what Professor Wade has called a "renaissance" in English Administrative Law.[5] In *Ridge v. Baldwin*[6] the House of Lords restored the proper scope of judicial supervision of "official" acts and decisions, by effectively abolishing the requirement that certiorari would lie only to "judicial" bodies. Moreover cases such as *Anisminic* and *Padfield*[7] gave an expanded definition to the types of error which might lead to such official action being struck down. Such was the scale of judicial activity in this period that Lord Reid's observation in *Ridge*[8] that "We do not have a developed system of administrative law" was an entirely inappropriate description of the law as it stood only fourteen years later.[9]

The detailed background to these developments and their wider impact must be sought elsewhere.[10] However one consequence of the renaissance was to direct attention to the remedies of administrative law - which operated in a quite unsystematic fashion. In particular the procedure for obtaining the prerogative orders of certiorari, prohibition and mandamus had been found over the years to work to the disadvantage of litigants in a number of respects. The judges' endeavours to circumvent these difficulties, sanctioning the use by way of alternative of the remedies and procedures of the civil law, whilst helpful, were nonetheless limited by other factors. The result was, in the words of the Law Commission, that "a litigant [seeking judicial review] may find himself in a dilemma. The scope and

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[3] [1982] 3 All ER 1124 (HL).

[4] Law Comm. No. 73 (1976), Cmnd. 6407. For earlier suggestions and proposals see Law Comm. No. 20 (1969), Cmnd. 4059; Working Paper No. 40 (1971).

[5] "Constitutional Fundamentals", (revised edn., 1989) at p.79.

[6] [1964] AC 40.

[7] *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147 (HL); *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL). See also *Congreve v. Home Office* [1976] QB 629 (CA).

[8] At 72.

[9] Per Lord Diplock in *O'Reilly v. Mackman* (supra) at 1130, referring to 1977.

[10] See Wade, "Administrative Law" 6th Edn (1989) (hereafter "Wade A.L."), parts IV-VI; De Smith, "Judicial Review of Administrative Action" 4th Edn (1980) by J M Evans (hereafter "De Smith J.R.A.A."), Parts 2 & 3.

procedural particularities of one remedy may suit one case except in one respect; but another remedy which is not deficient in this respect may well be unsatisfactory from other points of view".[11]

Undoubtedly the fact that some of the landmark cases of the renaissance - in particular *Anisminic* and *Ridge* - were civil actions for a declaration both pointed up the deficiencies of the prerogative orders and emphasised the limits of the civil law alternative. What precisely were these deficiencies and limitations?[12]

Challenging "official" action - procedural and remedial choices.

Classically it is to the prerogative remedies that a litigant[13] must turn where, lacking a cause of action in private law and alleging no crime, he is nonetheless aggrieved by an act or decision of a public authority. The two principal defects of the procedure for invoking these remedies prior to 1977 stemmed from its essentially summary character. First, evidence was taken on affidavit, not orally, with no provision for cross-examination. Accordingly the procedure was ill-adapted to deal with disputes of fact.[14] Secondly there was no express provision for discovery of documents or the administration of interrogatories. Had the plaintiffs in *Anisminic* proceeded by application for certiorari, rather than for a declaration of nullity, the absence of discovery would have defeated them.[15]

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[11] Law Comm. No. 73 at para 31.

[12] For detailed discussion see Law Comm. No. 73; *O'Reilly v. Mackman* (supra).

[13] ie an individual suing in his own name (and excluding those who take advantage of statutory appeal procedures against a particular administrative decision). It was, and presumably remains, possible for an individual to attempt to persuade the Attorney-General to apply for an injunction or declaration to restrain the commission of a crime or any wrong in respect of which a prerogative remedy is in theory available (the so-called relator action). For details see De Smith J.R.A.A. p 449-50. If the Attorney-General refuses, his decision cannot be reviewed by the courts - see *Gouriet v. Union of Post Office Workers* [1978] AC 435 (HL).

[14] In *O'Reilly* Lord Diplock offered by way of explanation the fact that a "tribunal or authority's findings of fact, as distinguished from the legal consequences of the facts that they have found, are not open to review by the court in the exercise of its supervisory powers" (at 1132). However there are, as his Lordship acknowledged, exceptions.

[15] For another example see *Barnard v.National Dock Labour Board* [1953] 2 QB 18.

These shortcomings, combined with the rule, mentioned above and not abandoned until *Ridge v. Baldwin*, that certiorari would issue in respect only of judicial acts, caused litigants to turn, with the sanction of the courts[16], to the remedies of declaration and, to a lesser extent, injunction as alternatives to prerogative relief. The significance of the former remedy as a means of controlling "official" acts had emerged in *Dyson v. Attorney-General*[17]. In that case a taxpayer had obtained a declaration that the Revenue had no power to demand, under threat of penalty, certain information about his financial affairs. With regard to the injunction, it had been established in *Boyce v. Paddington Borough Council*[18] that the remedy could avail an individual who had suffered special damage through interference with a public right, irrespective of any interference with his private rights.[19]

However this relaxed attitude to procedural matters was purchased at a price. For the procedure for seeking a prerogative remedy was hedged about with a number of safeguards designed to protect public authorities from excessive or tardy litigation.[20] Ordinarily these safeguards could be evaded only where the Attorney-General thought that the public interest warranted it.[21] Yet the disadvantages under which were placed litigants seeking prerogative relief were considered to outweigh this wider interest.[22]

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[16] See eg *Vine v. National Dock Labour Board* [1957] AC 488 (HL).

[17] [1911] 1 KB 410; [1912] 1 Ch 158.

[18] [1903] 1 Ch 109. See the criticism of this case in Emery & Smythe, "Judicial Review" (1986) at p. 250 n.14.

[19] Cf *Lonrho, Ltd v. Shell Petroleum Co, Ltd* [1981] 2 All ER 456 (HL), discussed in chap. 4 (text following n. 245) and chap. 5, n. 326.

[20] The applicant had to obtain the leave of the court to pursue his case; the application had to be supported by an *uberrima fides* affidavit (described by Lord Diplock in *O'Reilly* at 1130); and in the case of certiorari a six month time limit applied.

[21] Above n. 13. It may be that proof of special damage will also overcome the public interest in ensuring that only the Attorney-General (and Local Authorities proceeding under s.222 of the Local Government Act 1972) can seek an injunction in support of the criminal law. For this view, and the details of that public interest, see *Gouriet* (supra n. 13).

[22] See especially *Vine v. National Dock Labour Board*, supra.

Limits on the utility of the private law remedies.

But the new attitude was far from a remedial panacea. In particular, a declaration could not quash errors within jurisdiction[23]. Moreover, such errors could not be challenged collaterally and because the Divisional Court had no power to award damages it followed that where an invalid (but not void) decision resulted in interference with private rights, an aggrieved individual had to begin two wholly separate sets of proceedings to obtain the desired redress.[24]

This problem could be avoided in some cases by an injunction to restrain enforcement of an invalid decision within jurisdiction. However, apart from the obvious limitation where the harm to private rights had already occurred, injunctions could not be obtained against a Minister of the Crown.[25]

A final obstacle was that the rules of standing to seek the private law remedies were sometimes more restrictive than the equivalent rules for the prerogative orders.[26]

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[23] *Punton v. Ministry of Pensions and National Insurance* [1963] 1 WLR 186; *Same v. Same (No 2)* [1964] 1 WLR 226. For an explanation of the reasoning behind this rule see Craig "Administrative Law" 2nd Edn. (1989) p. 396.

[24] In fact, since *Anisminic* (supra), it seems likely that *all* reviewable errors will be classified as jurisdictional - see Lord Diplock in *O'Reilly v. Mackman*, at 1132-3. To that extent the Law Commission's concern with this particular problem seems misplaced. However, the effects of *Anisminic* were not appreciated until *Re Racal Communications, Ltd* [1981] AC 374 (sub nom *Re A Company*, especially per Lord Diplock) and even now cannot be stated with total certainty - see Wade A.L., pp 301f.

[25] Crown Proceedings Act 1947, s.21(2) as interpreted in *Merricks v. Heathcoat-Amory* [1955] Ch 567. For criticism see Wade (1991) 107 LQR 4; 142 NLJ 1275. Equally whilst a declaration *of nullity* could be obtained against a Ministerial act or decision the courts would not make interim declarations.

[26] It appears that the correct criterion for both the declaration and the injunction was special damage - see *Barrs v. Bethell* [1982] Ch 294 (Warner J, explaining the apparently more liberal approach in *Prescott v. Birmingham Corporation* [1955] Ch 310 (CA) as inadvertence). In *Bradbury v. Enfield LBC* [1967] 1 WLR 1311 (CA) the plaintiffs were permitted to seek injunctions despite not apparently having suffered special damage, although the standing issue was not fully addressed. See likewise *Legg v. ILEA* [1972] 1 WLR 1245.

In *Lee v. Enfield LBC* (1967) 66 LGR 195 the court appeared to interpret the special damage requirement very liberally. Moreover in *A-G ex rel. McWhirter v. Independent Broadcasting Authority* [1973] QB 629 at 649 Lord Denning MR stated (obiter) that an aggrieved individual could seek an injunction in civil proceedings where he had a "sufficient interest" in the subject matter of the proceedings. But if the policy of vesting public rights in the

The Law Commission intervenes - the "Application for Judicial Review".

It was to this state of affairs that the Law Commission's recommendations for reform were directed. The Commission's principal recommendation was that the declaration and injunction should be available with, and as alternatives to, the prerogative remedies under an improved procedure to be called the Application for Judicial Review (AJR)[27]. The requirement that an applicant obtain the leave of the court to make his application was to be retained[28]; so too the need for an applicant to show a sufficient interest in the subject matter

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Attorney-General can give way to the private interests of the individual who has suffered special damage it surely should not where an individual's grievance is no more defined than that of the public at large. Certainly where the public right in question is the observance of the criminal law special damage is a minimum requirement - and even then the House of Lords refused in *Gouriet* (supra) to give an unqualified assent to that proposition. Indeed Lord Diplock (at 502) simply stated that proper plaintiff where public rights were affected was the Attorney-General. Lord Wilberforce criticised Lord Denning's remarks at 483.

[27] Law Comm. No. 73, para 59. The Commission contemplated that an Act of Parliament would be necessary to implement the reforms. However most of the changes were implemented by the Rule Committee of the Supreme Court, which produced a revised Order 53 - the Order that had previously governed applications for prerogative relief. Most of the reforms are now in substance contained in Supreme Court Act 1981, s.31 which reads as follows:

(1) An application to the High Court for one or more of the following forms of relief, namely-

(a) an order of mandamus, prohibition or certiorari;

(b) a declaration or injunction under sub-section(2);

shall be made in accordance with rules of court by a procedure to be known as an application for judicial review [AJR].

(2) A declaration may be made or an injunction granted under this sub-section in any case where an [AJR] seeking that relief has been made and the High Court considers that, having regard to -

(a) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition and certiorari;

(b) the nature of the persons and bodies against whom relief may be granted by such orders; and

(c) all the circumstances of the case,

it would be just and convenient for the declaration to be made or the injunction granted, as the case may be.

[28] For the reasons set out at paras 37-39. See now Supreme Court Act 1981 s. 31(3) and RSC Order 53 r.3.

of the application.[29] The court was to have power to refuse dilatory applications where the delay had effects prejudicial to good administration[30] and the inability of the Divisional Court to award damages in appropriate circumstances was also corrected.[31]

The reception in the courts.

However in one sense the most important reform was that express provision was made in the new procedure for discovery, cross-examination and other interlocutory facilities.[32] For it began to look anomalous that litigants should be permitted still to evade those aspects of the Judicial Review procedure designed to protect public authorities when there was no longer any excuse for doing so. Accordingly public authority protection values came to represent the prevailing judicial philosophy[33].

These values were accommodated in different ways. In *Steeples v. Derbyshire CC*[34] Webster J held that the effect of Order 53 r.3(5)[35] was to make "sufficient interest" the test of standing to seek an injunction even where that remedy was sought in civil proceedings. Concerns about protecting public authorities from frivolous or tardy claims were to be accommodated in the fact that the injunction was a discretionary remedy and might be

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[29] See Supreme Court Act 1981, s.31(3). It appears that this sub-section does not faithfully reflect the intentions of the Law Commission. For details see Emery & Smythe, op. cit. at p. 275, explaining also how the House of Lords overcame the difficulty in *R v. IRC ex p. National Federation of Self-Employed and Small Businesses, Ltd.* [1982] AC 617.

[30] The Law Commission recommended no fixed time limit for applications. However Order 53 r.4 states that an application must be made promptly and in any event within three months, unless the Court considers that there is good reason for an extension. The Supreme Court Act 1981 s. 31(6) states that the court may refuse leave or any remedy sought if there has been undue delay in making the application and the granting of a remedy would unfairly prejudice third parties or be detrimental to good administration. However the section is without prejudice to Ord. 53 r.4. The resulting problem of interpretation is resolved by the House of Lords in *Caswell v. Dairy Produce Quota Tribunal* [1990] 2 All ER 434. For a case where an application though brought within three months was not "prompt" within r.4, see *R v. Independent Television Commission, ex p. TVNI Ltd* (Times 30/12/91).

[31] See now Supreme Court Act 1981, s. 31(4).

[32] Order 53 r.8.

[33] see eg *Heywood v. Hull Prison Visitors* [1980] 1 WLR 1386.

[34] [1985] 1 WLR 256, decided in 1981.

[35] The predecessor to what is now s.31(3) of the 1981 Act.

refused in the interests of good administration. However in *Barrs v. Bethell*[36] Warner J, observing that the court's discretion as to remedies did not afford protection as effective as the filter of the leave requirement under Order 53, held that only the proof of special damage to the plaintiff's interests would justify seeking an injunction in civil proceedings.[37]

In *Barrs*, Warner J supported his disapproval of *Steeples* with a reference to *Heywood v. Board of Visitors of Hull Prison*[38]. However in that case the plaintiff did appear to have suffered special damage, as he did also in *Uppal v. Home Office*[39], a case where the Court of Appeal had said (obiter) that "it would be wrong that this procedure [sc. civil action] should be adopted in order to by-pass the need for getting leave...where what in truth is sought is judicial review". So there was authority that even where special damage had been suffered, the discretionary nature of the injunction and declaration was considered insufficient protection.

However the precise status of the civil alternative in Judicial Review cases remained unclear until the decision of the House of Lords in *O'Reilly v. Mackman*, where the approach in *Heywood* prevailed over that in *Barrs*[40].

O'Reilly v. Mackman

Four inmates of Hull prison brought civil actions seeking declarations that disciplinary awards made against them by the prison board of visitors were invalid for want of observance by the board of the rules of natural justice. Leave was not obtained and proceedings were initiated after the expiry of the time period applicable to proceedings begun by AJR.

The defendants applied to Peter Pain J to have the writs and the summons struck out as constituting an abuse of the process of the court. They contended that the fact that, as was

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[36] supra, n.26.

[37] Contrast Peter Pain J in *O'Reilly v. Mackman* [1982] 3 All ER 680 at 685.

[38] Supra n. 33.

[39] Times 21/10/1978.

[40] It seems indisputable that the plaintiffs in *O'Reilly* had suffered special damage - see "Justice - All Souls: Farewell to Public Law?" [1988] PL 495 (C.T. Emery)

agreed by all sides, judicial review was an appropriate form of proceeding excluded other modes of challenge. This submission was not accepted by the judge. One reason why the plaintiffs had elected to proceed by action was that they anticipated a substantial dispute as to the facts. Whilst Order 53 was now equipped to deal with factual disputes it was clear that in practice evidence was nearly always taken on affidavit. To adopt a procedural course in which provision was made for the hearing of oral evidence as a matter of course was "clearly a rational choice"[41] and not one which his Lordship was prepared to characterise as an abuse.

The defendants' appeal to the Court of Appeal was unanimously allowed. Ackner and O'Connor LJJ held that the proper remedy to correct an allegedly wrongful determination by a board of visitors was certiorari, not declaration and that was enough to dispose of the case. However both judges considered that in circumstances where the declaration was available to correct ultra vires activity by a public body a complainant was entitled to seek that remedy either by application under Order 53 or by ordinary civil action.[42] Lord Denning took a more radical view holding that the Application for Judicial Review was to be an exclusive procedure in cases such as the present and that it was "an abuse to go back to the old machinery instead of using the new streamlined machinery".[43]

In the House of Lords it was Lord Denning's view which prevailed. Lord Diplock, with whom the remainder of their Lordships agreed, began by observing that a prisoner's expectation of remission - the denial of which formed the basis of the punishment meted out by the visitors - did not give rise to private law rights in the prisoner because it was not something which a court would protect against interference by awarding damages. However the anticipated reduction in sentence did give rise to a "legitimate expectation" of remission, conferring upon an inmate a sufficient interest to argue that its denial in a given case was ultra vires the board of visitors.[44] Having thus anchored the dispute firmly in the public law arena, Lord Diplock turned to the procedural issue.

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[41] at 688. It seems that Peter Pain J also regarded the claim as one involving a private law element on the basis of the decision in *De Falco v. Crawley BC* [1980] QB 460 (CA), disapproved in *Cocks v. Thanet DC*, discussed infra.

[42] Stressing again that the declaration was a discretionary remedy - see 700, 702.

[43] at 659.

[44] at 1126-7.

His Lordship noted the elements of the new procedure that equipped it to deal with disputes of fact and stressed that those elements should come into play whenever the justice of the case required it. This, combined with the new provision for discovery, meant that to proceed by civil action in a case where no private rights were at issue could only be a "blatant attempt[] to avoid the protections for [a respondent authority] which Order 53 provides". Nor could this protectionist concern be accommodated in the discretionary nature of the relief sought. That course would, given the length of the limitation period in civil proceedings, undermine "the need...for speedy certainty" as to the validity of a decision.

