**Making Sense of the Public-Private Divide**

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Abstract

*This thesis explores the public-private divide. Its primary focus is on two distinct but interlinked contexts: the amenability of bodies to judicial review in domestic law and the notion of ‘public authority’ under s 6 of the Human Rights Act 1998 (HRA). It also focuses secondarily on the notion of the governmental organisation in Strasbourg. The aim is to re-order the law in all three areas, providing an account of the law that is both doctrinally accurate and normatively defensible. The core argument is that, in both of the primary contexts, at the root of the public-private distinction lies an approach that defines ‘public’ activity as the exercise of legally-authorised coercive power. This is called the ‘LACPA’ for short. The LACPA is functional in outlook and sufficiently flexible to bring private bodies performing delegated public functions within the purview of public law. As such, this thesis challenges the orthodox view that the courts’ approach to the public-private divide is ill-equipped to deal with trends in modern governance and needs a major overhaul. Instead, fine-tuning and a better judicial appreciation of the existing law are all that is required.*

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# 1.

# Introduction

This thesis explores the public-private divide. Its primary focus is on two distinct but interlinked contexts: the amenability of bodies to judicial review in domestic law and the notion of ‘public authority’ under s 6 of the Human Rights Act 1998 (HRA). It also focuses secondarily on the notion of the governmental organisation in Strasbourg. The aim is to re-order the law in all three areas. My core argument is that, in both of the primary contexts, at the root of the public-private distinction lies an approach that defines ‘public’ activity as the exercise of legally-authorised coercive power. I shall call this the legally-authorised coercive power approach or ‘LACPA’ for short. The term ‘coercion’ is a broad-brush one that encompasses a variety of activities, as I explain in detail later. This chapter justifies the investigation, establishes the theoretical framework for the thesis and gives an overview of the thesis’s structure, providing a route map through the various arguments that follow in subsequent chapters.

## JUSTIFYING THE INVESTIGATION

At the outset I should make clear the precise nature of my thesis. It is primarily doctrinal in focus, but it draws from theoretical material to bolster its doctrinal arguments. It aims to provide a doctrinally convincing and theoretically workable account of what the law means when it distinguishes ‘public’ from ‘private’ in the contexts concerned. Thus, there are three particular things that this thesis does *not* seek to do. First, it does not attempt normatively to defend the public-private divide in these contexts. Because my aim is to reconceptualise the existing law, my starting point is that there *is* a public-private divide in the contexts concerned. This is clear in all three of the contexts dealt with here. In the judicial review context it is clear from Part 54.1(2) of the Civil Procedure Rules, which provides that ‘a “claim for judicial review” means a claim to review the lawfulness of… a decision, action or failure to act in relation to the exercise of a public function’;[[1]](#footnote-1) and in the HRA context from s 6(1), which provides that ‘It is unlawful for a public authority to act in a way which is incompatible with a Convention right’. In the Strasbourg context the divide is slightly different, centring as it does on a basic distinction between governmental organisations and other, non-governmental bodies and persons; but it is nevertheless a public-private distinction of sorts. It exists by virtue of the state responsibility principle, which renders the state directly liable for Convention breaches that are carried out by organs of the state; and Art 34, which provides that the European Court of Human Rights (ECtHR) ‘may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a [Convention] violation’. It is therefore implicit in Art 34 that *governmental* organisations are unable to file Convention claims of their own. On various occasions, Strasbourg has indicated that the governmental organisations implicitly referred to by Art 34 and the organs of the state that directly engage the state’s responsibility are the same bodies.[[2]](#footnote-2) Throughout this thesis, I therefore use the term ‘governmental organisation’ as an umbrella term to describe both types of body.

In all of these areas the public-private divide is an important one: it is only if the perpetrator of the behaviour complained of falls on the public side of the line that there will be a direct duty to comply with the Convention or the various principles of good administration – the duty to act fairly, rationally and the like – that comprise the substantive principles of judicial review.

Various scholars have questioned the very idea of a public-private divide, however. As an abstract notion it has drawn particular fire from feminists, who criticise the idea that private activity should be presumptively free from scrutiny by public or state.[[3]](#footnote-3) This, they say, has the effect of perpetuating and legitimating gendered harms that can occur in private spheres such as the family and the home. On the constitutional plane A.V. Dicey famously abhorred the notion of a separate system of public law, fearing that it would infringe the requirement of equality under the law by creating legal privileges and immunities for public officials that would be unavailable to private actors governed instead by the ‘ordinary common law principles which govern the relationship of one Englishman to another.’[[4]](#footnote-4) Dawn Oliver is a further critic of the divide as it operates in judicial review, this time on the different basis that in English law it is undermined by its permeability and is therefore unnecessary.[[5]](#footnote-5) She points in particular to the similarities that exist – the ‘cross-fertilisation’, as David Mullan puts it[[6]](#footnote-6) – between certain of the principles of judicial review and private-law doctrines such as the fiduciary principle,[[7]](#footnote-7) arguing that public and private law converge on a deeper level because both aim to protect the same common values of autonomy, dignity, respect, status and security.[[8]](#footnote-8) Carol Harlow makes a range of criticisms of the divide.[[9]](#footnote-9) Some are similar to the ones advanced by Dicey[[10]](#footnote-10) and also by Oliver, in the sense that they cast doubt over the usefulness of the divide in domestic law;[[11]](#footnote-11) another, more scathingly, drives at the ‘hard truth that the “public”/“private” classification is today irrelevant and devoid of intrinsic merit’, which renders it inherently difficult to develop ‘precise and rational’ distinctions between the two spheres.[[12]](#footnote-12) All of these authors’ claims may be persuasive in one sense or another, but it would transcend the scope of this thesis to explore them in detail. For now, at least, the public-private divides are inescapable in the contexts at hand. Even were the HRA to be repealed and replaced with a British Bill of Rights, it is almost inevitable that such an instrument would retain some sort of a public-private divide.[[13]](#footnote-13) This is not least because the Convention rights themselves seem to be drafted with interference by only public authorities in mind.[[14]](#footnote-14) Although some of the concerns over the desirability of distinguishing public and private may affect the location of the public-private divide, my concern is firmly with that location – not with whether the divide does or should exist.

Second, this thesis does not seek to argue that the LACPA is normatively the best way of devising the public-private divide. The argument is more modestly that it *does* broadly underlie the divides in the contexts in question; that it is a reasonable model for the law to follow; and that the model is normatively and doctrinally preferable to the existing competition. The law may be better off under a wholly different model, or even by abandoning the public-private divide altogether in these contexts, but investigating either of these questions in detail would be to deviate from the thesis’s central task of attempting to make sense of the law as it stands.

Third, in seeking to make sense of the law in the contexts concerned, this thesis does not claim to be able to rationalise every single decided case. Rather, the argument is simply that the approach I propose represents a fit with the law that is both plausible and closer than that of its main rivals.[[15]](#footnote-15) Some of the great many cases in these areas, I contend, are wrongly decided.[[16]](#footnote-16) This does not harm my thesis. Up to a point, it even tends to demonstrate that my theory can bring order to the law by providing a coherent and workable framework for distinguishing good decisions from bad. Condemning whole swathes of case-law might bring into doubt my claim that the LACPA does in fact fit the law, but this is not what I do. Relatively few decisions emerge as erroneous, as later chapters show.

### Two principal justifications

There are two principal justifications for the investigation: one practical, the other intellectual. Practically speaking the public-private divide has been a thorny problem in each of the contexts concerned, as we will see. Uncertainty abounds not only because separating public from private is a complex and difficult task in the abstract for the reasons given below; it is also because the courts have had to perform it for the most part on shifting sands, during a period of considerable administrative change. Particularly over the last three decades, there has been a dramatic elision between public and private activity – a ‘hollowing out of the state’.[[17]](#footnote-17) As Michael Taggart explains, ‘The profound changes brought about by deregulation, commercialisation, corporatisation, public sector downsizing, privatisation and globalisation have fundamentally altered the political and social landscapes in countries around the world.’[[18]](#footnote-18) Once such changes had begun to take firm hold in the UK as a result of Thatcherite reforms in the 1980s, the public-private boundaries blurred further as the public and private spheres began increasingly to interact and overlap.[[19]](#footnote-19) ‘The structure of the modern state’, Harlow remarks, ‘is such that public and private industry, autonomous statutory bodies, regional boards and central government departments all jostle for place.’[[20]](#footnote-20) In reality the public-private divide is ‘wafer thin and spanned by many bridges.’[[21]](#footnote-21) The courts’ task in recent years has been akin to trying to thread a needle on a bumpy train: a tricky task made harder still by the conditions in which it is performed. Two types of situation – examined at length in later chapters – have been particularly problematic. The first is the monopoly regulator, typically a professional regulator or overseer of corporate activity in a given sector such as City takeovers and mergers or horseracing, who acts not under direct legal authority but instead by virtue of the consent of its members or through its monopoly position alone. Are such bodies performing public functions and therefore subject either to judicial review or the HRA? The courts typically say no[[22]](#footnote-22) – but not in all cases,[[23]](#footnote-23) not without dissent from individual judges,[[24]](#footnote-24) and not without strong criticism from academic writers.[[25]](#footnote-25) The second is the contracted-out provider, typically a charity or profit-making company, who performs public services on behalf of central or local government. These are private bodies acting pursuant to commercial agreements, but they are stepping into the state’s shoes by assisting government to deliver what may be a vital public service, such as social housing or residential care, often to vulnerable individuals for whom the state has assumed a responsibility to provide. Are these bodies performing public functions? Again, the courts view this as typically private activity[[26]](#footnote-26) – but again, not in all cases,[[27]](#footnote-27) not without judicial dissent[[28]](#footnote-28) and not without strong academic criticism.[[29]](#footnote-29) Nowhere has this criticism been stronger than in relation to the courts’ persistent refusal to interpret s 6 HRA to include private care home operators who act on behalf of local authorities. This is the only aspect of the HRA to have been the subject not only of two condemnatory reports by the Joint Committee on Human Rights,[[30]](#footnote-30) but also of correcting legislation by Parliament as well.[[31]](#footnote-31) The latter came in the form of s 145 of the Health and Social Care Act 2008, which classifies bodies delivering care services under arrangements made pursuant to the National Assistance act 1948 and similar provisions as public authorities under s 6 HRA. This was a welcome fix. But a quick fix was all it was, since it left untouched the underlying *approach* that generated the courts’ conclusion that contracted-out services should be classed as private rather than public activity under s 6.[[32]](#footnote-32) The point is that uncertainty and dissatisfaction at the state of the law have been recurring themes for some time in both the contexts concerned. The uncertainty and dissatisfaction are exacerbated by the difficulty the courts face in trying to hit a moving target by casting the public-private divide in a constantly-changing environment. It is clear that there is a pressing need for a fresh and comprehensive attempt to rationalise the law in this area, as well as a thorough and informed attempt to examine the law’s fitness for purpose in the modern world.

The intellectual justification for my thesis takes four forms. First, whilst the public-private divide in each of the judicial review and HRA contexts has been extensively written about before, the vast majority of the existing work is either heavily doctrinal or heavily theoretical. There is a relative paucity of literature that seeks to combine both doctrine and theory – to devise legal tests, in Colin D. Campbell’s words, ‘that are both very largely consistent with judicial decisions *and* normatively attractive.’[[33]](#footnote-33) Thus, we are typically told after a survey of the case-law in the amenability context, for instance, that there are a number of different formulations of public-ness at work rather than a single, overarching conception.[[34]](#footnote-34) This is an example of the heavily doctrinal approach, which identifies and compares trends in certain cases against those in others but makes little attempt to situate the law within any broader theoretical setting.[[35]](#footnote-35) At the other, theoretical, end of the spectrum, authors advance ambitious and ‘big-picture’ formulations of the public-private divide but are little concerned with whether the model they propose fits the case-law in question.[[36]](#footnote-36) Each of these approaches has its place, but there is a definite need for a hybrid approach that combines the two. Campbell has valiantly attempted to fill this void with his monopoly power model, which has much to commend to it, but it is an essential argument of my thesis – to be made in detail in chapter four – that Campbell’s model is both doctrinally and normatively inferior to the model I propose. The LACPA itself is not a brand new approach,[[37]](#footnote-37) but it can be made use of and applied in a number of novel and significant ways, as I explain at various points throughout the thesis.

Second, there is a fundamental doctrinal orthodoxy in the judicial review context that has managed to evade significant challenge for far too long now – that the Court of Appeal’s ruling in *R v Panel of Take-overs and Mergers, ex p Datafin*[[38]](#footnote-38)was a landmark decision that ushered in a novel approach to the law on amenability. It is subscribed to by some of the foremost scholars in UK public law, including Christopher Forsyth,[[39]](#footnote-39) Sir William Wade,[[40]](#footnote-40) Sir Jack Beatson,[[41]](#footnote-41) Murray Hunt[[42]](#footnote-42) and Dawn Oliver.[[43]](#footnote-43) The orthodox view is that *Datafin* altered the courts’ approach to public-ness from a source-of-power test to one based instead on the nature of the function being performed by the defendant.[[44]](#footnote-44) My argument is that this orthodoxy cannot stand, on closer inspection of the case-law as a whole. In reality, I will argue, the courts’ case-law in this area had been underlain by the LACPA for some time – much of the twentieth century, in fact; and whilst the source of the defendant’s power is a large part of the public-private equation, the LACPA focuses on the *kind of power* being exercised. In other words, the courts’ approach had been underlain by a function-based test all along. Whilst *Datafin* indeed broke new ground for reasons that are explained in detail later, it amounted to a creative – perhaps even strained – application of the courts’ *existing* approach. It did not signal the birth of a new one. In turn, these findings have a profound and positive impact on the ability of the law to adapt to modern challenges posed by administrative practices such as contracting out. All of these arguments are developed in detail in chapters three to five.

Third, my thesis seeks to fill another significant void by attempting to provide a thorough explanation of the interrelationship between the public-private divides in judicial review and under the HRA. In other words, it links the divides in each context by a common overarching theme – the LACPA – rather than considering them in isolation from each other as the current literature overwhelmingly tends to do.[[45]](#footnote-45) This is important not just because it helps demonstrate the contribution to scholarship that my thesis aims to make, but also because it tackles a particular practical problem that has troubled the courts since the HRA’s entry into force. When interpreting the phrase ‘functions of a public nature’ under s 6(3)(b), the courts have issued mixed signals about the interpretative relevance to that issue of their case-law on amenability to judicial review. As chapter seven discusses in greater detail, some judges have indicated that the public-private distinction in each context will be materially identical; others that s 6 establishes a *sui generis* Convention-based public-private divide that has little or nothing to do with that in the judicial review context. The first view is unconvincing because it denies any possibility that the nature of the divide under s 6 might be affected by the fact that the HRA and judicial review involve different legal schemes, applying different legal norms. In the former context the courts must determine whether a decision should be subject to the principles of good administration, which are developed by the judges, whereas in the latter they are deciding which bodies shall be bound to comply with the Convention according to a statute whose principal aim was to make an international rights treaty enforceable in domestic courts. It is scarcely believable that this could make no difference whatsoever.[[46]](#footnote-46) Yet at the same time, the alternative view that the two areas of law are entirely unrelated is equally unconvincing. In both contexts the courts must determine which decisions attract duties to respect norms that are predominantly worded to guard against state rather than private behaviour.[[47]](#footnote-47) The idea that there must be some link therefore seems inescapable, although the nature and extent of that link have hitherto remained elusive and unexplained. This is no doubt because the meaning of the amenability law has itself been difficult to determine.

Fourth, in addition to tackling the more fundamental issues in the primary and secondary contexts mentioned above, my thesis also attempts to provide insights into two key secondary issues in the HRA context, both of which are integral to a proper understanding of the term ‘public authority’ under s 6(1). These are the nature of the courts’ duty to develop the domestic common law Convention-compatibly between private parties, and the issue of whether private bodies performing public functions under s 6(3)(b) are themselves capable of relying on the Convention when acting in their public capacities. In exploring these issues I draw in part from arguments that I have already advanced elsewhere.[[48]](#footnote-48)

## THEORETICAL FRAMEWORK AND CORE PRINCIPLES

It was said above that distinguishing ‘public’ from ‘private’ is an inherently complex and difficult task. As Lord Nicholls once remarked, ‘The [very] word “public” is a term of uncertain import, used with many different shades of meaning: public policy, public rights of way, public property, public authority… public nuisance, public house, public school, public company.’[[49]](#footnote-49) Employed in so many different contexts and for so many different purposes, there is little hope of being able to discover a universally-accepted sense in which the word is used. But more fundamentally, neither is there any hope of being able to construct the ‘correct’ meaning through normative reasoning alone. The location between public and private is something on which reasonable but fundamental disagreement – often vehement and intractable – inevitably exists. This is for two main reasons. First, at the root of the definition of ‘public authority’ or ‘public functions’ lies an ideological value-judgement, of great scale and importance, about the state’s proper role.[[50]](#footnote-50) Indeed, it is the fundamental disagreement between left and right over the state’s role that makes up much of modern politics; it is the stuff of ballot-box choices. Such ideological value-judgements frequently appear in practical political decision-making. Take David Cameron’s ‘Big Society’ plans, for example. In the Cabinet Office’s words, the Big Society involves ‘putting more power in people’s hands – a massive transfer of power from Whitehall to local communities.’[[51]](#footnote-51) In essence, it is a statement of the Government’s intention to shrink the state by farming political responsibility out to private enterprise and local communities – a statement, in other words, that the private (or, more precisely, non-government)[[52]](#footnote-52) sector should properly exercise this power.[[53]](#footnote-53) Further examples abound in myriad policies such as Free Schools and NHS reform, in particular the Any Willing Provider principle (which aims to place a patient’s Primary Care Trust in competition with other, private, providers, to provide healthcare services). All of these policies rest on judgements as to the government’s and private sector’s proper relative roles. Political leftists tend to favour a broad role for the state, with the provision of education, healthcare, public transport, utilities and so on – even the manufacturing of cars or the running of airlines – potentially being examples of functions that they might regard as properly ‘public’ in nature. Neo-liberals, by contrast, prefer a stripped-down, minimalist state whose activities are far less extensive. To take a more extreme form of neo-liberalism, Robert Nozick famously argued that ‘a minimal state, limited to the narrow functions of protection against force, theft and fraud, enforcement of contracts, and so on, is justified; that any more extensive state… is unjustified’.[[54]](#footnote-54) For Nozick, all but an exceptional few functions would properly be characterised as private. The point is that any attempt to ascertain the state’s proper role on either the practical or theoretical levels will give rise to a fundamental political objection of some sort or another. Developing a worked-out theory in this area that both left and right would accept is simply not something the courts can realistically do, if indeed it can be done at all.

Second, it must be remembered that the courts’ task in the contexts concerned is to draw the public-private distinction for a particular purpose, namely, to determine whether in a given situation the defendant must respect public-law norms – Convention rights and/or the principles of good administration. Aside from differing on the more abstract ideological level described above, there is also likely to be ample room for disagreement on whether it would be appropriate to apply these norms in the circumstances in question and therefore whether the law can bear an interpretation that does so. This disagreement can be particularly acute in the case of private bodies that are said to be performing public functions by virtue, for instance, of their position as monopoly regulators or contracted-out providers.[[55]](#footnote-55) Here, the courts must endeavour to strike some sort of balance between the interests of both claimant *and* defendant. Claimants need legal protection from harm, but defendants also need protection from over-regulation that itself may become unduly oppressive. Nobody would seriously contend that all private decision-making, such as whether to buy one’s weekly groceries at one supermarket rather than another, should be amenable to judicial review and subject to general duties of good faith, rationality, fairness and so on. But in less extreme cases, genuine disagreement abounds. Judges may reasonably have differing starting points on the extent to which the law should generally regulate the activities of private individuals (again, a political question), differing views as to the nature and extent of the effect on the parties and those in analogous positions of making the decision one way or another, differing views on the scope and adequacy of the existing remedies at addressing whatever harm the claimant complains of, and so on. Again, in all but the clearest of cases there will usually be a range of different but reasonable views as to how to balance these various factors. The upshot is an additional level on which to disagree about the appropriate abstract distinction between public and private. All things considered it is pointless, or at the very least unrealistic, to go searching for the ‘correct’ formulation of that distinction. Such a thing is a chimera. There are many public-private divides, each with its own distinct purpose, rather than a single one.[[56]](#footnote-56)

### Theoretical ‘givens’

This is not to say that the public-private divide can be drawn anywhere in the contexts with which this thesis is concerned, however. ‘Public authority’ and ‘public function’ are not empty terms into which *any* content can simply be poured.[[57]](#footnote-57) Nicholas Bamforth has been vocal in making this point.[[58]](#footnote-58) He argues quite sensibly that there are certain respects in which the public-private divide is inescapable,[[59]](#footnote-59) which generate certain uncontroversial starting points that exist even though the precise formulation of the divide may remain the subject of controversy and reasonable debate. These starting points do not *compel* the LACPA, it should be stressed. But they do justify it, when considered alongside the constitutional givens described in the following section. Taken together, the theoretical and constitutional givens explain the LACPA’s settled and uncontroversial normative underpinnings. In this sense, they have a significant bearing on my attempts to bring order to the law.

#### First theoretical given: the state exists

First, there *is* a state, which stands apart from the individual in the sense that it has a special role, powers, duties, and so on, that the individual does not. In this sense there is at least some core distinction between public and private. This is what Bamforth calls his descriptive claim to an essential, inescapable public-private divide: ‘in a modern constitutional democracy, certain duties and functions are generally entrusted to the state rather than to the private citizen – devising frameworks for education, social security and policing, for example.’[[60]](#footnote-60) In domestic constitutional discourse the concept of the state has been relatively overlooked, as authors such as John Allison have lamented.[[61]](#footnote-61) Allison argues that this seems to be due to the particular focus that UK constitutional law has traditionally placed on the Crown, the government and – most notably – Parliament as the bodies that sit at the apex of the constitutional system.[[62]](#footnote-62) As an entity conceptually distinct from these bodies, the state seems to have received comparatively little attention.[[63]](#footnote-63) Whether or not a developed conception of the state is the key to devising a workable public-private divide in English law, as Allison seems to think,[[64]](#footnote-64) it is not difficult to see how a basic appreciation of the fundamentals might help.

#### Second theoretical given: the selflessness principle

Second, the state differs institutionally from the individual by its motivation – in liberal societies, at least. This is because of what I term the ‘selflessness’ principle – one of the fundamentals of state theory.[[65]](#footnote-65) The principle also emphasises that there is a relatively straightforward and uncontroversial distinction between public and private *persons*, even if the proper dividing line between public and privatefunctions is more difficult to identify.

In order to be morally legitimate, the state must be able to justify its power. As Bamforth puts it, ‘The major purpose of any non-totalitarian political theory… is to explain why it is… legitimate for the state to discharge a particular range of functions’.[[66]](#footnote-66) If the state cannot justify its power, that power is arbitrary: there would be no difference between the state’s power and the power wielded by a band of robbers. ‘The difference between bands of robbers and states’, David Feldman remarks, ‘is that states are, or should be, organised through their constitutions in such a way as to limit the robber-band's capacity to use its powers in arbitrary, anti-social and unaccountable ways.’[[67]](#footnote-67) It is the state’s need to justify its power that underpins the work of theorists like H.L.A. Hart and Leslie Green.[[68]](#footnote-68) An essential element of this justification is that the state be other-regarding; that its power be used for the benefit of those over whom it is exercised.[[69]](#footnote-69) Unlike individuals, who are morally autonomous and entitled to act for their own ends within the confines of the law, the state ‘has no rights of its own, no axe to grind beyond its public responsibility’, as Laws J remarked in *R v Somerset County Council, ex p Fewings*.[[70]](#footnote-70) Instead, ‘in our constitutional theory… [the organs of the state] are regarded as being under duties to act *only* in the public interest as they perceive it to be.’[[71]](#footnote-71) They should expect sanctions to follow if they do not – whether legal, through judicial review (as in *Fewings* itself, through the improper purpose doctrine) or political, at the ballot-box. Hence the ‘selflessness’ principle: whereas individuals are generally entitled to act in their own interests, the state must act selflessly, in the interests of its citizens.

The selflessness principle is normative rather than empirical in focus – its purpose is to prescribe how the state *should* act rather than describing how it *does*. Although it will usually be true to say as a matter of fact that the state does act for others and individuals for themselves, many private individuals and bodies will buck this trend.[[72]](#footnote-72) Charities and fiduciaries are good examples. These are bodies or individuals who in common parlance are other-regarding. But it does not follow that, due to the selflessness principle, they should therefore be seen as part of the state.[[73]](#footnote-73) Despite the apparent motivational similarities, there are important distinctions. Individuals who establish charities are not *made* to do so, even though once they have created a charitable organisation the organisation itself may be constrained by law into maintaining its charitable objectives or disbanding. Similarly with fiduciaries – their role is assumed voluntarily rather than imposed by law. In each case the other-regarding behaviour begins with a voluntary act by the private actor(s). Second, states work for their members; charities work for those who are *not* their members.[[74]](#footnote-74) Third, the other-regarding activities of charities and fiduciaries are also not directed towards the *public* interest in the same way the actions of a government department or a local authority would be. Instead, the activities benefit a particular class of individuals – the poor, the disabled or whoever – chosen by the private actors in question themselves.[[75]](#footnote-75) Charities and fiduciaries are therefore free to favour one group over another, but the state is not. To act legitimately it must direct its efforts towards all of its members, not just some. This is inherent in the idea that the state must be other-regarding: it is not having regard to those whom it ignores.[[76]](#footnote-76)

#### Third theoretical given: the state’s coercive authority

The third given is that the state wields a particular kind of coercive force.[[77]](#footnote-77) There are two aspects to this idea. The first is that the state uses coercive force. This is a descriptive statement as to the manner in which the state presumptively enforces its commands. If it wishes to redistribute wealth through tax, for example, it commands individuals to pay their taxes and provides for a legal regime stipulating for a variety of sanctions for those who disobey. The second aspect is that, as well as exercising coercive force, the state also lays claim to an authoritative monopoly on the use of that force.[[78]](#footnote-78) When an armed robber demands a victim’s money and supports that demand with the threat of death, the robber does not become an organ of the state or engage in state-like behaviour.[[79]](#footnote-79) Tax demands backed by legal sanction differ fundamentally from armed robbery because of the nature of the claim that accompanies the latter: the state is not just able to take the money but also has the exclusive *right*, or so it says, to demand it.[[80]](#footnote-80) Hence the thinking that generates theoretical given number two, mentioned above: the state must justify its claim to this authority in order to distinguish itself from the robber band. The upshot of the idea that the state wields a particular kind of coercive force is a paradigm, in liberal theory, between the ways in which the state and individuals presumptively interact with others. Whereas the state claims the right to take from individuals, individuals themselves cannot make such a claim. They have no authority over others of the kind the state claims for itself. Their method of interaction, presumptively at least, is necessarily different: they interact with each other voluntarily, by choice, and on terms determined by negotiation and persuasion, not coercion.

This is only a presumptive paradigm. The day-to-day reality is more complex. In practice, individuals may well act through something more akin to force. Particularly in the commercial context, it is a truism that private bodies can wield so much power over others that those others are better described as compelled into relationships with them than as willing participants in a commercial bargain between equals. Similarly, the state frequently acts other than by using coercive force. Most obviously, the state’s objectives commonly involve giving as well as taking away; its job is not just to raise tax and maintain public order but also to deliver key facilities, services and welfare benefits. Alternatively, the state may wish to alter individuals’ behaviour but do so through persuasion – ‘nudging’.[[81]](#footnote-81) ‘Eat healthily’ and ‘quit smoking’ NHS campaigns are examples. ‘Quasi-legislation’ – rules ‘not directly enforceable through criminal or civil proceedings’,[[82]](#footnote-82) such as codes and guidance circulars – can be invaluable in allowing the achievement of governmental goals without having to call on the long arm of the law. All of this is what J. K. Galbraith would call ‘conditioned’ power – the power to persuade and manipulate – in contrast with the ‘condign’ power to issue a command supported by a threat.[[83]](#footnote-83) The state may also act by commercial agreement with individuals, as for instance when a local authority contracts out a service to a private organisation to deliver on its behalf. This is increasingly commonplace, especially in the light of the Thatcherite reforms mentioned above: ‘The [British] state, in reality, is compelled to an enormous extent to achieve its objectives by reliance upon private actors.’[[84]](#footnote-84) Although in *form* such commercial arrangements involve negotiation between two bodies who voluntarily come together to realise mutual benefits, they can also function as useful vehicles through which to pursue specific political objectives.[[85]](#footnote-85) As Ian Harden observes, the market-choice view of commercial activity, whereby supply is dictated by demand, begins to break down in the context of public-service contracting like that described above: ‘A public service is one which exists not because of choices in the market, but *because of a public decision* that it should exist.’[[86]](#footnote-86) Commerce becomes the means by which the government sees out its aims. The reality is a ‘corporatised’ public-service landscape, with a ‘commingling of public and private for common advantage’,[[87]](#footnote-87) that fits neither public nor private paradigms comfortably.

For present purposes the third theoretical given still deserves its status as such, however. It is important to bear two points in mind. First, a theoretical given does not have to capture real life perfectly. The paradigm described above between public command and private negotiation is very much still the norm, even if there are deviations from it. Even though the state may employ other methods of securing its objectives, its coercive force *is* still a unique kind of coercive force – and thus one of its distinguishing features – for the reasons given above. The paradigm of voluntary interaction between individuals is also embedded in the law: principally by the private law of contract, whose purpose is to facilitate legally binding agreements between parties,[[88]](#footnote-88) but also by the law’s general function in redressing grave power imbalances in private relationships. This takes place at common law through doctrines relating to undue influence, duress and so on; and by legislative intervention in various contexts – employment and consumer relationships being obvious examples – to try to even up the parties’ bargaining positions and protect relatively vulnerable individuals. The basic message is clear: private individuals are to choose whether and on what terms to interact with each other, with help from the law to deal with power imbalances affecting this choice where necessary.

Second, the *public-private divide itself* does not have to capture real life perfectly. For this reason, neither do the givens on which it is based. The divide does not have to accord perfectly with real life because it is not a theory of justice in itself. There may be good reasons to maintain an interpretation of the public-private divide that seems normatively imperfect. I explain this point further below.

#### Fourth theoretical given: the rule of law

The fourth given is that the government should act through law, a very basic axiom of the rule of law, which is integral to the state’s justification for the use of its power. Without it, non-legal power, being beyond the reach of the courts, can be exercised free from judicial sanction. The rule of law is not just a theoretical given; it is also a recognised constitutional fundamental. Ever since Dicey described it as such,[[89]](#footnote-89) it has featured increasingly prominently in academic and judicial constitutional discourse. It was also enshrined in statute by Parliament through s 1 of the Constitutional Reform Act 2005: ‘This Act does not adversely affect… the existing principle of the rule of law.’