Accordingly in Lord Diplock's view it would "as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of ordinary action".To this general rule Lord Diplock adumbrated two possible exceptions. The first, and less important, was where none of the parties objected to proceedings begun by action.[45] The second was where "the invalidity of a decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law."[46] Others might be worked out on a case to case basis.

This process began with their Lordships' next decision. In *Cocks v. Thanet DC*[47] it was held that a housing authority's decision that an applicant for housing did not satisfy the relevant statutory criteria[48] was challengeable only by AJR. This was so despite the fact that a favourable decision gave rise in the applicant to a private law right to accommodation.[49]

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[45] Cf *R v. Durham City Council ex p. Robinson*, Times 31/1/92 (Parties cannot create a public law jurisdiction)

[46] at 1134. The meaning of this will be discussed infra.

[47] [1982] 3 All ER 1135. See also *Cato v. Ministry of Agriculture, Fisheries and Food* (CA), Times 9/6/88.

[48] Contained in the Housing (Homeless Persons) Act 1977. See now Housing Act 1985, Part III.

[49] For an explanation of the reasoning in this case see chap. 4, n.270.

The scope of the *O'Reilly* rule.

O'Reilly applies as a "general rule" in "public law" cases. Its application in a particular case depends on it being established "(1) that the claims in question *could* be brought by way of judicial review (2) that it [sic] *should* be brought by way of judicial review".[50] It will be noted at once that implicit in this test is that some cases can be dealt with by AJR but need not be.

When *can* a case be brought by AJR? Private law claims.

Lord Diplock seemed to regard the notion of public law right as coextensive with standing to seek one of the prerogative remedies[51], which plainly can be obtained only by AJR. Public law claims were to be contrasted with private law cases involving claims to damages "as a matter of right".[52] However we have observed[53] that the AJR is adapted to deal with some claims to damages and that such claims cannot necessarily be excluded from the general rule. On the other hand, it is plain from Order 53 r.9(5) that some damages claims *are* inappropriately pursued by AJR. What distinguishes qualifying from non-qualifying damages claims?

In *Davy v. Spelthorne BC*[54] Lord Wilberforce said "the right to award damages conferred by [the Supreme Court Act 1981 s.31(4)] is by its terms linked to an application for judicial review...So since no prerogative writ...in relation to the present claim could be sought...no consequential claim for damages can be made under [sub-section 4]." It is clear that the Law Commission did not intend this provision to alter the substantive law regarding damages claims against public authorities[55] and its operation is restricted to cases where an ultra

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[50] Per Lord Wilberforce in *Davy v. Spelthorne* [1984] AC 262 at 277.

[51] *O'Reilly*, passim.

[52] Ibid at 1126.

[53] Above n. 31.

[54] Above, n. 50 at 277-8.

[55] Law Comm. No. 73 para 9. Note however the suggestion of Smythe (1988) 138 NLJ 114.

vires decision by a public authority results in interference with an established private law right belonging to an individual.[56]

But whilst claims raising only issues of private law fall outwith the AJR it is not clear that *all* damages claims that contain a public law element lie within it. It has been pointed out[57] that in these "mixed" public/private cases, considerations of judicial resources and expertise might restrict the availability of Order 53 to applicants whose claim raises a complex public law point, leaving easier claims to the judges who staff the ordinary civil courts. There are, admittedly, dicta to the effect that AJR will be available in all "mixed" cases[58]. However Order 53 r.9(5) has been interpreted as allowing a litigant alleging a private law wrong to transfer out of the AJR *only* in a mixed case. Plainly if all mixed cases were determinable on an AJR the purpose to this interpretation would be difficult to discern.[59]

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[56] See Lord Diplock in *O'Reilly* at 1132 (for an example of this type of case see *Cooper v. Wandsworth Board of Works*, discussed below, text following n. 72); *R v. Secretary of State for the Home Department ex p. Dew* [1987] 1 WLR 881 (misuse of process to pursue by AJR a claim in negligence raising no public law issue). In fact the Law Commission appears to have contemplated that some "purely private" claims could be litigated by AJR, eg where a litigant makes an application in error and a full trial is not necessary- see para 55 of the report. The language of s.31(4) does admit this possibility. On this basis, rule 9(5) assists where the AJR is for some procedural reason unable to cope with a private law dispute. This is not how the rule has been interpreted - see infra. However some claims that might once have been considered purely private are now also justiciable on Judicial Review, where they raise issues resolvable by summary proceedings - see chapter 3. To this extent the courts have by circuitous means gone some way to implementing the Law Commission's intention.

[57] By C.T. Emery: "Collateral Attack - Attacking Ultra Vires Action Indirectly In Courts and Tribunals" (forthcoming). I am grateful to the author for allowing me access to a draft of this piece.

[58] Lord Wilberforce in *Davy*, supra at 278-9; Purchas LJ in *R v. East Berkshire Area Health Authority ex p. Walsh* [1985] 1 QB 152 at 181.

[59] For discussion, see infra.

Injunctions and declarations.

It has been held that an injunction or declaration cannot be granted on an AJR in support ofprivate rights only.[60] Of course the applicant's lack of private rights does not mean that his case will be appropriate for an AJR. For it is clear that an individual seeking an injunction to enforce the criminal law[61] should proceed by action.

The reason for both of these propositions is that the availability of the injunction and declaration on an AJR is, by the terms of s.31(2) of the Supreme Court Act 1981, matched

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[60] *Law v. National Greyhound Racing Club, Ltd.* [1983] 1 WLR 1302 (CA); *R v. BBC ex p. Lavelle* [1983] 1 All ER 241 (Woolf J). Note that the scope of the declaration *as* a civil law remedy is in some doubt. See the discussion in chapter 5.

[61] This possibility survives according to four of their Lordships in *Gouriet v. UPOW*, supra n. 13. The exception was Lord Diplock.

either exactly[62] or approximately[63]to the scope of prerogative relief.[64] This scope is considered later.[65]

When *should* a case be brought by AJR?

At paragraph 34 of its report, the Law Commission stated that "the new procedure we envisage in respect of applications to the Divisional Court should not be exclusive in the sense that it would become the only way by which [public law] issues could come before the courts."[66]

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[62] See eg Lord Scarman in the *Self-Employed* case, supra n. 29 at 647-8. Lord Scarman was considering Order 53 r.1(2), the predecessor of s.31(1). Rules of court can change only practice and procedure and accordingly to have interpreted r.1(2) as extending the range of matters over which the Court could exercise its supervisory jurisdiction would have been to condemn the rule as ultra vires. However in *Davy v. Spelthorne*, supra n. 50, Lord Wilberforce approved Lord Scarman's words after the 1981 Act had resolved all doubts about the vires of the rule. For discussion see Cane "Standing, Legality and the Limits of Public Law" [1981] PL 322.

[63] *ex p. Lavelle*, supra;*Law v. National Greyhound Racing Club*, supra; *R v. Panel on Takeovers and Mergers ex p. Datafin plc* [1987] QB 815 at 847-8 per Lloyd LJ. This opinion is based on the fact that by the terms of s.31(1) the court is obliged merely to "have regard to" the scope of the prerogative remedies and in any event can consider "all the circumstances of the case". But see n. 56 above. Emery & Smythe (op. cit. p. 295-6) speculate that the inclusion of the injunction and declaration in Order 53 was, like the inclusion of the remedy of damages, to give a full range of remedies to applicants bringing "mixed" applications. However this does not appear to have been the Law Commission's intention - see para 45 of the report, referring to the role of these remedies in Ontario.

[64] Note however that whilst a prerogative remedy will be available against a Minister purporting to act under statutory powers, an injunction will not - even on an AJR (*Factortame v. Secretary of State for Transport* [1989] 2 All ER 692. It will be otherwise where the injunction is sought in support of rights claimed under Community Law - Same v. Same (No.2) [1991] 1 All ER 70.). For criticism of this position see Wade (1991) 107 LQR 4. This creates difficulties in obtaining interim relief against a Minister. For a solution see *R v. Secretary of State for Education and Science ex p. Avon CC* [1991] 1 All ER 282 (CA); *R v. Secretary of State for the Home Department ex p. Muboyayi* [1991] 4 All ER 72. But see *Minister of Foreign Affairs, Trade and Industry v. Vehicles and Supplies Ltd.* [1991] 4 All ER 65 (PC).

[65] Chapter 3.

[66] See also para 58(a).

And it is not. For the new procedure does not apparently affect the ability of the Attorney-General to vindicate public rights by civil action either *ex relatione* or *ex proprio motu.* A similar power is conferred on local authorities by s.222 of the Local Government Act 1972. Moreover there have been a number of cases in which both plaintiffs and defendants in actions based on private rights have been permitted to raise public law issues necessary to the resolution of the private claim.[67]

But it will be apparent from an examination of the background and reasoning of *O'Reilly* that in some cases the AJR *must* be an exclusive procedure. As Professor Wade has observed[68], once Order 53 had been reformed "[h]ow then could it make sense to allow a choice of procedures for obtaining the same remedies under which the restrictions of one could simply be evaded by recourse to the other?".

O'Reilly established that the "irresistible" logic[69] of this reasoning applied in general to claims made by private actors raising only issues of public law. But if there was no longer any justification for allowing "purely public" claims to be made by action[70], other reasons have survived the reforms in cases where a public law issue is raised in the context of some other dispute.

Suppose for example that an individual is prosecuted for breaching a local authority byelaw which he alleges the authority had no power to make[71]. If the byelaw were more than three months old to apply the *O'Reilly* rule in these circumstances would effectively deny the individual his defence. Or suppose, as in *Cooper v. Wandsworth*[72], a house owner were to

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[67] See chap.2, discussing also cases where public law issues have been permissibly raised as a defence to a criminal charge.

[68] A.L. at 677.

[69] Wade "Procedure and Prerogative in Public Law" (1985) 101 LQR 180 at 186-7.

[70] But see chap.5, below.

[71] For a case law example see *R v. Crown Court at Reading, ex p. Hutchinson* [1988] QB 384.

[72] (1863) 14 CB(NS) 180. See also *Dowty Boulton Paul, Ltd v. Wolverhampton Corporation (No2)* [1976] Ch 13 (Allegation that public authority in breach of a contract made with the plaintiff. Authority's defence was that the breach was authorised by statutory powers.)

bring an action in trespass against a local authority which had demolished his house pursuant to a demolition order purportedly made under statutory authority. To succeed, the house owner would plainly have to establish the invalidity of the order and to require this issue to be resolved by AJR would effectively reduce the limitation period applicable to his action from six years to three months.

Of course it may be thought that the public authority protection values expressed in *O'Reilly* apply over the private interests of individuals even in these cases. Some judges do take this view.[73] Lord Diplock, as we have seen, was inclined to except from the *O'Reilly* general rule public law issues that arose collaterally to a claim in private law. Perhaps because his Lordship thought that only a plaintiff could perpetrate an abuse of process[74] he did not address the position of a defendant raising a public law issue. However even if Lord Diplock did not intend the rule to apply defendants, he gave no guidance about the meaning of the term "collateral" as applied to a plaintiff.

O'Reilly - defining the problem

The most obvious difficulty with *O'Reilly* is that the decision has resulted in a "formulary system under which a complainant may lose his case not because it has no merits but simply because he has chosen the wrong form of action".[75] This point can perhaps best be illustrated by examining the position of a litigant seeking an injunction to restrain the breach

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[73] Woolf LJ (extra-judicially) "Public Law -Private Law: Why the Divide?" [1986] PL 220 at 233; *Wandsworth LBC v. Winder* [1985] 1 AC 461, per Ackner LJ at 470-71.

[74] See eg Lord Fraser in *Winder*, supra. In *R v. Oxford Crown Court ex p. Smith* (Times 27 December 1989; LEXIS Transcript) Simon Brown J considered that Lord Diplock would have regarded defences not as exceptions to his general rule, but as not within its scope. See also the remarks of Lloyd LJ in *R v. Reading Crown Court ex p. Hutchinson* [1988] QB 384 at 392, quoted below, chap. 2 n. 109.

[75] Wade op. cit. supra n. 69 at 187-8.

by a public authority of a statutory duty, and contrasting it with that of a litigant seeking damages.[76]

Legal duties are the product of either the common law or statute. A litigant seeking an injunction to enforce a common law duty against a public authority is faced with the problem that the remedy he seeks is available under two mutually exclusive procedures, the correct choice depending on the characterisation of the duty as public or private. However the very fact that the duty in question is owed at common law means that its character will normally be apparent. Common law duties are, after all, established by the award of a remedy at the conclusion of litigation and (in accordance with the principle *ubi remedium, ibi ius*) the nature of the remedy dictates the nature of the duty.

Statutory duties, though, owe their existence not to litigation but to legislation. There is no remedial touchstone of their character as public or private, which must discerned instead by interpretation - a process that has been likened to the tossing of a coin.[77]

Now, a litigant who has suffered "once and for all loss" and who seeks damages is not, on our assumption[78], in a difficult position in point of procedure. For even if his claim also raises a public law issue, he is nonetheless asserting a private law right and can bring a civil action. Of course he may lose precisely because the statute creates rights in public law only. But this is not an *O'Reilly* problem, but rather a case where the substantive law does not provide a remedy that is of any value.[79] However if a litigant suffers continuing or anticipated loss, he will wish to seek specific relief in the form of an injunction. Plainly in this case a valuable remedy may be lost through choosing the wrong procedure.

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[76] We will make a preliminary assumption that the effect of Lord Diplock's "collateral issue" exception is to permit all damages claims against public authorities to be pursued by civil action.

[77] By Lord Denning MR in *Ex p. Island Records* [1978] Ch 122.

[78] Above n. 76.

[79] For a case law example see *Bourgoin v. Minister of Agriculture* [1985] 3 All ER 585, discussed in chapter 4.

Of course it is incorrect to regard established common law duties as being of immutable character[80] and in any event the foregoing assumes that all damages claims raising public law issues can proceed by action. In all probability this assumption does for practical purposes represent the law. However due largely to the imprecise meaning of the term "collateral" it is not possible to be certain.[81]

The problem compounded - the "obverse" of *O'Reilly*.

These difficulties have been exacerbated by a number of cases in which courts have held that a claim brought by AJR should be struck out on the grounds that it disclosed only allegations of private law wrongdoing. Occasionally this has been on the basis that the respondent is not a public body[82]; occasionally because the claim relates to an act or decision of a body which is admittedly public for some purposes but not for the purposes of the claim in question.[83]

This latter sort of case has tended to arise in the employment context. Sometimes the applicant will seek certiorari because it is a more valuable remedy in dismissal cases than those available at common law or under the employment protection legislation.[84] In these cases the applicant's failure is not attributable as much to procedural formalism as it is to the fact that the law does not provide a particular kind of remedy in respect of the wrong alleged. However where the decision under challenge amounts to less than dismissal, it is often a purely procedural difficulty which defeats the application.

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[80] See the "Jockey Club" cases, discussed in chapter 3.

[81] See the discussion of *Roy v. Kensington FPC* in chap. 2.

[82] eg *Law v. National Greyhound Racing Club*, supra, n. 60.

[83] eg *R v. East Berkshire Area Health Authority ex p. Walsh* [1985] QB 152.

[84] For details see Fredman and Morris (1991) 107 LQR 298 at 299.

Making matters worse - *ex parte Dew.*

The current procedural position has been rightly criticised as a "trap for the unwary litigant".[85] Criticisms of this sort would be to some extent met if litigants who made the wrong choice were able to request that their claims be transferred into the correct procedure. What facility exists to enable this?

It is clear that the Court has no power to transfer into Order 53 proceedings begun by civil action[86]. A measure of relief is provided in the practice of at least one judge of granting leave to apply when the action comes before the court and treating the documentation as fulfilling the procedural requirements of an AJR.[87]

More complicated is the position of the applicant for judicial review whose claim is in fact based in private law. Order 53 Rule 9(5) states:

> Where the relief sought is a declaration, injunction or damages and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in an action begun by writ by the applicant at the time of making his application, the Court may, instead of refusing the application, order the proceedings to continue as if they had been begun by writ...

It is clear that this provision will avail a litigant only if he has sought the relief specified in the opening words of the sub-rule. In *R v. East Berkshire Area Health Authority, ex parte Walsh*[88] the applicant sought certiorari to quash the respondent's decision to dismiss him. A declaration in private law being the correct remedy, it was held that Rule 9(5) did not

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[85] Forsyth "Beyond *O'Reilly v. Mackman*: the Foundations and Nature of Procedural Exclusivity" [1985] CLJ 415.

[86] See Lord Diplock in *O'Reilly* at 1133.

[87] Woolf LJ, op. cit., at 232. However this would not amount to a transfer of the action and a claimant would presumably lose his costs up to the date on which leave was granted.

[88] Above, n. 83.

permit an applicant to amend his claim to seek a remedy in private law where he had sought in his application a remedy whose availability was confined to public law only.

A litigant who proceeds by AJR when he should have proceeded by ordinary civil action cannot, of course, be accused of an improper attempt to evade the safeguards of Order 53 for the protection of public authorities. It might be supposed, therefore, that the Court would take a broad view of the scope of Rule 9(5). This has not happened. In *O'Reilly*, Lord Diplock appeared to state that the rule applied where an AJR was made which in fact raised no issues of public law.[89] However in *R v. Secretary of State for the Home Department, ex parte Dew*[90] McNeill J held that the Court's discretion arose only in cases where "a breach of a public law right...has as a consequence an entitlement to damages in private law". This "pro-technicality" approach is difficult to support, for it confines the application of the provision to cases where it is arguably not needed.[91] Nonetheless, the approach of McNeill J has been endorsed by Woolf LJ in *R v. Derbyshire County Council, ex parte Noble*[92].

Summary of points to be discussed.

The remainder of this thesis concentrates on some of the issues raised in this introductory chapter. We have noted that the scope of the AJR is more or less matched to that of the prerogative remedies and in chapter 3 the ambit of the foremost of these remedies - certiorari - is discussed. Obversely we have seen that the "private life" of public bodies is defined by reference to the availability of the remedy of damages. It is not possible in work such as this to list exhaustively the circumstances in which a public authority might incur liability in damages and in chapter 4 we accordingly confine our inquiry to the most problematic area, breach of statutory duty. Chapter 5 addresses some suggestions for reforming procedural public law. However we begin in chapter 2 by examining the procedural issue in cases where a public law matter has been raised in the context of some other dispute.

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[89] at 1133.

[90] [1987] 1 WLR 881.

[91] Above, n. 58.

[92] [1990] IRLR 332 at para. 29 (not referring explicitly to *ex p. Dew*).

CHAPTER TWO: COLLATERAL CHALLENGE

O'Reilly v. Mackman was a case where the issue that arose related to the prisoners' rights in public law only. However, in chapter one we noted two examples of cases where a public law issue might arise in the context of some other dispute - typically concerning liability in either criminal or private law. In fact it is not uncommon that a defendant (to civil or criminal proceedings) or a plaintiff will be required to prove that an authority has acted unlawfully in public law in order to make good his defence or his claim.[93] Where a party to a legal dispute raises a public law issue not in proceedings, such as AJR[94], designed specially to resolve such issues, but instead in proceedings designed to deal with issues of civil or criminal liability *and in the context of such an issue* he is said classically[95] to mount a collateral challenge to the act or decision in question. To what extent are collateral challenges permitted in a post-*O'Reilly* world?

Raising a public law issue as a defence to a civil action.

Lord Diplock did not consider the position of a defendant who seeks to negative liability by demonstrating that an authority - which, as we have seen, may or may not be the other party to the litigation - has acted unlawfully in public law. The opportunity for the House of Lords to address this question in the context of a private law claim arose in *Wandsworth LBC v. Winder.*[96]

Mr Winder had refused to pay a rent increase effected by the plaintiff (his landlord). His defence to proceedings for possession and arrears was that the increase was in fact ultra vires the statutory power under which the Council had purported to act. The county court judge struck out the defence on the ground that it was an abuse of process and stayed the proceedings to allow the defendant to make an AJR.

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[93] Note that the authority need not be a party to the proceedings - *Bunbury v. Fuller* (1853) 156 ER 47.

[94] Or statutory appeal procedures.

[95] Rubinstein, "Jurisdiction and Illegality" (1965), p. 37-8.

[96] [1985] 1 AC 461.

In the Court of Appeal Ackner LJ resolved the essential policy question outlined above[97] in favour of the Council.[98] However he was in the minority and in the House of Lords it was the views of his brethren which prevailed. Lord Fraser expressly adopted an approach which balanced "the arguments for protecting public authorities against unmeritorious or dilatory challenges to their decisions" against "the arguments for preserving the ordinary rights of private citizens to defend themselves against unfounded claims."[99] It was noted that Mr Winder had been refused leave to make an AJR as out of time. Whilst a denial for this reason of the opportunity to challenge the decision of an authority was acceptable in the circumstances of *O'Reilly*, it was not to be countenanced where, as here, contractual rights in private law were involved.

The reception accorded the decision in *Winder* has been mixed. Lord Fraser distinguished *Cocks v. Thanet DC*[100] on the ground, inter alia, that in that case "the impugned decision of the local authority did not deprive the plaintiff of a pre-existing private law right [but instead]...prevented him from establishing a new private law right." Forsyth[101] is unpersuaded by this distinction. He argues that "the council's resolution [sc. to increase rents], if valid, extinguished Winder's pre-existing rights; so that even to assert those rights was a challenge to those resolutions". This is, of course, true. But it does not mean that the distinction drawn by Lord Fraser is misconceived. For were the rent increase found upon an AJR to be *invalid*, Mr Winder's contractual rights would be unaffected by it, whereas in *Cocks* even an invalid decision would not have *created* private rights in the applicant.[102]

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[97] Chapter 1.

[98] See also the views of Woolf LJ in *R.v South Somerset DC, ex p. DJB (Group), Ltd.* (unreported, referred to by Simon Brown J in *R v. Oxford Crown Court ex p. Smith*, above n. 74.)

[99] At 509.

[100] [1982] 3 All ER 1135.

[101] [1985] CLJ 415 at 430. See also Sir Harry Woolf, extra-judicially, at [1986] PL 220, 223.

[102] It is convenient to deal at this point with an apparent misunderstanding on the part of some commentators of the effects of *Cocks v. Thanet DC*. Stanton ("Breach of Statutory Duty in Tort", 1986 at p.79), for example, cites the decision as authority for the view that where a disappointed applicant for housing seeks damages, contending that the authority's refusal to house him is unlawful, he must pursue his damages claim by AJR Power (142 NLJ 749), on the other hand, states that a damages claim can be pursued by action provided the

Moreover if Forsyth's argument were accepted, the result would ensue that "all private rights would...be subject to any de facto assertion of public power unless challenged within three months and then only on limited grounds."[103]

Winder has also been said to represent a departure from the philosophy of their Lordships in *Davy v. Spelthorne*.[104] At this level the criticism is that the House of Lords is adopting an ad hoc, pragmatic approach to the procedural issue when what litigants really need is a clear definition of public law for procedural purposes.[105] The basis of this view is that *Davy* is authority for the proposition that wherever a claim raises a vires issue as a "live issue"[106] it must be litigated by AJR. However in *Davy* Lord Fraser said merely that the absence of such an issue meant that a claim could certainly proceed by action. He did not say that the *presence* of a live issue required leave to be sought to make an AJR. Indeed *O'Reilly* itself acknowledges that public authority protection values apply *unless, in fairness to the person affected, they should not.*[107]

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invalidity of the decision has been established on an AJR. However it is clear that *the fact that an applicant must challenge the decision* means that damages are not available - see *An Bord Bainne Co-op v. Irish Dairy Board* [1984] 2 CMLR 584 at 588 per Sir John Donaldson MR (sed quaere if the decision is reached negligently - see below). *Cocks* as thus explained does not undermine the view that all damages claims against public authorities can be made by civil action.

[103] Beatson (1987) 103 LQR 34 at 60.

[104] [1984] AC 266.

[105] Beatson, op. cit. at 57f.

[106] As it would do wherever an order was made which would have the effect *in law* of nullifying an act or decision of an authority. This would include a successful collateral challenge. By contrast a dispute would not raise a live issue where the effect of any order made might *in practice* cause an authority to depart from its decision. *Davy* is a case of the latter sort for reasons explained below at n. 130. For criticism of the artificiality of the distinction see Forsyth op. cit. n. 101 at 429; Craig "Administrative Law" 2nd Edn. at p. 423.

[107] At 1131. It is therefore inaccurate, as Power does (op. cit. supra) to describe these cases as a "retreat" from *O'Reilly*.

Ultra vires as a defence to a criminal charge.

In distinguishing *O'Reilly* in *Winder* Lord Fraser referred expressly only to defences based on private law rights. It might be supposed from the tenor of his Lordship's judgment[108] that his approach would apply a fortiori where a defendant to a criminal charge raised by way of defence an allegation that a public authority had acted unlawfully in public law. However in *Quietlynn, Ltd v. Plymouth City Council*[109] Webster J regarded the distinction as significant.

Quietlynn, Ltd had applied to the Council under the Local Government (Miscellaneous Provisions) Act 1982 for a licence to operate a sex shop. The company considered the refusal of the application to be invalid and, accordingly, it resolved to carry on operating the shops without a licence. When prosecuted in the magistrates' court, the company raised the defence that paragraph 28 of Schedule 3 to the Act permitted trade pending the resolution of a licence application. Here no valid determination had taken place and therefore no offence had been committed.

The conclusion of the Crown Court, on appeal from the magistrates, that the justices had no power to entertain the company's defence, was upheld by the Divisional Court. Lay justices were not to be expected to exercise a judicial review jurisdiction in these cases, and the appropriate course was for proceedings in the magistrates' court to be adjourned to enable an AJR to be made.

However in *R v. Reading Crown Court ex parte Hutchinson*[110], which concerned the byelaw example given above, this approach was doubted. Lloyd LJ said that it was fanciful to characterise as an abuse of process "a case where the plaintiff [sic] is not complaining of anything but is defending himself against a criminal charge". The decision in *Winder*, thought his Lordship, was not limited to private law claims. That did not mean that it would never be an abuse of process to raise a vires issue by way of defence to a criminal charge. Indeed the facts of *Quietlynn* itself provided an example. For the company had in fact first

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[108] especially the penultimate paragraph.

[109] [1988] QB 114 at 130.

[110] [1988] QB 384 at 392.

applied for Judicial Review, abandoning its application at the door of the court.[111] In any event Lloyd LJ would have held that *Quietlynn* did not apply to byelaw cases.

The limits of the "vires defence".

In *Hutchinson* Lloyd LJ would have permitted a public law decision to be challenged by way of defence wherever it was "an essential element in the proof of the [wrong] alleged".[112] However a decision *to initiate* civil or criminal proceedings does not fall into such a category[113] - for in such a case the consequences of a successful challenge "would simply be to prevent the [authority] taking proceedings to establish a liability which the defendant has no ground to deny."[114] Accordingly the criticisms made in *Hutchinson* of *Quietlynn* stand up only because of the provision contained in Schedule 3, para 28 of the 1982 Act. Without that section the company would have had no defence *to the charge* of trading without a licence.[115]

Raising a vires issue as plaintiff.

We have already noted that Lord Diplock suggested that public law issues arising collaterally to a private law claim might be excepted from his general rule. But another ground on which Lord Fraser in *Winder* was able to distinguish *O'Reilly* was that in the latter case "the prisoners had initiated the proceedings...while in the present case the respondent is the

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[111] This suggested rationalisation was adopted by Simon Brown J in *R v. Oxford Crown Court* (supra), who considered that the general approach in *Hutchinson* represented the correct position.

[112] At 395.

[113] See *Waverley BC v. Hilden* [1988] 1 WLR 246; approved *Avon CC v. Buscott* [1988] 2 WLR 788 (CA). See also the remarks of Simon Brown J in *Oxford Crown Court ex p Smith*, supra.

[114] C.T. Emery "The Vires Defence" [1992] CLJ 308 at 329.

[115] This is well expressed by Rubinstein (op. cit) at 37: "A refusal to grant a licence is a negative act which is reviewable only in direct proceedings. In criminal proceedings against a person operating without a licence, it is of no avail to argue that the authority's refusal to grant a licence was invalid; even if true, that in itself does not create the necessary licence and does not negative the offence." Professor Wade appears to overlook the significance of para 28 at A.L. p.333 n.15.

defendant....He did not select the procedure to be adopted." Plainly, then, the decision in *Winder* could not be taken necessarily to apply to a case where a plaintiff sought to raise a public law issue in support of a private law claim, and for a time there was uncertainty.[116]

This uncertainty has been substantially reduced - though not eradicated - by two recent decisions[117] in which plaintiffs have been permitted to mount collateral challenges to public law issues. To understand the first of these decisions requires us to digress into a brief account of the circumstances in which a public authority might attract liability in negligence for the careless discharge of its statutory functions.

Impermissible negligence claims

As a matter of substantive law it will in fact be very difficult to establish that an authority is liable in negligence in respect of statutory functions. If a decision in relation to such a function can be classified as a "policy" decision no liability can attach. *Anns v. Merton*[118] involved a claim that a local authority had been negligent in failing to deploy its powers of building inspection so as to prevent damage to the plaintiff's flat caused by its being built on inadequate foundations. It was held that, if that failure was traceable to a discretionary decision about how many inspectors to recruit or how often inspections were to be made,

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[116] Contrast *Shears Court, Ltd. v. Essex CC* (1986) 85 LGR 479 with *Guevara v. Hounslow LBC* Times 17th April 1987, criticised by Wade A.L. at p 684. In the Court of Appeal in *Winder* Goff and Parker LJJ (482b, 491b-d) regarded the arguments for admitting the vires defence as applying equally to a claim based on private rights. Cf *Doyle v. Northumbria Probation Service* [1991] 4 All ER (Authority's defence to claim in contract that it had acted ultra vires in making the contract can be contested in civil proceedings. Plaintiff was not *challenging* but *relying upon the correctness* of the authority's action.).

[117] *Lonrho plc v. Tebbit* [1991] 4 All ER 973; *Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 All ER 705.

[118] [1978] AC 728. See also *Home Office v. Dorset Yacht* [1970] AC 1004.

this was a policy matter for the authority[119] and - apparently[120] - could not be made the subject of a negligence claim.

Permissible negligence claims

However it may be suggested that decisions about whether an individual satisfies the criteria of entitlement to a benefit - as in *Cocks v. Thanet*[121] - are relevantly different from policy decisions of the *Anns* kind. In *Rowling v. Takaro Properties*[122] the Privy Council refused to rule out the possibility that a negligence claim could be maintained by an individual against a public authority which had acted ultra vires in denying him a benefit[123].

How should a complainant proceed in such a case? In *Lonrho plc v. Tebbit*[124] it was held that where an individual was required to prove ultra vires as part of a negligence claim against a public authority he could raise the vires issue in proceedings begun by writ. However *Lonrho* did not involve a decision to withhold a benefit in the ordinary sense of

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[119] "Public authorities have to strike a balance between claims of efficiency and thrift" per du Parcq LJ in *Kent v. East Suffolk Rivers Catchment Board* [1940] 1 KB 319, 338.

[120] *Anns* is in fact ambiguous on whether a policy decision can ever form the basis of a negligence suit. However the Privy Council in *Rowling v. Takaro Properties* said that such decisions are not justiciable by a court - see [1988] AC 473 at 501, citing Craig, *Administrative Law* (see now 2nd edition at 449-58). For a fuller discussion see Craig (1978) 94 LQR 428. "[I]t is well established that in cases where the exercise of a statutory discretion involves the weighing of competing public interests , particularly financial or economic interests, no private law duty of care arises because the matter is not justiciable by the courts" per Browne-Wilkinson V-C in *Lonrho plc v. Tebbit* [1991] 4 All ER 973 at 981.

[121] Above n. 100.

[122] Above n. 120.

[123] In that case the benefit denied was a necessary Ministerial consent to a sale of shares, consent being granted or withheld according to a statutory scheme. However a number of arguments against possible negligence liability were advanced. For example the fear of liability might lead to "defensive" administrative practices causing delay in decision-making; that the availability of judicial review afforded an adequate remedy; that ordinarily the effect of an ultra vires decision which is reversed on a reconsideration of the matter is merely to "postpone the receipt by the plaintiff of a benefit which he had no absolute right to receive" (see 502-3).

[124] Supra n. 117. Since this section was written the Court of Appeal has upheld the views of the Vice-Chancellor (Times 5/6/92).

that phrase and a closer examination of the judgment suggests that it may be of only limited assistance in cases of that type.

The facts of *Lonrho* were these. The plaintiff company contended in an ordinary civil action that Norman Tebbit, as Secretary of State for Trade and Industry, and the DTI had failed in breach of a duty of care promptly to release it from an undertaking not to purchase more than a certain percentage of shares in House of Fraser. The undertaking had been obtained by the defendants acting under statute following a report by the Monopolies and Mergers Commission in 1981 that a merger between the plaintiffs and House of Fraser might be expected to operate against the public interest. A further report in 1985 had reached a different conclusion, whereupon the defendants had come under a duty to release the undertaking[125]. As a result of the delay in discharging this duty the plaintiffs had lost their opportunity to make a bid for Fraser's.

The defendants applied to have the action struck out on two grounds. First they argued that the facts disclosed no reasonable cause of action - the decision to delay was a policy decision to which no duty of care could attach[126]. Browne-Wilkinson V-C did not agree. In *Anns v. Merton* idiom the timing of the release was arguably an "operational" matter - ie one involving the carrying out of a policy decision. Such a decision was in theory

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[125] This was the view of Browne-Wilkinson V-C at 981e. Counsel for the defendants submitted that the only duty was to consider whether to discharge the plaintiff from its undertaking. The distinction was not material because, in the words of the judge, "the relevant question in this case is not whether the undertaking should have been released (it was) but whether it should have been released earlier" (ibid).

[126] The defendants claimed that the reasons for the delay were a) that they had been advised to postpone the release of the undertaking until the announcement of the decision whether to refer rival bid for Fraser's to the MMC and b) that they had been advised first to hear representations from the board of Fraser's.

susceptible to a negligence action[127] provided the plaintiff could prove that it had been reached ultra vires[128].

Secondly the defendants claimed an abuse of the process of the court - in as much as a vires question formed part of the plaintiff's claim that question could be properly raised only by Application for Judicial Review (AJR). Browne-Wilkinson V-C disagreed. In his Lordship's opinion the need to prove ultra vires was not "purely collateral" to the negligence claim although it was "only one ingredient" in the plaintiff's cause of action.[129]

However in deciding the abuse of process point, the Vice-Chancellor was influenced by a number of factors which might be taken to limit the scope of his conclusion[130]. First, his Lordship admitted to difficulty in understanding why a plaintiff needed to establish at all that the defendant's decision was ultra vires in these cases. That the requirement should operate

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[127] In *Rowling* (supra n. 120) at 501 it was observed that, whilst negligence actions are excluded in respect of policy decisions, to classify a decision as operational does not necessarily mean that a duty of care will exist. For example the loss suffered by the plaintiff could be economic. Moreover as Bowman and Bailey ([1984] PL 277) point out in *Anns* the plaintiff was alleging an omission by the council to prevent loss whose immediate author was some other agency. In *Murphy v. Brentwood DC* [1991] 1 AC 398 Lords Mackay (at 451) and Keith (at 463) left open the question of whether the council would have been liable had the plaintiff in *Anns* suffered physical loss.