Despite the prominent constitutional position of the rule of law, however, its content is heavily contested. Broadly, two competing conceptions emerge. The first is the ‘thinner’, formalist, conception,[[90]](#footnote-90) of which Joseph Raz is a famous exponent.[[91]](#footnote-91) ‘Thin’ conceptions require simply that the state acts through law. Provided that such law satisfies the core procedural requirements of being validly-made, accessible, sufficiently clear and precise in meaning, properly applied and so on, thin conceptions have no concern with its *content*.[[92]](#footnote-92) The other conception is the ‘thicker’ conception, which makes substantive demands of the law as well.[[93]](#footnote-93) Lord Bingham,[[94]](#footnote-94) Trevor Allan[[95]](#footnote-95) and Sir John Laws,[[96]](#footnote-96) for instance, champion this view.[[97]](#footnote-97) Proponents of a thicker rule of law contest the idea that the content of the law is irrelevant. Instead, the state must act through law that not only satisfies the procedural criteria mentioned above but that also satisfies substantive criteria such as respect for democracy and fundamental rights.[[98]](#footnote-98) Formalist proponents respond that under substantive conceptions of the rule of law, it is difficult if not impossible to prevent the concept from becoming a full-scale theory of justice: once the nature and quality of the law become relevant, the floodgates are opened to myriad normative arguments as to the proper content of legal rules.[[99]](#footnote-99) This, it is said, goes far beyond a simple rule dictating the medium through which the government should act: it is necessarily a ‘complete social philosophy’.[[100]](#footnote-100) Thus used, the term ‘rule of law… lacks any useful function’ in its own right:[[101]](#footnote-101) it is political argument masquerading as a legal norm.

It is unnecessary to attempt to resolve this debate, but for present purposes there are three points to keep in mind. First, it should be emphasised that, whether seen as ‘thick’ or ‘thin’, the rule of law does not necessarily trump the fundamental notion of parliamentary sovereignty such that courts can strike primary legislation down. This argument is developed in detail in the following chapter, which examines the constitutional foundations of judicial review.

Second, the rule of law is useful to the present investigation because it makes an implicit but nevertheless significant point: that law is an important source of authority. It is inherent in the twin ideas that the state must act through law, and that this is an essential requirement of any authority-claim by the state to use its power, that legal – *de jure* – power has certain properties – authority-conferring properties – that *de facto* power does not. Legislation enacted by Parliament enjoys presumptive democratic force; and the common law enjoys normative force as a body of rules developed forensically, with reference to precedent and on the basis of facts and evidence.

Third, the rule of law is a rule of *law*, not of *public law*. Whilst it is useful in the present context for what it says of the authority of law relative to *de facto* power, it does little additional work in resolving the finer questions of where the public-private divide should lie. This point has two foundations. First, the rule of law’s focus is on *government* under the law. It is the *state* that must justify its claim to authority, and the *state* that must therefore act under law. The rule of law therefore generates individual rights and interests against the *state* (whether ‘thin’ procedural ones or ‘thick’ substantive ones), with the result that the functions of the *state’s* public authorities become fairly obviously amenable to the public-law norms, in English law, that seek to guarantee those rights. But rights against *individuals* – bodies who are constitutionally selfish according to the selflessness principle – are a different issue. The rule of law cannot of itself explain which individuals’ functions should be amenable to the same norms: the claim that *government* should act fairly beats the air. This is especially so given the second foundation to my point: that the rule of law focuses on *whether* to protect certain rights and interests, not *how*. Even in its thicker manifestations it simply prescribes the various rights and interests that ‘good’ law should protect. It does not also prescribe the means by which the law should do this. Even if the rule of law makes it clear that the law should protect a particular right in a given situation, it is unclear whether this should be achieved through public law, the private common law or parliamentary legislation. The upshot is that the rule of law does not regard public law as the *only* means of regulating the exercise of a particular function – especially where private defendants are concerned.[[102]](#footnote-102) Appeals to the rule of law alone are therefore unlikely to be able to generate the conclusion that a private individual is performing a public function. This is another argument to which I return later, in chapter four, in the context of Campbell’s monopoly power model.

### Constitutional ‘givens’

The theoretical givens described above are supplemented by three constitutional givens, the upshot of which – in ways that I explain – is to constrain the courts’ freedom to choose where to draw the public-private divide.

#### First constitutional given: the public-private divide is not a theory of justice

Sometimes the courts will have to stop an applicant’s public-law claim dead in its tracks by ruling that the defendant’s function is not a public function, even though they might sympathise with the applicant’s plight.[[103]](#footnote-103) This is not self-evidently unacceptable. As observed above, the legal purpose of the public-private divide in the contexts in question is to determine whether public-law norms apply to the defendant in a given set of circumstances. Whilst the divide is important because cases may be won or lost on the basis of it in practice, and thus entire judgments may revolve around the issue, it is not the divide itself that does justice; it is not the divide itself that necessarily determines whether the law should protect against the harm that the claimant claims to have suffered. It is important not to lose sight of this idea. It is something of a growing fashion to think of the meaning of public-ness simply in terms of power. As Lord Steyn has argued, for example, ‘The very existence of institutional power capable of affecting rights and interests should itself be a sufficient reason for subjecting exercises of that power to the supervisory jurisdiction of the High Court, regardless of its actual or would-be source.’[[104]](#footnote-104) Again, where judges do not seem to embrace this view, the fashion is to criticise them for it[[105]](#footnote-105) and encourage them to re-think – usually in relation to powerful *de facto* regulatory bodies such as the Jockey Club and Football Association, whose functions are presently not amenable to judicial review. But claiming without more that the courts’ approach must be flawed for allowing such power to go unregulated – and therefore for injustice perpetrated by the wielders of that power to go un-remedied in judicial review – makes unrealistic demands of the public-private divide. Both in theory and in reality, the public-private divide is but one aspect of a broader legal framework that seeks to do justice to individuals.[[106]](#footnote-106) When the courts are deciding whether to remedy a particular harm in a given situation, it depends upon much more than simply determining whether the defendant or its behaviour should be classified as public or private. For instance, the claimant might succeed in establishing that the defendant is a public authority but nevertheless lose on the substance of their claim or at the remedies stage.[[107]](#footnote-107) The claimant might lose on the threshold public authority question, and thus have no recourse to public law, but nevertheless be able to avail themselves of an alternative, private-law cause of action.[[108]](#footnote-108) The claimant might have no arguable claim at all, whether in public or private law, but might nevertheless benefit from a later intervention by Parliament, through correcting legislation, to remedy the harm complained of. The point is that there are other factors to consider in the justice game, as explained above; other ways, crucially, of remedying injustice than through public law. Especially given that the term ‘public’ is indeterminate in the abstract and therefore nebulous as a term to interpret, it is tempting to drift into thinking that the term can and should be interpreted to encompass any powerful bodies – whether institutionally public or private – who are able to cause individuals demonstrable harm. But this view has the effect of casting the net of public-ness very widely indeed; and in turn, it places intolerable burdens on public law by suggesting a growing expectation that judicial review and the Convention should be used to cure injustice generally. This has clear implications for parliamentary sovereignty, in the sense that the courts’ ever-broadening jurisdiction risks encroaching on Parliament’s role in using legislation to decide how to perform this task. But it imposes a profound practical burden on the courts, too, by requiring judges to play an ever-increasing role in the development of a theory of justice. The greater their role becomes in policing power imbalances between private individuals at the expense of Parliament’s, the more – if they are to make good-quality decisions – the courts will have to begin to ape Parliament’s decision-making methods; to adjudicate upon the various political and policy issues that Parliament does.[[109]](#footnote-109) This is not to say that law and politics can be sharply distinguished – it is clear that they overlap to some extent, as seen below – but there is undoubtedly a point at which we can begin to ask too much of judges as we drive them further down the political road. They are judges, not political or moral theorists; and they are constrained, too, by the procedural rigours of the adversarial system. They do not have a blank canvas on which to design solutions to polycentric, political questions from scratch.[[110]](#footnote-110) Where exactly the line should be drawn between policing power imbalances legislatively, and by the common law, is a difficult and contested question that I do not attempt to answer here. Rather, my point is that even if in a given instance there is a clear consensus that the *law* should regulate a particular private body’s behaviour, it still cannot be *self-evidently* unacceptable for the courts to turn the claimant away by ruling that the defendant is not a public authority and therefore amenable to public-law norms. As Hoffmann LJ once stated, ‘I do not think that one should try to patch up the remedies available against domestic bodies by pretending that they are organs of government.’[[111]](#footnote-111) His note of caution should not be forgotten.

#### Second constitutional given: the political constraint

Why might the courts be justified, then, in turning away an applicant with what they believe to be a worthy public-law claim? Two significant constraints on the courts in this area are givens two and three: respectively, the political and constitutional constraints.

The political constraint prevents courts from venturing too deeply into political territory.[[112]](#footnote-112) Certain issues lend themselves more easily to executive or legislative deliberation. The courts are not there to decide political issues.[[113]](#footnote-113) This is the basic thrust of the ‘doctrine’ of due deference, if it can be so termed,[[114]](#footnote-114) which demands that the courts accord appropriate deference to the views of government on issues that are better suited to executive or legislative decision-making.

The political constraint resounds with particular strength in the context of the public-private divide. As observed above, the proper role of the state, and the proper extent to which public-law norms should be used to regulate private activity in particular, are profoundly political questions. Given that strong, varied and reasonable disagreement exists over how to construe the terms ‘public authority’ and ‘public function’ in the contexts with which this thesis is concerned, by far the most satisfactory way to determine the issue reliably – the theoretical ideal – would be to have Parliament decide on the more precise meaning of these terms; to make its precise intentions explicit with minimal room for interpretative disagreement as to its intentions in court. The practical reality is different, however – the courts are faced with having to make real choices in this area themselves. This is firstly because, in the HRA context, Parliament’s language in s 6 is vague; and second, in the judicial review context, because the law requires the defendant to be performing a ‘public function’ – the meaning of which is not legislatively determined – before the principles of good administration can apply.

As a result, there are two alternative ways of looking at the courts’ approach to the law in these areas. One view would see the judges as embracing and making full use of the political power that this interpretative task gives them, using it to work their own ideological preferences into the law. Proponents of this view might point as evidence to the ruling of the House of Lords in *YL v Birmingham City Council*,[[115]](#footnote-115) in which a policy-preference on the majority’s part for shielding commercial activity from Convention-based regulation is arguably detectable.[[116]](#footnote-116) The second view, by contrast, would see the courts as being more cautious, precisely because of the controversy in this area. It would view judges as having a sense, if a not a full awareness, that the meaning of public-ness is inherently contestable[[117]](#footnote-117) and see them as approaching their interpretative task by reasoning from settled and uncontroversial theoretical starting points – the theoretical givens, described above – instead. I take the second perspective as the preferable one, for various reasons. It realistically presumes the courts to be complying with, rather than flouting, the political constraint: to be acting within their constitutional competence rather than embarking on a political frolic of their own. ‘English courts’, Harlow remarks, ‘have always been afraid to set themselves up as rivals to Parliament by trespassing on political ground.’[[118]](#footnote-118) The second perspective therefore presumes the best of the courts’ general approach rather than fearing the worst. It also emphasises the norm at the heart of the notion of deference: that certain issues *should* be decided primarily by the legislature and executive rather than the courts. Most importantly, however, it is also the perspective that makes most sense of the case-law. As chapters three and four show, in relation to the law on judicial review, the courts’ approach is underlain by a largely consistent and theoretically sensible distinction between public and private. This is the LACPA, which also forms the constitutional blueprint for the divide under s 6 HRA. Certain judgments may of course demonstrate elements of the alternative, more subjective approach described above, but these are rightly open to criticism for doing so. *YL* receives such criticism in chapter seven.

#### Third constitutional given: the constitutional constraint

As well as being politically constrained, the courts also face a related constitutional constraint: that is, a constraint that requires them to develop the law in a judicial rather than legislative fashion. This is another fundamental fetter on the courts’ power to regulate a given function in public law.

Whilst Parliament is the sovereign law-maker, it is clear that the courts also make law,[[119]](#footnote-119) albeit law that differs fundamentally in nature and quality from Parliament’s legislation.[[120]](#footnote-120) The idea that the courts simply ‘apply’ legislation and ‘discover’ the content of the common law has become untenable – especially in recent decades, with the general growth in the judicial control of the exercise of statutory discretion. Now, it is widely accepted that the process of interpretation inevitably involves recourse to context – to the underlying values that give words their concrete meaning.[[121]](#footnote-121) Thus, whilst Parliament is sovereign, the courts have a great deal of latitude to determine the meaning of the statutory language it produces through the underlying values that the common law supplies. Parliament, we are told, ‘does  not  legislate in a  vacuum’.[[122]](#footnote-122) The judges’ freedom to determine legal meaning exists classically in the common law, whose dynamism comes not just from new cases that allow the courts to set novel precedents but also from evolution ‘in the light of changing social, economic and cultural developments’.[[123]](#footnote-123)

More is said of the concept of interpretation in the following chapter, which analyses the constitutional foundations of judicial review. For now, the salient point is that the law-making function of the judiciary necessarily differs fundamentally from that of Parliament because of the respective constitutional roles of each body. Whereas Parliament is constitutionally free to devise sweeping, forward-looking, root-and-branch reforms of the law, the courts are more constrained. Instead, they must develop the law piecemeal, in a principled fashion, and with due regard to existing precedent.[[124]](#footnote-124) As Lord Bingham puts it, ‘the common law scores its runs in singles: no boundaries, let alone sixes.’[[125]](#footnote-125) The need for courts to adhere to these requirements when developing the law derives from a number of constitutional fundamentals.[[126]](#footnote-126) Parliamentary sovereignty and democracy confer on Parliament its constitutional position as the supreme law-maker, which would be undermined were the courts to assume a rival law-making role. The separation of powers, whose aim is to ensure that the legislative, executive and judicial functions are performed by separate bodies, further emphasises the dangers inherent in eliding the judicial and legislative roles.[[127]](#footnote-127) The rule of law requires the law to be sufficiently clear and precise that well-advised individuals can plan their conduct around it,[[128]](#footnote-128) which means in turn it abhors retrospective law-making of the kind that would occur if the courts could decide cases on the basis of sweeping changes to the common law. By these principles the courts are therefore ‘constitutionally constrained’ to develop the law incrementally.[[129]](#footnote-129)

### Summary: significance of the constitutional givens

At this point it is worth briefly re-emphasising the theoretical picture of the public-private divide that begins to emerge from the foregoing discussion of the theoretical and constitutional givens. It is a given that the state differs fundamentally from the individual by virtue of the selflessness principle; and also that the state wields a particular, authoritative form of coercive power. This means in turn, through the rule of law, that law – and therefore legal power – can be seen as enjoying a certain kind of authority that *de facto* power does not.

These findings lay the foundations for my doctrinal analysis in three ways. First, as mentioned above, they establish a starting presumption that the courts’ approach to the public-private divide would reflect the theoretical givens, whether some or all of them, fairly closely in the contexts concerned. This is due to the political constraint: the courts should not usurp Parliament’s role by deciding heavily political questions for themselves.

Second, and assuming that the courts’ approach *does* centre around one or more of these constitutional givens in the contexts concerned, the findings above provide the law with a sound, uncontroversial theoretical basis. To re-emphasise an earlier point, this does not mean that the theoretical givens compel the LACPA; and nor does it mean that the LACPA is normatively the best way of drawing the public-private divide. Rather, the point is that the LACPA is an acceptable model – a theoretically acceptable basis on which to construct the divide in court. This is all the more so if the approach draws from multiple theoretical givens rather than a single one.

Third, aside from the political constraint, there are two further potentially constraining factors on the definition given to the courts of terms like ‘public authority’ and ‘public function.’ Both are relied upon at later points in the thesis. The first is the idea that public-law norms are not the only means by which to regulate the behaviour of powerful bodies. The courts need not – and for the reasons above, should not – feel that their definition of public-ness must be expansive enough to catch all exercises of power that might adversely affect the individual. If their definition was indeed this broad, or if the courts instinctively felt that it should be, then public law would risk presenting a major constitutional challenge to Parliament’s role. Therefore, some claimants who have suffered injustice at the hands of powerful institutionally private bodies, at least, will need to be turned away from court. The second factor, and a key reason why the courts might be inclined to turn such a claimant away, is the constitutional constraint. The courts must develop the law incrementally, in a judicial fashion. Once they have developed the law in a particular way, and according to a particular approach, they will need broadly to adhere to it. If and when the courts conclude that their previous approach requires some change in direction, this can happen – but only in accordance with the requirements of incrementalism and subject to the doctrine of precedent. Importantly, this means that the courts cannot simply rely on the fact that the applicant lacks a remedy as a reason to regard the defendant’s activities as a public function if precedent suggests a contrary result. Although the need to remedy an injustice can be a relevant factor in the courts’ interpretation of a public function,[[130]](#footnote-130) their interpretation must still be capable of accommodation within the basic framework that they have set for the public-private divide.

## OVERVIEW AND ROUTE MAP

I develop and defend my thesis in chapters two to seven. Chapters two to five consider the public-private divide in the context of amenability to judicial review; chapters six and seven the divide in the context of s 6 HRA, including the ‘governmental organisation' concept in Strasbourg.

Chapter two begins the analysis by considering the constitutional foundations of judicial review. It aims to place judicial review in its constitutional context by making two arguments: first, that Parliament is sovereign, even in the sphere of fundamental rights; and second, that the best way to understand the judicial review of statutory power is according to what is known as the ‘modified ultra vires model’.[[131]](#footnote-131) According to this model, judicial review of statutory power is seen as an interpretative exercise: that is, an exercise in which the courts determine the limits to statutory power by reference to Parliament’s intention, whether express or implied. The purpose here is not so much to re-open the well-trodden debate over the foundations of judicial review but to emphasise what I see as judicial review’s broader constitutional foundation: the ascertainment of statutory limits to *de jure* power rather than the imposition of common-law limits on power generally. This finding both supports, and is supported by, my broader thesis that the public-private divide is underlain in the contexts concerned by a model that focuses, as the LACPA does, on a basic distinction between *de jure* and *de facto* power.

Chapter three analyses the courts’ approach to the amenability of bodies to judicial review in the case-law prior to the Court of Appeal’s ruling in *Datafin*. It argues that, despite occasional confusion and erroneous decisions and some cosmetic changes to the presentation of the courts’ distinction between public and private in recent decades, the law had been largely consistent at least since the start of the twentieth century, based as it was on the LACPA. This primes the canvas for chapter four’s analysis of the law in *Datafin* and beyond. Here, the overall point is that the fundamental features of the law remain largely unchanged, even to this day. *Datafin*, it is argued, represents a strained application of the LACPA rather than a departure from it; and the LACPA’s fundamental features remain very much alive in the modern, post-*Datafin* case-law. Campbell’s alternative monopoly power conception of the courts’ approach, it will be argued, is both doctrinally and normatively deficient. Rather than trying to interpret the ‘new’ post-*Datafin* law, attempts at which have caused confusion and generated some arbitrary decisions along the way, courts and scholars would therefore be better off acknowledging what seems instead to be the reality: that in substance the law has never really changed. This conclusion is bolstered by chapter five, which explores the LACPA’s ability to cater for ‘delegated’ functions, i.e. functions that are public in nature when performed in-house by central and local government but later delegated to private bodies to be performed on the delegator’s behalf. Since the LACPA is firmly focussed on the nature of the *function* being performed, there is a great deal of room in the courts’ approach to bring these functions within the purview of judicial review. As chapter five argues, the courts can, and *should*, interpret the LACPA in this way – even if they do not yet seem to realise the full potential of their current approach.

With the courts’ approach to the public-private divide in judicial review thoroughly analysed, and its fitness for modern purpose explored, the analysis of s 6 HRA begins. Chapter six considers s 6 HRA in context. Its purpose is to analyse the extent to which Parliament intended through the HRA, either expressly or implicitly, to depart from the LACPA. In other words, it seeks to ascertain what we *do* know about Parliament’s intention *vis-à-vis* the HRA’s public-private divide. In turn this involves a thorough analysis, first, of the governmental organisation concept in Strasbourg and its relationship to the meaning of public authority under s 6 HRA. It will be argued that the meaning and scope of Strasbourg’s distinction between governmental organisations and private bodies have been fundamentally misunderstood, and that the governmental organisation jurisprudence – contrary to established judicial and academic opinion – indicates nothing useful about the meaning of the term ‘functions of a public nature’ under s 6(3)(b). Chapter six also considers the impact, on the present investigation, of issues such as the common-law horizontal effect of the Convention and the meaning of s 2 HRA’s duty upon the courts to take Strasbourg jurisprudence into account. Overall, chapter six concludes that the courts have an incredibly broad discretion to determine the meaning, in particular, of the term ‘functions of a public nature’ under s 6(3)(b). It is broader, in fact, than even the courts seem to believe. With this in mind, the final substantive chapter (seven) considers the meaning of this term in detail. It uses the LACPA to proffer a novel, ‘two-strand’ approach to the concept of a public function. The argument is that the courts’ treatment of s 6(3)(b) has been seriously flawed since the HRA’s inception; that the key to an accurate interpretation of that provision lies first of all in reconceptualising the framework of liability that s 6(3)(b) establishes, which chapter seven does by proffering its novel ‘chameleonic horizontal effect’ model; and that, once the framework is reconceptualised, the LACPA’s role becomes clear. Section 6 therefore contains a great deal of variation on the LACPA theme, but the LACPA’s place as the underlying constitutional blueprint – and therefore as an integral structural element in the definition of a public function under s 6(3)(b) – very much remains.

# 2.

# Judicial Review:

# The Constitutional Foundations

Examining the constitutional foundations of judicial review is an important first step in analysing the courts’ approach to the public-private divide in the judicial review context. The *foundations* of review are closely related to the *breadth* of the courts’ jurisdiction. A clear position on the former helps inform the investigation of the latter.

This chapter explores the debate – the ‘ultra vires’ debate – over the constitutional foundations of the courts’ review of decisions taken pursuant to statutory power. I do not attempt to engage exhaustively with the technical arguments made in this fierce and well-trodden debate. Rather, I aim to set out my position as a primer to the analysis that follows in subsequent chapters. Whilst the ultra vires debate itself centres only around the review by the courts of statutory power, it nevertheless suggests important things about their approach to the review of *non*-statutory power, including power exercised by private bodies, as well. Non-statutory power includes ‘third-source’ powers exercised by typically public bodies. These are dealt with in the following chapter.

In this chapter I make the core argument that the ‘modified ultra vires’ model, as it is known, is preferable to the rival common law model at providing the constitutional foundation for the review of statutory power.[[132]](#footnote-132) Crucially, however, this is not for the reasons of hard-edged logic that take centre stage in the ultra vires proponents’ work. The choice is not between two models, one of which must be right and the other wrong. Instead, the choice is between two plausible models, both of which have a great deal in common anyway. The choice as to how to conceptualise the courts’ review of statutory power must be made on the basis of contextual factors. On the basis of these factors there are various reasons why the courts’ review of statutory power should be conceptualised according to the modified ultra vires model *now –* even though this model is not, as its proponents claim, necessarily enduringly correct for as long as Parliament enjoys unfettered sovereignty. My ultimate objective in making this core argument is to demonstrate what I see as the courts’ ultimate task in the judicial review context more broadly: that is, of using a process of interpretation to determine the limits that attach to positive, *de jure*, legal powers. The upshot is a conceptual framework that both supports, and is supported by, the thesis I advance in chapters three to five: that in the judicial review context the LACPA lies at the root of the courts’ treatment of the public-private divide.

The chapter comes in three parts. Part A provides an overview of the ultra vires debate and explains in greater detail the potential impact of that debate on the public-private divide. Part B briefly dispatches so-called ‘strong’ criticisms of ultra vires theory, arguing that Parliament enjoys unfettered sovereignty – even over the principles of good administration and fundamental rights. Part C then turns to so-called ‘weak’ criticisms, arguing that the modified ultra vires model, whilst not necessarily correct, is nevertheless preferable in both instrumental and constitutional terms to its common law rival.

## THE RELEVANCE OF THE ULTRA VIRES DEBATE

The thrust of ultra vires theory is simple: when the court reviews the activities of a body exercising statutory powers, this review is justified by the intention of Parliament. Any activity consistent with Parliament’s intention is intra vires and therefore lawful;[[133]](#footnote-133) activity falling outwith the scope of the powers conferred on the body by Parliament is ultra vires and liable to be struck down by the court. The proponents of ultra vires theory are Christopher Forsyth and Mark Elliott, joined occasionally by Trevor Allan.[[134]](#footnote-134) Ultra vires proponents accept that Parliament will rarely provide *expressly* for particular heads of review or principles of good administration such as irrationality, legitimate expectation and natural justice to apply.[[135]](#footnote-135) However, they argue nevertheless that in the absence of statutory language to the contrary, Parliament can be ‘taken to have granted an imprimatur to the judges to develop the law in the particular area.’[[136]](#footnote-136)

Proponents of the rival common law model believe the ultra vires principle to be artificial, arguing instead that it is more transparent to regard the principles of judicial review as deriving from the common law.[[137]](#footnote-137) This is not simply because in many cases the courts will lack clear statutory guidance as to which principles of good administration should apply and what the content of those principles will be.[[138]](#footnote-138) It is also because the notion of parliamentary intention, discerned at the time of enacting the statute, is unable to explain why the contents of those principles change over time.[[139]](#footnote-139) Common lawyers argue, in other words, that the ultra vires principle fails to establish a sufficient link between Parliament’s intention and the standards of review actually applied by the courts.

Elliott aims to address these concerns by proffering the ‘modified’ ultra vires model.[[140]](#footnote-140) Even though Parliament will rarely provide expressly for particular standards of review, it can nevertheless be taken to intend implicitly or generally that statutory power be exercised consistently with the rule of law.[[141]](#footnote-141) Thus, the imprimatur said to have been granted by Parliament to the courts – the missing link between Parliament’s intention and the principles of good administration – is to determine the requirements of the rule of law and to apply them to the powers concerned unless the statute directs otherwise.[[142]](#footnote-142) Given that the rule of law is a dynamic concept whose content may evolve, the modified ultra vires principle explains why the principles of good administration may develop over time yet still be referable to, and justified by, Parliament’s intention at the time of enacting the statute in question.[[143]](#footnote-143) Common lawyers remain unconvinced, however, believing it spurious and fictional to infer an intention on Parliament’s part to comply with the rule of law in the absence of clear statutory language providing for it.[[144]](#footnote-144) Craig claims that it remains more transparent to abandon the notion of ultra vires and attribute the principles of good administration to the development of the common law.[[145]](#footnote-145)

The ultra vires proponents’ key argument is what Craig calls the ‘analytical claim’.[[146]](#footnote-146) This is the claim that ultra vires theory is logically entailed by the unfettered legislative sovereignty of Parliament such that the common law model cannot function without challenging that sovereignty. As Forsyth remarks, ‘What an all powerful Parliament does not prohibit, it must authorise either expressly or impliedly.’[[147]](#footnote-147) He argues that, if Parliament enacts a statute that makes no express mention of the principles of good administration, there are only two logical possibilities: either Parliament implicitly intends that those principles apply, or it implicitly intends that they do not. Hence, he says, the courts *must* conceptualise the principles of good administration according to legislative intent.[[148]](#footnote-148) To do otherwise would involve the courts applying those principles *against* Parliament’s implicit intention, which would challenge its sovereignty.[[149]](#footnote-149) Forsyth therefore envisages two categories of ultra vires critic. ‘Strong’ critics argue that Parliament does not enjoy unfettered legislative sovereignty at all; ‘weak’ critics, by contrast, accept Parliament’s unfettered legislative sovereignty but nevertheless attempt to maintain the correctness of the common law model over its ultra vires counterpart.[[150]](#footnote-150) Forsyth argues that there is no such thing as meaningful weak criticism: because sovereignty entails ultra vires theory, one cannot criticise the latter without also challenging the former.[[151]](#footnote-151) There is strong criticism or no criticism at all. In part C I explain my reasons for agreeing with common law proponents that the analytical claim is flawed.

### Ultra vires theory and the LACPA

The ultra vires debate is not conducted around the public-private divide, but there is a conceptual link to it.[[152]](#footnote-152) As Nicholas Bamforth remarks:

‘[T]he questions raised [in the amenability context]… reflect the continuing dispute about the function of judicial review: does it exist to keep statutory and arguably prerogative bodies within the limits Parliament has set them, or does it exist to control more broadly the exercise of governmental and/or public power, especially where this is of a monopolistic nature?’[[153]](#footnote-153)

The debate itself also touches on the amenability issue at times. In particular, Craig criticises ultra vires theory for being unable to explain the constitutional basis of the courts’ review of *non*-statutory power.[[154]](#footnote-154) When the courts use judicial review to control decisions taken pursuant to the prerogative, or to *de facto* regulatory power, there can be no room for a justification based on Parliament’s intention. The review of non-statutory power is discussed in further detail in chapters three and four, but Elliott’s response to Craig’s argument is nevertheless significant for present purposes.

Elliott attempts a partial defence to the criticism, arguing that common to the review of both statutory and prerogative power is what he calls ‘vires-based’ review: that is, the ascertainment, driven by the rule of law, of the inherent limits attaching to positive legal powers.[[155]](#footnote-155) Thus, whilst it is only logically necessary to adhere to ultra vires theory in the statutory context, prerogative power can still be brought under the broader umbrella of vires-based review: prerogative powers are positive legal powers nevertheless. His defence stops at the courts’ review of *de facto* power, though, to which he concedes vires-based review cannot apply. *De facto* power is ‘one area in which a common law model of review is both appropriate and necessary.’[[156]](#footnote-156) He argues that it ‘simply makes no sense to impugn the legality of an act for want of legal power when such power is not… a condition precedent to the act’s legality.’[[157]](#footnote-157) In this context, the courts instead impose common-law *duties* on the capacity to act. It is no different to their task in the classically private-law context where they impose duties in negligence, contract and nuisance on private individuals: they are limiting freedom rather than discerning the limits to powers.[[158]](#footnote-158) Craig’s criticism therefore remains intact: ultra vires theory cannot comprehensively explain the courts’ judicial review jurisdiction, and the dichotomy between judicial review that can be explained by ultra vires theory and that which cannot ‘does little service to rational system of public law.’[[159]](#footnote-159) Whereas the origin of the power is a bar to the ability of ultra vires theory to rationalise judicial review, it is no bar under the common law model. Conceptually, the common law can account for the review of both statutory *and* all forms of non-statutory power. He also goes one step further, adding that this is also an accurate reflection of the historical position. This, he argues, is because the common law has always had an inherent ‘capacity to regulate public power’[[160]](#footnote-160) – whether through private-law doctrines or judicial review. Wherever there is power of any kind, the common law can intervene to regulate it if the substantive principles permit. Elliott responds by arguing that the review of *de facto* power will still be driven by the rule of law, and thus that there is some residual link with the review of statutory and prerogative power under the modified ultra vires model.[[161]](#footnote-161) But this is an abstract link indeed, and a long way from being able to provide a clear symmetry between the review of all three forms of power. It is also doubtful that the rule of law, which requires *government* to act under the law,[[162]](#footnote-162) can adequately explain the review of *de facto* power by bodies that are not clearly institutionally public in nature. ‘Third-source’ powers exercised by central government, yes;[[163]](#footnote-163) but *de facto* power exercised by the Panel of Take-overs and Mergers, for instance, no.[[164]](#footnote-164)

As the ultra vires proponents’ claim is pitched, however, they need not worry too much. After all, they have their bedrock analytical claim – that ultra vires theory is logically inescapable where statutory power is concerned. If this claim is correct, then the untidiness Craig describes is only a minor concern. It is a necessary price to pay for subscribing to logic. But once it is appreciated that the analytical claim is not in fact irrefutable, a point that I pursue below, then the ultra vires proponents lose their main line of defence to Craig’s criticism that the model cannot provide a comprehensive foundation for all forms of judicial review. They are unable to take cover behind hard-edged logic and must therefore take this criticism more seriously. Similarly, once it is appreciated that the choice between ultra vires and common law theories is not in fact a question of logic but is instead a question of preference between the competing models rather than the correctness of each, again a point that I develop below, then it becomes more pressing to examine the *strength* of Craig’s criticism about the distinction between the different forms of review. On this view, it becomes important to dissect Craig’s claim – to look to the *kind* of non-statutory power to which judicial review extends – in order to see just how artificial ultra vires theory can be said to be. If judicial review routinely lies against power that has nothing at all in common with statutory power, then the ultra vires model will indeed be unable to account for a sizeable chunk of the courts’ judicial review jurisdiction and Craig’s criticism will be strong. But if ultra vires theory does paint a more appealing picture of the review of statutory and non-statutory power alike, the force of this criticism will wane. The credibility of the common law model may itself even be at threat.