[128] see eg *Dorset Yacht* (supra n. 118) at 1031, 1067-8.

[129] "The essence of the claim is for breach of a private law right, ie a claim in negligence." per Browne-Wilkinson V-C at 987f. Why was the vires issue not "purely collateral"? Mr John Laws, for the defendant, distinguished between collateral vires issues and those that were "essential" to a private law claim. Here, in order to succeed, Lonrho were "bound to allege that the defendants' actions were ultra vires" and the vires point was therefore essential. However it is more usual to describe a collateral challenge as involving the raising of a vires point in proceedings designed to settle some other issue eg the civil or criminal liability of one of the parties. On this view *Lonrho* were plainly mounting a collateral challenge. The definition of collateral challenge advanced by Mr Laws is difficult to support, for it implies that Lord Diplock in *O'Reilly* contemplated the raising in private law proceedings of inessential vires points.

[130] Browne-Wilkinson V-C also relied on *Davy v. Spelthorne DC* [1984] AC 262 as establishing that the rule in *O'Reilly* did not in general extend to cases where claims in negligence were brought in the ordinary courts "even though those claims collaterally raise questions as to the validity of acts done by public authorities". In fact *Davy* did not involve a challenge to a public law decision. The whole essence of the plaintiff's claim was that the negligence of the authority had *deprived* him of his chance to question the validity of the enforcement notice made against his property.

effectively to lock out Lonrho from its damages claim, it being long out of time to make an AJR, was scarcely a conclusion which, in the light of that difficulty, his Lordship was likely to reach.

It is, with respect, easy to sympathise with the Vice-Chancellor on this first point[131]. Permissible negligence claims related, in his Lordship's definition, to the execution of decisions. A number of cases have indicated that at this level the legality or otherwise of public authority activity is to be measured in private law only[132]. However, claims that an authority has acted negligently in deciding not to confer a benefit plainly must involve establishing that the decision under challenge was ultra vires - for otherwise the authority has not acted unlawfully. There is some indication in Browne-Wilkinson V-C's judgment that his Lordship thought such decisions were inappropriately the subject of negligence claims[133]. But important for our purposes is that *Lonrho* is not necessarily authority for the view that an applicant for a benefit who alleges that the refusal of his application is both ultra vires and negligent can raise the vires issue in civil proceedings.

Secondly his Lordship was influenced by the fact that Lonrho's claim, if successful, would not have any "general retrospective effect on the public administration - a factor of great importance in requiring that public law matters should in general be ventilated by way of the speedy process of judicial review". The implication of this remark is that where a collateral challenge was made which did have this effect, a litigant might have to proceed by AJR. This limitation does not, however, feature in the second of the two recent cases on the scope of collateral attack, namely *Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee*[134].

The facts were as follows. The plaintiff was a GP listed with the defendant Committee as undertaking to provide general medical services in its area. The Committee was under a

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[131] see eg Beatson and Matthews *Administrative Law, Cases and Materials* 2nd Edn (1989) pp 579-80.

[132] *Cocks v. Thanet DC* (supra), *Cato v. MAFF* (Times 9/6/88), *R v. Panel on Takeovers and Mergers, ex parte Al Fayed* Times April 15th 1992.

[133] [1991] 4 All ER at 982.

[134] [1992] 1 All ER 705 (HL)

statutory duty to pay the full basic practice allowance to a GP on its list if, inter alia, "he [was] in the opinion of the...Committee devoting a substantial amount of time to general practice under the National Health Service". In October 1984, the Committee reduced the plaintiff's basic practice allowance by twenty per cent, effective from the following January, on the ground that his frequent absences from his practice meant that he no longer fulfilled this statutory criterion. The plaintiff began proceedings by writ, alleging that in acting in this fashion the Committee was in breach of the contract which it had made with him when it included him on the area list. The Committee argued that in challenging its decision the plaintiff was raising a public law issue which could in the circumstances be litigated only by AJR and applied to have the action struck out. The judge granted the application and was overturned by the Court of Appeal. The Committee appealed to the House of Lords.

Their Lordships dismissed the appeal. In their unanimous opinion Dr Roy was asserting a private law right and though he was required to raise a vires issue in litigation to vindicate that right he could do so in proceedings begun by ordinary civil action. However their Lordship's reasoning is at best difficult to understand.

The first question for the House was whence derived the plaintiff's private law rights. The Court of Appeal had found that the act of listing amounted to the formation of a contract between the plaintiff and the Committee. Indeed Nourse LJ[135] considered that the Committee's duty to form an opinion on what was a "substantial amount of time" was a contractual one and no issue of public law arose. The House of Lords was less sure that a contract existed[136]. However, this was not decisive against Dr Roy. Lord Lowry was clear that the statute gave rise to a "bundle of rights which should be regarded as [the Plaintiff's] individual private law rights against the Committee...including the very important private law right to be paid for the work that he has done".[137] However the mere fact that private law rights were capable of flowing from the statute was not of itself sufficient to enable a claim

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[135] quoted in the judgment of Lord Lowry at 727. Sed quaere whether this approach to the incorporation of statutory powers into public authority contracts is consistent with that of Sir John Donaldson MR in *R v. East Berkshire Area Health Authority ex parte Walsh* [1985] QB 152 at 165.

[136] 709c-d per Lord Bridge, 725c-g per Lord Lowry.

[137] 725h

to those rights to be made in proceedings begun by writ. For as Lord Bridge acknowledged[138], "the doctor's entitlement to the full rate of basic practice allowance [was] conditional on the opinion of the...Committee that he [was] devoting 'a substantial amount of time' to his national health service practice" - it was "made to depend on [the Committee's] discretionary judgment". In that respect the plaintiff's claim bore a striking resemblance to the challenge to the authority's decision in *Cocks v. Thanet DC*. Lord Lowry was able to distinguish *Cocks* on the basis that the inclusion of the Plaintiff's name on the Committee's list gave him a private law right not to *payment* but to a *fair and correct consideration of his claim* for payment. In contrast the claim in *Cocks* was brought by someone who was "simply a homeless member of the public" and not in any pre-existing formal relationship with the housing authority[139]. Lord Lowry was plainly influenced by the fact that a strong Court of Appeal had found there to be a contract by virtue of the listing and that the listing itself therefore had the appearance of an act conferring private rights of some kind. By this means his Lordship was able to hold without embarrassment that "*the existence of any dispute about entitlement* means that [the Plaintiff] will be alleging a breach of his private law rights through a failure by the Committee to perform its public duty"[140].

Lord Bridge was elliptical in his speech. Satisfied that the essential principle embodied in *Cocks* should be maintained, his Lordship nonetheless appeared to lay down a general principle that "the circumstance that the *existence and extent* of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons"[141].

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[138] 709a-c

[139] 728e-f

[140] 726d-e. Emphasis added.

[141] 708a. Emphasis added. In fact Lord Bridge begins this sentence with the words "But where a litigant asserts his entitlement to a subsisting right in public law...". But how can a right be subsisting when the public law decision on which its vesting depends has gone against an individual and its invalidity is not yet clear? One possibility might be that the right vests in individuals the moment the statute in question is passed and the authority merely performs a mechanical role in identifying those individuals. However this argument would seem to apply with equal force to enable a *Cocks* complainant to challenge a housing decision by ordinary action, and therefore cannot explain the statement of Lord Bridge in *Roy*.

On the facts of the case, Lord Bridge too appeared to regard the inclusion of the Plaintiff on the list as an act constitutive of private rights. Again the likeness to a contractual relationship formed the basis of this view. However with respect it might be wondered whether the existence of "contractual echoes" in the relationship between an authority and an individual provides a sufficiently precise basis for distinguishing *Cocks*. Moreover if the Plaintiff's right to have his claim properly considered is a *private right*, what basis is there for the view of their Lordships that Dr Roy was alleging public law illegality on the part of the Committee?[142]

Plaintiffs and public law issues.

However the greatest difficulty with *Roy* is the equivocality with which their Lordships endorsed the mode of proceeding adopted. For even assuming *Roy* to be reconcilable with *Cocks*, it is not clear that *every* plaintiff asserting that an exercise of public law power had interfered with his private law rights would be permitted to proceed as Dr Roy did. Their Lordships approved the statement of Robert Goff LJ in *Winder*[143] that the considerations enabling a defendant to a private law action to raise public law matters in those proceedings as part of his defence should in principle also apply to plaintiffs raising vires issues. However it was unnecessary to go so far in the instant case. Lord Lowry said that what was important was not merely that Dr Roy's private law rights were involved, but that those rights "dominated the proceedings"[144].

This was because his Lordship was content to adopt what counsel for Dr Roy referred to as the "narrow approach" to the application of the *O'Reilly* rule. This approach permitted to be brought by civil action cases raising public law issues necessary to the resolution of a private law claim only where the public law matter was somehow less prominent than the private element. By contrast, counsel's broad approach permitted all necessary public law issues to

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[142] Cf the approach of Nourse LJ in the Court of Appeal, supra. It may be that the duty to form an opinion is a duty owed in both public and private law. *Cocks v. Thanet DC* (supra) would appear to indicate that a single statutory duty will be *either* public *or* private - not both. Is this "dichotomy" between public and private law to be reassessed in the light of *Roy*?

[143] supra n. 116. See also *An Bord Bainne Co-op, Ltd v. Milk Marketing Board* [1984] 2 CMLR 584 at 588, per Sir John Donaldson MR.

[144] 729c

be raised in a civil action. This distinction reflects ambivalence surrounding the meaning of the term "collateral" for the purposes of Lord Diplock's collateral challenge exception in *O'Reilly*.[145]

There are, not surprisingly, problems in adopting such an imprecise test. Firstly it would leave in place the "procedural minefield"[146] which the straightforward adoption of Robert Goff LJ's dictum would have done much to remove. Secondly, though it is arguably acceptable that the vulnerability of private rights to the running of time should depend on whether or not the defendant is a public authority[147], surely the narrow approach goes too far. For it would appear to give the court an enormous discretion to deny private rights in a given case using the pretext that the public law issue was more central than its private counterpart. Nor is it clear that a collateral challenge permissibly made by writ can alternatively be made by AJR[148] - so to proceed by application is not necessarily to play safe.

A third difficulty arises from the fact that Lord Lowry advanced a number of reasons why Dr Roy was entitled to proceed by action, even on the narrow approach. For example, the order sought by Dr Roy, for the payment of money due, could not be granted on Judicial Review; the type of claim at issue - although not this particular claim - might involve a dispute of fact.[149] However it is not clear whether these reasons stand independently of the fact that Dr Roy's private rights dominated the proceedings, nor whether, without those reasons, that fact would be sufficient.

Indeed the relevance of a dispute of fact to the procedural question is not clear. Lord Lowry said that the presence of such a dispute "must constitute an important qualification of the

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[145] Compare with the definition advanced above (n. 95) that supplied by Lord Fraser in *Wandsworth v. Winder* (supra n. 96) at 508.

[146] 729a

[147] As it would do if plaintiffs claiming an ultra vires interference with their private rights were required to proceed under Order 53. This concern weighed with the Court of Appeal in *Winder* (supra n. 96). On the question whether a special procedure is needed even for private law claims against public authorities see Beatson op. cit. above n. 103 at p 44.

[148] Chapter 1 n. 57. See also Lord Lowry at 726b.

[149] at 729.

general theory propounded by Lord Diplock in *O'Reilly v. Mackman*"[150]. It is unclear whether his Lordship intended this remark to distinguish between types of cases involving both public and private law or whether any public law matter that raised a dispute of fact was appropriately litigated by ordinary civil action. Can the latter interpretation be reconciled with the *O'Reilly* general rule? It would seem not, for the facts were an issue in *O'Reilly* itself. Lord Lowry was influenced in his view of the relevance of facts by a statement of Woolf LJ made in the context of separating out those orthodoxly private claims which were nonetheless apt to be dealt with by AJR. This plainly cannot apply to allow purely public law claims *out* of Order 53.[151] Moreover Woolf LJ has a number of times made clear that he favours a strict application of the *O'Reilly* rule.[152] He is unlikely therefore to have intended his statement to constitute a potentially broad exception to it.

Nevertheless Lord Lowry did indicate his preference for the broad approach[153] and stated moreover that "when individual rights are claimed, there should not be a need for leave or a special time limit" as there would be if an individual was required to proceed under Order 53. This, combined with the conclusion that where possible a court "ought to let a case be heard rather than entertain a debate concerning the form of the proceedings"[154], reflects a great desire to mitigate the effects on litigants of procedural rigidity in public law cases. And this is as it should be. However their Lordships' decision does allow for the possibility that complex public law cases, best heard by the judges who take Crown Office business, should be litigated by AJR despite the presence of a private law element to the claim. Lord Lowry declined to adopt the broad approach because the point had not been fully argued before the House and had been "seriously discussed only by the academic writers". It seems that for sufferers from the *O'Reilly* headache, relief may yet be some way off.

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[150] 723f, 726d-e, 729c

[151] See chapter 3, below n. 243.

[152] See eg [1986] PL 220,233; [1992] PL 221; "The Protection of the Public: The New Challenge" (1990, Hamlyn Lectures) p 24ff.

[153] 728-9.

[154] 730. We might note also the lengths to which their Lordships were prepared to go to distinguish *Cocks v. Thanet.*

CHAPTER THREE: THE SCOPE OF THE APPLICATION FOR JUDICIAL REVIEW

In *O'Reilly v. Mackman* Lord Diplock regarded Order 53 as adapted to deal with challenges to the "lawfulness of a determination of a statutory tribunal or any other body of persons having legal authority to determine questions affecting the common law or statutory rights or obligations of other persons as individuals."[155] In so doing his Lordship echoed the much-cited description of the scope of certiorari supplied by Atkin LJ in *R v. Electricity Commissioners, ex parte London Electricity Joint Committee Co.(1920), Ltd.*[156] Such authority - or *de iure* power - comes principally from one of two sources - contract or statute. "Outside the regular courts of this country, no set of men can sit in judgment on their fellows except so far as Parliament authorises it or the parties agree to it."[157] Although Lord Diplock's words are apt to embrace contractual jurisdictions, it was clear at the time of *O'Reilly*, and is acknowledged elsewhere in his Lordship's judgment, that contractual powers are not reviewable.[158] Accordingly, certiorari is orthodoxly a remedy to control decisions made under statutory authority.

"Affecting legal rights".

It is not proposed here to list the various ways in which legal rights can be affected by the exercise of a statutory jurisdiction[159] and we may confine ourselves to some particular observations.

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[155] [1982] 3 All ER at 1129.

[156] [1924] 1 KB 171 at 205.

[157] Per Denning LJ in *Lee v. The Showmen's Guild of Great Britain* [1952] 2 QB 329 at 341. A third source is the Royal Prerogative (whence indeed derives the power of the ordinary courts). Prerogative power, except when exercised by a superior court, is clearly reviewable in principle (*Council of Civil Service Unions v. Minister for the Civil Service* [1984] 3 All ER 935) but is statistically not important and is not considered here. For discussion see C. Walker "Review of the Prerogative: The Remaining Issues" [1987] PL 62.

[158] See *R v. National Joint Council for the Craft of Dental Technicians (Disputes Committee) ex p. Neate* [1953] 1 QB 704; *R v. Criminal Injuries Compensation Board ex p. Lain* [1967] 2 QB 864 at 882 per Lord Parker CJ.

[159] See De Smith J.R.A.A. chapter 8.

First it is clear that for certiorari to issue, the jurisdiction in question need not have a potentially negative or "subtracting" effect on legal rights.[160] The reason appears to be this. It seems now settled[161] that where an authority is empowered to award a statutory money benefit to individuals who satisfy certain criteria, a decision that the individual does so qualify for the benefit confers upon him an entitlement to it in private law. Thus the authority enjoys a capacity to create private rights by decision which the private individual enjoys only through the machinery of contract or covenant. Judicial Review has traditionally been concerned with the "special" aspects of the legal personality of public bodies[162] and the cases are therefore consistent with this view.[163]

Certiorari and licensing decisions.

However it is doubtful whether a decision to confer other types of statutory benefit - such as regulatory licences and other permissions - will constitute private rights in the applicant.[164] Nonetheless such decisions are plainly subject to certiorari[165]. The reason is that to engage in a regulated activity without a licence is invariably to court the application of sanctions which *do* affect legal rights - typically criminal penalties. In such cases, there will be no option *in law* but to comply with the jurisdiction of the licensing authority.

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[160] See the cases cited in De Smith at p.389, nn.67,8.

[161] *Cato v. MAFF* (Times 9/6/88); *Cocks v. Thanet* [1982] 3 All ER 1135. Cf *R v. Secretary of State for Transport ex p. Sherriff and Sons*, discussed below chap 5 n. 298.

[162] *Davy v. Spelthorne DC* [1984] AC 262; *R v. East Berks AHA ex p Walsh* [1985] QB 152.

[163] With one celebrated exception - *R v. Criminal Injuries Compensation Board ex p. Lain* [1967] 2 QB 864. The Board is a non-statutory body charged with the disbursement of compensation to the victims of violent crime. A decision to pay compensation to an applicant does not give the him a right to sue for the money in the event of it being in fact withheld. Accordingly *the decision* does not "affect legal rights" in the sense discussed. This was acknowledged by Lord Parker CJ and Ashworth J, who did not regard the matter as problematic. Diplock LJ attempted to fit the decision into the "legal rights" formulation - but unconvincingly, see Wade AL at p. 642 n.65.

[164] See chapter 5.

[165] See eg *R v. Gaming Board for Great Britain ex p. Benaim and Khaida* [1970] 2 QB 417; *R v. Huntingdon DC ex p. Cowan* [1984] 1 WLR 501.

Indeed licensing decisions fall within a wider principle, expressed by Professor Wade[166] that certiorari will lie "where there is some preliminary decision, as opposed to a mere recommendation, which is a prescribed step in a statutory process which leads to a decision affecting rights, even though the preliminary decision does not immediately affect rights itself." It seems that the preliminary decision must be binding on the later decision-maker (unless it can be shown to be ultra vires) or something of which he is legally required to take account.[167]

Ex parte Datafin.[168]

The position just described has been radically altered by the decision of the Court of Appeal in *R v. Panel on Take-overs and Mergers ex parte Datafin plc* which, in essence, extends the scope of certiorari[169] to jurisdictions with which an individual or firm wishing to engage in a particular activity has no option *in fact* but to comply.[170] *Datafin* was a case in which the applicant company was aggrieved by a decision of the Panel that N plc, Datafin's rival in a battle to take over M plc, had not, as Datafin had alleged, breached the City Code on Take-overs and Mergers. Datafin did not stand in a contractual relationship with the Panel and its difficulty in obtaining a public law remedy was that the Panel lacks the legal power to enforce its findings.

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[166] A.L. p. 638. See also Diplock LJ in the *Lain* case, above n. 163 at 884-5.

[167] Compare with the cases cited by Wade A.L. at 638 the decision in *R v. St. Lawrence's Hospital Visitors ex p. Pritchard* [1953] 1 WLR 1158.

[168] [1987] QB 815.

[169] Though it was a declaration that was actually awarded for reasons of convenience - see Donaldson MR at 842.

[170] Except, it appears, where the individual is forced to bind himself by contract to the jurisdiction in question, see infra.

Note: it is possible to detect a movement away from the requirement that an instrument has *legal* effect in *Gillick v. West Norfolk and Wisbech AHA* [1986] AC 112. See Wade (1986) 102 LQR 173. Donaldson MR acknowledges this in *Datafin* at 838.

Nonetheless, a breach of the Code is a factor to which the Stock Exchange accords "great importance"[171] in the exercise of its statutory power to list and delist a company for the purposes of dealings in its shares. And whilst it is implicit in this that the Stock Exchange is not legally bound by a determination of the Panel[172], in practice the Stock Exchange is faithful to Panel decisions - even to the point at which Nicholls LJ was able to regard the Panel as acting as a delegate of the Stock Exchange for these purposes.[173] This fact enabled the Court of Appeal unanimously to hold that a decision of the Panel was reviewable. The resulting effect on the scope of certiorari was described by Sir John Donaldson MR:

> "Possibly the only [elements essential to ground the jurisdiction to award certiorari] are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction."[174]

The limitation that certiorari is concerned with the exercise of statutory or prerogative powers only is thus abandoned.

Limiting review - the "implied devolution of power".

But it is mistaken to assume on the basis of *Datafin* that all bodies exercising a de facto jurisdiction are amenable to certiorari. The fact that decisions of the Panel have "indirect" legal effect through the powers of the Stock Exchange is one limitation. Another is that evidence from the Department of Trade and Industry[175] showed, in effect, that the Government would have established the Panel by Act of Parliament had it not already

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[171] Nicholls LJ at 851. A breach of the Code so found by the Panel will be *ipso facto* an act of misconduct for the purposes of the exercise by the Stock Exchange of its contractual powers over its members.

[172] It follows that a decision of the Panel does not fall within the orthodox scope of certiorari as "a prescribed step in a statutory process". Contra Forsyth [1987] PL 356 at 361. Cf *R v. Kidderminster District Valuer ex p. Powell* (Times 23/7/91).

[173] At 852.

[174] At 838.

[175] Details of which appear at 835.

existed in effective form. Thus, in the words of Lloyd LJ[176], there had been an "implied devolution of power" from government to the Panel akin to the way in which the Criminal Injuries Compensation Board, an admittedly reviewable body[177], had been constituted. To this extent the source of a body's power remains relevant.[178]

Contractual jurisdictions

Can we detect any further limitations? It might be supposed, for example, that the Court of Appeal in *Datafin* intended to leave unaltered the rule that certiorari will not lie at the instance of an individual whose relationship with the respondent authority is purely contractual[179]. But even if this were the case, a significant number of previously domestic bodies might find themselves properly the subject of an AJR in respect of at least some of their decisions. Take, for example, the National Greyhound Racing Club. The Club is a non-statutory body responsible for overseeing the conduct of greyhound racing in the UK. It discharges this regulatory function through the award of licences to, amongst others, trainers who agree to abide by the rules promulgated by the Club from time to time. The Club has no strict legal power to do this, in as much as it is not unlawful to train greyhounds without a licence. However the near monopoly control enjoyed by the Club over greyhound racing means that in practice it will be impossible for an unlicensed trainer to gain access to "official" race meetings. In *Law v. National Greyhound Racing Club, Ltd.*[180] it was held

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[176] At 849.

[177] See *ex p. Lain* (above).

[178] See for example *R v. Advertising Standards Authority Ltd ex p. The Insurance Service plc* (Times 14/7/1989); *R v. Chief Rabbi ex p. Wachman* (Times 7/2/91); *R v. Football Association ex p Football League Ltd* (Times 22/8/91); *R v. The Imam of Bury Park, Luton ex p. Sulaiman Ali and 304 others* (Independent 13/10/91). These tests have been criticised as uncertain by Popplewell J in *R v. Code of Practice Committee of the British Pharmaceutical Industry ex p. Professional Counselling Aids Ltd* (Times 7/11/90). Compare the criteria applied by the Court of Justice of the European Communities in deciding what is an organ of the State for the purposes of the rules governing the direct effect of directives: *Foster v. British Gas plc* [1990] 3 All ER 897 (CJEC); [1991] 2 All ER 705 (HL); *Doughty v. Rolls Royce plc* (Times 14/1/92). Note that merely because a body is in principle amenable to judicial review does not mean it will be so in respect of all its decisions - see below n. 190.

[179] But see infra.

[180] [1983] 1 WLR 1302.

that certiorari would not lie to quash a decision to suspend an existing licence on the basis that the licence holder was in a contractual relationship with the Club. But what of the applicant for a licence? The power enjoyed by the Club over the livelihood of such an individual is not derived from contract - nor indeed any legal source. It is purely de facto power and it is arguable therefore that, like the power of the Takeover Panel, it should be amenable to judicial review under Order 53.[181]

The contract exclusion undermined.

But if this were to be so, might it not appear anomalous if those in an existing contractual relationship were "confined to an action begun by writ, while the applicant [could] obtain the same or possibly more extensive relief through the remedy of Judicial Review"?[182] Obversely it appears that a challenge to revoke an existing statutory licence can be made only once the procedural hurdles of Order 53 have been surmounted. It might appear strange at least that, in a case where de facto power has been harnessed where otherwise legislation would have been deployed[183], these requirements can be evaded merely because the relationship between the applicant and the authority is nominally consensual.

In *Datafin*, Lloyd LJ appeared to exclude from the newly extended ambit of Judicial Review at least challenges of the kind mounted in *Law*[184]. Donaldson MR, on the other hand, excluded only bodies whose jurisdiction was exclusively *consensual*[185]. The language is important because it is, of course, quite possible to enter into a contract simply because one has in practice no option but to do so. A strict reading of the judgment of Donaldson MR

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[181] It seems that even in the absence of a contract a declaration in private law proceedings will lie in such circumstances. But the grounds on which it will issue afford little real protection to an applicant (*McInnes v. Onslow-Fane* [1978] 1 WLR 1520). Contrast the protection afforded by the rules of natural justice to the applicant for a statutory licence, discussed by Wade AL at 559. On *McInnes*, see the remarks of the Divisional Court in *ex p. RAM Racecourses*, discussed below.

[182] Per Stuart-Smith LJ in *RAM Racecourses* summarising the respondents' argument. See also Craig at p.421; Forsyth [1987] PL 356 at 365; Pannick [1992] PL 1 at 4.

[183] Above.

[184] At 847, approving *ex p Neate* (supra) - a revocation case.

[185] At 838. See also the language of Nicholls LJ.

may therefore admit a challenge under Order 53 to a decision to revoke an existing contractual licence.

This possibility has been discussed in three recent cases in which challenges have been made to decisions of the Jockey Club[186]. In each case the possibility has been denied given the current state of the authorities, but in all there are indications of judicial unease with the orthodox position.

The Jockey Club Cases.

The Jockey Club is now incorporated by Royal Charter made under the prerogative although it does not itself exercise prerogative powers[187]. The existence of the Charter is nonetheless considered to indicate governmental recognition of the important position of the Club, "a position which could as well have been enshrined in legislation".[188] In law the Club occupies a position with regard to those involved in horse racing that is for present purposes identical to that of the Greyhound Racing Club.

The most comprehensive analysis of the amenability of the Club to the prerogative orders is found in the second of the three cases with which we are concerned, *ex parte RAM Racecourses*. The gravamen of the dispute in that case concerned a decision by the Club not to allocate "official" fixtures to the applicants' racecourse contrary to the applicants' alleged legitimate expectation. As Simon Brown J observed, such an expectation would be material only if in deciding the question of allocation the Club were performing a public law duty. However in *Massingberd-Mundy* it had been held by a Divisional Court comprising Neill LJ and Roch J that the Club was not a body susceptible to Judicial Review under Order 53. Neill LJ had regarded himself as bound so to hold by *Law's* case, for although in *Law* the applicant was in a contractual relationship with the Club, unlike Mr. Massingberd-Mundy,

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[186] *Re Massingberd-Mundy* (Times 3/1/90, LEXIS Transcript); *R v. Jockey Club ex p. RAM Racecourses* (Times 6/4/90, LEXIS Transcript); *R v. Disciplinary Committee of the Jockey Club ex p. HH the Aga Khan* Independent 29/7/91, LEXIS Transcript). See Grayson (1991) 141 NLJ 1113.

[187] This appears to be the consensus of the judges who decided the applications, sed contra Roch J in *Massingberd-Mundy*.

[188] Per Simon Brown J in *RAM Racecourses*.

the Court of Appeal had not limited its decision by reference to this fact. Roch J did not appear to regard *Law* as applying necessarily to cases where there was no existing contractual relationship, but held that it did conclude the matter of Mr. Massingberd-Mundy's application. This apparent inconsistency on the part of Roch J is apparently to be explained in that his Lordship was in reality identifying the desirable, rather than the actual, limits of *Law*.[189] In *RAM*, Stuart-Smith LJ took a sceptical view of Roch J's judgment and followed Neill LJ. However his Lordship expressed dissatisfaction with *Law* to the extent that it did appear to extend to cases where, as in the instant case, no contract existed between applicant and authority[190].

Simon Brown J (obiter) was more radical still. His Lordship considered that the Court in *Massingberd-Mundy* should have distinguished *Law* on the ground of the existence of a contract. Moreover he also made it clear that in the light of *Datafin* it would still have been open to a court to entertain an application under Order 53 even in the circumstances of *Law's* case.

This with respect is surely an accurate statement of the law. According to its pre-*Datafin* definition, power was either unique to public authorities (ie essentially statutory) and reviewable, or shared with private actors (ie essentially contractual) and challengeable by way of civil proceedings for a declaration and/or injunction. However the exercise of de facto power is not the exclusive preserve of statutory bodies and criteria additional to "legal uniqueness" must now also be considered when attempting to distinguish public and private for procedural/ remedial purposes. Simon Brown J offered a guide based upon whether the respondent authority was exercising a quintessentially governmental function. The Jockey Club's function of allocating fixtures to racecourses was "strikingly akin to a statutory licensing function". Obversely the employment and commercial decisions of admittedly

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[189] This is the explanation advanced by Woolf LJ in *ex p. HH the Aga Khan.*

[190] It is not to be assumed that Stuart-Smith LJ would have wished to see the ambit of the prerogative remedies extended to all decisions of the Jockey Club made in the absence of a contract. His unease was confined to the decision in the instant case. We may speculate that, like Simon Brown J, his Lordship would have approved of the actual decision in *Massingberd-Mundy* that a decision concerning who may sit as the Chairman of a local Stewards' Panel was one lacking any significant public dimension.

public bodies lay outwith the scope of certiorari because of their kinship to the activities of private institutions.[191]

Nevertheless even Simon Brown J would have followed *Massingberd* had the outcome of the case depended upon it[192] and the judgments in the Jockey Club cases therefore all reaffirm the view that where an authority's sole source of de iure power is contract even its exercise of purely de facto power (ie in application cases) is unreviewable. *Datafin* accordingly is confined to bodies exercising no de iure power whatever and it is premature to conclude, as Pannick does, that the only issue is whether the authority has "such a de facto monopoly over an important area of public life that an individual has no effective choice but to comply with [its] rules".[193]

Should *Law* be departed from?

The issue addressed in *RAM* is unlikely to go away. Were the Court of Appeal to consider the matter it would not of course have to follow *Massingberd*. But what considerations might influence the Court in choosing between applying *Law* and pursuing the *Datafin* logic?

Surely the first consideration must be whether Order 53 would be the exclusive avenue of redress in these cases. There are policy arguments to suggest that it should.[194] However Simon Brown J in *RAM*, addressing the apparent anomaly that the applicant for a contractual licence might obtain superior remedies to those available in revocation cases, suggested that in such cases certiorari would be available as an alternative to a declaration in civil proceedings.

This raises the related question of whether Order 53 is actually needed to control the activities of the Jockey Club and similar bodies. For it is clear that even in "refusal" cases

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[191] His Lordship illustrates this with *R v. BBC ex p. Lavelle* [1983] 1 WLR 23 - however the BBC is not a public body on the orthodox definition.

[192] The application failed on grounds unconnected with the jurisdictional issue.

[193] Op. cit. p3. Cf *R v. Corporation of Lloyds ex p. Briggs* (Times 30/7/92)

[194] Above. See also Beloff [1989] PL 95 at 108 speculating whether the AJR might become "the appropriate, and hence, the necessary procedure".

the Court has the jurisdiction to award a declaration in civil proceedings that an applicant has been treated unfairly.[195] There is no danger here, unlike in *Datafin* (where no private law remedy was available); of the courts "allowing their vision to be clouded by the subtlety...of the way in which [executive power] can be exerted"[196]. Nonetheless, as already pointed, out the protection afforded at the level of substantive principle in refusal cases is meagre in comparison to applications for statutory licences. Might it be that the inclusion of the Jockey Club within the ambit of certiorari will enhance that protection? Certainly the status of the applicants' legitimate expectation in *RAM* was said to turn on this consideration. However it would be unfortunate if Clubs and Associations were to find themselves required to afford an applicant a full, oral hearing (with the possibility of legal representation) before refusing him a licence, without the countervailing protection of the *O'Reilly* rule. A possible solution to this conundrum is hinted at by Stuart-Smith LJ and Simon Brown J in *RAM*, both of whom considered that had *McInnes v. Onslow-Fane* been decided after *Datafin* it would have found its "natural home" in Order 53 "rather than" civil proceedings. This still leaves a difference in revocation cases between decisions concerning, on the one hand, statutory and, on the other, contractual licences despite the fact that the protection afforded an individual at the level of substantive principle is very similar in each case. It is submitted that the answer to this problem is not to force the *Law* plaintiff into Order 53 but rather to recognise that there is a difference between the refusal and the revocation of a licence whatever the source of the decision-maker's authority, and to allow a choice of procedure in *all* revocation cases.

Matching the issue to the procedure - the summary character of Order 53 proceedings.

Nothing in *RAM Racecourses* detracts from the view that the reviewability of a non-statutory body depends upon evidence of governmental recognition of its "public" character. Moreover the case emphasises that only the "governmental" decisions of such bodies will be reviewable.

However in a number of recent cases it has been held that public authority decisions in the realm of employment might be challengeable under Order 53 despite the fact that in *RAM*

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[195] *McInnes v. Onslow-Fane*, above.

[196] Per Donaldson MR in *Datafin* at 838-9.

both judges considered that such decisions were essentially domestic. In these cases it is possible to detect an approach which brings within the scope of Order 53 matters governed by private law prior to *Datafin* but which are nevertheless suitable to be dealt with in summary proceedings. However to understand these cases it is necessary to examine the pre-*Datafin* position regarding amenability to certiorari of the employment decisions of public authorities.

Public authority employments and public law.

This position has been worked out in a number of cases in which public authority employees have sought to challenge disciplinary decisions made by their employers. In essence where such a decision - to dismiss or suspend etc - is taken pursuant to a statutory power conferred on the authority, certiorari will lie to quash it. Where, on the other hand, the power to discipline is derived from the contract of employment the employee must investigate other avenues of redress.[197]

The problems of applying this test surfaced before the current pre-occupation with the public/private divide[198] but arose in a most acute form in a post-*O'Reilly* case, *R v. East Berkshire Area Health Authority ex parte Walsh.*[199] Walsh was a senior nursing officer who had been dismissed from his employment with the respondent authority on disciplinary grounds. He alleged that in so acting the authority had breached the procedures applicable in such cases which were contained in his contract of employment. However his application for certiorari[200] was supported on the ground that statute required his contract to include terms, including those at issue, negotiated by the Whitley Council for the Health Service and approved by the Secretary of State.

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[197] ie remedies at common law or under the employment protection legislation.

[198] *R v. Post Office ex p. Byrne* [1975] ICR 221 (Disciplinary procedures negotiated by the Post Office with Trade Unions pursuant to a statutory injunction held not to be enforceable by prerogative order as derived from the applicant's contract of employment)

[199] [1985] QB 152.

[200] "The applicant did not claim damages, no doubt because he or his advisers took the view that the quashing of the dismissal would leave his contract of employment intact and entitle him to full pay unless and until there was a further and valid dismissal" per Sir John Donaldson MR at 160.