In my view the LACPA, properly understood, reveals Elliott’s concession in relation to *de facto* power to have been too generously given. Vires-based review *can* explain the review of *de facto* powers, in formal terms at least. This is because the LACPA’s framework requires functions to be coercive powers *legally-authorised*, i.e. grounded in positive law, before they become amenable to judicial review. *De facto* powers can still be amenable, but only at the fringes. If the courts are to review *de facto* power, their decision to do so must still be referable to the LACPA’s basic framework, as later chapters show. The courts must be able to put a convincing case that those powers can and should be classified as positive legal powers, all things considered. They must use the LACPA creatively, in other words. Whilst the review of *de facto* (and prerogative) power under the LACPA cannot therefore be justified with reference to *Parliament’s* intention, it can at least be justified according to another fundamental feature of ultra vires theory: that reviewable powers are positive legal powers whose limits must be discerned by interpretation. In all contexts under the LACPA, the courts can therefore be *said* to be conducting vires-based review. There is no need to resort to the more abstract argument that those contexts are linked by the rule of law.

This of course is only a formal reconciliation between the review of *de facto* power and ultra vires theory. Elliott is right to recognise that in reality vires-based review cannot apply to *de facto* power. But a formal reconciliation is better than no reconciliation at all. Although my argument therefore generates a tension between the formal and the real, i.e. between what is actually happening (the review of *de facto* power) and how it should be perceived (as review of *de jure* power), this by no means weakens my thesis. In fact, the need to engage in some conceptual fudging when applying judicial review to *de facto* power illustrates a point that I defend by various means throughout the following chapters: there is no general warrant under the present law, nor should one be inferred, to expand the meaning of a public function beyond the strictures of *de jure* coercive power. It is only exceptionally that such expansion can occur.

This section’s observations demonstrate the LACPA and ultra vires theory to be mutually supportive. The LACPA supports ultra vires theory in two ways: first, by dampening (albeit not neutralising) the force of Craig’s criticism that ultra vires theory can only do an incomplete job at justifying judicial review, emphasising that it can still give a partial account of the review of prerogative and *de facto* power through its reference to vires-based review; and second, because it emphasises the general idea behind ultra vires theory – that the distinction between *de jure* and *de facto* powers is significant. Conversely, ultra vires theory also supports the LACPA. Given that for other reasons the modified ultra vires model is preferable to its common law rival at rationalising the review of statutory power, which I argue below is the case, then ultra vires theory provides one more reason in support of my claim that the courts are interpreting the public-private divide according to a root distinction between *de jure* and *de facto* power. This is not to say that the LACPA and ultra vires theory are inescapably intertwined. Because ultra vires theory strictly only relates to the judicial review of statutory power, there is nothing that would logically prevent the courts from adopting a broader, more extensive common law jurisdiction that transcends the LACPA outside of the statutory context. But ultra vires theory and the LACPA are at least *suggestive* of each other. Their irreducible cores are the same.

## ‘**STRONG’ CRITICISMS**

With the relevance of the ultra vires debate to my overall thesis explained, I begin my defence of the modified ultra vires model. In this part I consider the issue of parliamentary sovereignty, explaining why ‘strong’ criticisms of ultra vires theory are unpersuasive. Whilst this may seem like a digression given my general claim that the common law model is not logically incompatible with parliamentary sovereignty, it nevertheless aids in my overall argument that the modified ultra vires model should be preferred. This is because the reasons underlying that argument, which are explored in part C, depend in part on the idea that Parliament’s legislative authority is unfettered – or, at the very least, unfettered where the principles of good administration are concerned. The best way to demonstrate that the principles of good administration lie beyond the courts’ reach, moreover, is to explain why Parliament’s legislative sovereignty is not constrained at all. In Diceyan terms,[[165]](#footnote-165) Parliament ‘can make or unmake any law whatever’ and enjoys a monopoly on the power to decide which bodies can lawfully set aside primary legislation.[[166]](#footnote-166)

Sovereignty is a lengthy topic that could occupy a doctoral thesis in itself. What follows is therefore a relatively brief, if fairly thorough, defence of the idea that Parliament’s legislative authority remains unfettered. There are two main issues: first, how to identify the criteria for determining the extent of Parliament’s sovereignty; and second, whether these criteria are met in fact.

### The rule of recognition

The answer to the first question lies in determining the nature of the rule of recognition – the rule that establishes the terms on which Parliament enjoys legislative authority.[[167]](#footnote-167) There are three competing views. The first is Sir William Wade’s, according to which the courts are free to alter the terms on which Parliament is sovereign unilaterally, at any time.[[168]](#footnote-168) Wade rightly observed that the rule of recognition had to lie ‘above and beyond the reach of statute’,[[169]](#footnote-169) because Parliament could surely not confer legislative authority on itself. He therefore argued that the power to do so lay ‘in the keeping of the courts’, as a matter of ‘political fact’.[[170]](#footnote-170) One identifies the seat of constitutional power simply ‘by looking at the courts and discovering to whom they give their obedience’.[[171]](#footnote-171)

Wade’s theory is deeply problematic, however, for the reason that it allows the courts an apparently unfettered power to change the rule of recognition.[[172]](#footnote-172) As Trevor Allan argues:

‘[T]reatment of the rule of recognition as a matter merely of political fact leaves no room for an adequate account of what qualify as good reasons – good *legal* reasons – for resolving doubts about the rule in one way rather than another.’[[173]](#footnote-173)

Advancing the second of our three competing views, Allan argues that the rule of recognition is instead a principle of common law whose ‘nature and scope are matters of reason, governed by our understanding of the constitution as a whole’.[[174]](#footnote-174) Seen as such, the rule of recognition would require careful and principled judicial exposition, imposing reason-based limits on the courts’ power to alter it. For this reason there is at least a conceptual fetter on the courts’ ability to change the terms on which Parliament is sovereign, which represents an improvement in this respect on Wade’s theory. But Allan’s theory nevertheless contains flaws. Above all, it presumes *courts* to enjoy the legal power to confer on Parliament its legislative authority,[[175]](#footnote-175) which Jeffrey Goldsworthy rightly observes ‘would be just as question-begging as the discredited idea that Parliament conferred authority on itself by statute.’[[176]](#footnote-176) It is also unclear that the conceptual fetter on the courts’ decision-making power would translate into a *legal* one. It is difficult to see what legal mechanisms could prevent the courts from changing the rule of recognition through a poorly-reasoned judgment.[[177]](#footnote-177) Lower courts could expect to have their judgments overturned, but the Supreme Court could not. Moreover, it is not as if Parliament could intervene to use legislation to overturn a judicial determination of the rule of recognition as it could with other common-law rulings that it found erroneous or distasteful. This is because it would place Parliament back in control of the rule, which Allan’s theory could not permit.

Clearly it is problematic, then, to vest the power to determine the rule of recognition in the courts alone, whether under Allan’s or Wade’s view. The third view is Goldsworthy’s: that the rule of recognition should be regarded as capable of legitimate change only by unanimous consensus between the legislature, executive and judiciary.[[178]](#footnote-178) On this basis, Goldsworthy concludes after lengthy historical analysis that Parliament’s unlimited legislative authority was settled between the executive, legislative and judiciary since before the Glorious Revolution of 1688,[[179]](#footnote-179) and ‘was firmly entrenched in British constitutional thought by the mid-eighteenth century’.[[180]](#footnote-180)

Goldsworthy’s ‘consensus’ formulation of the rule of recognition is preferable to both of the others for four reasons. First, it avoids the problem, inherent in Wade’s theory, of allowing the courts unfettered discretion to alter the rule of recognition unilaterally and without having to justify their view. Whilst the rule remains a matter of fact rather than common law under Goldsworthy’s theory as it does under Wade’s, the courts are unable to change the rule unilaterally because they may only do so legitimately with the consent of the legislature and executive. Consequently, they would be placed under practical pressure to explain why they believed such consent to exist – pressure, in other words, to justify their view. Thus, and secondly, Goldsworthy’s theory also substantially addresses Allan’s view, given in the quote above, that the correctness of judicial attempts to alter the rule of recognition should be capable of assessment against objective criteria: under Goldsworthy’s theory, judicial attempts to alter the rule of recognition would be illegitimate unless the courts could demonstrate that the change in question had also been agreed upon by Parliament and the executive. Thirdly, by requiring consent between the three organs of state, Goldsworthy’s theory, unlike Allan’s theory, ‘avoids the [conceptual] question-begging that is implicit in any one branch of government purporting to confer law-making authority on itself.’[[181]](#footnote-181) Fourthly, and along similar lines, vesting authority to alter the rule of recognition in all three organs of state also realistically emphasises the idea that there is probably no correct answer to key questions concerning the terms on which a legislature should be sovereign. Whether judges should be legally empowered to invalidate or ‘strike down’ legislation, for instance, ‘is in many communities itself a subject of reasonable disagreement’,[[182]](#footnote-182) as Goldsworthy remarks. That there is no correct answer implies in turn that such decisions lend themselves better to democratic agreement between all three organs of state than to determination by a single organ, whether Parliament or the courts, acting alone.

That Goldsworthy’s theory is preferable does not mean that it is entirely unproblematic, however.[[183]](#footnote-183) In particular, the distinction between his theory and Allan’s theory of a normatively-driven, common-law rule of recognition begins to blur once it is appreciated that normative principles will need to play at least some role in the interpretation of the conduct of the organs of state.[[184]](#footnote-184) If the organs ambiguously affirm that ‘Parliament is sovereign’, for instance, whether one interprets this statement to allow for or preclude a judicial strike-down power over legislation abrogating fundamental rights will depend at least in part on whether or not one believes key constitutional principles such as democracy and the rule of law to mandate such a power.[[185]](#footnote-185) It should be stressed, though, that this criticism is not necessarily fatal to Goldsworthy’s theory. There are two points. First, Goldsworthy’s and Allan’s theories are still distinct. They do not simply collapse into one another. Interpretative principles will play no practical role where there can be no doubt as to what the organs of state collectively intend. Second, even if Goldsworthy’s theory does sometimes yield an unclear picture of the state of the rule of recognition, the alternative theories explored above are no clearer. Under Wade’s theory, the state of the rule would be inherently unpredictable since the courts are free to alter its content at any time.[[186]](#footnote-186) The same is true of Allan’s theory. As a principle of common law, the rule of recognition would be subject to the principles of common-law reasoning: that is, it would be developed piecemeal, incrementally and so on. The common law has an ‘ethical aimlessness’ about it, as Lord Lester observes.[[187]](#footnote-187) It develops slowly and painstakingly, never really knowing its eventual destination as it travels. All of this obscures the courts’ true position on the extent to which Parliament is sovereign. Bamforth remarks that ‘in a sufficiently novel situation it will not be possible… reliably to gauge as a matter of *law* which way the courts are likely to jump.’[[188]](#footnote-188)

### The doctrinal investigation

With Goldsworthy’s theory identified as the preferable method of determining the content of the rule of recognition, it falls to enquire of the content of that rule today. There are three potential challenges to the idea that Parliament currently enjoys unfettered legislative sovereignty. These are: first, that as a matter of history Parliament has never enjoyed such sovereignty; second, that as a matter of normative theory Parliament has never enjoyed unfettered sovereignty; and third, that Parliament *no longer* enjoys unfettered sovereignty, even though it once did.

#### First challenge: sovereignty has never been unfettered (historical argument)

This argument can be relatively swiftly dispatched as being at odds with empirical fact. As noted above, Goldsworthy’s historical analysis concludes that the three organs of state have agreed since at least as far back as the Glorious Revolution that Parliament enjoys unfettered sovereignty.[[189]](#footnote-189) Modern courts reassert the idea that Parliament enjoys unfettered sovereignty, too. In *R v Secretary of State for the Home Department, ex p Simms*,[[190]](#footnote-190) Lord Hoffmann observed that the courts presume Parliament not to intend to abrogate fundamental rights but that it ‘can, if it chooses [to express its intention sufficiently clearly], legislate contrary to fundamental principles of human rights.’[[191]](#footnote-191) Lord Phillips PSC recently echoed this view in *Ahmed v HM Treasury*: ‘I do not consider that the principle of legality permits a court to disregard an unambiguous expression of Parliament's intention.’[[192]](#footnote-192) Even were it true that Parliament had never enjoyed unfettered sovereignty, there are no known demonstrations of this idea through the courts dis-applying a provision of primary legislation said to contravene norms beyond Parliament’s reach. The exception to this is the EU context, which is explored below. Admittedly in some instances the courts might adopt strained interpretations of statutory language that could be seen to flout Parliament’s ‘proper’ intention,[[193]](#footnote-193) but if anything this is more indicative of unlimited than limited sovereignty. If the courts did enjoy a power to strike down legislation, that is all they would have to do.[[194]](#footnote-194)

Second challenge: sovereignty has never been unfettered (normative argument*)*

The argument here is that Parliament’s sovereignty is attenuated by the fundamental principles that justify it – democracy, the rule of law and so on. The courts are therefore legally entitled to refuse to apply legislation that offends these principles by transgressing fundamental rights, such as the rights to free speech, a fair trial and from retroactive criminal punishment, necessarily entailed by them. Trevor Allan, Sir John Laws, Lord Woolf and Sir Jeffrey Jowell are notable proponents of this view,[[195]](#footnote-195) which shall be referred to as the ‘attenuated sovereignty’ argument.

It is not necessary to dwell at length on this argument given the preference I express for Goldsworthy’s views on the rule of recognition: whether or not Parliament *should* enjoy unfettered legislative sovereignty, it *does*. There is no clear consensus to different effect, as we will see below. But there are also problems with the attenuated sovereignty argument on its own terms.[[196]](#footnote-196) Additionally to contending that liberal democracies should respect fundamental rights and that the courts should enforce this duty,[[197]](#footnote-197) the argument also involves the contention, crucially, that the courts should be entitled to assume the power to strike statutes down in the absence of a written constitution conferring it.[[198]](#footnote-198) Surprisingly little consideration is given by attenuated sovereignty proponents to this point, however. Allan simply remarks, for instance, that the courts’ power to expound the content of fundamental rights and strike down unconstitutional statutes follows ‘inescapably’ from the idea that Parliament’s legal authority is theoretically bounded by principles such as democracy and the rule of law.[[199]](#footnote-199) For this reason the attenuated sovereignty argument is highly problematic.[[200]](#footnote-200) It allows the courts alone to determine which fundamental rights to protect and what the scope of those rights should be.[[201]](#footnote-201) Reasonable disagreement exists over these issues,[[202]](#footnote-202) but Parliament and the people it serves are denied any say.[[203]](#footnote-203) This does not mean that courts could never be capable of resolving contestable issues. As Craig recognises, private-law adjudication may involve such issues anyway.[[204]](#footnote-204) But attenuated sovereignty proponents need to explain the point away. It is not clear why English courts should enjoy greater power in this respect than their counterparts in jurisdictions with written constitutions.

#### Third challenge: sovereignty unfettered now

This challenge comes in two distinct forms, which are discussed in turn: first, the ‘external’ challenge arising from the UK’s membership of the European Union; and second, the ‘internal’ challenge resulting from recent doubts by domestic judges, for reasons quite unrelated to EU membership, that Parliament enjoys unfettered legislative freedom today.

(1) The external challenge

In *R v Secretary of State for Transport, ex p Factortame (No. 2)*,[[205]](#footnote-205) the House of Lords needed to decide whether certain provisions of the Merchant Shipping Act 1988 (MSA), which were said to conflict with directly effective European Community law by requiring fishing vessels to be operated by British-controlled companies in order to be registered, impliedly repealed Parliament’s earlier stated intention in s 2(4) of the European Communities Act 1972 (ECA) that domestic law should be construed and given effect ‘subject to’ directly effective EC provisions. Following a preliminary reference from the European Court of Justice affirming the primacy of Community law over domestic law, their Lordships granted interim relief against the Secretary of State on the basis that Community law, rather than the later statute, prevailed. The MSA had effectively been dis-applied.

The judgment is significant because it appears to eschew what had previously been regarded as settled orthodoxy:[[206]](#footnote-206) that Parliament, being sovereign, cannot be bound by its predecessors.[[207]](#footnote-207) This was thought to give rise in turn to the doctrine of implied repeal, under which a later primary legislative provision would repeal an earlier one in the event that the two were inconsistent.[[208]](#footnote-208) Only Lord Bridge attempted to reconcile *Factortame* with the doctrine of implied repeal, explaining tersely that any ECA-based limitations on Parliament’s sovereignty were voluntarily assumed because Parliament would have been well aware of them when it enacted the statute.[[209]](#footnote-209) This explanation is deficient however, because it simply presumes without more that parliamentary sovereignty entails the power to assume such limitations in the first place.[[210]](#footnote-210)

There are three principal views as to the implications of *Factortame* for the doctrine of parliamentary sovereignty, each reflecting the different conceptions of the rule of recognition explored above. Wade believes *Factortame* to represent a constitutional revolution by its departure from orthodox conceptions of sovereignty. To Wade, as seen above, the rule of recognition is a matter of political fact within the courts’ unilateral control, which rule the courts have altered by preferring the will of the earlier Parliament to that of the later.[[211]](#footnote-211) By contrast, Allan disagrees that *Factortame* represents a ‘revolution’.[[212]](#footnote-212) He argues instead that it reflects a principled and justified *evolution* in the rule of recognition as principle of common law, brought about by the UK’s membership of the EU.[[213]](#footnote-213) Both of these conclusions are doubtful: they rest on conceptions of the rule of recognition that are flawed for the reasons given above.

The third and preferable view of *Factortame* is Goldsworthy’s. Against the backdrop of his ‘consensus’ view of the rule of recognition, he argues that the ruling represents the final stage in a change to the rule agreed between Parliament, comprised of both legislature and executive, and the judiciary:

‘Parliament, by enacting section 2(4) of the [ECA]…, and the courts, by the way they have applied that section, have overturned the former assumption that Parliament cannot control the form in which future legislation must be enacted... [I]n effect, Parliament and the courts have tacitly agreed that as long as Parliament does not repudiate Britain’s treaty obligations with Europe in express and unambiguous language, the courts will not apply statutory provisions that violate those obligations.’[[214]](#footnote-214)

On this view, the rule of recognition has been changed, but the change is legitimate because it has been agreed upon by all three organs of state. It is unclear whether Goldsworthy believes this change to apply to all future attempts by Parliament to prescribe the form of legislative language required, or whether it is confined only to legislation conflicting with directly effective EU law.[[215]](#footnote-215) This is a side-effect of the difficulty of having to interpret the conduct of the three organs of the state, which was discussed above. It might be that further rulings are required to refine the scope of this change.

One might refer to the change to the rule of recognition in *Factortame* as ‘revolutionary’, as Wade did, but this overstates its effect. The change is actually relatively modest and is entirely compatible with the central idea that Parliament remains sovereign. As briefly noted above and as Goldsworthy and other scholars have observed,[[216]](#footnote-216) the doctrine of parliamentary sovereignty does not *necessarily* give rise to the doctrine of implied repeal, as courts seem to think it does. Whilst it may be true that a Parliament bound by a predecessor to use express language to repeal existing legislation is in some sense ‘constrained’ and therefore limited in its legislative capacity, this is equally true of a Parliament prevented by the doctrine of implied repeal from imposing restrictions as to form on future Parliaments. Either way, the legislative capabilities of the Parliament of the day are curtailed. As Hamish Gray reasons:

‘[I]f Parliament is sovereign, there is nothing it cannot do by legislation; if there is nothing Parliament cannot do by legislation, it may bind itself hand and foot by legislation; if Parliament binds itself by legislation there are things which it cannot do by legislation; and if there are such things Parliament is not sovereign.’[[217]](#footnote-217)

Hence, neither view – that the doctrine of implied repeal is or is not entailed by sovereignty – is *logically* correct. Each represents a plausible inference of what the doctrine of parliamentary sovereignty might require.[[218]](#footnote-218) What *Factortame* seems to reveal Parliament and the courts to have agreed is not a radical or unprincipled departure from existing constitutional fundamentals, as Wade’s use of the label ‘revolutionary’ suggests, but a shift in preference from one logically plausible view of sovereignty’s requirements to another. Parliament is still the sovereign legislature with the power to implement whichever legislative changes it wishes provided it makes its intentions sufficiently clear.[[219]](#footnote-219)

(2) The internal challenge

The ruling of the House of Lords in *Jackson v Attorney-General*[[220]](#footnote-220)mounts an internal challenge to the idea that Parliament’s legislative authority remains unfettered today.[[221]](#footnote-221) The case concerned a challenge by the Countryside Alliance to the validity of the Hunting Act 2004, via a challenge to the Parliament Act 1949 under which it was enacted. The claimant alleged that the 1949 Act was invalidly made under the procedure set out in the Parliament Act 1911, which allows the House of Commons to bypass the House of Lords and present a bill directly for Royal Assent if certain conditions are met. The nine-judge Appellate Committee ruled unanimously that both the 1949 and 2004 Acts were valid Acts of Parliament. Having reached this conclusion, two of their Lordships then took the opportunity to express the view that the doctrine of parliamentary sovereignty is a judge-made creation;[[222]](#footnote-222) and, joined by Baroness Hale, that certain judicially-enforceable limits to Parliament’s legislative power may exist. Lord Steyn remarked that:

‘In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.’[[223]](#footnote-223)

Along similar lines, Lord Hope stated that:

‘[P]arliamentary sovereignty is no longer, if it ever was, absolute… Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.’[[224]](#footnote-224)

Some attempt has been made to argue that Parliament’s legislative authority may now be limited following *Jackson*,[[225]](#footnote-225) but it is difficult to see how.[[226]](#footnote-226) First, the remarks given above were strictly *obiter dicta*: the issue arising for consideration was the legal validity of the 2004 Act, not whether general judicially-enforceable limits on Parliament’s authority exist. Second, the remarks were in any event not the majority’s view.[[227]](#footnote-227) Lord Bingham even opposed them by stating that the doctrine of parliamentary sovereignty remains ‘the bedrock of the British constitution’ and that ‘[in 1911], as now, the Crown in Parliament… could make or unmake any law it wished.’[[228]](#footnote-228) Lord Carswell also expressed caution by stating that he did not wish ‘to expand the role of the judiciary at the expense of any other organ of the state or to seek to frustrate the properly expressed wish of Parliament as contained in legislation’.[[229]](#footnote-229) Third, the remarks are also flawed on their own terms. The view that sovereignty is a common-law construct is open to the same criticisms of Allan’s view given above.[[230]](#footnote-230) Since Goldsworthy’s view of the rule of recognition is preferable, it falls to the judges to demonstrate agreement between the three organs of state that Parliament’s sovereignty is now limited.[[231]](#footnote-231) Lord Steyn proffered *Factortame* and the enactment of the Human Rights Act 1998 as evidence, respectively, that the UK no longer has ‘an uncontrolled constitution’ and that ‘a new legal order’ focussing on respect for individual rights exists.[[232]](#footnote-232) However, neither establishes the existence of a collective agreement to limit Parliament’s sovereignty by allowing the courts to strike legislation down: *Factortame* is best seen as evidence of tacit agreement between Parliament and the judiciary to suspend the doctrine of implied repeal, as seen above; and whilst some have argued that the HRA has eroded Parliament’s legislative sovereignty in the fundamental rights context,[[233]](#footnote-233) this can only realistically be an erosion in a practical rather than *legal* sense if, as I have argued, there is no consensus between the organs of state to the effect that Parliament’s sovereignty is now attenuated.[[234]](#footnote-234) It is true, of course, that the HRA has equipped the courts with powers to protect Convention rights that they did not previously enjoy. Thus, under s 3 HRA, the courts must interpret legislation compatibly with the Convention as far as possible, which will sometimes require, for instance, the adoption of statutory language ‘which linguistically may appear strained.’[[235]](#footnote-235) But in clear terms Parliament has also expressly attempted at various points to safeguard its position as the constitutional sovereign, ruling out any possibility that it is agreeing to limit its legislative capacity enduringly in the fundamental rights context. As Tom Mullen puts it, ‘It is a considerable leap from noting that Parliament has engaged in [practical] self-limitation of its powers to suggest that courts might impose limitations that have not been suggested by the other branches.’[[236]](#footnote-236)

### Summary

Parliament’s absolute sovereignty remains intact, as it has done since the Glorious Revolution. Neither normative arguments nor recent legal developments are sufficiently convincing to upset this view. The result is to fend off strong criticisms of ultra vires theory, leaving only weak criticisms to analyse. It is by considering these that the true virtue of the modified ultra vires model emerges.

## ‘WEAK’ CRITICISMS

In this part I argue that the modified ultra vires model is preferable to its common law counterpart at justifying the courts’ review of decisions made pursuant to statutory powers. The argument comes in three parts. The first explains why the ultra vires proponents’ analytical claim is flawed, and therefore why the common law model *can* exist without challenging parliamentary sovereignty. Given that a real choice must therefore be made between the two models, the second part explains why this choice should be made in favour of the modified ultra vires model. The third then explores the implications of these findings for the ultra vires debate.

### The analytical claim

Ultra vires and common law proponents agree on a great deal. Since both camps take Parliament to enjoy unfettered sovereignty, both agree that Parliament can suspend the principles of good administration if it wishes. Both also agree, conversely, that if Parliament does provide expressly for a particular standard of review, the courts must apply that standard for that reason alone.[[237]](#footnote-237) Ultra vires proponents also accept that since Parliament is often silent as to the relevant standard of review to apply, the courts will very often develop those principles themselves.[[238]](#footnote-238) Indeed, the modified ultra vires model emphasises this creative judicial role by reference to the exposition of the rule of law. Given the camps’ common ground, the sole question on which the debate rests is this: when Parliament confers statutory powers on a body but makes no express mention of the principles of good administration attaching to those powers, must the courts justify the imposition of such principles by reference to Parliament’s implicit intention, or are they free to claim that the common law has imposed those requirements autonomously, according to the rule of law, instead?

The answer to this question rests in turn on an understanding of the concept of implied intention. It is something of a myth to say that the courts simply ‘apply’ Parliament’s language, as chapter one explained. In ‘easy’ cases, they will. Here, there can be no reasonable doubt as to Parliament’s intention, even though the intention may be implied rather than express. But in ‘hard’ cases there *is* reasonable doubt.[[239]](#footnote-239) Here, the courts must resort to interpretative principles in order to settle the statute’s meaning. These principles are normatively derived; that is, constructed by the courts and imputed to Parliament as rebuttable presumptions as to its intention.[[240]](#footnote-240) Parliament’s implied intention is therefore a product both of the statute’s language and of judge-made interpretative principles: a combination, in other words, of both ‘literal’ and ‘constructivist’ intent. The relative contribution of each in a given situation will be a question of degree, based on a ‘spectrum’[[241]](#footnote-241) or sliding scale.[[242]](#footnote-242)

This is not to say, however, that Parliament is somehow involved in every application by the courts of a normatively-reasoned principle. Parliament cannot sensibly be taken to have intended everything that happens. If it were to be, as Elliott rightly remarks, this would ‘manifestly fail to accord with the reality of the British legal system.’[[243]](#footnote-243) Some legal spheres are simply untouched by statute. In these spheres – what Laws terms the ‘undistributed middle’ ground[[244]](#footnote-244) – the courts may develop the common law autonomously according to the rule of law. If the issue of whether to apply the principles of good administration to the exercise of a statutory power falls into the undistributed middle, the courts can therefore apply those principles in the name of the common law. They need not rely on Parliament’s intention.[[245]](#footnote-245)

Ultra vires proponents disagree. Having advanced their analytical claim,[[246]](#footnote-246) they put two responses to the argument that the principles of good administration are capable of falling into the undistributed middle. These may be termed the ‘neutrality’ argument and the ‘context’ argument. Though forceful, neither is correct by virtue of the ‘abstract logic’[[247]](#footnote-247) that ultra vires proponents argue lies behind their analytical claim.

#### The neutrality argument

Elliott argues that it is ‘absurd and implausible’ not to presume that Parliament intends the principles of good administration to apply to the exercise of statutory power,[[248]](#footnote-248) for it would necessarily involve the contention that Parliament is ‘wholly neutral’ as to whether the powers it enacts should be exercised according to the rule of law.[[249]](#footnote-249) Elliott claims that his argument is persuasive as a matter of abstract theory and also empirically, because in various contexts the courts *do* interpret statutes on the basis that Parliament intends to comply with the rule of law.[[250]](#footnote-250) Although the idea that Parliament should be taken to intend to comply is attractive for obvious reasons in a liberal democracy, there are two reasons why it is not something that we are *driven* to accept in the way Elliott suggests. First, Parliament is not necessarily ‘neutral’ or ‘agnostic’[[251]](#footnote-251) towards the rule of law simply because it fails to legislate for it to apply.[[252]](#footnote-252) These terms denote conscious, personal, attitudes towards an issue.[[253]](#footnote-253) Individual legislators might have their own views, whether of approval, indifference or whatever, but this is not necessarily *Parliament’s* intention.[[254]](#footnote-254)

Second, Elliott’s empirical claim needs dissecting. He notes the courts’ tendency to interpret ouster clauses restrictively and argues that this can only be constitutionally justifiable on the basis that the courts presume Parliament to intend to comply with the rule of law: there is no room for the claim that they are effecting the ordinary meaning of the statute when the usual course is to strain that meaning so much.[[255]](#footnote-255) But whilst this claim is forceful, it nevertheless fails to establish Elliott’s argument that it is ‘logically impossible’ to say that Parliament is neutral or indifferent as to whether the rule of law should apply.[[256]](#footnote-256) For one, logic alone cannot compel the conclusion that the courts should take Parliament to intend to abide by the rule of law when enacting *all* statutory provisions.[[257]](#footnote-257) Ouster clauses have the obvious potential to interfere with the rule of law in a way that other provisions may not. It is not beyond the reach of *logic* to conclude that for some provisions, Parliament may not have given the issue any thought. But even were this point to be wrong, and the courts’ approach to ouster clauses did require a presumption that Parliament intended to comply with the rule of law in all its statutes, it is still possible that the courts could alter their approach in future. Again, logic would not prevent this. Although it is attractive for the courts to impute a rule-of-law-based intention to Parliament, they did not always do so, opting instead for a more literal reading of Parliament’s intention.[[258]](#footnote-258) To some, at least, literalist interpretation remains a jurisprudentially credible alternative to more purposive construction.[[259]](#footnote-259) So whilst the courts’ current approach is fashionable, and desirable, the fashion might still change.[[260]](#footnote-260) In this regard, Sir Philip Sales posits that the need for parliamentary decision-making – and presumably therefore the importance of taking Parliament’s language especially seriously – increases as society develops to become more ‘fractured and pluralistic.’[[261]](#footnote-261) In future we might also find ourselves, for instance, with a reformed and generally more effective democratic system that strengthens the courts’ faith in Parliament’s abilities to the point where they no longer feel the *need* to supplement that language using the rule of law.[[262]](#footnote-262) This is in no way a prediction, but it is one of various potential examples that emphasise that logic can only get us so far in the present setting. What matters to a greater degree is the constitutional climate – current practice, trends and so on – that gives the ‘logic’ of imputing a rule-of-law-based intention to Parliament some purchase. In substance, Elliott’s argument that we *must* impute such an intention is nothing more than a declaration that the courts’ current approach is normatively desirable. It only remains ‘correct’ for as long as that approach obtains in practice.

#### The context argument

According to the context argument, the language or ‘context’ of a statute is inextricably bound up with the application by the courts of the principles of good administration such that those principles cannot be taken to derive from the common law.[[263]](#footnote-263) Trevor Allan has expounded the argument in detail. His context argument has two basic foundations. The first is rooted in the idea, seen above, that the ‘meaning’ of a statute comprises both text and normatively-derived principles.[[264]](#footnote-264) This is said to mean that statutory language and normative principle can never operate independently of each other.[[265]](#footnote-265) The second foundation is doctrinal: the contents of the substantive principles of good administration cannot be determined in the abstract by common law-reasoning and therefore only crystallise in the administrative context set by the statutory scheme in question.[[266]](#footnote-266) They only ‘bite’ on the statute in question. Neither of these arguments convincingly establishes the claim that ultra vires theory is logically entailed by parliamentary sovereignty, however. First, although the courts will be reliant on normative principle to supplement statutory language during the interpretative process, there must still come a point at which Parliament can be taken not to have expressed a view on the matter in question. If the contribution of statutory language and interpretative principles to the interpretative process lie on a sliding scale, there will be some cases, at least, in which the contribution of the language is nil or negligible and judge-made principles – common-law doctrines – are in fact doing all the work. There is no reason why this cannot be acknowledged.

Second, the doctrinal foundation to Allan’s argument also contains certain weaknesses. His claim is that ‘The abstract precepts of the rule of law are powerless to generate substantive conclusions on their own’,[[267]](#footnote-267) so the ‘legislation, both text and context, will be absolutely critical: it is the statutory context that supplies the material on which the doctrinal “criteria” can bite.’[[268]](#footnote-268) The claim is flawed in two respects. First, even if it is correct and the contents of the principles of good administration mean nothing without their context, the argument only holds for as long as those principles remain in such a state. In other words, Allan’s claim is time-limited since it relies on a doctrinal freeze-frame of the state of the law today. ‘Public law is developing at breakneck speed.’[[269]](#footnote-269) Some grounds of review depend more on the statutory context for their content than others, as the ultra vires proponents are aware. ‘Narrow’ review for excess of jurisdiction, for example, is one ground that depends entirely on the wording of the relevant statute – in Lord Davey’s words, to ascertain where the ‘four corners of the Act’ lie[[270]](#footnote-270) – for its substance.[[271]](#footnote-271) Arguably, however, the contents of the doctrine of procedural – and the newly-emerged doctrine of *substantive* – legitimate expectations *can* be formulated reasonably precisely in abstract terms without any recourse to the contents of the statute in question.[[272]](#footnote-272) And even if the contents of this doctrine cannot be formulated sufficiently precisely to be attributed to the common law rather than the legislation in question, there is no reason to presume that other doctrines would not develop in future that can. To be sure, there would still be good reason to *prefer* the modified ultra vires principle to the common law model in these circumstances. As Elliott argues, it would be undesirable to justify some heads of statutory review according to legislative intent and others according to the common law.[[273]](#footnote-273) But this is still a long way from the analytical claim that ultra vires theory must be preferred because the common law model *necessarily* challenges parliamentary sovereignty.

The second flaw in Allan’s doctrinal argument lies on a deeper level. As Craig argues, he wrongly equates the relevance of context with the presence of discernible *legislative intent*, manifested in the statute’s language, that the principles of good administration should apply.[[274]](#footnote-274) Allan responds by taking Craig to task for attributing to him ‘the “literal” conception of intent we both reject’, claiming that Craig ‘entirely misconceives the issue’. He continues, ‘Either the [statutory] context is critical or it is not. If it is, as Craig generally seems to concede, the statutory text must be interpreted accordingly.’[[275]](#footnote-275) However, this fails to combat Craig’s point sufficiently, simply restating the earlier argument that the involvement of statutory context equates with intention. There is a clear difference between deriving the principles of good administration from a statute, on the one hand, and making fine adjustments to the application of judge-made principles based on the statutory context, on the other. Allan regards the latter as a *necessarily* interpretative exercise. Indeed, whilst it may be characterised in this way, as the modified ultra vires model would have us do, his claim that it *must* be so characterised is unconvincing. It is not hard-edged logic that establishes the virtue of ultra vires theory.

### Defending the modified ultra vires model

There is such a thing, then, as meaningful weak criticism of ultra vires theory. The common law model *can* function without challenging parliamentary sovereignty. Evidently, a choice must therefore be made between that model and its modified ultra vires rival. In this section I explain why the latter should be preferred.

It is useful first of all to address the central arguments made by so-called weak critics. Ultra vires theory has been criticised as artificial and indeterminate: it fails to acknowledge that the principles of good administration are developed in practice according to the common law,[[276]](#footnote-276) and reference to legislative intent gives no indication on its own as to the standard of review that the courts will actually apply.[[277]](#footnote-277) Both of these criticisms drop away under the modified ultra vires model, however, because the norms are applied by the courts with reference to their assessment of the rule of law’s requirements.[[278]](#footnote-278) There are two further criticisms of ultra vires theory. The first is that if the (judge-made) principles of good administration are to be regarded as products of Parliament’s intention when applied to statutory bodies, then so must judge-made private-law doctrines such as contract and tort.[[279]](#footnote-279) As Elliott responds, however, ultra vires proponents do not contend that such doctrines have been *created* by the courts pursuant to an imprimatur from Parliament. Rather, they argue simply that the courts must *apply* those principles on that basis where statutory bodies are concerned. Nothing in the modified ultra vires model denies the courts’ creative role, either in relation to private-law or public-law principles.[[280]](#footnote-280)

The second criticism relates to legislation that regulates private matters. If Parliament intervenes in the employment context to increase the minimum wage, for instance, it has altered the common law of contract. Does ultra vires theory therefore require the courts to justify their application of contract law on the basis of legislative intent?[[281]](#footnote-281) Elliott says no.[[282]](#footnote-282) Where private individuals are concerned, there is no exercise of legal power. Instead, there is liberty – *de facto* power – and therefore no need to conceptualise the application of private-law principles in terms of vires-based review.[[283]](#footnote-283)

There are two principal reasons to prefer the modified ultra vires to the common law model. I call these the ‘instrumental’ and ‘constitutional’ arguments.

#### The instrumental argument

Under the common law model, administrative acts that contravene the principles of good administration are unlawful but are nevertheless valid in law in the sense that they have legal effect. Under ultra vires theory, by contrast, they are void – of no legal effect.[[284]](#footnote-284) This is because Parliament cannot be taken to authorise an act that lies beyond the scope of the powers concerned. This has two instrumental benefits. The first is that the courts are better able to use statutory interpretative techniques to protect individuals from ouster clauses.[[285]](#footnote-285) This is because it is easier to justify reading an ouster clause restrictively, to remove certain administrative decisions from the protective scope of that clause, if those decisions are conceptually void.[[286]](#footnote-286) The second instrumental benefit is that ‘collateral challenge’ automatically becomes available to individuals who wish to plead the invalidity of an administrative act as a defence in court.[[287]](#footnote-287) Public authorities cannot rely on void acts, and so the individual is relieved of the need to begin separate High Court proceedings to have the act quashed. This is important to vouchsafe the rule of law, as Lord Steyn observed in *Boddington v British Transport Police*.[[288]](#footnote-288)

The common law model does not necessarily prevent the courts from protecting the individual in these ways. Under this model the principles of good administration are taken to fall into the undistributed middle. Whilst this means that acts contravening those principles are not automatically ultra vires and void, it also means that they are not intra vires and protected by parliamentary sovereignty from being struck down or removed from the protective scope of an ouster clause by statutory interpretation, either.[[289]](#footnote-289) But the ultra vires proponents’ argument is still strong. Whilst one might hope that the courts would safeguard the rule of law to the best of their abilities under the common law model, nothing would *compel* them to reason in the ways given above. Practice also shows there to be a real risk that they might not. Even without appearing to endorse the common law model the Divisional Court took a wrong turning in *Bugg v Director of Public Prosecutions*,[[290]](#footnote-290) later overruled by the House of Lords in *Boddington*, by finding that collateral challenge would only lie against subordinate legislation which was ‘substantively’, rather than ‘procedurally’ invalid.[[291]](#footnote-291) In *Staatspresident v United Democratic Front*,[[292]](#footnote-292) too, the Appellate Division of the Supreme Court of South Africa held that regulations that were unlawful at common law were nevertheless protected by an ouster clause immunising regulations ‘made under section 3 [of the Public Safety Act 1953]’ from judicial review.[[293]](#footnote-293) The conclusion would have been indefensible under ultra vires theory, however, because ultra vires regulations could not have been described as made under the Act.[[294]](#footnote-294) The virtue of ultra vires theory is that it establishes an *ineluctable* link between unlawfulness and invalidity.

#### The constitutional argument

The modified ultra vires model is also preferable to the common law model because it posits a more theoretically attractive relationship between the courts and Parliament, and between legislation and the rule of law. As Allan observes, drawing on work by David Dyzenhaus, the modified ultra vires model is preferable because:

‘A satisfactory account of judicial review holds that the courts, legislature, and executive are not “best viewed as engaged in a struggle with each other for sovereign power”, but rather “as engaged in a collaborative enterprise whose common aim is to live up to and develop the fundamental values of legal order [*sic*.]”’.[[295]](#footnote-295)

This is an important point. As Jowell remarks, we should seek to avoid ‘a damaging turf war between our institutions of governance.’[[296]](#footnote-296) Instead, judicial review is a ‘collaborative enterprise’[[297]](#footnote-297) between the courts and Parliament. For two reasons, this enterprise is best served by the modified ultra vires model. First, by emphasising that Parliament should be taken to intend to comply with the rule of law, the modified ultra vires model draws together and integrates the constitutional fundamentals of democracy and the rule of law. The common law model, by contrast, leaves them floating independently of each other. The normative justification for the courts’ actions is therefore stronger under the modified ultra vires principle.[[298]](#footnote-298) Under both common law and modified ultra vires models the courts develop and apply the principles of good administration according to their interpretation of the rule of law, but the modified ultra vires model also emphasises the normatively sensible idea that in a liberal democracy the legislature would ordinarily wish to respect that principle. It is not *necessary* to impute a rule-of-law-based intention to Parliament, as argued above, but by failing to impute this intention the suggestion is that ‘the judiciary is… the only branch of government which is concerned about… [fairness]’.[[299]](#footnote-299) Not only would this be out of step with the courts’ current approach to statutory interpretation given that they *do* take Parliament to intend to comply with the rule of law, but it is also empirically more difficult to sustain in the light of s 1 of the Constitutional Reform Act 2005, which at the very least indicates Parliament’s awareness of the rule of law as an ‘existing constitutional principle.’ Empirically, therefore, the modified ultra vires principle represents a better fit with practice. This point is subject to an argument by Craig as to historical practice that I discuss in the following section.

Second, the common law model causes judges to reason in a way that could endanger parliamentary sovereignty in practice. As Allan observes, the model assumes the existence of a sovereign Parliament but seems to marginalise ‘[the role of] legislative intent in the operation of judicial review, except where Parliament has, at the outer limits of judicial power, claimed the “last word”’.[[300]](#footnote-300) This is because the common law model allows judges to develop the principles of good administration autonomously, only modifying their approach where Parliament, in Craig’s words, ‘manifests a specific intent [that they]… do so in the relevant legislation.’[[301]](#footnote-301) As Craig and Bamforth together put it, ‘unless... Parliament has clearly authorised action which is inconsistent with the judicially created controls then such controls should be operative’.[[302]](#footnote-302) The courts therefore apply the principles of good administration as the common law directs unless told otherwise. The practical onus lies on Parliament to manifest a sufficiently clear intention for the judges to take notice. Given that the judges must justify their application of the principles of good administration with reference to Parliament’s intention under the modified ultra vires model, by contrast, one would expect them to be more focused on the legislative context in which they apply those principles. This is because their proffered constitutional rationale for applying those principles inevitably falls away unless they can demonstrate that their actions are compatible with the legislation in question. The burden placed on the courts by the modified ultra vires model, in other words, is effectively reversed – the judges themselves must establish that their actions comport with Parliament’s intent.[[303]](#footnote-303) This is not to say that the courts would necessarily encroach on parliamentary sovereignty under the common law model. The point is simply that judges may be more likely under that model to overlook legislative intention unless it has been communicated particularly clearly. In detailed or complex legislation where Parliament’s implicit intentions may be only faintly communicated,[[304]](#footnote-304) judges may be that bit less inclined, under the common law model, to hunt around for a provision’s correct meaning. In this limited sense, then, there is a case to be made that the modified ultra vires model might safeguard parliamentary sovereignty more effectively than its common law counterpart.[[305]](#footnote-305)

### Implications

The choice between common law and modified ultra vires models is not dictated, then, by hard-edged logic as ultra vires theorists claim. In reality, the common law model *can* function without undermining the idea that Parliament enjoys unfettered sovereignty. Consequently the contest between the two models rests instead on subtler, more contextual factors. According to these factors the modified ultra vires model is preferable, principally because it would seem better able in practice to protect the individual from overzealous interference by the executive and parliamentary sovereignty from unwitting interference by the courts. It also represents a better fit with the courts’ current approach to statutory interpretation, under which Parliament is taken – at least where ouster clauses are concerned – to intend to comply with the rule of law. But this is not a matter of *logic*. It is a preference for one plausible model over another according to the constitutional climate in which those models are put to work.

I should stress that I am not disagreeing with the analytical claim for disagreement’s sake. Combating the analytical claim performs the important task of strengthening the modified ultra vires model, whose appeal becomes more enduring if it can be loosened from the shackles of abstract logic. As it is presently put, the analytical claim is entirely dependent on the idea that the courts will continue to take Parliament to intend to comply with the rule of law in future. The modified ultra vires model is only ‘correct’ for as long as this continues; and for the reasons given above, it may not. It would be better for the ultra vires proponents to concede or more openly acknowledge the limitations to the idea that the modified ultra vires model *must* be right. If they do this, the focus of the debate then shifts decisively to the relative merits and demerits of each, where the ultra vires model’s true potential becomes clearer. In this sense, a short-term investment of intellectual pride by the proponents could yield them longer-term benefits.

Given that the choice between the two models rests not on hard-edged logic but more on contextual factors, Craig’s argument as to the common law model’s historical origins becomes pertinent. Craig disagrees with the claim that the ultra vires model depicts a more appealing relationship between the courts and Parliament, arguing that the common law model provides a more accurate account of the *historical* development of the law of judicial review:[[306]](#footnote-306)

‘[Historically]the courts… reasoned in the manner argued for by advocates of the common law model… There was no attempt to legitimate this exercise of judicial power by reference to *ultra vires* in the sense of legislative intent, howsoever it might be defined.’[[307]](#footnote-307)

Craig therefore concludes that ultra vires theory ‘constitutes a modern vision of judicial review which does not sit well with our past.’[[308]](#footnote-308) This is an important point because it tends to echo the argument in this chapter that the ultra vires debate relates more to preference, choice and context than to abstract notions of logical right and wrong. Inevitably, too, history will form one of the various pieces of context relevant to the choice between the two competing models. But in a dynamic constitution it should not be prized too highly. If the question of how to conceptualise judicial review is to some extent a matter of fashion, as this chapter has argued, then history and tradition cannot indicate of themselves why the common law model should be regarded as fashionable today.

## CONCLUSION

The idea of a fashionable conceptualisation of the courts’ review jurisdiction *does* make sense. Once the common ground between the competing common law and modified ultra vires models is identified, this becomes the common denominator that *justifies* the courts’ decisions to review the exercise of statutory power. The rest – the choice, for *conceptualisation* purposes, between two models that are both plausible – is down to the merits of each. In an evolving constitution in which the balance of power between courts and judiciary and the relative roles of each at guaranteeing the demands of liberal democracy will shift over time, it is entirely plausible that the preferred conceptualisation of the courts’ review jurisdiction will shift as well. Currently the climate seems to be in the modified ultra vires model’s favour. In future, however, this could change, even if Parliament’s sovereignty remains intact. Nothing would necessarily render such a change *logically* wrong.

The modified ultra vires model supports, and is supported by, the LACPA. They are suggestive of each other because both models perceive judicial review as an interpretative process whose purpose is to discover and derive the limits to *de jure* legal powers, rather than imposing common-law limits on the exercise of power generally. I discuss the courts’ approach to the law on the amenability of bodies to judicial review next.

# 3.

# Public Functions in Judicial Review I:

# The Pre-*Datafin* Landscape

The examination of the scope of what we now call judicial review is an important exercise in its own right, as chapter one explained, but it also serves a valuable purpose because it informs the meaning of the parallel public-private divide under s 6 of the Human Rights Act 1998 (HRA), as later chapters show. There is not the space to do justice to the entirety of the amenability case-law here; there may well be particular contexts requiring greater exploration in future. But the overall thrust of chapters three to five is to establish a strong *prima facie* case in favour of the model – the LACPA – that I argue constitutes the basic framework for the law in this area.

This chapter considers the law prior to the Court of Appeal’s ruling in *R v Panel of Take-overs and Mergers, ex p Datafin Plc*;[[309]](#footnote-309) the following chapter, *Datafin* and subsequent cases. I approach the law in these two stages because of the profound effect that *Datafin* was said to have had on the public-private divide, supposedly altering the law from a source-based to a function-based test. Together, this and the following chapter mount a major assault on that idea. I argue for an alternative view of the courts’ approach: that its *form* has undergone a certain amount of change over the years, and that *Datafin* engendered confusion and some doctrinal wrong-turnings along the way, but that the fundamental public-private distinction – between activity which is judicially-reviewable and activity which is not – has remained largely untouched for much of the twentieth century. The courts’ approach is in fact more consistent and theoretically defensible than is often thought, resting as it does, and has done for some time, on the LACPA. This model is also better able to cope with the modern practice of contracting-out than one might presume, as chapter five argues.

In this chapter I argue that the LACPA had become a staple feature of the law in this area long before *Datafin* was decided. I consider the case-law holistically, from cases concerning the applicability of the prerogative orders of certiorari, mandamus and prohibition against statutory authorities, to the more modern pre­­-*Datafin* cases examining the reach of the specialised procedure known as judicial review. There are four parts to the argument: part A clarifies my methodology; part B then sketches the courts’ basic approach – the LACPA – to the amenability issue; part C explores the LACPA’s core concepts of legal authority and coercion in greater detail; and part D defends this chapter’s findings against what might appear to be doctrinal obstacles, namely, superficial changes to the law in the run-up to *Datafin* and cases, or groups of cases, that sit uncomfortably with my model.

## PRELIMINARY POINTS

It helps to begin with a brief overview of the development of the judicial review procedure.[[310]](#footnote-310) English law has not always had a developed body of public law. As Dicey observed in the nineteenth century, both government and the citizen alike were subject to the ordinary common law.[[311]](#footnote-311) This was unlike the position in France, whose system of *droit administratif* gives rise to sharp jurisdictional contrasts between the law applicable to each.[[312]](#footnote-312) But in keeping with the dynamic nature of the domestic constitution a fairly clear system of public law has gradually emerged, through a patchwork – an ‘asymmetrical hotchpotch’,[[313]](#footnote-313) in Stanley de Smith’s words – of developing common-law doctrine and primary and secondary legislative reforms.[[314]](#footnote-314) It began with the issue by the courts of the prerogative writs of certiorari, prohibition and mandamus,[[315]](#footnote-315) at the suit of the Crown, but later by the individual in the Crown’s name, ‘to ensure that public authorities carried out their duties, and that inferior tribunals kept within their proper jurisdiction.’[[316]](#footnote-316) The Administration of Justice (Miscellaneous Provisions) Act 1938 replaced these writs with prerogative orders of the same name but left the substantive law unchanged.[[317]](#footnote-317) Order 53 of the Rules of the Supreme Court eventually created the application for judicial review in 1977, following the Law Commission’s recommendations the previous year.[[318]](#footnote-318) Order 53 had a number of important procedural effects, one of which was to allow litigants to seek declarations and injunctions as well as the three prerogative orders given above in the same (judicial review) proceedings. Certain of the Order 53 reforms were enshrined in legislation by the Senior Courts Act 1981 (SCA);[[319]](#footnote-319) the remainder of Order 53 was replaced by the Civil Procedure Rules (CPR), Part 54, in 2000.[[320]](#footnote-320) Amongst other things, the CPR renamed the prerogative orders, which became quashing, prohibiting and mandatory orders respectively. These orders can only be sought through judicial review.[[321]](#footnote-321) Part 54 also defined the scope of judicial review, providing that ‘a “claim for judicial review” means a claim to review the lawfulness of… a decision, action or failure to act in relation to the exercise of a public function.’[[322]](#footnote-322) The end-point of this evolutionary process is therefore a long way from the start. Whereas the ordinary law applied equally to all bodies in Dicey’s time,[[323]](#footnote-323) there is now a clear distinction, formally at least, between the legal regimes applicable to public and private functions: only decisions taken pursuant to public functions are amenable to judicial review.

The reforms described above give rise to three different public-private divides, any or all of which might potentially play into the courts’ treatment of the more modern issue of which bodies are amenable to judicial review. The first is the procedural divide, between judicial review applications and ‘ordinary’ applications by private-law procedure. The creation of a separate judicial review procedure, especially one in which private-law remedies can also be sought, has generated the idea that in certain circumstances claimants should be required to pursue one procedure rather than the other, depending on the public-private nature of their claim. This ‘procedural exclusivity’ principle, as it is known, was born in *O’Reilly v Mackman*.[[324]](#footnote-324) The second is the substantive divide, between the principles of good administration – rationality, procedural fairness and the like – and of private-law doctrines such as contract and tort. The third is the remedial divide, between the public-law remedies of quashing, prohibition and mandatory orders and the private-law remedies of declarations, injunctions and damages.

None of these divides is perfectly sharp and can provide a crystal-clear picture of the courts’ distinction between public and private. There are significant public-private overlaps on the procedural and substantive planes, as explained below. There are also overlaps on the remedial plane, not least due to the availability now of declarations and injunctions in judicial review. However, my investigation takes as its starting point the third line of enquiry. It is the prerogative orders from which the courts have ‘developed the nucleus of a system of public law.’[[325]](#footnote-325) It is the remedial divide – the cases concerning the availability or not of the prerogative orders – to which the modern law on amenability most evidently owes its heritage, as the analysis in this and the following chapter shows. This also makes sense in the abstract: the first and second public-private divides given above are particularly flimsy and unlikely to yield much in the present context. The procedural public-private divide is a latecomer to the law that emerged in response to Order 53’s creation of the application for judicial review. It has also been significantly eroded in recent years: the distinction for procedural exclusivity purposes between public-law and private-law claims, once apparently strict,[[326]](#footnote-326) is now only a shadow of its former self.[[327]](#footnote-327) Moreover, the substantive public-private divide, between public and private *law*, is probably something of a chimera. Never having known a rigid distinction between public-law and private-law procedure, English law has never had to distinguish clearly between the substantive principles in this way. It has never been particularly coy about substantive overlaps between the two regimes, either.[[328]](#footnote-328) This is evident not just from the fact that private-law doctrines like contract and tort have historically applied to government actors as well as private individuals,[[329]](#footnote-329) but also from the cases in which judges have re-fashioned private-law principles or made use of private-law remedies in order to generate substantively the same result for a claimant as a judicial review claim would. *Nagle v Feilden*[[330]](#footnote-330) and *R v BBC, ex p Lavelle*[[331]](#footnote-331)are examples; they are discussed below. The upshot is that, whilst all three divides are in some sense permeable and therefore only partial, the remedial public-private divide is sharpest and best able to guide the courts in their treatment of the amenability issue.

Two potential concerns should be assuaged at this stage. Although Paul Craig accepts that a focus on the scope of the prerogative orders for amenability purposes ‘might be reasonable’,[[332]](#footnote-332) he observes that the ambit of those orders has historically not been fixed, and that ‘they could be used to cover any duty of a public nature, whether it derived from statute, custom, prerogative or contract’.[[333]](#footnote-333) Furthermore, he argues, the fact that the orders’ ambit is not fixed also renders them unable to guide the courts in their determination of the amenability issue. Because the remedial public-private divide fails to provide the courts with a stable and immutable definition of public-ness, the argument goes, they are still forced to engage with the abstract public-private question: ‘the nature of a “public” as opposed to a “private” duty still has to be determined, and… we are no further forward in deciding whether such an obligation exists in any particular case.’[[334]](#footnote-334) These observations should not undermine my particular claim, however. There is a middle ground: that the ambit of the prerogative orders is indeed variable, but that it is nevertheless sufficiently precise and constant to play reliably into the amenability issue. This is particularly true of the twentieth-century case-law. As this and the following chapter demonstrate, that case-law shows a clear and consistent approach to the applicability of the prerogative orders that can be traced directly into the modern law on amenability to judicial review, which, again, is itself relatively clear and consistent. It might be argued that my focus on twentieth-century case-law is somehow misguided, but this would overlook the nature of the ultimate claim that I seek to make. My point is that the law on amenability has been largely coherent and theoretically workable for a considerable period of time – certainly further back than the *Datafin* judgment in the mid-1980s. It is not part of my claim that the LACPA has determined the scope of the prerogative orders since time immemorial, nor that it fits every decided case, even, that I examine. It is entirely possible that the scope of the prerogative orders differed at one time from the approach that I claim presently underlies the modern law on amenability to judicial review – even though both areas of law are underlain by a public-private divide.

To assuage the second potential concern, I am aware that the common-law rules governing the applicability of each of the three prerogative orders given above can vary in certain respects; that there is no single, overarching remedial public-private divide to govern them all.[[335]](#footnote-335) Indeed, more restrictive rules historically applied to mandamus than to the other remedies where standing was concerned;[[336]](#footnote-336) it was only when the application for judicial review was created that the various rules were unified.[[337]](#footnote-337) In terms of the particular bodies and functions against which the prerogative orders lie, however, there is enough parity between the various rules applicable to each order for an approach like mine to make sense. Certiorari and prohibition are ‘complementary remedies’ that were often sought and issued together:[[338]](#footnote-338) it would be common for courts to quash a decision and prohibit the defendant from taking further steps to implement it. The same amenability rules apply to each, as demonstrated by many of the cases discussed below. These rules quite clearly follow the LACPA, as I explain. This leaves mandamus, whose purpose is to compel the performance of a public legal duty. Older precedents indicate that it would be issued not just in respect of statutory legal duties but also of the duties of bodies who were public-facing but nevertheless not self-evidently public authorities, such as universities and, in certain cases, trustees.[[339]](#footnote-339) At first sight mandamus therefore seems to have a potentially wider scope than the other two remedies,[[340]](#footnote-340) although for present purposes this difference is probably negligible – for two main reasons. First, as Sir William Wade and Christopher Forsyth opine, the growth of the administrative state during the last two centuries has probably brought the scope of mandamus more into line with that of the other remedies. This is because ‘Modern government is based almost exclusively on *statutory* powers and duties’,[[341]](#footnote-341) which means that the ‘plethora of ancient and customary jurisdictions [to which mandamus once extended] no longer exists.’[[342]](#footnote-342) The more flexible side of mandamus that once applied to these jurisdictions has, in other words, wilted and died.[[343]](#footnote-343) Second, in important practical respects there always had to be a fair amount of conceptual parity between the three remedies anyway. At least where the public duty in question was a duty to reach a fresh decision, the scope of mandamus could be no broader than that of certiorari (and therefore of prohibition): it would make no sense to order a fresh decision to be made unless the original decision could be quashed.[[344]](#footnote-344) The growth in statutory decision-making discretion over the last two decades can only serve to strengthen this parity in practical terms. The second concern, then, can be assuaged in much the same way as the first: by emphasising that the rules applicable to the issue of the prerogative orders can develop, and that my focus is on the more modern law.

Given that I explore the amenability issue with the scope of the prerogative orders in mind, it might be thought that the procedural exclusivity principle is relevant anyway. But conceptually, at least, the amenability and procedural exclusivity issues are different – as the courts appear to realise, because procedural exclusivity cases hardly ever appear in the amenability case-law. The courts therefore seem to be aware that the distinction between public and private *claims*, in the *O’Reilly* line of case-law, tells them little about the meaning of a public *function* for amenability purposes.[[345]](#footnote-345) There are isolated exceptions in which the courts confuse the two questions,[[346]](#footnote-346) thereby characterising what is in reality a straightforward amenability issue in terms of the procedural exclusivity principle,[[347]](#footnote-347) but these are rare and at odds with their general approach. This general approach might be criticised on the basis that it *should* take greater account of *O’Reilly*-type issues in the amenability context; that the courts *should* consider in greater detail whether or not judicial review is a suitable procedure when determining the meaning of a public function. However, this is a normative claim as to how the public-private divide ought to be constructed in the amenability context and therefore lies outwith this thesis’s scope. The doctrinal fact – my concern – is that the courts see themselves as confronted with two different public-private divides: one for amenability, the other for procedural exclusivity.

This is not to say that the procedural exclusivity *cases* are all irrelevant, however. In fact, the courts can sometimes say useful things about the amenability issue. If they rule that a claimant should proceed in judicial review rather than private law, it is implicit in their thinking that the defendant would be amenable to judicial review in the circumstances in question.[[348]](#footnote-348) Conversely, courts may decide that an applicant is correctly pursuing private-law procedure precisely *because* the defendant would not be amenable to judicial review.[[349]](#footnote-349) Where necessary, useful cases like these are considered along the way in the following analysis. My point is simply that the procedural exclusivity *principle* is conceptually distinct from the amenability issue, which is why I omit detailed discussion of it here.