The Court of Appeal did not regard this as sufficient to inject a public law element into Mr Walsh's claim. According to Donaldson MR claims of the present type could be divided into three categories. He said (at p.165):

> "Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss, thus giving the employee public law rights and at least making him a potential candidate for administrative law remedies. Alternatively it can require the authority to contract with its employees on specified terms with a view to the employee acquiring private law rights under the terms of the contract of employment. If the authority fails or refuses thus to create private law rights for the employee, the employee will have public law rights to compel compliance...If, however, the authority gives the employee the required contractual protection, a breach of that contract is not a matter of public law and gives rise to no administrative law remedies."

Walsh's claim fell clearly into the last of these categories and was to be struck out.[201]

Bernadette Walsh has criticised the decision in *ex parte Walsh* on the ground that, despite clear authority[202] that some statutory underpinning of an employment is necessary for public law remedies to be available, there is no authority that the required underpinning disappears once statutory procedures have been incorporated into a contract[203]. The actual decision can therefore be supported only on the "somewhat contrived" ground that in instructing the authority to incorporate, Parliament has indicated its intention that matters be governed by private law only[204].

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[201] The court also rejected the argument that a public law element could be derived either from the fact that the public had an interest in the employment affairs of a great public service or from Walsh's seniority within the service. Moreover the general employment protection legislation was not considered a sufficient statutory underpinning for these purposes - see chap. 4 ("Statutory duties and public authority defendants").

[202] *Ridge v. Baldwin* [1964] AC 40; *Malloch v. Aberdeen Corporation* [1971] 2 All ER 1278.

[203] [1989] PL 131 at 141.

[204] Ibid at 143. For other criticisms of the decision see Fredman and Morris (1991) 107 LQR at 303.

Walsh's second observation on the test propounded by the Master of the Rolls is more important still. We have already observed that *ex parte Walsh* is notable for having established the "obverse" of the rule laid down in *O'Reilly* viz. that purely private claims cannot be pursued by AJR. Yet there remains one outstanding area of uncertainty. "One interpretation of the judgment suggests that the Court of Appeal intended to exclude from judicial review only cases in which there were no statutory restrictions upon dismissal and cases in which the authority was actually directed by statute to contract with its employees on specified terms. Alternatively, did it intend the exclusion to cover all cases in which statutory restrictions have been expressly or impliedly incorporated, even in the absence of a specific statutory requirement that they should be so incorporated?"[205] In a regime of procedural rigidity such uncertainty is unfortunate.

Reviewing employment decisions in the absence of a statutory underpinning.

What can nevertheless be said with certainty on the basis of the foregoing is that the exercise of a "free-standing" statutory power to discipline can be supervised by a prerogative order.[206] However it seems now clear that the absence of such a power is not fatal to a claim made under Order 53.

This possibility arose in *R v. Civil Service Appeal Board ex parte Bruce.*[207] There the Divisional Court held that the CSAB, although not a statutory body, was in principle amenable to Judicial Review largely because the applicant was not apparently engaged under a contract of service with the Crown and could not enforce the limits of the Board's jurisdiction in private law proceedings. However May LJ thought that even where a civil

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[205] B. Walsh, op cit. at 143. In support of the first view she cites *R v. Birmingham CC, ex p. Gollam* (LEXIS Transcript); in support of the second *R v. Home Secretary ex parte Benwell* [1985] QB 554. For the resolution of a further potential uncertainty about what constitutes a "statutory underpinning" see the discussion of *ex p Noble*, infra.

[206] *R v. Home Secretary ex p. Benwell* (supra);*R v. Home Secretary ex p. Attard* (LEXIS Transcript).

[207] [1988] ICR 649 (Divisional Court; relief refused in discretion); approved [1989] ICR 171 (CA). The Court of Appeal did not comment on the dictum of May LJ referred to infra.

servant was engaged under contract[208] the circumstances of his dismissal and any appeal to the Board might still be susceptible to Judicial Review under Order 53.

This dictum has been interpreted by Fredman and Morris[209] as a reference to the statute/contract divide propounded in *ex parte Walsh*, adapted to fit cases where the exercise of *prerogative* powers affects contractual rights. Recently, however, another possibility has emerged in a number of cases in which, paralleling the dicta in *RAM Racecourses*[210], the courts, whilst affirming the *sufficiency* of a statutory underpinning, have indicated their preparedness to review contractual disputes in the absence of either prerogative or statutory powers.

Publicness related to the substance of an employment decision.

The first of these cases is *R v. Derbyshire County Council ex parte Noble.*[211] Noble was a police surgeon whose services had been dispensed with by the respondent Council in circumstances revealing an alleged breach of the rules of natural justice. He sought certiorari to quash the Council's decision and mandamus to require it to reinstate him. A Divisional Court had struck out the application, applying *ex parte Walsh.* However in the Court of Appeal counsel for Dr Noble argued that a public law element was supplied by the fact that Dr Noble was employed pursuant to the Council's duty under the Police Act 1964, s.1 to provide an adequate and efficient police force for its area. Woolf LJ emphatically rejected this contention. In his Lordship's opinion a statutory underpinning would be present in these cases only where it regulated the very decision under challenge. In this case there was no provision governing dismissal.[212]

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[208] A possibility which did not appear to his Lordship to be unconstitutional, should the Crown display the intention to create legal relations lacking at the time the applicant was engaged.

[209] [1988] PL at 74. See also Arrowsmith (1990) 106 LQR 277 at 285. For an alternative interpretation see B. Walsh, op cit at 149.

[210] Supra.

[211] [1990] IRLR 332. Noted by Carty (1991) 54 MLR 129.

[212] Paras. 11, 17. See also McCowan LJ at para 32. Woolf LJ stated that the presence of a statutory provision "may" entitle an employee to Judicial Review (para 11). This may be taken to be a reference to the fact that where such a provision is incorporated into a

With respect this view is surely correct - for otherwise Mr Walsh would have succeeded in his application. However it will not always be irrelevant that an employee is the instrument whereby a public authority discharges its public law duties. Woolf LJ quoted with approval[213] a passage from the judgment of Purchas LJ in *Walsh* indicating that where the termination of an individual's contract owed to a breach by the authority of a public law duty Judicial Review would be available. Of course a duty such as that in the Police Act 1964 s.1 - as with most duties of this nature -is highly open-ended and therefore seldom clearly breached[214]. However in rare cases Order 53 may be an appropriate route.[215]

In any event Woolf LJ acknowledged that it was possible for a contractual dispute to be suffused with a public element irrespective of any statute. This would be the case where the "subject-matter of the dispute [indicates that] Judicial Review is appropriate", as it would do where it applied broadly to all the employees of an authority[216] or where the decision was taken in the interests of the public.[217] By contrast the decision in Dr Noble's case concerned the way "he and he alone had been treated".[218]

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contract the rule in *Walsh* will apply.

[213] at para 16.

[214] see Cane [1981] PL 11.

[215] For an example see *R v. Liverpool City Council ex p. Ferguson and Grantham* (Times 20/11/85), discussed by B. Walsh op. cit. p. 145. Additionally, even if no breach can be proved, a contract may be a consideration which an authority must take into account in deciding how to fulfil a duty - *R v. Hillingdon Health Authority ex p. Goodwin* [1984] ICR 800 (judicial review of dismissal permitted).

[216] eg *Council of Civil Service Unions v. Minister for the Civil Service* (the "GCHQ" case) [1984] 3 All ER 935.

[217] See *R v. Harrow LBC ex p. D* [1989] 2 WLR 1239 (decision to place applicant on register of suspected child abusers held reviewable even though it did not alter the pre-*Datafin* "affecting legal rights" test). See also *R v. Norfolk CC ex p. M* [1989] QB 619; *R v. Lewisham LBC ex p. P* [1991] All ER 529.

[218] Para 28. Applying the "interests of the public" criterion we might ask why Dr Noble's dismissal was not a matter of public law - whilst s.1 of the 1964 Act might be an insufficient underpinning for the purposes of the *Walsh* test, yet does it not indicate that the public had an interest in the employment of Dr Noble? Contrast Dillon LJ at para 40 and also Donaldson MR in *ex p. Walsh* at 164.

Woolf LJ's attempts to blur the contract/statute divide in the employment context continued in *McLaren v. Home Office*[219], heard immediately after Noble's case by the same panel of judges. The issue here was whether a prison officer at Wandsworth Prison had an arguable case that a working agreement of which the prison Governor was allegedly in breach had been incorporated into a contract of employment between the officer and the Home Office. The officer's action for a declaration had been struck out by the judge who considered that his rights, if any, were in public law only and that AJR was the correct way to proceed. Dillon LJ considered that the plaintiff did have an arguable case that his private law rights had been infringed[220], and Woolf LJ took the opportunity to lay down (obiter) guidance for future cases.

Essentially these cases were to be divided into the following categories.[221]

> (i) In relation to "personal" claims against his employer a public authority employee should pursue any cause of action that he may have by ordinary civil action. Proceeding by AJR would be appropriate only where an employee's private law claim was "subsidiary to" a public law matter.[222]
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> (ii) Where "an employee of the Crown or other public body is adversely affected by a decision of general application, but he contends that that decision is flawed on... *Wednesbury* grounds, he can be entitled to challenge that decision by way of judicial review."[223]

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[219] [1990] IRLR 338.

[220] For the reasons set out at paras 18-20.

[221] see paras 38-42.

[222] Paras 38, 42. See eg *ex p . Ferguson and Grantham* (supra).

[223] *"GCHQ"* supra. This appears to be the case irrespective of any statutory underpinning (*ex p. Noble*, supra, paras 18f, passim.)

(iii) Disciplinary decisions of bodies established under statute or the prerogative, to which the employer or the employee is entitled or required to refer disputes affecting their relationship, are challengeable by way of AJR.[224]

(iv) Disciplinary decisions which are by contrast purely domestic can be challenged only by civil action.

About this analysis we can make a number of points. First, although Woolf LJ was clear that McLaren's claim fell within the first category, it is not apparent why the case was "entirely unsuited" to judicial review as falling within category (ii).[225] This is not to say that the result of the case would have been different if Mr McLaren's claim had been so classified - for it seems that AJR will be an appropriate rather than an exclusive mode of proceeding in these cases.[226] However we may wonder about the outcome had Mr McLaren proceeded by AJR.

Secondly whilst the quasi-judicial characteristic of disciplinary proceedings might point to their amenability to Judicial Review some proceedings can be challenged only by civil action. In any event private employers too exercise disciplinary functions. In delineating the scope of Order 53 Woolf LJ expressly referred only to the disciplinary decisions of bodies set up under statute or the prerogative, although it is clear that disciplinary decisions of the public authority employer itself can be reviewable.[227] To this extent a statutory underpinning remains sufficient to bring a case within Order 53, irrespective of whether the authority is acting in a fashion akin to private institutions.

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[224] See *ex p. Attard*; *ex p. Bruce*; *ex p. Benwell* (supra).

[225] I have adopted a different numbering system from that of Woolf LJ for ease of narrative exposition.

[226] Woolf LJ's language throughout is permissive.

[227] ie where there is a sufficient statutory underpinning within the meaning assigned to that expression in *ex p. Walsh*. Woolf LJ implicitly accepted the correctness of this proposition in *ex p. Noble*, supra, passim.

Third whilst it is plain that "an attack on a collective decision of a public body... is of a different sort to an attack on an individualised decision "[228] it is not the case that private employers never make decisions affecting their workforce as a whole. Accordingly to allow Judicial Review of an employment decision on the ground of the breadth of its impact is not the same as allowing Review because of its "governmental" nature.[229]

The place of Judicial Review in the realm of public authority employment arose again in *R v. Lord Chancellor's Department ex parte Nangle*[230]. That case concerned a challenge to a disciplinary decision of the respondent Department on the grounds of an alleged breach of the rules of natural justice.[231] It was conceded by the applicant that were he engaged under a contract of employment it was inappropriate for him to proceed by AJR. However he contended that as a Civil Servant he did not have a contract.

The Divisional Court held that Mr Nangle had indeed a contract and the respondent's decision was not therefore amenable to Judicial Review. If their Lordships were wrong about that then the decision in any event lacked any significant public element.

The conclusion that the presence of a contract ousts Judicial Review is difficult to support in the light of the above discussion, as is the statement that "in the absence of a... contract the applicant is clearly in a stronger position [to contend that his claim falls within Order 53]".[232] The presence or absence of a contract is irrelevant if the claim involves a public element - as their Lordships appear to admit later in their judgment.[233] Why then did Mr Nangle's claim involve no public element?

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[228] Carty (1991) 54 MLR at 131.

[229] *RAM Racecourses*, supra. This is not, of course to suggest that the policy decisions of private employers will be amenable to certiorari - these tests simply mark the boundary between the public and private lives of public bodies.

[230] [1991] IRLR 343.

[231] Nangle had not been dismissed and therefore had no right of appeal to the Civil Service Appeals Board.

[232] Para 29.

[233] Para 42.

First their Lordships made it clear that the absence of a remedy in private law did not necessarily mean that Mr Nangle would have a remedy in public law. Counsel for Mr Nangle had submitted that the matter fell within the third of Woolf LJ's four categories listed above. This was because the authority of the CSAB - which Woolf LJ expressly included within the ambit of Order 53 - was derived form the Civil Service Pay and Conditions Code, which also contained the internal departmental disciplinary procedures at issue in the present case.

However their Lordships identified an "essential difference" between the decision of a body whose jurisdiction had to be invoked by way of appeal and the decision of an employer with whom the applicant was in a direct relationship.[234] Decisions of the latter kind were "internal" and were such as might arise in the case of any large employer. Additionally a decision *of a public authority employer* might be amenable to certiorari where it raised "questions of policy or interpretation of legal powers which will be justiciable in Judicial Review".[235] Mr Nangle's claim was both internal and individualised and had no public element.

Conclusion on contract and the private lives of public bodies

The tests deployed to distinguish between the public and private lives of public bodies in the contractual sphere are both mutually inconsistent and of uncertain application.[236] In *RAM Racecourses*, Simon Brown J would have restricted review to cases where contractual powers were used in support of a "governmental" function - in that case, regulation. There is, of course, imprecision in this term - more so in other, different, tests, such as whether the claim involves challenging a policy decision of general application or a decision made in the public interest. Admittedly there is no indication in any of the cases that AJR will be an exclusive mode of proceeding in these circumstances. To that extent it will always be open to an employee to avoid uncertainty and begin proceedings by writ. However the advantages of

[234] A distinction which held irrespective of whether the Pay and Conditions Code had contractual force (para 45).

[235] para 42.

[236] See Arrowsmith (1990) 106 LQR 277.

proceeding by AJR[237] will continue to attract employees into Order 53. Here uncertainty is critical - the "obverse" of the *O'Reilly* rule[238] together with the restrictive interpretation of rule 9(5), in substance confirmed in *Noble*, will conspire to cost litigants time and money in instituting fresh proceedings if they guess incorrectly. In the circumstances the way forward must be to overturn the celebration of legal technicality that is the decision in *ex parte Dew*[239], and allow easy transfer out of Order 53.

Nevertheless there is much in these cases from which to take encouragement. It is surely correct that the Courts should not regard themselves as confined by the historical definition of public law for the purposes of allowing litigants *in* to Order 53. As Woolf LJ pointed out in *Noble* there is no question of an *O'Reilly*-type abuse of process here and the substance and background to a particular decision can therefore be considered.[240]

Arrowsmith[241] has argued that the special position of the State is "background" enough for these purposes. However the summary character of Order 53 proceedings would presumably place restrictions on the amenability of contractual decisions to Judicial Review even in such a regime. In *Noble*, Woolf LJ was influenced by the fact that the claim in that case involved a conflict of evidence with which the AJR procedure was not ordinarily adapted to deal.[242]

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[237] See Fredman and Morris, op cit above n. 204 at 299. Also B. Walsh, op cit n. 203 at 132f.

[238] See the discussion of *ex parte Walsh* in chap. 1.

[239] *R v. Secretary of State for the Home Department ex p. Dew* [1987] 1 WLR 881.

[240] It has been pointed out by commentators that one factor influencing the result in the employment cases has been the availability to the applicant of remedies under the employment protection legislation (see B. Walsh, op cit. at 146; Fredman and Morris, op cit n. 204 at 308. However this consideration has not been invoked consistently (contrast eg Dillon LJ in *Noble* at para 40 with May LJ in *ex parte Walsh* at 169-70) and in any event does not affect the characterisation of a dispute as public/private but is instead to be considered in the exercise of the court's discretion to grant a remedy - see per Donaldson MR in *Walsh* at 161.

[241] Op cit, at 292. See also the Court of Appeal's judgment in *Jones v. Swansea CC* [1989] 3 All ER 162 (reversed on other grounds [1990] 3 All ER 737, HL), discussed by Arrowsmith at 286f.

[242] Para 9.

Indeed some of the criteria of reviewability applied in these cases may be designed to reflect this limitation.[243]

[243] See the quotation from *ex p. Nangle* (above n. 235). Moreover although *RAM Racecourses* involved an *individual* application, the court intervenes to control decisions of "contractual" tribunals in a supervisory capacity and not as a court of appeal - see *Lee v. The Showmen's Guild of Great Britain* [1952] 2 QB 239. Woolf LJ's comments about factual disputes in *Noble* should not, of course be taken as a qualification to the *O'Reilly* rule. *O'Reilly* is authority for the view that where a dispute raises issues of public law only, the existence of a factual dispute is not enough to allow evasion of the safeguards of Order 53 for the protection of public authorities. Woolf LJ's concern is to identify when a litigant, having a cause of action against an authority in private law, is entitled as an alternative to proceed by AJR and when, by contrast, he may bring only a civil action. In *Roy v. Kensington and Westminster Family Practitioner Committee* [1992] 2 All ER 705, Lord Lowry appeared (at pp. 723, 726) to regard Woolf LJ's comments as of wider application, although in that case the plaintiff did have a cause of action.

CHAPTER FOUR: BREACH OF STATUTORY DUTY - PUBLIC OR PRIVATE LAW?

The general position.[244]

The question of when a statutory duty sounds in damages in the event of breach is one of notoriously uncertain resolution. The "only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted".[245] Nonetheless the courts have developed certain presumptions to assist in their search for this elusive legislative intention, as follows.[246]

It seems that, as a general rule, "where an Act creates an obligation and enforces the performance in a specified manner....that performance cannot be enforced in any other manner".[247] Criminal statutes may nonetheless create private law duties if it is apparent that the statute was passed for the benefit of a class of persons as opposed to the public at large[248]. Moreover where a statute creates "public rights" - and it appears that the right to the observance of the criminal law is not enough for these purposes[249] - damages may be obtained by an individual who suffers special damage as a result of a breach of the statute.[250]

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[244] See Stanton, "Breach of Statutory Duty in Tort" (1986); Harding, "Public Duties and Public Law" (1989), pp.230-253; Buckley "Liability in Tort for Breach of Statutory Duty" (1984) 100 LQR 204.

[245] Per Lord Simonds in *Cutler v. Wandsworth Stadium* [1949] AC 398 at 407. See also *Atkinson v. Newcastle Waterworks* (1877) 2 Ex. D. 441. For the correct test of remoteness of damage, see *Gorris v. Scott* (1874) LR 9 Ex 125.

[246] See *Lonrho v. Shell Petroleum* [1982] AC 173.

[247] Per Lord Tenterden CJ in *Doe dem. Bishop of Rochester v. Bridges* (1831) 1 B & Ad 847 at 859.

[248] eg *Groves v. Lord Wimborne* [1898] 2 QB 402.

[249] Nor, it would appear, the right to enforce good government through the prerogative remedies. See *Lonrho v. Shell* (above) at 185-6.

[250] Ibid. The authority for this was said by Lord Diplock to be *Boyce v. Paddington BC* [1903] 1 Ch 109. However, as envisaged by *Boyce*, special damage merely gave to an

Statutory duties and public authority defendants.

The obverse of the presumption that a criminal penalty excludes a remedy in damages is that the *absence* of a specified means of enforcing performance is likely to result in the availability of a private law remedy.[251] For reasons explained below this is likely to be the case where a statute is cast alike on public and private actors. But where a duty is cast exclusively upon public authorities, a court is likely to hold that the statute was passed for the benefit of the public - even if it is apparently intended to protect a class[252] - and that a public law remedy is the only appropriate mode of enforcement.[253]

This approach is neatly illustrated by comparing two cases in which English courts have addressed the question in the context of duties imposed by European Community law.[254] In the first, *Garden Cottage Foods, Ltd v. Milk Marketing Board*[255], the House of Lords[256] inclined to the view that a breach of Article 86 of the EEC Treaty (prohibiting the abuse by "undertakings" of a dominant market position in so far as it might affect trade between Member States) was capable of sounding in damages. It had been established by the

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individual the standing to seek an injunction in "public rights" cases without the assistance of the Attorney-General. Lord Diplock uses special damage in effect to alter the nature of the right infringed, thus creating a new category of the tort of breach of statutory duty. See further Stanton, op. cit. at 50.

[251] Lord Tenterden CJ loc. cit.(supra n. 247).

[252] See eg *Hague v. Deputy Governor of Parkhurst Prison* [1991] 3 All ER 733 (HL).

[253] Note that sometimes a remedy of Ministerial complaint will oust even public law remedies - see *Pasmore v. Oswaldthistle UDC* [1898] AC 387.

[254] Community law states that certain of its provisions (including those discussed infra) shall be effective (without the need for legislation by national authorities) to create in individuals rights to which national courts must give full effect - see *Van Gend en Loos* Case 26/62 [1963] ECR 1; *Simmenthal* Case 106/77 [1978] ECR 629. This could not overcome the principle of UK constitutional law that Treaties cannot alter the general law. Accordingly the European Communities Act 1972 s. 2(1) states that such "directly effective" provisions of Community law shall have effect in UK courts. Sub-section (2) empowers the Secretary of State to make orders bringing into effect in the UK those rules of Community law which the Community itself acknowledges require implementing legislation.

[255] [1983] 2 All ER 770.

[256] Lord Wilberforce dissenting. The matter came up to the House on an interlocutory point and it was unnecessary for their Lordships to express a concluded view.

Court of Justice of the European Communities (CJEC) that Art. 86 created rights and obligations *between* individuals which national courts were obliged to uphold. It followed, said Lord Diplock, that an individual aggrieved by its breach had a cause of action for breach of statutory duty against the Board.[257]

This logic is impeccable with regard to Art. 86 - for, with regard to the imposition of liability, the mere fact that the defendant is a public authority is irrelevant if, in similar circumstances, a private actor might have been liable.[258] But the logic obviously need not apply where the duty in question can only ever be enforced against a public authority - a point which the Solicitor General successfully urged upon a majority of the Court of Appeal in the second of our two cases, *Bourgoin v. Ministry of Agriculture, Fisheries and Food.*[259]

The plaintiffs were French companies which, until August 1981, had imported turkeys into the United Kingdom under a general import licence issued by the Minister acting under statute. In August the Minister had revoked the licence in so far as it permitted the import of turkeys from countries, including France, in which a particular virus affecting poultry was controlled by vaccination rather than slaughter. The Commission of the European Communities brought proceedings before the Court of Justice contending - successfully - that the UK Government was in breach of Article 30 of the EEC Treaty.[260] Following this ruling a further licence was issued and the plaintiffs' trade resumed in November 1982. They subsequently brought an action against the Government claiming damages for loss suffered in the interim. The Government contended as a preliminary matter that the plaintiff's only

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[257] At 775h-j.

[258] "English law fastens not upon principles but upon remedies" (per Lord Wilberforce in *Davy v. Spelthorne BC* [1984] 1 AC at 276).

[259] [1985] 3 All ER 585.

[260] Art 30 provides that "Quantitative restrictions on imports and all measures having equivalent effect shall...be prohibited between member states". It was established by the CJEC in *Ianelli & Volpi SpA v. Ditta Paolo Meroni* Case 74/76 [1977] ECR 557 that Art. 30 is directly effective to create rights in individuals which national courts must protect.

remedy for a breach *simpliciter* of Article 30[261] - now academic - was Judicial Review quashing the original decision to revoke.

Parker and Nourse LJJ agreed. Exploiting the scope afforded by its exclusive nature[262], their Lordships held that Art. 30 was appropriately enforced in public law only. The CJEC had itself recognised[263] the "undesirability, in areas in which choices of action depend on judgment, that member states should be hindered in taking...action by the prospect of actions for damages if their judgment should ultimately be held to be wrong."[264] The observance of Art. 30 plainly required the exercise of judgment on the part of the Government as to what measures did or did not fall within it.[265]

It must be stressed that this policy is relevant only where the duty in question is addressed exclusively to public authorities. As Lord Diplock pointed out in *Garden Cottage*[266], it will sometimes require a preliminary ruling from the CJEC under Art. 177 of the EEC Treaty to determine whether a particular pattern of behaviour by an authority constitutes an abuse within Art. 86. The fact that Art. 86 binds private actors as well as public authorities is

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[261] The Plaintiffs also pleaded that the Minister was in any event guilty of the tort of misfeasance in a public office. This, they argued, could be established if the Minister had breached a public law duty, aware both that his actions amounted to a breach and that as a result the Plaintiffs would suffer loss. The Minister conceded for the purposes of the preliminary proceedings that he had possessed this mental element, but denied that anything short of malice towards the Plaintiffs was sufficient to attract liability. The Court unanimously accepted the Plaintiffs' submissions on this point.

[262] See especially Nourse LJ at 633a. Note: it appears that merely because a duty is addressed in terms only to Member States does not mean it cannot also bind private actors - see Art 119 of the Treaty, as interpreted by the CJEC in *Defrenne v. Sabena* Case 43/75 [1976] ECR 455. However as Oliver LJ made clear (at 613a) Art 30 is capable of implementation only by a member state (although, for reasons explained below, his Lordship did not regard this as relevant).

[263] In *Bayerische HNL Vermehrungsbetriebe GmbH* Joined Cases 83 and 94/76, 4, 15, and 40/77 [1978] ECR 1209 and *Koninklijke Scholten Honig NV* Case 143/77 [1979] ECR 3583 (The Isoglucose Case). These were claims for damages against the Council of Ministers for loss suffered as the result of invalid measures.

[264] Per Parker LJ at 628.

[265] This, as Parker LJ pointed out (at 625c) is more especially true in view of the derogations from Art. 30 contained in Art. 36.

[266] Loc. cit. at 776d.

therefore one "vital but unexpressed step"[267] in concluding that it is enforceable by award of damages.[268]

"Special" statutory duties - private law.

However whilst only "special" statutory duties are enforceable in public law it does not follow that no such duty may be enforced by award of damages. For it appears that even exclusive statutory duties sound in private law if they are *executive*, ie duties whose implementation does not require the exercise of judgment.[269] In *Cocks v. Thanet DC*[270] the House of Lords held that a housing authority's duty to execute its decision that an individual was entitled to accommodation was enforceable in proceedings begun by action.[271]

"Special" statutory duties - the Community impact.

A considerable extension of the circumstances in which the breach of an exclusive statutory duty attracts liability in damages may now have been effected by developments in Community law. How might this be?

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[267] Per Lord Wilberforce (dissenting) in *Garden Cottage* at 783f, suggesting that another such step was the refusal of the majority to believe that Community law might engender a *sui generis* cause of action for an injunction against private actors not backed by the possibility of an award of damages.

[268] Compare *An Bord Bainne Co-op v. Irish Dairy Board* [1984] 2 CMLR 584 (Proceedings to enforce both Art. 86 *and* a Council Directive addressed only to Member States held to raise issues of public and private law).

[269] The notion of "judgment" in this context appears to embrace only those choices which are of a quintessentially governmental character. Accordingly a duty to keep school premises "reasonably safe" is to be regarded as executive for these purposes - see Cane [1981] PL 11.

[270] [1982] 3 All ER 1135.

[271] Note that damages were not available to an applicant in respect of an ultra vires and unfavourable decision regarding his entitlement. To hold otherwise, said Lord Bridge, would have involved the court in deciding that not only was an adverse decision invalid, but that the authority acting lawfully would certainly have decided that the applicant fulfilled the criteria of entitlement. This is substantially the same consideration that motivated the majority in *Bourgoin.*

The approach of the majority in *Bourgoin* means that ordinarily where an individual suffers loss through interference with a Community law right which is by its nature enforceable only against the State he cannot recover damages.[272] But, as Oliver LJ acknowledged[273], it is accurate to say that he is unable to enforce his Community rights for this period only if Art. 30 constitutes a duty owed in private law.

In holding as they did, Parker and Nourse LJJ took advantage of the rule, well established in Community jurisprudence[274], that the remedies available in national courts to enforce Community rights need only be no less effective than those available to enforce analogous rights under domestic law (the principle of non-discrimination)[275]. A domestic statute in the terms of Art. 30 would be construed as conferring public law rights and the result therefore followed.

Oliver LJ, however, felt constrained to interpret Art. 30 differently.[276] Public law rights were those enjoyed by any member of the public with sufficient locus standi to go to court to correct the misuse of administrative power. An "individual right"[277] was the antithesis of such a right and could only describe the right of a person *not to suffer loss* as the result of a breach of the law. This, moreover, appeared to be implicit in the jurisprudence of the

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[272] A degree of comfort is to be found in the rule that full interlocutory relief must be available to an applicant in appropriate circumstances to prevent further, and possibly unlawful, loss being sustained pending the final outcome of proceedings to enforce Community rights - see *Factortame* [1991] 1 All ER 70.

[273] at 611g.

[274] See eg *Rewe v. Hauptzollamt Kiel* Case 158/80 [1981] ECR 1805.

[275] There is one qualification to this, viz. that national rules of procedure must not be so adapted as to make it impossible in practice to enforce Community law rights (see *Amministrazione delle Finanze dello Stato v. Ariete SpA* Case 811/79 [1980] ECR 2545). Thus Community rights may be enforceable by remedies which would not avail an applicant complaining of the infringement of domestic rights - see eg the *Factortame* saga, below n.

[276] His Lordship reached his conclusion with reluctance for the reasons which the majority regarded as compelling - see 616g et seq. Neither Parker LJ nor Nourse LJ were embarrassed by the language of individual rights "for an individual right may be a right in private law or in public law" (631f).

[277] Above n. 260.

Court of Justice.[278] Such rights were characterised in UK law as private law rights, and to deny the full range of remedies - including damages - for their protection would violate the principles of full effect and non-discrimination. The difference between *Garden Cottage* and the present case - though valid[279] - gave way to Community jurisprudence.

It now seems that the scope now exists for a court to prefer the approach of Oliver LJ to that of his brethren.[280] The reason is the recent decision of the Court of Justice in *Francovich and Bonifaci v. Italy*.[281] This establishes that where the enforceability of a Community

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[278] See also *Simmenthal* (supra n. 254) where the CJEC asserted that Community law rights should be given effect "from the date of their entry into force" (para 22). The views of the Parker and Nourse LJJ are not irreconcilable with this assertion - all depends on the nature of the right - but the language is significant.

[279] Oliver LJ would have construed a domestic statute in the terms of Art. 30 as enforceable in public law only - see 619b.

[280] The issue is now before the Divisional Court as a sequel to the *Factortame* litigation (for discussion see Toth (1990) 27 CMLRev 573; Gravells [1989] PL 568 and [1991] PL 180). Spanish fishermen claimed that Community law gave them a right to register their catches against UK fishing quotas, and that the Merchant Shipping Act 1988, which purported to deprive them of this right, was therefore to be set aside. The Divisional Court made a reference to the Court of Justice under Art. 177 of the EEC Treaty to determine the extent of the applicants' Community rights and granted them an interlocutory injunction restraining the Secretary of State from enforcing the Act in the meantime (an anticipated period of approximately two years). The House of Lords [1989] 2 All ER 692 considered that the Divisional Court had no power to grant the injunction, for two reasons. First, s.21 of the Crown Proceedings Act 1947 prohibited the granting of injunctions against a Minister. Secondly, the Court could not make an order temporarily depriving of its effect an Act which might, in the result, be entirely compatible with Community law. The House nonetheless conceded that these reasons were subject to any "overriding principle of Community law" and made an Art. 177 reference on this point. The Court of Justice [1991] 1 All ER 70 considered that such a principle did exist, because, if it did not, the possibility would arise that the applicants' Community rights would be deprived of their effect for two years. The Court therefore said, in effect, that the House of Lords was to apply the test in *American Cyanamid v. Ethicon* ([1975] 1 All ER 504, HL) to determine the question of interim relief unembarrassed by the reasons which it had first found persuasive. The House of Lords obliged and made the interlocutory order - see ibid.

In July 1991 the Court of Justice [1991] 3 All ER 769 ruled that the fishermen could indeed register their catches against UK quotas. The matter has therefore returned to the Divisional Court and the applicants now seek damages for loss suffered whilst the issue of interim relief was being resolved. Thus the question arises as to the correctness of the majority views in *Bourgoin*.

[281] Joined Cases 6/90 and 9/90 (Times 20/11/91). See Barav (1991) 141 NLJ 1584; Parker (1992) 108 LQR 181; Greenwood [1992] CLJ 3.

directive in national courts depends upon the enactment by the State of implementing legislation, an individual who is unable to enforce his rights through the State's failure to act may recover damages against the State.[282]

So defined, this new right of action would appear to cover cases where a directive is either incapable of direct effect or, in any event, where enforcement is sought against a private actor.[283] Moreover it may be thought to follow *a fortiori* that *Francovich* applies to a case like *Bourgoin* in which the State *positively interferes* with *directly effective* Community rights.[284]

The matter has received the attention of the House of Lords in *Kirklees Metropolitan Borough Council v. Wickes Building Supplies, Ltd*[285]. This case arose as a consequence of other proceedings[286] in which their Lordships sought a ruling from the Court of Justice to help resolve the question of the compatibility with Art. 30 of the prohibition against Sunday trading contained in the Shops Act 1950, s. 47. In *Kirklees* the House considered whether a local authority seeking an interlocutory injunction to enforce s. 47 in the meantime was required to give a cross-undertaking in damages in case it should turn out that Art. 30 had the effect claimed by the respondent company. The Court of Appeal, giving judgment before

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[282] Provided always that the directive has as its goal the creation of individual rights - see Barav, op. cit. at 1585.

[283] See *Marshall v. Southampton AHA* [1986] QB 401. For what is a public body for these purposes see *Foster v. British Gas plc* [1991] 2 All ER 705 (HL); *Doughty v. Rolls Royce* (Times 14/1/92, CA). Note in most cases a national court applying domestic law against a private defendant will be obliged to interpret that law in the light of the wording and purpose of directives operating in the same sphere (*Marleasing* Case 106/89 [1990] ECR I-4135). However EC law itself acknowledges limits to this obligation - see eg *Webb v. EMO Air Cargo (UK), Ltd* [1992] 2 All ER 43 (CA), noted by the author at (1992) 29 CMLRev (forthcoming).

[284] See eg Vaughan and Randolph in "Constitutional Adjudication in European Community and National Law" (eds Curtin and O'Keeffe), p. 225 n. 28; Parker, op. cit. at 181; Greenwood, op. cit. at 6.

[285] [1992] 3 All ER 717.

[286] A "leap frog" appeal from the judgment of Hoffmann J in *Stoke-on-Trent CC v. B&Q Retail, Ltd.* [1991] 4 All ER 221. The House of Lords made a reference to the Court of Justice. There is no report of their Lordships' reasons for doing so.

Francovich, had decided that it was. However Lord Goff[287] considered it probable that *Francovich* gave to an individual affected by the breach of Art. 30 the right to recover damages *as a final remedy against the Government* for its failure to repeal s. 47. It followed that to require an undertaking *from the Council* was both unnecessary and wrong.