## THE BASIC APPROACH

Perhaps the most-cited pre-*Datafin* case in this area is the *Electricity Commissioners* case.[[350]](#footnote-350) It contains the ‘classic formula’, in Wade and Forsyth’s words, for ‘the scope of judicial review’.[[351]](#footnote-351) Here, the applicants alleged that the Commissioners’ decision to formulate an electricity scheme in the London and Home Counties electricity district was ultra vires its powers under the Electricity (Supply) Act 1919, because it effectively created two joint electricity authorities for the same district. The Court of Appeal upheld the applicants’ claim and issued a writ of prohibition to prevent the Commissioners from proceeding further with the scheme. Atkin LJ made the following observation:

‘Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs [i.e. certiorari and prohibition].’[[352]](#footnote-352)

It is clear from this passage that in Atkin LJ’s view three preconditions must be met before the courts can issue a prerogative writ against unlawful behaviour. Although his Lordship makes no mention of mandamus, it is clear from the later case of *R v Industrial Court, ex p A.S.S.E.T.*[[353]](#footnote-353) discussed below, that the core of the *Electricity Commissioners* approach applies in that context also. The first condition is that the body in question must have legal authority; second, that the legal authority must empower the body to determine questions affecting the rights of subjects; and third, that the body must be under a duty to act judicially. Whilst the third condition was faithfully applied in earlier subsequent cases,[[354]](#footnote-354) more recent decisions have laid it to rest. In *Ridge v Baldwin*, both Lord Reid, for the majority, and Lord Evershed, dissenting, stated that the body did not need to be under a superadded duty to act judicially in order for certiorari and prohibition to lie.[[355]](#footnote-355) Despite an apparent revival of the requirement in the later case of *R v Criminal Injuries Compensation Board, ex p Lain*, in which both Lord Parker CJ and Ashworth J remarked in apparent ignorance of *Ridge* that certiorari would only lie if such a duty existed,[[356]](#footnote-356) the modern prevailing view is that the requirement has been abolished, if it ever really existed at all.[[357]](#footnote-357) In *O’Reilly* Lord Diplock, also the remaining member of the court as Diplock LJ in *Lain*, stated that the House of Lords in *Ridge* had ‘destroyed’ the limitation placed upon the availability of the prerogative writs by the requirement of the duty to act judicially.[[358]](#footnote-358) This view is also reflected implicitly in later amenability cases, which tend to ignore the requirement altogether.

What remains of *Electricity Commissioners*, then, is a two-pronged requirement in order for public-law remedies – the prerogative orders – to apply: that the body enjoys legal authority, and that this legal authority allows it to determine questions affecting the rights of subjects. The essential thrust seems to be that public-law remedies will only lie in respect of unlawful decisions by bodies exercising legal power to impact on – or, as I prefer to term it, ‘coerce’ – their subjects.[[359]](#footnote-359) The notion of coercion is not restricted to typical forms of coercive behaviour such as imprisonment, however. Instead, it is broader-brush than this. Along with the meaning of legal authority, coercion is explored in part C.

The public-private distinction taken in *Electricity Commissioners* can be seen in a number of pre-*Datafin* cases. In *R v National Joint Council for the Craft of Dental Technicians, ex p Neate*,[[360]](#footnote-360) the claimant had contracted to undertake a dental apprenticeship with his employer. The contract empowered the National Joint Council for the Craft of Dental Technicians to hear disputes arising out of the contract. When the claimant’s apprenticeship was terminated by his employer’s successors, the Joint Council remitted the claimant’s complaint to its Disputes Committee, who found against him. The three-judge Divisional Court refused to quash the decision and issue an order of prohibition to prevent the Committee from proceeding with the arbitration. As Lord Goddard CJ explained, the Committee ‘are merely arbitrators appointed under an ordinary submission to arbitration contained in an indenture of apprenticeship’,[[361]](#footnote-361) and:

‘unless there is a body set up by statute and which has duties conferred on it by statute so that the parties are bound to resort to it, it appeared to the court that it would be a very novel proceeding indeed if we issued these prerogative writs to it.’[[362]](#footnote-362)

In clearer terms still, Croom-Johnson J remarked that the Committee was ‘in no sense a public body – like the Electricity Commissioners.’ Its authority:

‘does not depend upon any statutory jurisdiction. People are not compelled to abide by their [*sic*.] decision as people were compelled in so many of these cases as, for example, the *Electricity Commissioners* case, by statute to submit to orders which were made subject to various safeguards.’[[363]](#footnote-363)

The distinction in the court’s mind is evidently between bodies whose jurisdiction to affect the position of the individual derives from law, on the one hand, and those whose jurisdiction derives instead from the consent of the applicant, on the other. Bodies that are legally empowered to force their decisions on the individual come within the purview of public law; remedies against those without such power, by contrast, will lie only in private law.[[364]](#footnote-364) Whilst their Lordships used the term ‘statutory’ rather than the broader term ‘legal’ authority or ‘provisions’ (used by Atkin LJ in *Electricity Commissioners*), little if anything turns on this. Whatever the position prior to the Court of Appeal’s decision in *Lain*, it was put beyond doubt in that case that the courts’ jurisdiction to issue public-law remedies extends beyond statute and also to other forms of legal power. I explore this issue further in part C.

The LACPA draws a fundamental distinction between legal, or *de jure*, and non-legal, or *de facto*, power. Where there is no legal power, there is (generally) no judicial review.[[365]](#footnote-365) Two significant consequences follow from this, as the courts have recognised in a number of cases. These cases not only help to add colour to the sketch of the divide given so far in this chapter; they also further suggest that the LACPA does in fact underlie the courts’ thinking. The first is that jurisdiction over an individual will not be amenable to judicial review if the individual has voluntarily assumed that jurisdiction in law. If there has been voluntary assumption in law, then the law cannot be imposing the jurisdiction: it cannot derive from legal power. Thus, the claimant in *Nagle*[[366]](#footnote-366) was resigned to pursuing a claim in private law against the Jockey Club when it discriminated against her on gender grounds by refusing to award her a training licence. The Jockey Club enjoys a virtual monopoly in the field of horseracing, as Lord Denning MR recognised in the Court of Appeal,[[367]](#footnote-367) but its monopolistic power is self-made and not conferred by law. Neither is it in a contractual relationship with somebody who merely applies to join the Club as a trainer. In this case the Court of Appeal felt able to adapt private law to remedy the obvious injustice the claimant faced, its approach being to recognise the potential existence of a *sui generis* cause of action, based on the right to work, that could allow for the court to issue an injunction and a declaration that the decision was invalid in the circumstances in question.[[368]](#footnote-368) But there was no suggestion that the claimant should have been able to proceed in public law had she chosen to, and rightly so. Granting a prerogative order would have been at odds with the courts’ apparent emphasis on *legally-authorised* power. It should be stressed that this approach focuses firmly on consent *in law*. Whether the applicant has consented *in fact* to the body’s jurisdiction over them – i.e. whether their ostensibly voluntary choice was *actually* voluntary – is not the issue. This is something to bear in mind for the following chapter, which revisits this idea.

The second consequence, more specifically, is that the exercise of power with a contractual source will not be amenable to judicial review.[[369]](#footnote-369) This is clear from *Neate,* but the courts have issued further pre-*Datafin* rulings to that effect. A straightforward example is *R v Post Office, ex p Byrne*,[[370]](#footnote-370) in which the Divisional Court refused to quash the Post Office’s decision to suspend an employee because its power to do so derived from the contract of employment. Woolf J issued a substantially similar ruling in *R v BBC, ex p Lavelle*,[[371]](#footnote-371) in respect of the BBC’s decision to dismiss an employee accused of stealing audio tapes from work. Albeit in a slightly different context in *Law v National Greyhound Racing Club*,[[372]](#footnote-372) the Court of Appeal underscored the private nature of contractual jurisdiction by refusing the defendant’s contention that the claimant, who was seeking a private-law declaration that the Club had exceeded its contractual powers when suspending her for a doping offence, should proceed instead in judicial review. Both Fox and Slade LJJ cited *Byrne* with approval. The rationale behind the idea that judicial review does not extend to contractual jurisdiction is expressed clearly by Lord Parker CJ in *Lain*: ‘Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is, from the agreement of the parties concerned.’[[373]](#footnote-373) This is a straightforward and common-sense proposition in LACPA terms: if the jurisdiction exists by virtue of a contract, it cannot have been imposed by law.[[374]](#footnote-374) This thread also runs through the courts’ approach to the issue of mandamus, as *A.S.S.E.T.* shows. Here, the applicants were refused mandamus against the Industrial Court in its capacity as a private arbitrator. The only remedies against it could be private-law ones such as injunction. This was because the Industrial Court was not exercising its statutory jurisdiction but was instead acting by virtue of appointment by the Minister of Labour, acting in turn under contractual agreement with the applicants: the Industrial Court ‘are clearly doing something which they are not under any public duty to do’.[[375]](#footnote-375)

This is not to say that the application of this idea is always straightforward in practice, however. As Ian Leigh observes, particular difficulties arise in the local government context where an acute tension exists between the need to check the use of discretion by local authorities, as statutory bodies created to serve the public interest, and the private-law concern of permitting them to enter into contracts freely as ‘distinct legal entit[ies]’.[[376]](#footnote-376) One cannot escape the fact that when engaging in what seem to be everyday private activities, local authorities exercise statutory powers.[[377]](#footnote-377) Private individuals, by contrast do not. The result is a complex body of case-law allowing for certain forms of public-law challenges against local authorities when these would be unavailable against private individuals.[[378]](#footnote-378) Decisions by local authorities as to whether to enter into contracts, for instance, have been successfully challenged in judicial review when tainted by irrelevant considerations or made for an improper purpose.[[379]](#footnote-379) The courts’ aversion to reviewing the exercise of contractual discretion, seen in cases like *Neate*, *Byrne* and *Lavelle*, also comes under pressure when local authorities’ statutory and contractual powers are closely enmeshed. In *Wheeler v Leicester City Council*,[[380]](#footnote-380) for example, the House of Lords quashed the council’s decision to punish a rugby club for playing its players in South Africa by revoking its consent to use its recreational facilities for training and matches. Lords Roskill and Templeman believed that the council’s decision represented a use of statutory powers, namely the ‘Open Spaces Act 1906 and the various Public Health Acts’,[[381]](#footnote-381) but it might equally have been seen as the use of contractual discretion to revoke the club’s licence:[[382]](#footnote-382) not, of course, a judicially-reviewable function. Indeed, the fact that certain claims might reasonably be thought to straddle both public and private law has generated fine distinctions for procedural exclusivity purposes between claims relating to public-law decisions made under statute that give rise to private rights, which claims are said to reside in judicial review;[[383]](#footnote-383) and the vindication of private rights that are merely affected by the prior exercise of a statutory discretion, which can occur through private-law procedure.[[384]](#footnote-384) As interesting as the local government context is for this reason, though, detailed discussion of it must await another day. My present concern is to establish what I see as the basic blueprint for the law on amenability to judicial review, not to give a comprehensive account of how it would apply in particularly difficult situations like the ones just described. It may even be, as Leigh opines, that different rules of public-law contracting should ideally apply as between local and central government anyway, so as to reflect ‘the constitutional differences between the two sectors, especially the limited and subordinate position of the former.’[[385]](#footnote-385) All in all, more searching analysis of the local government issue would involve digression from my main task; although the foregoing does illustrate the need to prise apart the various powers in question as carefully as possible: only legally-authorised coercive powers will qualify as public functions under the LACPA. This task is aided by the distinction between first-order and second-order choice, discussed below.

The LACPA, then, requires the courts to look closely to the origin and effect of the power in question, which must be grounded in law and coercive in nature in order for judicial review to lie. The LACPA therefore involves a ‘functional’ rather than an ‘institutional’ test,[[386]](#footnote-386) focusing on the nature of the particular power wielded by the defendant rather than on the nature of the body and its links with other public authorities. The view that the public-private divide in judicial review is institutional is misguided.[[387]](#footnote-387) Courts may refer in shorthand to the various bodies amenable to judicial review as ‘public bodies’ (as Croom-Johnson J did in *Neate*, for example),[[388]](#footnote-388) but the essence of their test focuses on the kind of power being exercised in the case at hand. Even bodies empowered by law to engage in the most intrusive forms of coercive activity will also be capable in law, at other times, of interacting with individuals and other public bodies on a *voluntary* basis, for instance through contracts of employment.[[389]](#footnote-389) Subject to some exceptions, which are examined below, these interactions are regarded as private activities and are not, therefore, subject to judicial review.

## THE APPROACH UP CLOSE

With the basic sketch in place, this part explores the concepts of legal authority and coercion in greater detail.

### Legal authority

As chapter one explained, law has authority-conferring properties that *de facto* power does not. This can be derived from two givens, taken together: first, that the state is unlike private individuals in that it claims authority to use its power, and must therefore justify its claim; and second, that the state must act through law, which is an essential part of this justification requirement. The public-private divide is therefore referable in theoretical terms to a basic distinction between legal authority and non-legal (*de facto*) power: legal authority is the state’s province, *de facto* power the individual’s. It might be thought that the distinction is unnecessarily fine. Taking the example of the Jockey Club, seen above, it might be said that it should be irrelevant whether the Club’s ability to refuse entry to an applicant, for instance, resides in *de jure* or *de facto* power: either way, the Club has the ‘right’, under law, to decide that question, and should exercise its discretion fairly. But in Hohfeldian terms the distinction is significant.[[390]](#footnote-390) *De facto* power is mere liberty (*privilege*) on the Club’s part to behave in a particular way. It is no more than the absence of a duty to behave differently. There is no correlative *duty* on the subject to obey the Club’s commands; no *claim* against the subject for failing to comply. This does not of course mean that a recalcitrant subject could ignore the Club’s decision and carry on as a member anyway. In doing so they would doubtless break the law in various respects – trespass, by entering the clubhouse; defamation; even fraud, perhaps, by posing as a member. But this is because the Club’s own interests are protected by law. The Club has pre-existing *rights* that generate corresponding *duties* on the subject’s part not to interfere. It is not the Club’s use of its privilege *per se* that generates these duties.[[391]](#footnote-391)

Sceptics might take issue with the idea that law does carry any particular authority. Some laws authorising bodies to exercise coercive power, sceptics might argue, are in reality so morally repugnant that the beneficiaries of those powers enjoy no greater authority to engage in coercive activity than ordinary individuals not authorised to do so would. The public ‘authority’ in this case would in fact be no more than a state-backed robber band.[[392]](#footnote-392) The sceptic has a point, but it fails to do any real violence to the argument I present.[[393]](#footnote-393) The sceptic’s point is that the particular legal rule has transgressed the requirements of morality, not that the legal system as a whole is so morally degenerate that those who act under its rules cannot be taken to possess any particular authority at all. It is true that some jurisdictions allow courts to strike statutes down if those statutes transgress certain basic rights that are entrenched in written constitutions or the common law. But even when courts do strike statutes down, they are generally saying nothing beyond pronouncing on the legal (and perhaps also moral)[[394]](#footnote-394) validity of the particular statute in question. It does not follow that the law-making system itself lacks moral credibility. A legislature may eventually lose its moral credibility altogether if it continues to enact immoral statutes, but it would take some time for its standing to sink to this point. Short of a revolutionary meltdown in trust between a government and its citizens, bodies empowered by law to coerce – whether or not that law is subsequently invalidated in court – can be taken to enjoy an authority to act that other bodies not so empowered do not.

So what, then, is legal authority? It is not necessary to embark on a detailed theoretical examination of the meaning of law here.[[395]](#footnote-395) The concern is more with how the courts have defined it than what it means in the abstract. In one sense this is relatively straightforward; in the other, slightly less so. It is clear from the case-law – *Electricity Commissioners* is only one example – that the courts will review the decisions of bodies acting under statutory authority. Following the Court of Appeal’s decision in *Lain*, it is clear that they will also review decisions taken by bodies established under the royal prerogative. In *Lain*, the Criminal Injuries Compensation Board had been created by the home secretary, purportedly acting pursuant to the prerogative,[[396]](#footnote-396) to determine compensatory awards for claims made in respect of injury or death caused by criminal offenders. The applicant asked the court to quash the Board’s decision to award her and her children only £300 after her husband, a police officer, was killed by a suspect while on duty. Despite ruling that the Board’s decision disclosed no error of law, the Court of Appeal rejected its contention that as a prerogative body a quashing order could not lie. Drawing on Atkin LJ’s abovementioned *dictum* in *Electricity Commissioners*, Lord Parker CJ stated that he was unable to see why the Board ‘is not a body of persons amenable to the jurisdiction of this court’, remarking that ‘the fact that it is set up… under the prerogative, does not render its acts any the less lawful.’[[397]](#footnote-397) Diplock LJ and Ashworth J made similar remarks.[[398]](#footnote-398) The broad message, then, is that prerogative power is caught by the courts’ judicial review jurisdiction because it is *legal* power nevertheless.[[399]](#footnote-399) This was reiterated in *GCHQ* when the House of Lords ruled that judicial review could lie against an executive instruction made under Order in Council, although their Lordships disagreed over whether judicial review could extend more generally to what Lord Brightman described as a ‘direct exercise’ of the prerogative, i.e. a prerogative decision not taken under an Order in Council and therefore lacking a defined vires to constrain the decision-maker.[[400]](#footnote-400) Today, the prevailing judicial view seems to be such an exercise of prerogative power will in principle be amenable to judicial review, save that – as in many other areas – the courts should accord to the executive a level of deference appropriate to the circumstances when applying the principles of good administration to the decision in question.[[401]](#footnote-401)

Although judicial review applies straightforwardly to statutory decisions and sufficiently clearly for present purposes to prerogative ones, the less straightforward issue is whether it also extends to what Bruce Harris terms ‘third-source’ powers.[[402]](#footnote-402) Despite their name, third-source powers are not powers in the technical sense. Instead, they are *liberties* allowing institutionally public bodies – central government departments, and so on – to engage in certain activities without the authority of positive law.[[403]](#footnote-403) Whilst private individuals in liberal societies are permitted to do anything that the law does not prohibit, public bodies, by contrast, are expected to act under the law.[[404]](#footnote-404) The precise extent to which public bodies must demonstrate legal authority for their actions is unclear from the case-law, however, which has left the nature and ambit of third-source powers open to debate. Some judges appear to believe that public bodies must demonstrate legal authority for everything they do,[[405]](#footnote-405) effectively precluding any role at all for third-source activity, whilst other *dicta* appear more restrained.[[406]](#footnote-406) The better view, as Harris has argued, is that they do enjoy *some* scope to act under third-source power – this should be permitted as a matter of pragmatism if nothing else – but that such power only permits them to engage in activity that ‘does not conflict with what other persons are permitted to do by the authority of positive law’.[[407]](#footnote-407) Hence, the executive would be able to use third-source power to conclude contracts, for example, but not to override individual rights which are protected by law through various means such as the HRA, the tort of trespass to the person and the law of property.[[408]](#footnote-408) Third-source powers would not, therefore, permit overt interference with the liberty or legal position of the individual. Authority for such activities would need to come from Parliament or the prerogative instead, a core requirement in any constitution that aims to respect the rule of law.

With this outline of the general scope of third-source powers in mind, the issue then arising is whether decisions taken under third-source powers – these can include decisions to issue ‘quasi-legislative’ non-binding measures such as guidance circulars and codes – are amenable to judicial review.[[409]](#footnote-409)As Harris observes,[[410]](#footnote-410) *dicta* in certain cases such as *Gillick v West Norfolk and Wisbech Area Health Authority*,[[411]](#footnote-411) and more recently the Court of Appeal’s ruling in *Shrewsbury and Atcham BC v Secretary of State for Communities and Local Government*,[[412]](#footnote-412) suggest that they are. Provided that the power in question reaches the courts’ broader-brush requirement of being ‘coercive’ (a notion examined in the following section) such that the function in question is public in nature, there is no reason why they should not be. To contend otherwise would leave the individual subject to mere executive discretion, at odds with the rule of law.[[413]](#footnote-413)

For the avoidance of doubt, however, this should not be taken to imply that all quasi-legislative measures would necessarily be amenable to judicial review under the LACPA. Quasi-legislation ‘is not a term of art’: its nature, form and binding effect are all matters of degree,[[414]](#footnote-414) and it can be made under statute and the prerogative as well as pursuant to third-source power.[[415]](#footnote-415) The LACPA status of quasi-legislation will therefore depend inevitably on the circumstances so there is not the space to consider it in detail here, but my opening gambit would be to suggest a general presumption against subjecting quasi-legislative measures to judicial review – at least in those clearer-cut situations where individuals seek to challenge the contents of measures that are directed at, but do not bind, them. It is axiomatic that individuals have encountered no legally-authorised coercion here: if they dislike the measure, they are free to disregard it. A doctor seeking to complain that the contents of a government circular advising practitioners that they may issue contraceptives to under-16s are irrational or tainted by irrelevant considerations, for example, should not therefore expect the courts to intervene. The position may well be different if the individual is powerless to stop the measure’s effect on them, however. In *Gillick*, for instance, the claimant was a mother of under-16s who contended that contraceptive guidance to doctors was unlawful and could have affected her by leading to a medical decision to issue contraceptives to her children without her knowledge or consent. Here, Lords Scarman and Fraser opined that there would have been grounds to subject the decision to judicial review had such a claim been made.[[416]](#footnote-416) Albeit a fine distinction that demonstrates the relatively fact-dependent nature of the quasi-legislation issue, the distinction is nevertheless valid:[[417]](#footnote-417) in the circumstances a doctor could choose not to be affected by the advice; Mrs Gillick, however, had no such choice. Although this cannot alter the circular’s formal status as legally non-binding to the addressees, it does provide an impetus for courts to interpret the concept of legally-authorised coercive power carefully in this context, especially where third parties like Mrs Gillick are concerned: after all, the principal defendant in that case was a ‘selfless’ institutionally public body –the Department of Health and Social Security – whose coercive activities the rule of law requires to be within the courts’ supervisory reach.

The second remaining question is the status of local authorities acting under the Localism Act 2011, s 1(1) of which provides that ‘A local authority has power to do anything that individuals generally may do.’[[418]](#footnote-418) This is known as a general power of competence. It reverses the ultra vires rule by generating a presumption that activity is lawful,[[419]](#footnote-419) effectively conferring third-source powers on local authorities by statute. Again for the avoidance of doubt, this does not mean that local authorities who exercise contractual discretion are now amenable to judicial review if they conclude the contract under s 1(1).[[420]](#footnote-420) The power conferred by s 1(1) is limited because it is a power to do only what *individuals generally* can do. Since individuals generally do not enjoy legal authority over others, nor do local authorities acting under s 1(1). Nothing in that provision allows a local authority to impose its decisions on the individual any more than another individual could. The position is identical to that of ‘new’ universities, discussed below, who use their powers under the Education Reform Act 1988 to conclude contracts. Powers to contract differ fundamentally from other powers because they do not allow for the imposition over the individual of a jurisdiction to which they do not consent in law.[[421]](#footnote-421) Individuals have both the legal freedom to decide whether to contract and also – in general, anyway – the terms on which they contract.[[422]](#footnote-422) In LACPA terms the exercise of contractual discretion will be a private function, whether the power to contract derives from statute or not.

In sum, the courts’ view of the concept of legal authority extends beyond statutory power to prerogative and also to third-source power. With this definition of legal authority in mind, *Datafin* presents interesting questions about the true basis of the Court of Appeal’s decision to review the Panel of Take-overs and Mergers. The next chapter explores this point in detail.

### Coercion

Aside from the exercise of legal authority, the courts’ basic approach to the public-private divide also requires this authority to sanction the use of ‘coercive’ power, as I term it. In a theoretical sense the public-private divide can be referable to the notion of coercion because the state stands distinct from the individual as a particular kind of coercive force, as chapter one explained. Thus, it is not especially surprising that the idea of the state as a coercive force would feature somewhere in the courts’ distinction between public and private. Moreover, the requirement of coercion also fits neatly with the basic substance of the principles of good administration. This is a further indicator that the courts’ approach is theoretically credible, because it reflects what seems from relevant case-law to be a more overarching concern on the courts’ part in judicial review: to protect the individual from the abuse of power by those who are authorised to use it. Thus, in *Ridge*, the House of Lords emphasised that the duty to act fairly would only apply to decisions taken by public authorities that had an impact on the individuals concerned.[[423]](#footnote-423) And when formulating the content of that duty, the courts have stated on various occasions that they will attach significant weight to the nature and extent of that impact on the individual concerned. Accordingly, more onerous duties of fairness will apply to decisions concerning an individual’s liberty[[424]](#footnote-424) or livelihood,[[425]](#footnote-425) for instance, than to decisions about whether the individual should receive a discretionary benefit to which they cannot realistically regard themselves as entitled.[[426]](#footnote-426)

The courts’ concern to guard against the abuse of power also manifests itself, for instance, in their insistence that *Wednesbury* reasonableness[[427]](#footnote-427) imposes a variable rather than monolithic standard of decision-making on public authorities,[[428]](#footnote-428) capable of differing according to contextual factors. Some of these may have little or nothing to do with the manner in and extent to which the individual has suffered from the decision in question. One example is the technical complexity of the particular issue in question, which appeared to motivate the decision by the House of Lords to conduct a relatively light-touch *Wednesbury* review in *Nottinghamshire County Council v Secretary of State for the Environment*.[[429]](#footnote-429) Other factors undoubtedly do relate to the impact on the individual, however. Notably, the Court of Appeal has made it clear that *Wednesbury* reasonableness will require most from decision-makers when their decisions make significant inroads into individuals’ fundamental rights.[[430]](#footnote-430) The contention here, it should be stressed, is not that public law *exists* to prevent the abuse of power. It may have other important purposes,[[431]](#footnote-431) and it is doubtful that its underlying rationale can be expressed so simply.[[432]](#footnote-432) But these cases nevertheless illustrate an obvious concern on the courts’ part to ensure that the extent of the protection afforded by judicial review corresponds to the seriousness of the impact of the decision in question on the individual concerned. In a liberal society whose desire is to protect the individual’s autonomy from unnecessary intrusion by the state, this is entirely understandable; and it would seem that a basic approach to the public-private divide that reflected this axiom would be the stronger for it.

Coercion is a difficult concept to define and can take many forms, however. Obvious examples will include the kinds of overt coercion given above in relation to the review of third-source powers, such as interfering with an individual’s legal position or liberty, which are so intrusive that they require authorisation by positive law such as statute or the prerogative. Prisoners undoubtedly experience coercion when sentenced to a loss of remission under the Prison Rules for committing disciplinary offences, for example.[[433]](#footnote-433) But the courts’ approach to the concept goes beyond this, encompassing more subtle forms of activity.[[434]](#footnote-434) The term used by Atkin LJ in *Electricity Commissioners* was ‘authority to determine questions affecting the rights of subjects’.[[435]](#footnote-435) All three members of the Court of Appeal used similar terminology suggestive of a broad-brush approach to the concept in *Lain*. In particular, Lord Parker CJ rejected counsel’s contention that the word ‘rights’ used by Atkin LJ in *Electricity Commissioners* meant *legally enforceable* rights, noting that ‘the rights determined [in that case] were at any rate not immediately enforceable rights since the scheme laid down by the commissioners had to be approved by the Minister of Transport and by resolutions of Parliament.’[[436]](#footnote-436) Diplock LJ made a similar point, echoing a further remark by Lord Parker by stating that even a determination representing ‘merely one step in a process which may have the result of altering the legal rights or liabilities of a person to whom it relates’ could qualify.[[437]](#footnote-437) Diplock LJ then went on to explain that the Criminal Injuries Compensation Board enjoyed the power to determine questions affecting the rights of subjects in the instant case because it was empowered to make payments lawfully which would otherwise be unlawful.[[438]](#footnote-438) Ashworth J was bolder still, stating that he would prefer to interpret Atkin LJ’s phrase ‘affecting the rights of subjects’ simply as ‘affecting subjects’.[[439]](#footnote-439) Lord Diplock appeared to sound a more cautionary note in a longwinded passage in *GCHQ*, stating that ‘to be susceptible to judicial review’ the body must be empowered to ‘make decisions that, if validly made,’ affect the applicant in one of two ways: either ‘by altering rights or obligations of that person which are enforceable by or against him in private law’ (this resembles the remarks made in earlier cases), or by depriving him of a benefit:

‘which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.’[[440]](#footnote-440)

To the extent that these remarks conflict with the more open-ended and generous approach taken by Ashworth J and Lord Diplock himself in *Lain*, they are best read down rather than taken literally as an authoritative statement of where the public-private divide lies. Lord Diplock’s apparent reference through the term ‘legitimately expect’ to the legitimate expectation doctrine, as it is now known, represented a comprehensive description of the technical boundaries of that doctrine as it was understood at the time:[[441]](#footnote-441) a person could use judicial review to challenge a decision to withdraw a benefit from them if that person enjoyed a legitimate expectation, express or implied, that it would not be withdrawn without their being notified and given the opportunity to contest the decision first.[[442]](#footnote-442) But it would have put the cart before the horse for his Lordship to insist that the applicant demonstrate the existence of a legally enforceable legitimate expectation *before* the decision-maker in question is adjudged by the court to be amenable to judicial review. Lord Diplock’s remarks are better understood less technically, it is suggested, as requiring that the body be empowered to affect the applicant in a way in which he or she could ordinarily have expected *not* to be affected: i.e., to impact adversely on their existing rights or liberties. Whether this had occurred would be a question of fact. An applicant could no doubt demonstrate it by pointing to an arguable legitimate expectation claim, but this would not always be necessary. In keeping with the broader-brush definition of coercion seen in other cases and what this chapter has argued is the courts’ underlying approach in this area, any applicant who is affected by and seeks to challenge the use of powers whose legal source is not consent should be able to satisfy this requirement. In other words it would be a restatement of the courts’ longstanding view, reiterated by Lord Diplock himself in *GCHQ*,[[443]](#footnote-443) that public-law remedies will not lie against powers to the existence of which the applicant has assented in law.

The view in *Lain* that ‘rights’ do not mean *legally enforceable* rights is sensible and justifiable.[[444]](#footnote-444) Most obviously, focussing legalistically on the individual’s rights obscures the real underlying issue: that in a liberal democracy, the law should aim to guard against individuals being harmed by bodies who overstep their legal powers. Harm can occur even if individuals’ rights, in a legal sense, remain intact. Moreover, the contention made by counsel in *Lain* that ‘rights’ mean *legally enforceable* rights is difficult to sustain because it presumes the existence of a readily discernible catalogue of judicially-protected rights – a presumption at odds with the constitutional traditions of a legal system historically wedded to the doctrine of parliamentary sovereignty. In the UK, an individual’s *liberty* – their ability to carry on as before without interference by the state – may be as important to them in practice as any enforceable right.[[445]](#footnote-445)

The judicial tendency, then, is towards a more generous and inclusive interpretation of the concept of coercion. The requirement is evidently an open-textured one that should be taken to extend generally to any behaviour, purportedly authorised by law or third-source power, that adversely affects the individual – either by abrogating their legal rights or hindering the enjoyment by them of their liberty. Thus, and as the courts have found, it would encompass seriously intrusive behaviour by public authorities such as decisions to imprison individuals,[[446]](#footnote-446) to discipline them in and remove them from their jobs,[[447]](#footnote-447) refuse them British citizenship[[448]](#footnote-448) or deport them;[[449]](#footnote-449) but also extends to decisions whose impacts on the individual are less severe, such as banning foxhunting on local authority-owned land;[[450]](#footnote-450) or more tenuous, such as decisions to spend part of a finite overseas aid budget on an uneconomic project rather than in more constructive ways,[[451]](#footnote-451) or to develop housing on an open space designated for public recreation.[[452]](#footnote-452) In response to those who may doubt that such an open-ended approach does or should underlie the courts’ reasoning, two points may be made. First, the public authority must still enjoy some level of ability to affect subjects adversely before a public-law remedy will lie against the decision in question. Diplock LJ emphasised this in *Lain*, cautioning against applying prerogative orders to ‘a determination which was incapable of having any effect upon legal rights in any circumstances.’[[453]](#footnote-453) As he reiterated as Lord Diplock in *GCHQ*, ‘To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker’.[[454]](#footnote-454) Second, if the courts’ approach to the concept of coercion becomes too open-textured, other mechanisms will allow them to close down the availability of judicial review. It is the courts’ concern, after all, that they should not normally concern themselves with claims by ‘busybodies, cranks and other mischief-makers’ who are not aggrieved by the decision they seek to challenge.[[455]](#footnote-455) One such mechanism is standing – the procedural requirement that an applicant has a ‘sufficient interest’ in the relevant matter in order to seek judicial review.[[456]](#footnote-456) Other examples would be the various public-law doctrines themselves, a number of which contain variable requirements that change according to the extent to which the applicant has been affected by the impugned decision, as seen above.

## DOCTRINAL OBSTACLES?

This section deepens this chapter’s analysis of the case-law. Its purpose is to demonstrate further that the LACPA underlies the law, in the face of what might otherwise seem to be doctrinal obstacles to that model. It also offers some further observations to aid in a proper understanding of *Datafin*, discussed in the next chapter. Two issues warrant discussion: superficial changes to the judicial method, and apparently confusing cases.

### Superficial changes

Whilst the basic approach to the public-private divide is relatively conceptually clear, it was not always *applied* with clarity by the courts. By the 1970s and 80s, the courts seemed to be displaying two notable trends when rehearsing and applying the relevant principles in this area. The effect, if only slight, was to obfuscate and to some extent destabilise their approach to the public-private divide in the run-up to *Datafin*, which may have had an important impact on how courts and academics subsequently construed that decision. First, judges increasingly began to insist that an applicant’s claim needed to contain a ‘public element’ or ‘element of public law’ in order for a public-law remedy to lie.[[457]](#footnote-457) This is not of itself a misrepresentation of the courts’ approach, given that procedural reforms at the time were beginning to forge a separate public-law system of judicial review. Furthermore, it was tolerably clear in the cases in which judges did refer to the requirement of a public element that the courts’ underlying approach to the public-private divide itself remained fundamentally unchanged. Pre-*Datafin* judges who used the term mostly did so as shorthand to describe the courts’ existing approach, or to make the point that a public-law remedy would not lie, rather than as a legal test *per se*. In *Law*, for example, Lawton LJ remarked that ‘A stewards' inquiry under the defendants' Rules of Racing concerned only those who voluntarily submitted themselves to the stewards' jurisdiction. There was no public element in the jurisdiction itself.’[[458]](#footnote-458) But the arguably needless introduction of a new term into what was already a conceptually clear body of law was unwise, bringing with it – as it inevitably would – the risk that subsequent courts would misconstrue that term as a legal test in its own right.[[459]](#footnote-459) This is exactly what many post-*Datafin* courts did, as the following chapter explores.

Second, by the 1970s and 80s a sloppy and dogmatic approach had emerged to the judicial recital of the rule that public-law remedies would not lie against powers with a contractual source. As seen above, the rule derives from the idea that judicial review will not lie against the exercise of powers that in law have been assented to by the applicant. The courts’ position on contractual power is therefore part and parcel of a broader approach to voluntarily-assumed activity that has sensible theoretical underpinnings. But whereas judges in earlier cases clearly noticed and were prepared to articulate the theoretical rationale underlying the idea that contractual powers could not be reviewed,[[460]](#footnote-460) it was increasingly rehearsed without explanation in later pre-*Datafin* cases. For instance, when the Divisional Court refused to quash the Post Office’s decision to discipline an employee in *Byrne*, Bridge J gave very little explanation in his leading judgment of why it was fatal to the applicant’s claim that the Post Office’s powers derived from her contract of employment. His Lordship’s reference to Atkin LJ’s *dictum* in *Electricity Commissioners* and subsequent remark that the Post Office ‘is not an authority which affects the applicant's rights qua subject; it affects the applicant's rights qua Post Office employee’[[461]](#footnote-461) is probably the most helpful indicator. But even so, it nevertheless fails to explain the underlying rationale in the clear and persuasive way that it had been before, namely, that the applicant had agreed in law to the jurisdiction giving rise to the decision challenged. *Lavelle* is a similar example. When Woolf J refused to quash the BBC’s decision to discipline an employee he stated three times that contractual jurisdiction either does not or should not invite judicial review, but only once referred – and obliquely at that, only featuring as it did in the long passage cited from Lord Parker CJ’s judgment in *Lain* – to the reason why.[[462]](#footnote-462) The results themselves in these cases fit with the LACPA and are not therefore in doubt, but the courts’ presentation of the applicable law and their reasoning in each of them risks obscuring their true approach to the divide in important respects. First, by emphasising without explanation the private nature of contractual powers, the apparent result is an artificial dichotomy between contract, on the one hand, and other sources of power, on the other.[[463]](#footnote-463) Not only does this seem arbitrary without clear explanation,[[464]](#footnote-464) it also suggests the mere presence or absence of a contractual relationship between applicant and defendant to be the courts’ sole concern. According to both theory and doctrine the courts’ analysis is in reality more sophisticated, requiring them to examine carefully the nature and type of the function, sometimes looking behind the mere presence of a contract, if one exists, in order to ascertain whether the function is a legally-authorised coercive power. In other words, the source of the power is important but the courts must remember *why*. Second, by generating this dichotomy and failing to explain the theoretical origin of the idea that the exercise of contractual powers cannot be reviewed, the courts’ remarks can easily be misread as implying that non-contractual powers *can* attract public-law remedies. This is only true according to a proper understanding of the courts’ approach, of course, if those powers are legally-authorised coercive powers. Obviously, not all non-contractual powers will be.[[465]](#footnote-465)

Subtle though these flaws in the later pre-*Datafin* courts’ approach are, the result is to depict what in certain respects has been termed a ‘rudderless’ approach to the law.[[466]](#footnote-466) It was beginning, or so it seemed, to break free of its underlying theory. Not only does this create the impression that the pre-*Datafin* approach to the amenability issue was more arbitrary and less conceptually defensible than it actually was; it also misrepresents that approach as in a continual state of evolution up to the point of *Datafin*. In reality it was not the approach itself but the judges’ presentation and application of it that had encountered change.

### First/second-order choice and apparently confusing cases

The idea that the courts must look behind the contractual framework, and to the particular kind of power being wielded over the applicant, speaks to the LACPA’s conceptual depth. In some situations the relationship between applicant and defendant will be in one sense or another voluntary, perhaps also contractual, but under the LACPA the function in question will nevertheless be amenable to judicial review. In others, the contract will indicate the applicant to have voluntarily assumed the jurisdiction over them in law. In effect, what emerges is a distinction between what I call ‘first-order’ and ‘second-order’ choice. It is a useful conceptual distinction because it helps to rationalise cases that might otherwise appear erroneous.

As a clear example, take convicted criminals who are imprisoned. Being morally autonomous, convicted criminals are responsible for their own actions. As a matter of law, nobody is compelled to commit crime. But it would be unrealistic to say that prisoners must therefore be taken to have assented in law to their incarceration; that they are imprisoned by choice. It is significant that the prisoner lacks any legal power to negotiate the terms of their incarceration. Imprisonment is not an ‘agreement’ between court and prisoner: it is a consequence imposed by law following the prisoner’s commission of the acts in question. Prisoners therefore possess the legal choice as to whether to commit criminal acts, but no legal choice as to how they are dealt with having done so. In other words, they have what can be termed ‘first-order’ choice in the sense that they can choose whether to join a particular class of persons (prisoners), but no ‘second-order’ legal choice as to how that class is treated.

Similarly, a person may choose for instance to work for a government department rather than a private employer. Here, they have exercised their first-order legal choice to join a particular class – government employees. The basic employer-employee relationship may even be governed by contract. But this does not mean that the employee also enjoys the second-order legal choice to negotiate the terms on which they are treated once in that class. The employer might enjoy statutory or prerogative powers, for instance, to discipline the employee or set the level of their pay. Legal powers are inextinguishable[[467]](#footnote-467) – the parties cannot simply decide between themselves that they shall not apply – so these powers would govern that relationship whether the employee liked it or not. Whether they protested, purported to exclude those terms through contract or even purported to agree with them, the employee would remain subject to those powers in law. It is not the employee’s submission to those powers that gives the employer the legal right to use them, therefore: it is the *law*. In this situation, the functions of dismissing the employee and setting the level of their pay would be public functions amenable to judicial review under the LACPA, even though the general relationship between employer and employee might be governed by contract. The LACPA has a functional focus, it should be remembered: what matters is whether the function in question, not the defendants’ activities more generally, is a legally-authorised coercive power. The mere presence of a contract between the two parties is not enough to answer this question.

The distinction can be seen at work in the amenability case-law. In *R v East Berkshire Health Authority, ex p Walsh*,[[468]](#footnote-468) the applicant was a senior nursing officer employed by the defendant health authority. A district nursing officer decided to dismiss him for misconduct and the applicant obtained a quashing order at first instance. The Court of Appeal allowed the defendant’s appeal, ruling that the applicant was not entitled to proceed in judicial review. Their Lordships agreed that this was because the defendant employer was exercising disciplinary powers derived from its contract of employment with the applicant.[[469]](#footnote-469) The result is entirely consistent with the LACPA: contractual jurisdiction is not subject to judicial review, whoever the defendant happens to be,[[470]](#footnote-470) because the subject voluntarily assented to the use of such power in law.[[471]](#footnote-471) However, Purchas LJ opined that the result would have differed had the applicant been attacking the defendant’s policy of delegating its powers of dismissal to senior nursing officers. This is because the applicant would have been alleging ‘a failure by the health authority to comply with the statutory powers and duties imposed upon it’.[[472]](#footnote-472) According to the first-order and second-order choice distinction, this would have been a fundamentally different claim. Even though the applicant enjoyed a contract with the defendant, his claim would nevertheless have related to the use of a power that had been legally imposed upon, rather than agreed to, by him. While disciplining an employee using contractual powers is therefore a private function, formulating dismissal policies using statutory powers, on the other hand, would be public.

This view is further buttressed by *R v Secretary of State for the Home Department, ex p Benwell*,[[473]](#footnote-473) in which a prison officer sought certiorari of the home secretary’s decision to approve his dismissal from office after various contested disciplinary infractions. Referring to the Court of Appeal’s decision in *Walsh*, Hodgson J ruled that the home secretary’s decision was amenable to review. Nurses and prison officers are in fundamentally different legal positions, his Lordship recognised, because the former enjoy contractual relationships with their employers whereas the latter are employed on terms determined by primary and secondary legislation, namely the Prison Act 1952 and Prison Rules 1964. Thus, ‘in making a disciplinary award of dismissal, the Home Office… was performing the duties imposed upon it as part of the statutory terms under which it exercises its power.’[[474]](#footnote-474) In other words, the applicant in *Benwell* enjoyed the first-order choice to decide to take up his job, but unlike the applicant in *Walsh* he lacked the second-order legal freedom to negotiate the relevant terms of his employment, regulated as they were by Parliament. This again speaks to the argument made above – that the courts erred in certain later pre-*Datafin* cases by presenting their approach as cruder and less nuanced than it actually was. The lack of a contractual relationship in *Benwell* may have been significant but it was not of itself decisive, because it is the regulation of the employer’s powers of dismissal by Parliament – and the consequent absence of second-order legal choice – that explains the outcome.

Universities: an erroneous category?

Whilst cases such as *Walsh* and *Benwell* can be rationalised according to the LACPA, the courts’ general approach to the reviewability of universities cannot.[[475]](#footnote-475) It is suggested that this general approach is erroneous – a view, it will be seen, that has also been advanced elsewhere. The relatively recent inception of the Education Act 2004 (EA) has reduced the practical need for students to seek judicial review of universities’ decisions today, but the courts’ approach to universities is still a live issue. The Office’s statutory jurisdiction is neither comprehensive nor precludes review against universities themselves,[[476]](#footnote-476) with the result that universities remain amenable in principle to judicial review claims.[[477]](#footnote-477)

In one sense the position of universities under the LACPA is relatively clear-cut. ‘New’ universities incorporated under the Education Reform Act 1988 (ERA), for example, have a general statutory power to ‘do anything which appears to the corporation to be necessary or expedient for the purposes of or in connection with’ their general powers, for instance, to provide education and carry out research.[[478]](#footnote-478) Some of these legal powers, of course, will be coercive in the sense that they impact on the individual’s fundamental rights and interests and will therefore be amenable to judicial review under the LACPA. Withdrawing students from a course is a clear example.[[479]](#footnote-479) The exercise of contractual discretion should be regarded differently, however. Whilst the power to conclude contracts is given expressly by s 124(2)(e) ERA, the individual will still enjoy the legal freedom – i.e. the second-order choice – to negotiate the contract’s terms with the university. Again, they may be factually unable to do so, but this is not the LACPA’s concern. The statute does not prescribe or otherwise determine the content of the parties’ rights and liabilities: it simply provides for the contract to be made, on terms to be agreed. The contractual jurisdiction is therefore voluntarily assumed by the individual rather than imposed by law, even though the university’s power to conclude that contract resides in statute.

The position with other universities is less satisfactory, however.[[480]](#footnote-480) In *R v Aston University Senate, ex p Roffey*,[[481]](#footnote-481) the applicant university students were required to withdraw from their courses having failed their exams. The decision was confirmed by the university senate and the applicants sought certiorari and mandamus to force the senate to reconsider its decision. The Divisional Court refused the applications because the applicants had been slow in seeking relief, but readily accepted that the remedies sought could lie. Little reason was given as to why. Donaldson J seemed to think the issue beyond doubt, remarking that it was a clear breach of the rules of natural justice for the defendant to refuse to allow the applicants to be heard.[[482]](#footnote-482) Blain J also omitted to refer to the amenability issue, simply noting the parties’ concession that the concept of natural justice was applicable and remarking ‘rightly so.’[[483]](#footnote-483) Lord Parker CJ confessed to having ‘considerable doubts’ about the case but in the end simply concurred with Donaldson and Blain JJ.[[484]](#footnote-484) It is difficult to see why a university would be amenable to judicial review given that students, like newcomers to private clubs, enjoy the first-order choice to decide to attend a particular university *and* the second-order choice, in law, to negotiate the disciplinary terms that apply to them through their membership contracts. They are not in the same position as prisoners, for example. If Lord Parker CJ’s doubts related to the issue of amenability, they are entirely understandable. At the very least, *Roffey* is at odds with the amenability findings in *Lain* and *A.S.S.E.T.*,[[485]](#footnote-485) in both of which his Lordship had recently sat. As discussed above, both cases stand for the proposition that public-law remedies will not lie against consent-based power. Moreover, by the time of *Roffey* the Privy Council had already followed this logic through in the university context, in *Vidyodaya University of Ceylon v Silva*,[[486]](#footnote-486) by ruling that university staff could not seek certiorari of their employer’s decision to dismiss them. The principle that certiorari would not lie against the use of power derived from ‘an ordinary contractual relationship’, Lord Morris stated, was ‘well settled’.[[487]](#footnote-487)

At first sight it might be thought that the answer to the *Roffey* conundrum lies in the remedy – mandamus – that the applicants sought. Perhaps this was why the court took a more generous approach: historically, the rules were slightly different, as seen above. But, against this, the applicants also sought certiorari; and in the Divisional Court’s scant treatment of the amenability issue, at no point did their Lordships appear to emphasise any difference between the scope of each remedy. It is difficult to see *Roffey* as anything other than a general attempt to prescribe the scope of certiorari – and one that sits uncomfortably with the existing law.

Another potential answer might be that the university was created by royal charter, as Donaldson J recognised.[[488]](#footnote-488) Hence, it might be said, the university was exercising legal power under the LACPA. But, again, there are problems with this view. Above all, it would conflict with the post-*Datafin* case of *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan*,[[489]](#footnote-489) in which the Court of Appeal gave short shrift to the applicant’s argument that the issue of a royal charter to the defendant necessarily rendered it amenable to judicial review. As Hoffmann LJ explained, a royal charter amounts to nothing more than a ‘mark of royal favour to racing.’[[490]](#footnote-490) Unless we are to believe that the post-*Datafin* law *narrowed* the courts’ concept of a public function, which is scarcely arguable, then by implication the Divisional Court could not realistically have regarded charter powers as public powers in *Roffey* itself.

*Roffey*, then, is probably an erroneous decision. Others also seem to share this view. When deciding whether certiorari could lie against the Post Office when it disciplined an employee in *Byrne*, Bridge J remarked that universities were merely ‘assumed’ to be subject to certiorari in *Roffey* and concluded that it ‘is [not] an authority which throws any light on the issue which we have to decide today’.[[491]](#footnote-491) His Lordship also noted the reference made by Russell LJ in *Herring v Templeman*[[492]](#footnote-492) to Sir William Wade’s criticism of *Roffey* – as a case in which, Wade observes, the court seemed oblivious to the significant fact that the applicants enjoyed a contractual relationship with the defendant.[[493]](#footnote-493)

Despite the problems with *Roffey*, however, the courts now appear to accept the idea that universities will be amenable to public-law remedies unquestioningly. In the more recent post-*Datafin* case of *Clark v University of Lincolnshire and Humberside*, Lord Woolf MR boldly asserted that ‘A university is a public body’,[[494]](#footnote-494) which Sedley LJ remarked, again with no supporting argument, ‘seems plain on first principles.’[[495]](#footnote-495) Whilst the remark itself is accurate given that the university in that case was incorporated under the ERA, the terse statement that *a* university is amenable is concerning. In *R v University of Cambridge, ex p Persaud*, the applicant eventually won in her bid to have Cambridge’s decision to withdraw her from her doctoral course quashed. The amenability issue was never considered – neither at first instance,[[496]](#footnote-496) nor in the Court of Appeal.[[497]](#footnote-497) Likewise in *R (Matin) v University College London*:[[498]](#footnote-498) Wyn Williams J presumed without argument that the defendant was both amenable to judicial review and a public authority under s 6 HRA. The courts’ approach to non-statutory universities needs reappraising, ill thought-out as it is and entrenched as it seems to have become.

## CONCLUSION

Prior to *Datafin*, the courts defined the public-private divide for amenability purposes according to the LACPA. The model had a sound theoretical basis and was applied generally very consistently in court. Forsyth’s claim that ‘practically every word’ of the formulation given by Atkin LJ in *Electricity Commissioners* ‘is now either inaccurate or liable to mislead’,[[499]](#footnote-499) then, is an unfair characterisation of a body of law more settled than he acknowledges. It is true, as he observes,[[500]](#footnote-500) that the courts have extended the reach of the public-law remedies to the exercise of prerogative as well as statutory powers and have relaxed their interpretation of his Lordship’s phrase ‘affecting the rights of subjects’. But once the underlying theory behind the *Electricity Commissioners* formula and the courts’ subsequent treatment of it are explored in detail, these changes better resemble applications of and refinements to Atkin LJ’s approach than departure from it. Properly understood, the courts’ general approach was constant and workable in the run-up to *Datafin*. It was largely untouched in the wake of that case, too, as the following chapter explains.

# 4.

# Public Functions in Judicial Review II:

# *Datafin* and Beyond

The approach that underlay the public-private divide prior to *Datafin*,[[501]](#footnote-501) this chapter argues, remains today in much the same state as it previously existed. Key figures in the field who seem *Datafin* as marking a sea-change in the law in this area,[[502]](#footnote-502) it is argued, have misconstrued that judgment. This is a bold claim, but one that I believe is clearly borne out by considering the judgment carefully against both the pre- and post-*Datafin* law. The change that *Datafin* did effect to the courts’ general approach, if that is how best to describe it, was a relatively minor one that did not impact on the underlying legal framework that the courts had already adopted. The form and appearance of the underlying approach have encountered some change in the wake of *Datafin*, as will be seen, which may sometimes give the impression of a different approach. Greater uncertainty also surrounds the nature and ambit of the courts’ approach than existed before. But behind the law’s modern disguise and beneath the confusion, the core elements of the pre-*Datafin* law unmistakably remain.

Part A of this chapter explores the Court of Appeal’s ruling in *Datafin*. It argues that what has long been perceived as a ruling marking a turning point for the law is more convincingly seen, instead, as an application of well-settled legal principles to a body whose functions and unique links with government allowed it to be regarded – albeit at a push – as exercising legally-authorised coercive power. The ruling represents a daring use of the courts’ orthodox approach, not the birth of a new, post-*Datafin* one. Part B examines the principal changes to the law that *Datafin* appears from subsequent cases to have brought about, arguing that these apparent changes can be explained away as either deriving from a misunderstanding of that ruling, or as being unworkable and indefensible in their own right, or both. As such, they should be discounted where possible and the LACPA reasserted in clear terms. Part C then provides positive support for this point by arguing that the core features of that approach remain today; albeit, in one sense at least – in relation to the idea that consensually-assumed power is private – in a slightly modified and arguably corrupted form. Part D mounts the final defence of the conclusions drawn in this and the previous chapter by defending it against its main rival, the monopoly power thesis as advanced by Colin D. Campbell.[[503]](#footnote-503) The chapter concludes by briefly considering the LACPA in the round, explaining its additional ability to assuage certain concerns that other authors have voiced about the law in this area. The position of private organisations performing contracted out services is considered separately in the following chapter.

## THE *DATAFIN* RULING

The facts of *Datafin* are well known. The applicants were bidding in competition with a rival, Norton Opax Plc, to take over another company. They complained to the Panel of Take-overs and Mergers (PTM) that Norton Opax had breached the City Code on Take-overs and Mergers by acting in concert with other parties. When the PTM dismissed the applicants’ complaint they sought judicial review of the decision, requesting certiorari to quash it and mandamus to compel the PTM to reconsider the complaint. The High Court refused leave and the applicants appealed. Despite rejecting the applicants’ claim that the PTM had acted unlawfully, the Court of Appeal held unanimously that it was amenable to judicial review.

*Datafin* was novel in one sense, because of the non-legal nature of the regulatory power the PTM exercised. As Sir John Donaldson MR observed, the PTM ‘is a truly remarkable body [that]… oversees and regulates a very important part of the United Kingdom financial market… [but] it performs this function without visible means of legal support.’[[504]](#footnote-504) Instead of exercising statutory or common-law powers, it exercised considerable *de facto* powers, ‘by devising, promulgating, amending and interpreting the City Code[,]… investigating and reporting upon alleged breaches of the code [*sic*.] and by the application or threat of sanctions.’[[505]](#footnote-505) It is ‘self-regulatory’ in that it consists of ‘a group of people, acting in concert, [who] use their collective power to force themselves and others to comply with a code of conduct of their own devising.’[[506]](#footnote-506)

Their Lordships gave a number of reasons as to why the PTM’s decision to dismiss the applicants’ claim was nevertheless amenable to judicial review. The Master of the Rolls began by emphasising that whilst the PTM lacked *visible* legal support, ‘Invisible or indirect support there is in abundance’:[[507]](#footnote-507) a ruling by the PTM that a company had transgressed the City Code could prompt action against that company by other organisations such as the Stock Exchange, who in the exercise of its statutory powers could refuse to admit the company’s shares to the Official List. As his Lordship had earlier remarked, ‘The unspoken assumption… is that the Department of Trade and Industry or… Stock Exchange or other appropriate body would… exercise statutory or contractual powers to penalise the transgressors.’[[508]](#footnote-508) Especially when seen against its counterparts across the world, the PTM was ‘a complete anomaly’ for lacking a direct statutory base.[[509]](#footnote-509) Sir John then cited at length from *R v Criminal Injuries Compensation Board, ex p Lain*,[[510]](#footnote-510) briefly noting that the law in this area is adaptable and had continued to evolve thereafter, and believed the authorities to demonstrate that ‘Possibly the only essential elements [to a public function] are what can be described as a public element, which can take many forms, and the exclusion from jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction.’[[511]](#footnote-511) Sir John concluded that the PTM ‘is without doubt performing a public duty’, which was evident from the earlier decision of the Secretary of State for Trade and Industry to use the PTM as the regulatory ‘centrepiece’ for the take-over market rather than replacing it with a statutory regulator.[[512]](#footnote-512) The rights of citizens ‘are indirectly affected by’ the PTM’s decisions,[[513]](#footnote-513) his Lordship observed, and its regulatory power ‘is only partly based upon moral persuasion [by the PTM of its subjects,]… the bottom line being the statutory powers exercised by the Department of Trade and Industry and the Bank of England.’[[514]](#footnote-514)

Lloyd LJ’s approach was more clinical, forensically addressing the arguments advanced by counsel. These were on two levels, one policy-based, the other technical. On the policy level his Lordship argued that there is no good reason why a self-regulating body like the PTM should in principle be excluded from judicial review, even though ‘there will be many self-regulating bodies’, such as the ‘committee of an ordinary club’, for whom judicial review will be ‘wholly inappropriate’.[[515]](#footnote-515) The PTM ‘has a giant’s strength’, however, which ‘makes it not less but more appropriate that it should be subject to judicial review by the courts.’[[516]](#footnote-516) Responding to counsel’s technical argument that judicial review could only lie against statutory and prerogative powers, Lloyd LJ disagreed that the source of the power always determined the amenability issue:

‘Of course the source of the power will often, perhaps usually, be decisive. If the source of the power is a statute… then clearly the body in question will be subject to judicial review. If… the source of the power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review.’[[517]](#footnote-517)

However, ‘in between these extremes… it is helpful to look not just at the source of the power but at the nature of the power.’[[518]](#footnote-518) He continued, citing *Lain*, *R v Industrial Court, ex p A.S.S.E.T**.*[[519]](#footnote-519)and *R v BBC, ex p Lavelle*:[[520]](#footnote-520) ‘If the body in question is exercising public law functions, or if the exercise of its functions have [*sic*.] public law consequences, then that may… be sufficient to bring the body within the reach of judicial review.’[[521]](#footnote-521) Even if the source of the power *were* determinative of the outcome, however, Lloyd LJ would in any event have regarded the source as ‘indeed governmental, at least in part.’[[522]](#footnote-522) This was because the government had impliedly devolved its power to the PTM by ‘deliberately abstaining from exercising [legislative] power’ and allowing the PTM to continue in its regulatory role, and because ‘the Governor of the Bank of England appoints both… [its] chairman and… deputy chairman.’[[523]](#footnote-523)

Nicholls LJ began by expressing his agreement with the remaining judges. He then referred to *Lain* and stated that the PTM was not, ‘in the terms of Lord Parker’s dichotomy [between bodies operating under a public duty and domestic tribunals],[[524]](#footnote-524) a private or domestic tribunal whose authority is derived solely from the agreement of the bodies concerned.’[[525]](#footnote-525) He then gave other factors relevant to his decision that the PTM was performing a public duty and amenable to judicial review in prescribing and operating the City Code, observing that an understanding existed between the PTM’s members that their representative organisations would take their own steps to penalise those found to have transgressed the Code; that a ‘major element’ of the enforcement of the Code ‘is the sanctions which the Stock Exchange possesses over listed companies’;[[526]](#footnote-526) that the Stock Exchange would itself be amenable to judicial review when regulating the Official List; and that ‘the system which has evolved… is indistinguishable in its effect from a delegation [to the PTM] by the Council of the Stock Exchange… of its public law task of spelling out standards and practices in the field of take-overs.’[[527]](#footnote-527)

### Construing *Datafin*

My detailed rehearsal of the *Datafin* judgment is necessary given this chapter’s objective of debunking the widely-held view that it was a ‘seminal’[[528]](#footnote-528) or ‘landmark’[[529]](#footnote-529) case. In Murray Hunt’s words, ‘It was clear from the reasoning… that the thrust of the decision was to move from a “source of the power” test for reviewability to a “nature of the function” test’.[[530]](#footnote-530) Similarly, as Lexa Hilliard remarks, ‘At one stroke the supervisory jurisdiction of the High Court has been enlarged to cover an infinite variety of decision-making bodies.’[[531]](#footnote-531) The basis of such views is examined in part B. For now, however, it is helpful to begin the analysis by setting out some interpretative starting points and an initial, alternative, impression of what the judgment might mean.

The starting points, which set the interpretative context, are these. Prior to *Datafin* the courts seemed to have developed a workable and theoretically defensible approach to the public-private divide, as the previous chapter argued. Despite occasional erroneous decisions and confusion in the way the law was judicially presented in the run-up to *Datafin*, the courts had generally applied this approach to a very high degree of consistency in a raft of cases at all judicial levels until the mid-1980s. *Datafin*, however, was a single Court of Appeal ruling. Eager to decide the case swiftly ‘in a situation of considerable urgency’, when Hodgson J refused the applicants’ application for judicial review the Court of Appeal began the appeal hearing later that day.[[532]](#footnote-532) Their Lordships announced their decision at the close of argument and less than a fortnight passed before the full judgments were handed down.[[533]](#footnote-533) Given the weight of the pre-*Datafin* law and the circumstances surrounding the case itself, it is highly doubtful that *Datafin* can stand as a genuine attempt by the Court of Appeal to sweep away the courts’ pre-existing approach to the public-private divide. Nor, moreover, would the doctrine of precedent have allowed for that.

This preliminary impression is reflected in the content of the ruling itself. In particular, Sir John Donaldson MR and Lloyd LJ were keen to emphasise that the Court of Appeal was merely applying the existing law. Having cited from *Lain*, Sir John stated that ‘given its novelty… [the PTM] fits surprisingly well into the format which this court had in mind [in that case]’.[[534]](#footnote-534) Lloyd LJ put it more explicitly: ‘I do not accept… [counsel’s] submission that we are here extending the law.’[[535]](#footnote-535) But even absent these remarks, given the form of the *Datafin* ruling it would still be difficult to conclude that the judges had intended to effect a major change to the courts’ pre-existing approach to the public-private divide. For a start, one would have expected judges intending to do so to have examined a greater number of relevant cases in the process. Relatively few cases were cited, however, and the ones that were mentioned are on all fours with the LACPA. *Lain* was the only judgment cited at length by Sir John Donaldson MR, and at all by Nicholls LJ. Lloyd LJ did cite the additional cases of *GCHQ*,[[536]](#footnote-536)*A.S.S.E.T.,*[[537]](#footnote-537) *Lavelle*[[538]](#footnote-538)and *R v National Joint Council for the Craft of Dental Technicians, ex p Neate*,[[539]](#footnote-539) but these rulings are also consistent in one sense or another with the courts’ pre-existing approach, as the previous chapter saw. As I argued there, *Lain* coheres with the LACPA because it emphasises the well-settled dichotomy between public power as *de jure* (coercive) power and private power as power assented to in law by the applicant; and also because, in keeping with the focus on *de jure* power, it sensibly extends judicial review beyond decisions taken under statutory powers and also to decisions taken by a body established (purportedly, at least)[[540]](#footnote-540) under the prerogative. Sir John used *Lain* as an example of the court asserting its jurisdiction over the ‘administrative novelty’ of the Criminal Injuries Compensation Board as a prerogative body,[[541]](#footnote-541) and argued that the adaptability of the law demonstrated by *Lain* was further evidenced by the subsequent cases of *O’Reilly v Mackman*[[542]](#footnote-542)(‘by deleting any requirement that the body should have a duty to act judicially’),[[543]](#footnote-543) *GCHQ*[[544]](#footnote-544) (‘by extending [judicial review]… to a person exercising purely prerogative power’)[[545]](#footnote-545) and *Gillick v West Norfolk and Wisbech Area Health Authority*[[546]](#footnote-546) (by the *obiter* suggestion made by Lords Fraser and Scarman that judicial review would lie against ‘guidance circulars issued by a department of state without any specific authority’[[547]](#footnote-547)). His Lordship’s observations are mostly accurate,[[548]](#footnote-548) but whilst these cases may demonstrate some flexibility in the way the courts make use of their approach to the public-private divide, they do not of themselves demonstrate any significant change to the *underlying approach*. Properly understood, *O’Reilly* was not concerned with the amenability issue and the common denominator to both *GCHQ* and the relevant *dicta* in *Gillick* is the basic idea that judicial review will lie against decisions made pursuant to legally-authorised (including third-source) powers that are coercive in the sense understood by the courts.[[549]](#footnote-549) Thus, Sir John’s reference to the adaptability of the law in *Datafin* is not necessarily anything more than a reference to the idea that the courts may flexibly interpret and apply *their existing conceptual framework* to the public-private divide when they encounter a novel body and when justice demands it. For reasons which are explained below, this is precisely what the Court of Appeal appeared to do.