However Lord Goff refused to state unequivocally that *Bourgoin* was incorrectly decided and entertained in passing the idea that *Francovich* might be confined to the failure by a member state to introduce legislation to implement a directive.[288] If this is so it may be possible to limit *Francovich* to cases where, for example, the breach of Community law is clear, as opposed to those in which the observance of Community law requires an exercise of judgment. This would be consistent with the approach of Community law to the question of the liability of Community institutions.

Procedural matters.

If individual rights under Community law are private rights, it would seem, in accordance with the principle of non-discrimination[289], that they will be enforceable by ordinary civil action in many cases. However the position may not always be uncomplicated. Take, for example, the facts of *Bourgoin* itself. There the infringement of Art. 30 took the form of the exercise by the Minister of statutory powers. Thus, on the assumption that Art. 30 creates private rights, the case involved "mixed" issues of public and private law. We have seen in chapter 3 that the House of Lords has yet to state affirmatively that *all* public law issues can in such cases be litigated by civil action, the answer possibly depending on whether the private law content of a claim is more prominent than its public counterpart.[290] If this approach were to prevail, then Community law rights could effectively be denied unless the applicant were to begin proceedings within three months.

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[287] With whom the remainder of the House agreed.

[288] At 734c. Lord Goff, however, observed that the Court of Justice had spoken in general terms of a right to recover damages for "breaches of Community law attributable to a member state".

[289] Above.

[290] See the *Roy* case, discussed in chapter 3.

However there is a possible Community law solution. We have noted[291] that the non-discrimination principle is qualified by the fact that national procedures must not be so adapted as to make it impossible in practice to enforce Community rights. This includes the rule that time limits must be "reasonable".[292] It is not, however, clear whether the three month time limit under Order 53 is unreasonably short.[293]

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[291] Above n. 275.

[292] See *Rewe v. Landwirtschaftskammer Saarland* Case 33/76 [1976] ECR 1989.

[293] Quaere: would a claim under Art. 30 ever involve a public law issue? Plainly the decision of the Minister in *Bourgoin*, being one taken under statute, could have been challenged by a member of the public who had only a sufficient interest in the matter, as opposed to a private right. But it is doubtful whether individuals with private rights under Art. 30 would need to challenge the *vires* of the Minister's action in the same circumstances. All that they would need to prove was that the facts pleaded amounted to a breach of Art. 30 - the issue of private liability would not turn on the resolution of a vires point because the breach of Art. 30 *could never be* intra vires. This argument may, however, cause problems in the operation of the "obverse" of the rule in *O'Reilly v. Mackman* - see chapters 1&3.

CHAPTER FIVE: REFORMING PROCEDURAL PUBLIC LAW.

The foregoing survey has revealed a number of problems associated with the *O'Reilly* rule and its obverse, the rule in *ex parte Walsh*. It is helpful briefly to summarise them here.

The essential difficulty is that the boundary between public and private law cannot be drawn with precision. It is fairly clear[294] that merely because a case raises an issue of public law at the level of substantive principle - for example where a breach of the rules of natural justice is alleged - it will not necessarily be a public law case for the purposes of procedure. However, beyond this, uncertainty is quickly encountered.

First, it remains unclear exactly when a private law dispute will be considered to have a sufficient public dimension to enable it to be resolved on an AJR, and when, obversely a litigant may fall foul of the rule in *Walsh*.[295] Secondly, the courts have yet expressly to adopt a coherent approach to the question of when a statutory duty gives rise to correlative private rights. The cases do appear to establish that only duties cast uniquely upon public authorities will be candidates for enforcement by mandamus. However some "special" statutory duties are nonetheless private, and in this connection it is doubtful whether the "decision/executive acts" dichotomy outlined in *Cocks v. Thanet*[296] will bear scrutiny.[297] In any event, statutory duties which are clearly of the "decision-making" variety can nonetheless sound in private law - as *Roy*'s case illustrates.

A third, and related, problem is that if a decision to confer a statutory benefit does give rise to private rights[298], what of cases where the benefit is subsequently withdrawn? May we

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[294] See especially Purchas LJ in *ex parte Walsh* at 181. But see B. Walsh [1989] PL at 149f.

[295] Chapter 3.

[296] [1982] 3 All ER 1135 (HL).

[297] See recently *Tower Hamlets LBC v. Ali* Independent 10/4/92. For problems with this distinction in the branch of the law concerned with negligence in the exercise of statutory functions see Bowman & Bailey [1986] CLJ 430.

[298] In *R v. Secretary of State for Transport ex p. Sherriff & Sons, Ltd. (No.s 1 & 2)* (Times 18/12/1986; Independent 12/1/1988, noted by A.W. Bradley [1987] PL 141 and [1989] PL 197) the respondent had indicated to the applicant that it would pay a statutory

assume that such a decision can always be challenged collaterally on the basis of *Roy*? And if we can, what of cases where a renewable benefit is not renewed? In fact this problem is most likely to arise where the benefit in question is a statutory licence, or some variant thereof. Yet it is not even clear that the "two-stage" approach to the vesting of private rights adumbrated in *Cocks* applies at all to such interests. The tenor of the current judicial approach[299] suggests that the recipient of a licence enjoys only a legitimate expectation that he should continue to enjoy it. Yet there are obvious and strong arguments for allowing a licence-holder to recover damages if his licence is unlawfully revoked.[300]

Finally we have observed that there remain aspects in which the law relating to collateral challenges to public law issues is uncertain.[301]

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grant in support of the latter's business. The subsequent decision not to pay the grant was overturned on an AJR. The department paid the grant belatedly and it was then held (in No.2) that interest was not recoverable on the money for the period of delay. The reason was that AJR was not a "proceeding for the recovery of a debt or damages" within s.35A of the Supreme Court Act 1981. In the circumstances the company's only chance of recovering interest was to have brought a civil action. But Professor Bradley ([1989] PL at 199), echoing reservations of the judge, doubts whether such an action would have surmounted the *O'Reilly* obstacle. However it seems (from n.6 ibid) that this is because he doubts whether there was a "decision" in the *Cocks* sense sufficient to create private rights. Indeed the facts of No.1 reveal that the initial indication by the department made a final decision conditional upon a number of factors. Accordingly *Sherriff* does not undermine the approach in *Cocks* that a decision creates private rights, but instead concerns the question of what constitutes a decision.

[299] See Forsyth "The Provenance and Protection of Legitimate Expectations" [1988] CLJ 238; Craig "Legitimate Expectations: A Conceptual Analysis" (1992) 108 LQR 79.

[300] The classic exposition remains Charles Reich's "The New Property" (1964) 73 Yale LJ 733. *Bourgoin v. MAFF* [1985] 3 All ER 585 is not necessarily authority against such a proposition, for the licence there in question was a general one that did not enure to the benefit of any one individual. The *refusal* of a licence is certainly a matter of public law only - *R v. Knowsley MBC ex p. Maguire* (Times 26/6/92).

[301] Chap. 2. C.T. Emery (op. cit. above nn. 57, 114) considers that factors such as the competence of inferior courts to decide vires issues are additional values to be put in the scales against the private interests of the litigant when considering what is the *desirable* scope of collateral challenge. For a suggested means of accommodating these values see ibid.

Declarations and public authorities.

Another apparent uncertainty, not yet addressed, concerns the declaration as a remedy against public authorities in cases not involving a private law cause of action. In *O'Reilly* Lord Diplock appeared to state[302] that the mode of proceeding adopted in *Pyx Granite, Ltd v. Ministry of Housing and Local Government*[303] would be acceptable even in the light of the reforms to Order 53.

Pyx was a case where the company sought declarations that a Ministerial decision granting limited planning permission to undertake quarrying operations was invalid, and that no limits could be set. The company succeeded despite having suffered no interference with its private rights sufficient to justify the award even of a *quia timet* injunction. This is unremarkable because, despite initial hesitation[304], it has long been established that the declaration as a remedy in civil proceedings is not so confined.[305] This is how Order 15 r.16 has been interpreted, permitting the court to "make binding declarations of right whether any consequential relief is or could be claimed, or not." But if this is the case, why was the declaration sought by the prisoners in *O'Reilly* available only by way of AJR?

In *Gillick v. West Norfolk and Wisbech AHA*[306] the House of Lords was asked by the plaintiff to declare that the contents of a circular promulgated by a government department were invalid as containing advice that was erroneous in law. All but one of their Lordships felt it necessary to consider whether the plaintiff's claim should not have been brought by AJR under *O'Reilly*.[307] Indeed Lord Bridge[308] considered that because the plaintiff could

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[302] [1982] 3 All ER at 1131, 1133.

[303] [1960] AC 260.

[304] eg *London Association of Shipowners and Brokers v. London and India Docks Joint Committee* [1892] 3 Ch.D 242.

[305] See the majority judgments in *Guaranty Trust Co. of New York v. Hannay & Co.* [1915] 2 KB 536 (CA).

[306] [1985] 3 All ER 402.

[307] Lords Fraser and Scarman considered that AJR was an appropriate course; Lords Bridge and Templeman considered it *the* appropriate course.

[308] at 426b-c.

assert no private right against the defendant relief should have been sought in public law. Professor Wade doubts whether *O'Reilly* had anything to do with the claim in *Gillick* and considers that, as well as *Pyx Granite, Dyson v. Attorney - General*[309] would also escape the *O'Reilly* general rule. So we return to our problem - what declarations are covered by *O'Reilly*?

In both *Pyx* and *Dyson* the plaintiff could have mounted his challenge by way of defence to proceedings brought to enforce respectively the decision and the demand. This is obvious in *Dyson*'s case - less so in *Pyx*. We have noted[310] in an analogous case that a refusal to grant a licence cannot ordinarily be challenged by way of defence to criminal proceedings brought against a defendant who engages in the regulated activity in question. However as Lord Diplock pointed out in *O'Reilly*[311] *Pyx* on analysis appears to have been concerned with declaring that the plaintiffs had a lawful right to undertake quarrying activities without the need to obtain any decision from the Minister. The company would not, therefore, have had to surmount the obstacle that a successful challenge does not create the necessary licence - for the necessity of the licence was the very point at issue.[312] Given, then, that in both *Pyx* and *Dyson* the plaintiff could have avoided the procedural requirements of Order 53 defending himself in enforcement proceedings, it would be strange indeed to require him to mount an *attack* by AJR.

On this basis, *O'Reilly* certainly applies to declarations that a licence[313], housing[314],

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[309] Chap. 1. Wade's views appear at A.L. p. 683, observing that (for the reasons explained at n. 94 ibid) the effect of *Gillick*'s case might now be to require *Dyson*, though not *Pyx*, to have proceeded by AJR.

[310] Above chap. 2.

[311] At 1131g.

[312] As Rubinstein points out ("Jurisdiction and Illegality" p. 37), the need to create a licence arises only in cases involving what he terms "negative" decisions, ie decisions not to confer a benefit. "Positive" decisions, purporting to alter *existing* rights, have always been challengeable collaterally (ibid at 36). *Pyx* was such a case. As Viscount Simonds pointed out (at 287), whether the Minister's decision was valid turned on to what extent the statute cut down the company's common law right to quarry.

[313] Absent, at least, a clause such as that contained in para 28 of Sched 3 to the Local Government (Miscellaneous Provisions) Act 1982 - see the *Quietlynn* case, discussed in chapter 2.

remission of sentence or any other statutory benefit has been invalidly refused - all cases where, prior to 1977, *there was no possibility of a collateral challenge to the decision in enforcement proceedings* and where certiorari was the orthodox mode of challenge.

***O'Reilly* - should it be overruled?**

But the grey areas outlined above remain and have led, perhaps understandably, to calls for *O'Reilly* to be reconsidered by the House of Lords.[315] Their Lordships have shown themselves recently to be willing to depart from their previous decisions[316], however it is doubtful whether there is sufficient judicial consensus on the matter seriously to entertain this hope.[317]

In any event Professor Wade has argued that there is another, more serious, obstacle to attempting to overrule *O'Reilly*. We have already noted[318] that in some cases AJR *must be* an exclusive procedure, for otherwise the safeguards for public authorities contained in it would be routinely circumvented. Accordingly to avoid the prospect of at least some measure of procedural exclusivity involves dismantling the leave requirement and short time limit contained in the Supreme Court Act 1981.[319] Or, to put the same point another way, any proposal to overrule *O'Reilly* given the present rules is illogical.

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[314] *Cocks v. Thanet* (supra).

[315] "Administrative Justice: Some Necessary Reforms" Report of the Committee of the JUSTICE - All Souls Review at p. 166. The Law Commission's Fifth Programme of Law Reform, Item 10 (Judicial Review) places *O'Reilly* first in a list of topics to be examined.

[316] *Murphy v. Brentwood* [1991] 1 AC 398.

[317] See Lord Bridge in *Roy* [1992] 1 All ER 705 at 707.

[318] Chap. 1, n. 68.

[319] See Wade (1989) 105 LQR 315 at 317. The Committee of the JUSTICE - All Souls Review make this recommendation. Professor Wade believes that if protection for public authorities against ceratin types of litigation *is* needed then it can be accommodated in other ways - see "Procedure and Prerogative in Public Law" (1985) 101 LQR 180 at 189-90.

But if *some* cases must be brought by AJR does the line have to be drawn so as to bring exclusively within Order 53 all cases brought by private actors[320] raising only issues of public law? For some cases quite plainly raise only issues of public law - others involve some doubt. Why not depart from *O'Reilly* to permit a litigant to proceed by action where he makes an honest mistake about the character of the illegality he wishes to challenge? Order 53 would remain an exclusive procedure in "clear" cases and Professor Wade's logical objection would be met.

Indeed would this involve a departure from *O'Reilly*? As Sir Harry Woolf points out[321] "in his speech in *O'Reilly v. Mackman* Lord Diplock was careful to refer to a general rule. If a litigant who has a valid claim bona fide but wrongly regards a case as not falling within *O'Reilly v. Mackman* when it does, the principle should not be allowed to embarrass him." Support for the view that Lord Diplock did not intend to trap the litigant who makes an innocent mistake may also be found in the use by his Lordship of the language of abuse of process. As Forsyth points out[322] it is strange to regard all those who transgress the *O'Reilly* rule as having perpetrated an abuse of process, for the notion of abuse connotes a knowing misuse - of which the plaintiffs in *O'Reilly* itself were apparently guilty.[323] This would suggest that the discretion with which the courts have in the past exercised their abuse of process jurisdiction is contained in the rule itself.

Is it wrong, then, to call for the reconsideration of *O'Reilly* because a "sharp"[324] distinction between public and private law cannot be drawn? On the basis of the above a sharp distinction is unnecessary. But what of *Cocks v. Thanet*? In that case the plaintiff's claim was struck out by their Lordships despite the fact that Lord Bridge had to overrule one of his own judgments from the Court of Appeal[325] in order to hold that the matter in question

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[320] ie excluding the Attorney-General, local authorities acting under s.222 of the Local Government Act etc.

[321] "Judicial Review: A Possible Programme For Reform" [1992] PL 221 at 231.

[322] [1985] CLJ 415 at 419.

[323] [1982] 3 All ER at 134.

[324] JUSTICE - All Souls Review at 150.

[325] *De Falco v. Crawley BC* [1980] 1 All ER 913.

raised issues of public law only. Surely in such a difficult case the flexibility inherent in the general rule should have operated to permit the plaintiff to continue in civil proceedings, even if their Lordships were to indicate that *in future* AJR would be the only permissible mode of challenge. Is *Cocks* simply inconsistent with the *O'Reilly* rule as properly understood?

But *Cocks* was decided on the same day and by the same panel of judges that decided *O'Reilly*. This fact seems fatal to suggestions that their Lordships in *O'Reilly* intended to lay down a flexible rule. Instead it appears to indicate that Lord Diplock intended the policy of protecting public authorities to prevail even over the interests of litigants who proceed in error. If this is the case, the House of Lords should as early as possible reassess the balance of these two considerations. This, for the reasons explained above, can be achieved under the present s.31 of the Supreme Court Act 1981.

Remaining problems.

Unfortunately this reform would not solve every difficulty. For it would remain, presumably, to be settled what degree of locus standi - special damage or sufficient interest - a plaintiff would have to prove to obtain relief by civil action. *Barrs v. Bethell*[326] re-established the former test as the correct one. However these would be cases where, had the applicant guessed correctly, he would need to prove only a sufficient interest under s.31(3) of the Supreme Court Act 1981. Given the preparedness of the court on our present assumption to overlook the plaintiff's error to the point of allowing him to proceed by action, it would be anomalous then for it to use that error to penalise the plaintiff by imposing a stricter standing test.

A final difficulty is this. Prior to *O'Reilly* there were some indications[327] that the practice of awarding injunctions in civil proceedings in public law cases misled some judges into

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[326] [1982] Ch 294.

[327] eg *Meade v. Haringey LBC* [1979] 2 All ER 1016 especially per Lord Denning MR at 1023 and Sir Stanley Rees at 1033-4; *Lonrho v. Shell Petroleum* [1982] AC 173 (as explained in chap. 4. It seems clear that Lord Diplock would not have regarded administrative law duties as sufficient, when accompanied by special damage, to create private rights - but the confusion of rights and remedies is interesting).

assuming that [328] damages were available where the circumstances warranted it. This, of course, amounts to an abandonment of the public/private law divide as it is traditionally understood. This danger could only increase were a reform such as that canvassed here actually to be implemented - for we are imagining circumstances in which public law cases can proceed by action precisely because their public character is unclear. Accordingly there would need to be devised some way of "flagging" for later courts cases which are private at the level of procedure but nonetheless involve only public duties. This could be achieved by permitting the free transfer of such cases into the Crown Office list. This simple reform could be effected by the Rules Committee of the Supreme Court without the need for legislative intervention.

[328] Presumably on the basis of what is now s.50 of the Supreme Court Act 1981.