The substance of the *Datafin* ruling is also illuminating, in two respects. First, their Lordships make a number of remarks relating to the nature of the public-private divide which may look novel or cause confusion when read in isolation, but which can be seen to comport with the courts’ pre-existing approach to that divide when considered against the relevant case-law. For example, Sir John’s reference to the law requiring a ‘public element, which can take many forms’,[[550]](#footnote-550) may *look* like the emergence of a new, more open-textured definition of a public function. Indeed, judges in certain subsequent cases seem to have taken the public element (or ‘public-law’ element) terminology as a legal definition in its own right.[[551]](#footnote-551) But it would be improper to read Sir John’s remarks in this way.[[552]](#footnote-552) As the previous chapter explained, the ‘public element’ terminology had already begun to surface prior to *Datafin*, notably in Sir John’s own judgment in *R v East Berkshire Health Authority, ex p Walsh*,[[553]](#footnote-553) seemingly as either a shorthand description for the courts’ existing definition of a public function or to re-emphasise the point in a given case that judicial review either would or would not lie.[[554]](#footnote-554) It is also significant that when referring in *Datafin* to a public element as one of only two apparently essential components of a public function, Sir John gave the other as the exclusion of bodies exercising merely consensual power.[[555]](#footnote-555) The implication, then, is that his Lordship was merely using the public element terminology to draw the already orthodox contrast between bodies exercising coercive legal power and bodies to whose power the subject had consented in law. Understood accordingly, the reference to the need for a public element in *Datafin* broke no new conceptual ground: it was merely a repackaged restatement of a central feature of the pre-existing law. Similar judicial remarks carrying the potential to mislead will be explored in part B when the treatment of *Datafin* by subsequent courts and other authors is considered.

So how do the reasoning in *Datafin* and the result itself square with the LACPA, if the Court of Appeal did not intend to replace it? This is the second illuminating feature of the ruling’s substance. Rather than taking *Datafin* as extending the law, the ruling is better seen as an application of the LACPA to a uniquely powerful monopoly regulator whose institutional links with powerful public authorities were such that its power could *be taken*, albeit at a stretch, to derive from law. It is a creative application of the pre-existing law, not a novel approach. A number of factors suggest this. As seen above, Sir John Donaldson made it clear that the PTM lacked obvious legal power but nevertheless enjoyed *indirect* legal support ‘in abundance’.[[556]](#footnote-556) Other organisations such as the Stock Exchange, the Department of Trade and Industry and the Bank of England enjoyed statutory powers allowing them to penalise transgressors of the City Code; and the PTM, by acting as the authoritative determinant of when a breach had occurred, therefore played an integral role in the exercise of those powers.[[557]](#footnote-557) The PTM itself lacked legal power to punish transgressors of the Code, but pursuant to the ‘unspoken assumption’ that its rulings would be upheld by those with the legal power to administer that punishment,[[558]](#footnote-558) it effectively determined when the legal power of *others* should be used. Lloyd LJ remarked that ‘Power exercised behind the scenes is power nonetheless.’[[559]](#footnote-559) In his view, the institutional relationship between the various organisations involved an ‘implied devolution of power’ to the PTM.[[560]](#footnote-560) The reliance upon the PTM by the organisations mentioned is further evident from the Secretary of State’s decision to continue to allow the PTM to play the lead role in the regulation of take-overs and mergers. Hence, to accommodate the PTM, the Court of Appeal seemingly re-interpreted the notion of ‘legal’ power in *Datafin* to include not only bodies who exercised legal coercive powers of their own but also those, like the PTM, who played a central role in the exercise of such powers by others.[[561]](#footnote-561) As one commentator aptly puts it, ‘all members [of the Court of Appeal] appeared to accept that the Panel *did* have a certain amount of *de iure* authority.’[[562]](#footnote-562)

In the light of this view, two questions remain. First, if this analysis of *Datafin* is accurate and the Court of Appeal did indeed stretch the concept of legal authorisation to encompass the PTM’s powers, why did it choose to do this when it could have applied the LACPA strictly and designated the PTM’s regulatory function as private instead? This is the ‘motivation’ question. Second, why is my interpretation preferable? In other words, what would stop the contrary interpretation of *Datafin* as marking a landmark legal change taking hold anyway?

#### The motivation question

To answer the first question, their Lordships were clearly concerned to ensure that judicial review be available against the PTM as a body with a ‘giant’s strength’,[[563]](#footnote-563) and such a key regulatory responsibility in an important market. At least in *Datafin* itself, the applicants would have lacked a remedy in private law against the PTM.[[564]](#footnote-564) This would have rendered legislation by Parliament the only other remedial option, which for practical reasons Sir John Donaldson preferred aggrieved claimants not to have to rely on: ‘how long would that take and who in the meantime could or would come to the assistance of those who were being oppressed by… [the PTM’s] conduct?’[[565]](#footnote-565) As chapter one explained, the justice of the case is an acceptable reason to apply the law creatively – provided that the courts do not flout the constitutional constraint by improperly deviating from the underlying framework that they have created;[[566]](#footnote-566) and for the reasons given above, a creative application of the LACPA can yield the view that the PTM was exercising legally-authorised coercive powers. That the uniqueness of the circumstances drove the courts’ decision is further evidenced by their Lordships’ remarks as to the PTM’s nature and position. As seen above, it was described as ‘anomalous’, ‘remarkable’, ‘*sui generis*’ and a self-regulator, unlike others, for whom judicial review would be appropriate because of its sheer power. *Datafin* was somewhat left-field but, ultimately, seemingly seen by the Court of Appeal as a merely one-off application of the courts’ pre-existing approach to the public-private divide. It is difficult to see it as an attempt to overhaul the law.

#### Why is my interpretation preferable?

Aside from the difficulty of reading *Datafin* as a turning-point decision that swept away the courts’ existing approach, a certain amount of awkward conceptual difficulty arises in applying the principles of good administration if judicial review is extended more generally to bodies – at least to monopoly regulators who act under their own self-imposed code of conduct – who do not, strictly speaking, exercise *de jure* legal powers. This is a problem that faced the Court of Appeal in *Datafin* itself, and draws on what has been identified elsewhere as a curious contrast between the Court’s apparent willingness to declare the PTM a public authority, on the one hand, and its reluctance to declare its decision unlawful, on the other.[[567]](#footnote-567) As Christopher Forsyth remarks, ‘it is plain that successful applications for judicial review of the Panel’s decisions will not be common.’[[568]](#footnote-568) Having held that the PTM was amenable to judicial review, the Court of Appeal felt clear unease at applying the principles of good administration to decisions taken by the PTM under the City Code. Exercising only *de facto* powers, the PTM had devised as well as interpreted and applied the Code itself. Its power was not *conferred* but merely *existed*; it had no discernible vires beyond the limits placed on the PTM’s behaviour by existing legislation and private common-law doctrines. As the Master of the Rolls remarked, ‘there is [therefore] little scope for complaint that the panel has promulgated rules which are ultra vires, provided that they do not clearly violate the principle proclaimed by the panel of being based upon the concept of doing equity between one shareholder and another.’[[569]](#footnote-569) And ‘When it comes to interpreting its own rules’, he said, the PTM ‘must clearly be given considerable latitude… because, as legislator it could properly alter them at any time’.[[570]](#footnote-570) The result was an extremely limited form of judicial review that could only really apply if the PTM’s interpretation of its own rules ‘was so far removed from the natural and ordinary meaning of the words… that an ordinary user of the market could reasonably be misled.’[[571]](#footnote-571) But even then, ‘it by no means follows that the court would think it appropriate to quash an interpretative decision of the panel.’[[572]](#footnote-572) Claims like that made by the applicants in *Datafin* that the PTM ought to have found a breach of the rules are even less likely to succeed. His Lordship stated that he ‘would expect the court to be even more reluctant to move in the absence of any credible allegation of bona fides.’[[573]](#footnote-573) In fact, ‘The only circumstances in which I would anticipate the use of… certiorari and mandamus would be in the event, which I hope is unthinkable, of the panel acting in breach of the rules of natural justice.’[[574]](#footnote-574) So whilst judicial review theoretically applied, its practical use was greatly reduced due to the relative lack of authority enjoyed by the courts to interpret and police a self-imposed code to which a group of persons had subjected themselves using their own legal freedom.[[575]](#footnote-575) In effect, what Janet McLean refers to as a ‘mix and match approach’ resulted, under which some grounds of review were not fit to apply.[[576]](#footnote-576) Such problems do not arise when judicial review is applied to bodies exercising *de jure* powers, however, because the courts are the authoritative interpreters of the law.[[577]](#footnote-577) This is their constitutional role. Whilst there may be certain instances in which the courts do nevertheless feel equipped to review decisions taken under a self-imposed regulatory code[[578]](#footnote-578) – the message in *Datafin* was not that judicial review could never apply, after all – the difficulty the courts encounter suggests two things. First, *Datafin* cannot realistically be taken to herald a general expansion of the concept of a public function beyond bodies who exercise *de jure* legal power, even if that is how their Lordships’ remarks have been read by some. The relative difficulty of applying judicial review to decisions taken pursuant to *de facto* powers may have a significant limiting effect, in practice, on the usefulness of any expansion to that effect. Second, these observations buttress the general argument advanced in this and the previous chapter – that the underlying essence of the public-private divide is a distinction between those who exercise legal (coercive) power, on the one hand, and those who exercise *de facto* power, on the other. Judicial review will lie against the former, but in general is difficult to apply to the latter.[[579]](#footnote-579) This is one of various obstacles to Campbell’s monopoly power thesis, which is considered in detail later.

## EXAMINING SPECIFIC *DATAFIN* ‘DEVELOPMENTS’

*Datafin*, then, can be seen in a different way: not as a radical change to the courts’ take on the public-private divide but as an ambitious interpretation of their pre-existing approach, motivated by a clear concern to do justice by ensuring that the PTM remained under the law. In this part I consider the various opposing views in greater detail.

Part A’s argument was not that *Datafin* had no effect whatsoever on the law, however. There was a change of sorts, and as part C explores, the modern landscape of the public-private divide looks different in significant respects to how it looked before that case. But despite the strain the Court of Appeal seemed to place on the concept of legal authority in *Datafin*, the suggestion that their Lordships intended to bring about a grand change to the basic approach the courts had previously taken to the public-private divide is unconvincing. As Rose J rightly remarked in *R v Football Association Ltd, ex p Football League Ltd*, the effect of *Datafin* was not to supersede or transform the pre-existing law: ‘although *Datafin* is a landmark decision, it has not appeared as the *only* guide in an otherwise barren landscape… I do not agree that all pre-*Datafin* decisions must be re-examined.’[[580]](#footnote-580)

The first significant change that *Datafin* is said to have brought about is a shift in emphasis in the meaning of a public function, from the *source* of a body’s power to the *nature* of the power, its ‘publicness’ and the subject-matter of the dispute.[[581]](#footnote-581) As Neill LJ stated in *Massingberd-Mundy*: ‘it seems to me… that it is the public element in the relevant body's decision rather than the source from which its powers are derived which is likely to provide the surest answer to the question whether the decisions of that body can be reviewed by the process of judicial review.’[[582]](#footnote-582) Also, in *Noble*, Woolf LJ stated that ‘there is no universal test’, and that ‘the approach which the courts now adopt… is to look at the subject matter of the [impugned] decision… then come to a decision as to whether judicial review is appropriate.’[[583]](#footnote-583) The effect is to render the amenability question hopelessly vague and impressionistic,[[584]](#footnote-584) something that other judges have even begun to embrace in more recent cases. For example, Ognall J branded the amenability issue ‘one of overall impression, and one of degree’ in *R v Legal Aid Board, ex p Donn*;[[585]](#footnote-585) while Scott Baker LJ declared in *R (Tucker) v Director General of the National Crime Squad* that ‘whether a decision has a sufficient public law element… is often as much a matter of feel, as deciding whether any particular criteria are met.’[[586]](#footnote-586) Imbuing such uncertainty into the law is harmful in itself. But more significantly still, *Datafin* did not even mandate the shift in emphasis it is assumed to have done. Much is sometimes made of Lloyd LJ’s remark that the source of power will ‘often’ be decisive but that it is helpful, between the extremes of statutory and contractual power, to look also to the nature of the power.[[587]](#footnote-587) A number of points may be made in response, however. First, there is nothing unusual or novel in his Lordship’s insistence that the source of the power is not the decisive factor in determining the nature of a function. The source of the power never was the *sole* or *decisive* test for determining the public-private divide under courts’ pre-*Datafin* approach, properly understood, because it required not only that the power in question be legal but also that it *impact* on or *coerce* the subject, too. Even though the courts took a broad-brush approach to the notion of coercion, the test remained a two-pronged test in conceptual terms. Second, whilst Lloyd LJ’s remarks may appear at first sight to imply an intermediate category of non-legal, non-contractual functions whose nature alone renders them susceptible to judicial review, those remarks must still be construed in context. Taken against the backdrop of the courts’ pre-*Datafin* approach, all his Lordship seems to be saying is that if a power is not clearly *de jure* (as in *Datafin* itself), its nature may assist in its classification for amenability purposes *when considered alongside its source*. His remark that we should look ‘not just at’ the source of the power[[588]](#footnote-588) suggests that even when other factors like the nature of the power *are* considered, the source will remain of at least background relevance.[[589]](#footnote-589) It does not necessarily imply, as *Datafin* has been read by Forsyth, for instance,[[590]](#footnote-590) that the source of a non-legal, non-contractual power is now of no or only negligible concern to the courts when deciding how to classify it for the purposes of judicial review. The Court of Appeal ultimately believed that the non-legal nature of the PTM’s power in *Datafin* should not preclude judicial review, but as part A argued, this only seemed to be because the PTM’s institutional links rendered it possible – and its power rendered it appropriate, in the Court’s eyes – to regard it as exercising a form of *indirect* legal power instead. So the nature of the power and other factors were instructive in *Datafin*, but only for the purpose of categorising the *source* of that power. As one would expect and as the case-law reveals, applicants fare considerably worse against bodies like the Jockey Club who lack the same key role that the PTM did in the exercise of legal power by others and whose power, therefore, is far more difficult to describe as having a legal basis.[[591]](#footnote-591) Third, even if Lloyd LJ’s remarks could be read in the manner suggested by other authors as a matter of language, the extension of the law in that way – essentially, so as to apply to judicial review to mere abuses of power – would be unprincipled and unworkable and should be questioned for that reason alone. For Lloyd LJ to have asserted that some non-legal, non-contractual functions can be amenable to judicial review based solely on the nature of their power would have been deeply confusing. For a start, the ‘abuse of power’ formulation merely begs the question ‘What *type* of power?’, as Mark Elliott observes;’[[592]](#footnote-592) and Lloyd LJ gave no real answer to the question. All that could be reliably drawn from *Datafin* itself is the notion that the strength of the power, and perhaps that it is regulatory too, are important aspects of its nature. For the reasons given in part D below, however, mere power – even regulatory power – cannot sensibly be taken to render a function public of itself. It must be *de jure* power. As Hoffmann LJ stressed in *Aga Khan*, ‘Private power may affect the public interest and the livelihoods of many individuals. But that does not subject it to the rules of public law.’[[593]](#footnote-593) Moreover, any intention on Lloyd LJ’s part to carve out an intermediate category would be confusing in the face of his emphasis, simultaneously, on the ‘essential distinction, which runs through all the cases to which we referred… between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other.’[[594]](#footnote-594) As the previous chapter explained, this paradigm distinction – between contractual power and liberty as typically private and legal power as public – is part of the broader theoretical view that power, in effect, can only derive from one of two sources: law, or the subject’s legal consent. The former power is public, the latter private. It is a strictly orthodox view that lies at the heart of the LACPA.[[595]](#footnote-595) If Lloyd LJ’s remarks were genuinely intended to signal a departure from that approach, they would merely serve to produce a head-on collision between radicalism and orthodoxy. The better view is that his apparent attempt to set out a ‘new’ approach based on the nature of the power, like any other similar attempts that authors have claimed to infer from *Datafin*, are instead expressions of a creative way of applying the courts’ *pre-existing approach*, which the Court of Appeal decided to do for the reasons given in part A.

The second significant change that *Datafin* appears to have brought about is the introduction of new (and ultimately unsatisfactory) tests for the meaning of a public function. These have been examined elsewhere[[596]](#footnote-596) and will be considered only briefly. The first is the ‘but-for’ test, according to which the courts ask whether Parliament would legislate to provide for the performance of the particular function in the absence of the body in question. For example, when considering the amenability to judicial review of spiritual decisions by the Chief Rabbi in *R v Chief Rabbi of the United Hebrew Congregations of Great Britain, ex p Wachmann*, Simon Brown J believed ‘much emphasis’ to have been placed in *Datafin* on the idea that Parliament would ‘almost inevitably intervene to control the activity in question’ in the absence of the PTM.[[597]](#footnote-597) His Lordship concluded that the Chief Rabbi was not performing public functions ‘in the sense that he is regulating a field of public life and but for his office the government would impose a statutory regime’, because ‘his functions are essentially intimate, spiritual, and religious’.[[598]](#footnote-598) Rose J took a similar line in the *Football Association* case, having (erroneously) expressed *Datafin*’s *ratio* as the principle that ‘a body may be subject to judicial review if it regulates an important aspect of national life and does so with the support of the state in that, but for its existence, the state would create a public body to perform its functions.’[[599]](#footnote-599) His Lordship then decided that the FA failed the but-for test and was not amenable to judicial review, since no evidence existed that in the absence of the FA ‘the state would intervene to create a public body to perform its functions.’[[600]](#footnote-600) Ultimately the *Football Association* decision is consistent with the LACPA, because at its heart lies the application of the well-established rule from the pre-*Datafin* authorities that contractual power is private power.[[601]](#footnote-601) Nevertheless, the but-for test should be expunged from the case-law. First, it is extremely difficult to infer a but-for test from the *Datafin* ruling. The notion that the Secretary of State had refrained from replacing the PTM with a legislative regulator was only one of various factors given by the Court to support its conclusion, and Lloyd LJ only proffered it to make the secondary argument that if the source of the power *were* the sole test, then he would regard the PTM as a public authority anyway. It was not the thrust of his judgment, either as Lloyd LJ himself presented that judgment or as this chapter has sought to understand it. Second, the idea that courts should decide the amenability issue based on speculation as to what the government might or might not do in the hypothetical absence of the body in question is deeply unsatisfactory in itself,[[602]](#footnote-602) not least because it encourages judges to ask themselves a question that will be deeply or even exclusively influenced by their own political predilections – what *ought* the state to do?[[603]](#footnote-603)

*Datafin* is also said to have introduced a second ‘governmental function’ test, or at least a gloss to the public function test, under which the courts ask whether the function in question is *governmental* as well as public. This was a curious feature of the Court of Appeal’s ruling in *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan*.[[604]](#footnote-604) Sir Thomas Bingham MR, for example, noted that the Jockey Club had ‘not been woven into any system of governmental control of horseracing’ and that, consequently, ‘while the Jockey Club’s powers may be described as, in many ways, public they are in no sense governmental.’[[605]](#footnote-605) Like the but-for test, however, the governmental function test cannot reliably be said to ‘derive’ from *Datafin*, as Farquharson LJ seemed to believe it did in *Aga Khan*.[[606]](#footnote-606) Whilst some remarks were made in *Datafin* to the effect that the PTM exercised governmental powers, to draw a governmental function *test* from this would be to place undue weight on only one obscure aspect of that ruling. The true basis of the *Datafin* judgment was entirely different, as part A argued. In any event though, the test is unsatisfactory in itself, not least because of its vagueness and of the risk it imports of causing ongoing confusion for being at odds with the terminology of a *public* function used by the Civil Procedure Rules.[[607]](#footnote-607) Furthermore, the courts have since made little effort to elucidate upon the meaning of the term more clearly anyway,[[608]](#footnote-608) which suggests that it adds little of substance to the law. Especially given that the governmental function terminology has featured only rarely in the case-law and cannot therefore be said to have any broader application as the underlying *basis* for the courts’ modern approach to the public-private divide, it should also be expunged from judicial discourse as a wrong-turning by the courts in the wake of *Datafin*.

## A CLOSER LOOK AT THE POST-*DATAFIN* CASE-LAW

The lurking presence of the but-for and governmental function tests is interesting in a broader sense, though, because it tends to illustrate the apparent state of the post-*Datafin* law more generally – as confused and fractured, containing multiple obscure and nascent approaches rather than a clearly-visible and well-developed overarching framework to the public-private divide.[[609]](#footnote-609) Indeed, at first glimpse the law certainly seems more confused and theoretically aimless than it did before. While post-*Datafin* courts continue to issue judgments the results of which cohere with the LACPA,[[610]](#footnote-610) a number have also issued judgments seemingly at odds with it.[[611]](#footnote-611) It is also concerning that judicial confusion seems to reign over fundamental issues such as the binding effect of pre-*Datafin* authorities[[612]](#footnote-612) and the extent to which the presence or absence for an applicant of an alternative legal remedy against the defendant should influence the meaning of a public function. For instance, in *R v Insurance Ombudsman Bureau, ex p Aegon Ltd*, Rose LJ drew from *Aga Khan* the principle that ‘Judicial review should not be extended to a body whose powers derive from agreement of the parties *and when effective private law remedies are available against the body’*,[[613]](#footnote-613) the implication being that judicial review could be extended as a safety net for applicants who lack an adequate remedy in private law against a body whose jurisdiction they have consensually assumed.[[614]](#footnote-614) Collins J took a different approach in *R v Eurotunnel Developments Ltd, ex p Stephens*,[[615]](#footnote-615) however. Here, the applicants claimed that an undertaking given by the defendant to Shepway District Council bound it to compensate them for devaluation caused to their properties by the nearby Channel Tunnel development. In response to their argument that the defendant should be regarded as amenable to judicial review because otherwise they would lack a legal remedy against it, Collins J stated that ‘the absence of any obvious remedy does not translate what in my view is a clear private law matter to a public law matter. That is a point which came out of some of the Jockey Club cases.’[[616]](#footnote-616) Thus, ‘The fact there is no remedy does not mean that public law is to be used in lieu of private law.’[[617]](#footnote-617) Lord Oliver made a similar point in *Leech v Deputy Governor of Parkhurst Prison*, believing the presence of an alternative remedy to be relevant to the courts’ remedial discretion but not to the prior question ‘of the existence of the jurisdiction’.[[618]](#footnote-618) These are welcome remarks. Although the individual’s position should feature in the courts’ reasoning, they cannot allow it to dictate the meaning of a public function. Their decision must still be capable of accommodation within the basic framework of public-ness that they have chosen, as chapter one explained.

The modern landscape, then, looks rather different on its face – something both partially evidenced and exacerbated by the view, recently judicially expressed, that the classification of a function is now more about instinct or feel than the application of settled legal criteria.[[619]](#footnote-619) Whereas some might prefer to view the changed landscape as evidence of a more dynamic, open-textured modern approach to the public-private divide, an alternative view is that the law has given rise in the wake of *Datafin* to unprincipled anomalies: neither applying the pre-*Datafin* approach clearly nor replacing it with a suitable alternative, the courts are simply confused.[[620]](#footnote-620) But despite the confusion and general uncertainty afflicting the modern law, core elements of the pre-*Datafin* approach are still visible. The law is not so far gone that the LACPA cannot be salvaged; and as part D argues, doing so would be preferable to adopting any of the more developed alternative tests advanced by other authors.

The pre-*Datafin* approach can be said to remain the focal point of the modern law in three key respects. First, expressly: *dicta* in at least one case indicate that the courts view the public-private distinction as centring around the notion of legally-authorised coercive power. In *Leech*, two prisoners had been convicted of disciplinary offences under the Prison Rules and sought judicial review of the Secretary of State’s refusal to quash the awards for procedural irregularity. One applicant also challenged the underlying decision by the deputy prison governor. In a judgment with which all members of the House of Lords agreed, Lord Bridge rejected as ‘fundamentally fallacious’ the contention by the Secretary of State that the decisions were not amenable to judicial review:[[621]](#footnote-621)

‘The principle is now… well established… that where any person or body exercises a power conferred by statute which affects the rights or legitimate expectations of citizens and is of a kind which the law requires to be exercised in accordance with the rules of natural justice, the court has jurisdiction to review the exercise of that power.’[[622]](#footnote-622)

Although couched in terms of statute rather than more generally in terms of law, the message is clear: judicial review will lie against decisions taken pursuant to legal powers to affect subjects adversely. Thus, in his Lordship’s words, ‘a governor adjudicating on a charge of an offence against prison discipline bears… all the classic hallmarks of an authority subject to judicial review.’[[623]](#footnote-623)

The second indelible pre-*Datafin* feature is the continued presence of the distinction between ‘first-order’ and ‘second-order’ choice, the nature of which was explained in the previous chapter. This distinction supplements the LACPA because it reminds the courts that their focus is on the nature and type of power being deployed against the applicant in the given case. In difficult cases courts must unpick the various interlocking legal regimes – contractual, statutory and the like – that may simultaneously govern the relationship between the applicant and the body in question in order to identify whether the *particular* function exercised by the body derives from law or the subject’s consent. Hence, neither the mere presence of a contractual relationship between the applicant and the body nor the fact that the body *sometimes* exercises statutory coercive powers will necessarily foreclose the amenability issue one way or another: a function may still be public notwithstanding that the *background* relationship between the applicant and defendant is for instance contractual.[[624]](#footnote-624) In *Aga Khan*, Hoffmann LJ stated that ‘a body such as the Take-over Panel [in *Datafin*]… which exercises governmental powers is not any the less amenable to judicial review because it has contractual relations with its members.’[[625]](#footnote-625) More recently, in *Ashford Sankar v Public Services Commission*,[[626]](#footnote-626) prospective applicants to senior civil service positions in Trinidad and Tobago sought judicial review of the Commission’s decision to use assessment centre exercises during recruitment for deputy permanent secretary roles. Although the applicants had all chosen to accept their roles with the civil service in the first-order sense, the Commission’s amenability to judicial review was rightly not in issue before the Privy Council: the procedures governing promotion were not grounded in any legal agreement between the applicants and the Commission but, instead, in positive law – in the form of the Public Service Regulations and (ultimately) the Trinidad Constitution from which the Commission derived.[[627]](#footnote-627) The applicants therefore lacked the second-order legal ability to determine how they would be treated in this context having assumed their roles.[[628]](#footnote-628) The continued presence of the first- and second-order choice distinction post-*Datafin* does not of itself establish that the LACPA remains in place, but it bolsters the cumulative case that enough of the approach remains that it can still be regarded as the doctrinally correct approach. It also lends support to the arguments made in the previous chapter, by undermining what is sometimes proffered as an alternative view of the case-law *prior* to *Datafin* – not as relatively settled and workable (as the previous chapter argued) but as rather more unprincipled instead, arbitrarily cleaving to the idea that applicants in contractual relationships with their defendants are *automatically* denied review.[[629]](#footnote-629) Not only was such a crude principle not borne out in the pre-*Datafin* case-law itself; it seems to lack foundation in the modern case-law also. The true approach is, and was, to ask whether the power *in question* derives from law or the applicant’s legal consent.

The third, final and most significant remaining aspect of the pre-*Datafin* case-law to survive today is the strongly-held view that if the body in question *is* exercising jurisdiction that has been consensually assumed in law by the subject, the function in question will be private. The consensual jurisdiction doctrine lies at the heart of the LACPA because it emphasises the underlying distinction between the exercise of *de jure* power, on the one hand, and *de facto* power, on the other, as the previous chapter explained. It can be seen at work in numerous post-*Datafin* cases.[[630]](#footnote-630) A clear example is *Aga Khan*, in which the Court of Appeal ruled that the Jockey Club’s regulatory power was not amenable to judicial review. Hoffmann LJ opined that judicial review could lie when private clubs exercised statutory (and presumably other legal) powers but concluded that there was ‘no public source’ for the Jockey Club’s powers because it operates ‘by consent.’[[631]](#footnote-631) Sir Thomas Bingham MR observed that it would be ‘contrary to sound and long-standing principle to extend… judicial review to such a case’, remarking that ‘powers which the Jockey Club exercise… derive from the agreement of the parties and give rise to private rights’.[[632]](#footnote-632) This was despite the fact that if the Club and the code of conduct it promulgated and policed did not exist, ‘the government would probably be driven to create a public body to do so.’[[633]](#footnote-633) Seemingly, then, this doctrine runs even deeper than at least one of the new or alternative formulations for the meaning of a public function – the but-for test – that *Datafin* is said to have generated. This is an important indicator of the LACPA’s resilience and the deep and continuing reach of its roots into this area of law.[[634]](#footnote-634) The doctrine further manifests itself in a number of cases in which the courts have refused to designate a range of powers as public functions for the reason that their source lies in the subject’s legal consent.[[635]](#footnote-635) These include regulatory powers exercised by the Insurance Ombudsman Bureau,[[636]](#footnote-636) the Football Association,[[637]](#footnote-637) the Personal Investment Authority Ombudsman Bureau,[[638]](#footnote-638) Lloyd’s of London,[[639]](#footnote-639) the Association of British Travel Agents[[640]](#footnote-640) and the British Council;[[641]](#footnote-641) and, in keeping with pre-*Datafin* cases, decisions in the employment context that result from the use of *de facto* power.[[642]](#footnote-642)

An important point of clarification should be added here, however. Although in many cases the courts have applied the consensual submission doctrine as it was understood pre-*Datafin*, a corrupted form has appeared in others. Instead of asking whether the subject has consented in *law* to the body’s jurisdiction, i.e. whether the powers in question are *de facto* or not, judges have at times asked a rather different question – of whether the subject has consented in *fact*. In *Massingberd-Mundy*, which again concerned the amenability to judicial review of the Jockey Club, Roch J observed that the Club’s Rules of Racing derived from contractual agreement and applied the consensual submission doctrine, which he did correctly. But his Lordship also remarked that ‘in the absence of authority’ he would have decided that the Jockey Club was performing a public function,[[643]](#footnote-643) indicating that the courts should be able to look behind the contract to determine whether the applicants’ consent to the Club’s jurisdiction was real or effective. Jockey Club members, he remarked, ‘have no vote or voice in the amendment [or promulgation] of those rules… The alternative to their accepting the Rules of Racing is to be excluded from all recognised racecourses and… meetings in the United Kingdom.’[[644]](#footnote-644) A similar approach to consensual submission can also be found in cases in which no contract exists between applicant and defendant. In *Wachmann*, Simon Brown J stated that the jurisdiction of the Chief Rabbi over spiritual matters had not been voluntarily assumed – even though the Chief Rabbi exercised no statutory, common law or other powers realistically capable of being regarded as legal powers – because ‘an Orthodox rabbi is pursuing a vocation and has no choice but to accept the Chief Rabbi's disciplinary decisions.’[[645]](#footnote-645) Such remarks play into the broader issue of whether non-contractual, *de facto* powers can validly be regarded as public functions. Some judges have remarked in passing that they might.[[646]](#footnote-646) But they run against the underlying theory behind the LACPA, according to which the question whether the applicant has positively agreed to the body’s jurisdiction by contract or has simply acquiesced in the lawful exercise by a body of its *de facto* power is irrelevant: in neither case will the function in question be public, because in neither case is the body exercising legal power.

Might it be said that the law is changing, however, from an approach based on consent in law to one based instead on consent in fact? This argument would be hard to sustain for the principal reason that the strand of cases applying the alternative, orthodox formulation of the consensual submission doctrine seems to be more prevalent. This is evidenced not just by the number of cases, seen throughout this and the previous chapter, that either directly apply or tacitly endorse the consensual submission doctrine; but also by how comfortable certain judges, at least, seem to be with it. In *R (West) v Lloyd’s of London*, for example, Brooke LJ referred to the reasoning behind it as ‘unassailable’.[[647]](#footnote-647) Along similar lines, Rose J was manifestly unpersuaded in the *Football Association* case by the argument that the FA’s monopolistic powers rendered it amenable to judicial review, describing it an ‘inescapable’ conclusion that the FA, a contractual regulator, was exercising only private functions: ‘it is, in my judgment, a domestic body whose powers arise from and duties exist in private law only… [and] I do not find this conclusion unwelcome.’[[648]](#footnote-648) The idea that monopoly functions are and should be amenable in their own right is an argument to which I now turn.

## THE MONOPOLY POWER MODEL

Relatively few attempts have been made by commentators to explain the underlying basis of the public-private divide in terms that are both doctrinally and theoretically workable, as chapter one observed. The ‘abuse of power’, ‘but-for’ and ‘governmental function’ tests were all criticised by the previous discussion. The remaining model is Campbell’s ‘monopoly power’ model, which this part argues is inferior to the LACPA in various respects.

### The model

Campbell argues that a public function exists – i.e. that judicial review will lie – if the function in question is monopolistic in the sense that ‘only one person or body in fact performs’ that function.[[649]](#footnote-649) His thesis is novel because it is the first of its kind to argue that the monopoly power test can be used as the *sole* test for a public function in judicial review.[[650]](#footnote-650) Campbell advances the monopoly power thesis on doctrinal and normative levels. On the doctrinal level he argues that the monopoly power model accords with the courts’ decisions to review statutory and prerogative powers, and also non-statutory regulatory powers in the cases in which the PTM and Advertising Standards Authority have been subjected to judicial review.[[651]](#footnote-651) On the normative level, Campbell argues that it is important to subject decisions taken pursuant to monopoly functions to judicial review, because those adversely affected by such decisions lack the practical ability to choose another provider to perform the function in question.[[652]](#footnote-652) This leaves them open to arbitrary treatment that those subject to non-monopoly functions are in a better position to avoid. Indeed, as other authors have argued, non-statutory monopoly bodies regulating sports industries, for instance, often wield considerable power over individuals to affect their livelihood and reputation.[[653]](#footnote-653)

Campbell’s thesis is attractive because it proffers a simple answer to the question of which functions the law regulates, and ought to regulate, through judicial review. Nevertheless, it is flawed in a number of respects. At the outset it should be noted from *Datafin* that the standard grounds of judicial review seem potentially difficult to apply in practice, at least wholesale, to non-legal power, which would weaken the main selling-point of Campbell’s model – as being able to justify a relatively *expansive* form of review. The remaining flaws occur on each of the doctrinal and normative levels.

#### Doctrinal flaws

The monopoly power model does not describe the courts’ behaviour to the level of accuracy Campbell contends. He begins by explaining that his model ‘is by no means consistent with *every* case in which the court has assumed supervisory jurisdiction.’[[654]](#footnote-654) This is not an unreasonable concession, particularly given the confusion afflicting the post-*Datafin* case-law: some judgments, it was argued above, may well be anomalous. But his claim that the model nevertheless reflects the bulk of them is questionable for two reasons. First, it is not surprising that the monopoly power model accords with the courts’ decision to review statutory powers, because these powers will typically be conferred by Parliament on one body alone.[[655]](#footnote-655) It does not follow, however, that it is *because* the powers are monopolistic that the courts deem them to be amenable to judicial review. The same can also be said of the courts’ decisions to review prerogative powers – at least in those cases concerning what Campbell refers to as prerogative powers in the ‘narrow sense’.[[656]](#footnote-656) As Campbell explains, narrow-sense prerogative powers are specific powers that are ‘vested *solely* in the Crown at common law’.[[657]](#footnote-657) For this reason they fit the monopoly power model but, again, this is not surprising.

Second*,* even if Campbell’s model does persuade in the relatively straightforward context of statutory and narrow-sense prerogative power, it fails to do so when taken beyond that context. As Campbell recognises, there is also a further variant of what he terms *broad*-*sense* prerogative power. Quoting Dicey, he describes this as ‘[e]very act which the executive government can lawfully do without the authority of an Act of Parliament.’[[658]](#footnote-658) Campbell recognises that broad-sense power is not *necessarily* monopolistic, and that any other branch of government can act with the same freedom, ‘because it is not only the Crown that may exercise the function’.[[659]](#footnote-659) However, he argues that this does not necessarily undermine his model because the cases in which the courts have reviewed such power *do* appear to fit it.[[660]](#footnote-660) He gives *GCHQ* and *Lain* as examples. In both cases, he observes, it was highly likely that the body in question was the only body performing the relevant function – employment in the signals intelligence sector and dispensing compensation to crime victims respectively – at the time.[[661]](#footnote-661)

There are two problems with Campbell’s analysis of broad-sense prerogative powers. The first is fortuity. Precisely *because* these powers are not necessarily monopolistic, there would be nothing to stop any other public authority (or private body, for that matter) from performing them. Even if Campbell’s conclusion that no other bodies were likely to have performed the relevant functions in *GCHQ* and *Lain* is indeed borne out by the facts as they stood at the time the cases were decided, it would not necessarily have been by design alone that such a state of affairs existed. The underlying reason becomes clearer still when it is appreciated that what Campbell describes as ‘broad-sense’ prerogative power is what other authors would refer to as third-source power. As the previous chapter explained, third-source powers are legal *liberties* – freedoms rather than powers in the technical sense, properly understood. And they are freedoms for executive bodies generally, not just one particular public authority.

The second problem with Campbell’s analysis of broad-sense prerogative power is that it appears to overlook the practical consequences that would presumably follow in the event that a second public authority decided to perform the same function as the first.[[662]](#footnote-662) If the police force validly uses third-source powers to place an individual under surveillance by phone-tapping, for instance,[[663]](#footnote-663) the implication is that the decision to phone-tap can be challenged through judicial review unless and until the hapless individual is phone-tapped by a second public authority such as the security services, at which point neither body is exercising factually monopolistic powers and both become immune to public-law challenge. This would be absurd. Either we accept this absurdity, or we try to find another way to justify the obviously sensible conclusion that judicial review should lie against the use by *both* public authorities of phone-tapping techniques. If the latter, Campbell will have to concede that an alternative model potentially explains the court’s decision to intervene.

Campbell’s claim that his model fits the bulk of cases in which the courts have subjected bodies to review, then, is questionable. But his doctrinal case contains a further significant flaw, which surfaces when those cases in which the courts have *not* assumed jurisdiction are considered. This is evident in the context of non-statutory monopoly regulators, i.e. monopoly bodies who wield *de facto* regulatory power. Even if the monopoly power thesis can explain the courts’ review the decisions of *de facto* regulators like the PTM, as Campbell claims,[[664]](#footnote-664) the courts have *refrained* in a number of cases from designating *de facto* monopoly functions as public, as he also recognises. *Aga Khan* is a classic example.[[665]](#footnote-665) Campbell responds that this and similar cases are wrongly decided.[[666]](#footnote-666) He notes that the courts tend to justify the decision not to review according to the idea that the subject has consensually submitted to the body’s jurisdiction, and confesses to finding this puzzling. He believes it to be brought into question by the great many cases in which individuals consensually submit to the *statutory* jurisdiction of a body whose statutory functions nevertheless remain amenable to judicial review: if monopoly statutory powers to which the individual has consented are amenable to judicial review, there is no good reason why monopoly *non*-statutory powers should not also be. Having written off a sizeable body of case-law as wrongly decided, he then attempts to salvage some of it by suggesting that certain of the rulings on non-statutory bodies to which he referred might be ‘reconceptualised’ so as to fit the monopoly power model: instances where the courts refrain from subjecting to judicial review the monopoly regulatory functions of religious bodies as in *Wachmann*, for example, should be understood as instances of non-justiciability instead.

In response, both of these arguments are flimsy. The second, alternative, argument may be taken first. It is weak in four respects. First, the Court of Appeal has given a clear indication that in this context, religious functions will *not* be non-justiciable *per se*. In *R v Bury Park Imam, ex p Ali*,[[667]](#footnote-667) which Campbell omits to mention, the Court upheld Auld J’s ruling that an Imam was exercising only private functions when compiling a list of the eligible voters in his mosque’s forthcoming executive committee election. Although the judgment was reached primarily on the basis that the Imam’s power derived from the consensual submission of the mosque’s members,[[668]](#footnote-668) Roch LJ (with whom Balcombe and McCowan LJJ agreed) also referred to the fact that the Imam was discharging religious functions. His Lordship stated that ‘this aspect would not have led me to reject this appeal, had I been persuaded that the Imam was exercising a public law function’[[669]](#footnote-669) – a clear message that at least some religious functions can be public and thus amenable to judicial review. Second, it should be remembered that Campbell is attempting to put a doctrinal case here. This case is undermined by his proposal to re-employ the non-justiciability doctrine at a time when the courts seem to be side-lining it in administrative law more generally.[[670]](#footnote-670) Indeed, the prevailing and sensible modern view seems to be that it threatens the rule of law for the courts to leave the executive’s legal errors ‘uncorrected for extraneous reasons.’[[671]](#footnote-671) But this also exposes the third problem: not only does the use of the non-justiciability doctrine weaken Campbell’s doctrinal case, it also harms his thesis more generally, by placing its normative and doctrinal components in tension with each other. If normative reasoning so strongly compels the *prima facie* case that monopoly power should be regulated through judicial review, as Campbell claims, then his casual acquiescence in the notion that certain monopoly functions naturally lie beyond the courts’ public-law jurisdiction is difficult to understand. Normative reasoning, it seems, is trumped by simple instinct. Fourth, and in turn, this speaks to a broader problem with the monopoly power thesis more generally, which is its over-broad scope and the means by which Campbell proposes to reduce it again. Campbell admits that the monopoly power model will generate counter-intuitive *prima facie* results in certain situations, for instance when it appears to designate parental duties as monopoly functions and therefore amenable to judicial review.[[672]](#footnote-672) He attempts to address this problem by emphasising that protecting monopoly power is only *one* of the law’s chief concerns, and that its desire to do so may sometimes be outweighed by ‘important constitutional value[s]’[[673]](#footnote-673) such as safeguarding the autonomy of the family unit, or ‘maintaining the separation between Church and State.’[[674]](#footnote-674) Hence, the argument goes, it would do no harm to the model to designate parental duties, or monopoly functions in the religious context, as *private* functions instead. But his view rests on the mere assumption that ‘no one would think that decisions made by a parent with regard to its child should be subject to judicial review’[[675]](#footnote-675) – a baseless descriptive statement that says nothing, even if true, of the *reason* why such a view would be correct. How we identify the important constitutional values to which Campbell refers, and precisely why they are *so* important that they automatically trump what Campbell believes to be a strong normative argument for regulating monopoly power, remain unexplained. In the face of this mystery it is more tempting simply to conclude that an alternative model is both doctrinally and normatively better able to explain when the courts do and should intervene in public law. As this and the previous chapter have argued, this is the LACPA.

In any event, however, Campbell’s initial claim that cases like *Aga Khan* involving non-statutory monopoly regulators were incorrectly decided is unpersuasive. The difference between the courts’ treatment of consensual submission in the face of statutory and non-statutory monopoly functions is readily explicable by reference to a constitutional fundamental: that Parliament is sovereign. As the previous chapter explained, when individuals purport to consent to statutory jurisdiction, their consent is legally meaningless. Statutory power over an individual exists whether they consent to it, denounce it, purport to exclude or modify it by agreement, or whatever else. It continues in force until modified or removed by subsequent legislation. Those subject to statutory power have no choice in law.[[676]](#footnote-676) The position is fundamentally different with *de facto* power, however. Here, individuals *do* enjoy the legal power to negotiate with the body to determine the terms of the body’s jurisdiction over them in these cases.[[677]](#footnote-677) Campbell’s criticism of the courts’ treatment of non-statutory regulators seems to proceed on the assumption that when the courts refer to consensual submission by the individual, they mean consensual submission *in fact*. Indeed, it is only on this basis that the comparison he attempts to make between the positions of those consenting to statutory and non-statutory monopoly jurisdiction makes sense. Properly understood, however, the orthodox, popular judicial approach is to ask whether the individual has consented to the jurisdiction *in law*, in accordance with the LACPA, as this and the previous chapter have explained. Examples of courts asking whether individuals have consented *in fact* in the way Campbell asks, though on the increase post-*Datafin*, are still relatively rare – and doctrinally erroneous, as part C argued.

#### Normative flaws

Campbell’s positive doctrinal case for the monopoly power model, then, bears significant shortcomings. But his normative case is also unpersuasive. First, the model ignores one of the fundamental distinctions in liberal discourse between public and private, between the individual and the state. As chapter one explained, the state is more than simply a monopoly actor. It not only wields considerable power but also claims the *authority* to wield that power. This is reflected in the LACPA, which requires both that a function be powerful in the sense that it is coercive, but also that it be authoritative in the sense that has a legal basis. Under the monopoly power model, by contrast, the courts’ only concern is ‘the amount of power’,[[678]](#footnote-678) i.e. whether or not it is monopolistic. By reducing the meaning of a public function to a simple assessment of *how much* power a particular body wields, Campbell’s model ignores altogether the important question of authority.[[679]](#footnote-679)

There are two potential counter-arguments to the above. First, it might be argued that monopoly power is necessarily authoritative in a way that ordinary power is not. This would be difficult to sustain, however.[[680]](#footnote-680) Although *law* can be seen as authoritative for the reasons given in the previous chapter, the concept of authority is notoriously difficult to determine more generally. Sports regulators like the Jockey Club undoubtedly possess some degree of special authority as expert regulators in their field, but the origin of this authority is unclear. It is certainly not clear that it results from the mere exercise by them of monopoly power. Many situations will exist in which bodies who exercise monopoly power have no particular authority to do so. Corporate giants and political dictators, who dominate on the basis of raw power alone, are good examples.

It is here that the second potential counter-argument comes to the fore: the meaning of a public function should not necessarily depend on the presence or absence of authority, because a strong enough independent case exists for subjecting monopoly functions, whether authoritative or not, to judicial review. In other words, so the argument would go, it is precisely because private monopolies exist, and can cause harm to the individual, that judicial review should extend to them. This is the thrust of Campbell’s normative case and presumably the counter-argument that he would prefer. Indeed, not only does Campbell argue that it would be normatively desirable to subject monopoly functions to judicial review; he also argues that his normative case can derive support from something as constitutionally fundamental as the rule of law.[[681]](#footnote-681) But as chapter one explained, the rule of law does not progress the debate in this area very far. It is a rule of *law*, not of public law. Even in its thicker, substantive manifestations, it simply prescribes the rights and interests that the law should protect. It fails to explain why these rights and interests must be protected through judicial review.

The upshot, then, is that when advancing the normative case for the monopoly power model, Campbell seems to overlook that the courts must perform an *interpretative* task, namely, of distinguishing public from private. This is also reflected in his further doctrinal claim that the law contains a strong historical foundation for controlling private monopoly according to the principles of good administration: equity and the common law, he observes, have long subjected trustees and businesses affected with a public interest, such as wharf owners, to duties of fairness not dissimilar from those imposed in public law.[[682]](#footnote-682) But once again, this is not an example of the control of monopoly power by *public* law (i.e. by the prerogative writs). Rather, as Campbell concedes,[[683]](#footnote-683) it reveals only a general concern on the law’s part to guard against the abuse of monopoly power. The hurdle that he fails to overcome is to explain why the task of assuaging this concern should fall exclusively to judicial review. Whilst normatively-reasoned values and interpretative principles may – and do – feature in the construction of the term public function, determining the scope of judicial review is not a *purely* normative exercise according to which the courts simply start from scratch and ask themselves how far judicial review should, theoretically, apply. They must also weave into their blueprint a theoretically workable distinction between public and private. This is where Campbell’s model fails, and the LACPA succeeds.

## CONCLUSION

Post-*Datafin*, the LACPA remains a largely doctrinally accurate explanation of the courts’ approach to the amenability issue. It is also both normatively and doctrinally more convincing than its main rival, the monopoly power model. With these points established, the following chapter examines the LACPA’s fitness for modern purpose – by considering the position of private bodies acting under ‘delegated’ powers.

# 5.

# Public Functions in Judicial Review III:

# Delegating Functions to Private Parties

In the previous chapter I made my position in relation to monopoly functions clear: as harmful as monopoly power may be, monopoly functions are not amenable *per se* to judicial review. This chapter considers the LACPA’s approach to private bodies who perform ‘delegated’ functions on behalf of central and local government. This is a pressing problem given the increased role that the private sector has played in governance over the last three decades in particular, as chapter one saw. The contracting-out of functions is concerning because of the potential for crucial methods of accountability for the performance of those functions to be lost as they are transferred into the private sector. This has particular force in the key context of judicial review, where the courts have ruled in clear terms that the performance of a function on behalf of central or local government does not amount to a public function of itself[[684]](#footnote-684) – even if the public authority on whose behalf the services are delivered would itself be regarded as performing a public function when providing the services in-house.[[685]](#footnote-685)

This chapter builds on Paul Craig’s argument that if a function ‘is a public function when undertaken in house, it should be equally so when [delegated to a private delegate].’[[686]](#footnote-686) This will be termed the delegation argument. Whilst the delegation argument itself has been made before,[[687]](#footnote-687) this chapter’s contribution to the debate is to advance the argument through the lens of the LACPA, whose functional focus provides the courts with a greater ability to extend judicial review against private delegates than is often assumed. This chapter challenges the orthodox – and pessimistic – view shared by key authors in the field such as Murray Hunt,[[688]](#footnote-688) Catherine Donnelly[[689]](#footnote-689) and Peter Vincent-Jones:[[690]](#footnote-690) that the courts’ underlying approach to the public-private divide is unsuited to new trends in modern governance and has some way to evolve, or may even require a substantial overhaul, in order to meet the challenge posed by contracting-out.[[691]](#footnote-691) Tweaks and fine-tuning may be needed, but not an overhaul.

The argument proceeds as follows. Part A briefly defines and explores the concept of delegation. For this chapter’s arguments to make sense, this concept must first be explored. Part B sets out the basic case for the delegation argument, explaining why delegates can, and should, be regarded under the LACPA as exercising public functions. Part C then considers the extent of the doctrinal support for the delegation argument. Contrary to first impressions, it is already fairly substantial. The courts seem to see the argument’s basic force but have been reluctant to embrace it in the case of private delegates who have not been created by the state. With this in mind, it becomes particularly important to scrutinise their reasons for refusing to do so. None of these are particularly convincing, as part C shows.

Readers will see that in this chapter I make use of materials concerning the term ‘functions of a public nature’ under s 6(3)(b) HRA as well as the public-private divide in judicial review. This is because my discussion centres around the public-private status of delegated functions, on which the HRA sources are often just as illuminating. I should stress that my purpose is not to consider the meaning of s 6(3)(b) in detail here, however. This occurs in chapter seven, where I advance my novel ‘two-strand’ interpretation of that provision.

1. **‘**DELEGATION’

As Donnelly observes, delegation implies a transfer of authority conferring ‘a degree of legitimacy of action’,[[692]](#footnote-692) in this context to a private actor. It can occur by contract, but need not.[[693]](#footnote-693) The notion of transfer requires that the delegation be express: the use of implied authority does not count.[[694]](#footnote-694) Any private activity not prohibited by law could be said to occur to some extent with the state’s implicit authority.[[695]](#footnote-695) Thus, private pub landlords establishing and co-operating in a ‘pub watch’ scheme to identify and ban troublesome customers, for instance, would not be regarded as exercising delegated authority, even though the local police may approve of the scheme and encourage other landlords to join.[[696]](#footnote-696) Mere approval is not enough.

Along these lines it should also be stressed that *authority* must be transferred.[[697]](#footnote-697) Anne Davies’ work on government contracts is valuable here. Not all government contracts to engage private contractors will involve the delegation of a power or duty.[[698]](#footnote-698) Some will involve the contractor merely ‘providing… a component part of the means [the government] needed to perform its own duties or functions’,[[699]](#footnote-699) in effect ‘just contributing to a broader enterprise managed by the [government] itself’.[[700]](#footnote-700) Admittedly the concepts of authority, functions and duties may not lend themselves easily to precise definitions.[[701]](#footnote-701) Disagreement may therefore exist in a given situation over whether a delegation has occurred. This was a live issue in *YL v Birmingham City Council*,[[702]](#footnote-702) where a bare majority of the House of Lords held that a local authority had not contracted out its functions when it used its power under s 26 of the National Assistance Act 1948 (NAA) to engage a private care home operator to provide residential care services on its behalf. Their Lordships held that the only statutory duty imposed on the local authority was to *arrange* to provide residential care, and reasoned therefore that the contractor’s *provision* of the services pursuant to the contract constituted an entirely different – private – function.[[703]](#footnote-703) The conclusion that this particular function is private under s 6(3)(b) HRA has been overruled by s 145 of the Health and Social Care Act 2008, but the *YL* reasoning remains of import for other functions under s 6(3)(b) and for judicial review more generally.[[704]](#footnote-704) The stronger view is that the local authority’s function of providing accommodation *had* in fact been delegated.[[705]](#footnote-705) The majority’s argument ignores the NAA’s effect, which is to impose a duty on the local authority to provide the accommodation (s 21) before allowing it the choice, under s 26, of providing the accommodation either in-house or by contracting-out. In the event that a local authority is unable or unwilling to contract-out, the consequence is clear: the local authority has no option but to deliver the services itself.[[706]](#footnote-706)

Despite the difficulties that may sometimes exist in determining whether a transfer of authority has occurred, by emphasising the need for that transfer, Davies’s point nevertheless usefully illustrates that an important safeguard exists against over-regulating private contractors through judicial review.[[707]](#footnote-707) As Lord Neuberger opined in *YL*, for instance, it seems difficult to accept that a company engaged by the Ministry of Defence to supply military material could be regarded as performing a public function when it did so.[[708]](#footnote-708) Indeed, the performance of a series of discretion-less, one-off tasks such as supplying goods contrasts with the public-facing, decision-making role of a private care home operator engaged to take over the day-to-day management of residential care services from a local authority. Only in the latter case does it seem sensible to suggest that a transfer of authority has occurred.[[709]](#footnote-709)

Finally, it should be emphasised that privatisation is not delegation, at least for present purposes.[[710]](#footnote-710) The courts are clear that the delivery of privatised services does not of itself constitute the performance of a public function,[[711]](#footnote-711) an uncontroversial stance that will not be further examined. Privatisation differs in an important respect from delegation because the former involves the transfer of both the function and the performer itself into the private sector.[[712]](#footnote-712) It is a true attempt by the state to cast off the service. By contrast, delegation involves engaging a private organisation to perform functions *on behalf of* a public authority who itself remains empowered or required, as the case may be, to perform those functions. Hence, the responsibilities of the delegator for the service are typically unaffected by delegation.[[713]](#footnote-713) As Davies remarks, the delegator ‘cannot divest itself of its public powers or duties by entrusting performance to a contractor.’[[714]](#footnote-714) The delegator thus remains legally accountable for the performance of the function in question with the result, as Davies emphasises, that the delegation argument renders the delegate concurrently rather than exclusively responsible in judicial review.[[715]](#footnote-715)

## THE BASIC CASE

The basic case for the delegation argument consists of three main points. First, it encapsulates a crisp, forceful logic that plays a key role in its appeal: ‘It is difficult to see why the nature of a function should alter if it is contracted out, rather than being performed in house’.[[716]](#footnote-716) This is all the more compelling once it is appreciated, as chapters four and five explained, that the LACPA’s outlook is functional. Its focus is on the *genus* of power being exercised by the body in question, not the body’s institutional identity. Thus, the exercise by a psychiatric hospital of statutory powers to detain and treat mental inpatients against their will is a public function even when the hospital is private rather than NHS.[[717]](#footnote-717) Provided that it exercises what the LACPA deems to be a legally-authorised coercive power, the hospital will be performing a public function.[[718]](#footnote-718) The underlying thrust of the LACPA therefore provides the logical aspect of the delegation argument with vital contextual support, generating a strong presumption that the exercise of delegated functions should be amenable to judicial review.

Second, and quite apart from its inherent logical force, there are good reasons for embracing the delegation argument by regulating delegated public functions in judicial review – in other words, to bring them within the LACPA framework. In particular, delegates wield enormous power to interfere with the fundamental rights and interests of those on the receiving end of their actions.[[719]](#footnote-719) Typically, these are vulnerable individuals such as the elderly, children, the infirm or the poor. They are in need of a service that the state has deemed fundamental enough to provide to them, but they lack the means to procure the service themselves. If the state decides to delegate the service-provision to a delegate to act on its behalf, the individual’s only options are to accept the service provided by the delegate, warts and all, or go without. Private law and context-specific statutory schemes designed to regulate delegates’ activities do not seem to provide an effective and systematic safeguard against decisions that are unfair, irrational or interfere with a range of fundamental rights.[[720]](#footnote-720) The individual’s position becomes worse still once it is appreciated that neither self-funders, i.e. people procuring the services from the contractor without state support, nor service-users receiving in-house services would be placed in the same invidious position. Self-funders enjoy at least some economic power to take their custom elsewhere; and in-house service-users would be able to seek judicial review against the service-provider because it would be performing a public function under the LACPA, through the exercise of direct legal authority to engage in an activity that impacts on the service-user’s rights and interests.[[721]](#footnote-721) This state of affairs might be acceptable were the individual to be allowed some say in the public authority’s decision to delegate, but typically they do not. The resulting incongruity is both arbitrary and harsh.

Third, and especially given the logical and normative force of the delegation argument explained above, delegated functions can be seen readily to fit the basic scheme of the LACPA. They can comfortably be described as legally-authorised coercive powers, so the courts can regulate delegates through judicial review without distorting the broad conceptual framework that they have already adopted. On this point, it is clear that coercion is not really an issue. The power the delegate wields is evidently coercive in the sense that it can impact on the individual’s fundamental rights and interests.[[722]](#footnote-722) Moreover, there is also a strong case to be made that courts should recognise the delegate’s powers as legally-authorised. It is important to return briefly to basics in making this point. As chapters three and four showed, the concept of legal authorisation under the LACPA is a flexible one. Whilst it encompasses legal authorisation in the archetypal sense of statutory or prerogative powers, it also seems to extend, rightly, to third-source powers, which are legal liberties strictly speaking. In sufficiently pressing circumstances it may also extend to *de facto* as well as legal powers, provided that the decision to review does not stray impermissibly from the LACPA framework. This idea underlay *R v Panel of Takeovers and Mergers, ex p Datafin*,[[723]](#footnote-723) where the Court of Appeal stretched the concept of legal authority yet further to an immensely powerful *de facto* regulator, the PTM, that was so closely bound up in the exercise of legally-authorised coercive power by others that it could itself be said to be exercising such power.[[724]](#footnote-724) At the outer boundaries of the conceptual framework set by the LACPA, the interests of justice can therefore act as a catalyst for applying the concept of legal authority creatively – provided of course that the courts’ ultimate designation of a given function as public still goes with the grain of the idea that the body in question exercises legal power. In the case of delegates, it does, because the delegate’s power derives from the express permission of the state, through the agreement by the public authority in question to delegate the function.

This is significant in two respects. First, it emphasises that delegates are in a fundamentally different position to ordinary private individuals. In liberal societies, the latter typically act without the state’s express permission for the simple reason that they do not need it. When the delegate performs the particular function it is engaged to perform, however, it is there by the grace of the state. The way in which the delegate obtains its power to act – through positive permission – is materially similar to the way in which institutionally public authorities typically obtain theirs.[[725]](#footnote-725) Like the power of public authorities who act directly under law, the delegate’s power will also be bounded by a vires. The delegate’s jurisdiction over the service-user only extends as far as the delegation agreement with the delegator permits.

Second, the origin of the delegate’s power illustrates exactly what it is doing. It is not interacting with the service-user by legal negotiation and compromise, as private individuals would ordinarily be required to do. It has stepped into the delegator’s shoes, taking over the performance of the self-same function that the delegator itself enjoyed the express legal authority to perform.[[726]](#footnote-726) As a result, the relationship between the individual and the delegate ‘is itself a consequence of the exercise of state power’;[[727]](#footnote-727) and the individual should be entitled to the same level of protection against the delegate that the law deems it necessary to afford them when the delegator performs the function in-house.[[728]](#footnote-728) Legal authority will invariably underlie the delegation, too, albeit on a more latent level, since public authorities who delegate functions will themselves be making use of an express statutory power to do so.[[729]](#footnote-729) Moreover, the law should guard against the possibility that delegator and delegate deliberately conspire, whether for economic or other reasons, to bring about a situation in which, by delegation, the individual’s rights and interests go unprotected.[[730]](#footnote-730) All things considered, the upshot is that it is far more natural – and compelling – to describe the delegate’s jurisdiction as imposed by law than as a *de facto* power.

My arguments so far might encounter objection on two levels. First, it might be said that delegates cannot be regarded as exercising legally-authorised coercive powers if they enjoy a contractual relationship with the individual in question. This will typically be the case, as in *YL*, if the service-user or someone acting on their behalf has agreed to pay a top-up fee to the delegate to secure services that cost more than the local authority delegator is prepared to pay.[[731]](#footnote-731) Thus, it might seem at first sight that there exists an obvious point of distinction between the service-user in *YL*’s position and the service-users in *R v Servite Houses, ex p Goldsmith*[[732]](#footnote-732)and *R (Heather) v Leonard Cheshire Foundation*,[[733]](#footnote-733) who were not paying top-up fees and seemed not to be in a contractual relationship with the delegates: in *YL*, the service-user was able to choose her delegate by shopping around, in much the same way a self-funder would. Indeed, as Lord Neuberger remarked in *YL*, the element of choice that this gave the service-user suggested that ‘the services provided in this case are very much of a personal [i.e. private] nature.’[[734]](#footnote-734) The argument is superficially plausible but on closer inspection it begins to break down. Essentially it is simply a restatement of strict orthodoxy: that the contractor is not exercising legally-authorised coercive powers, so its jurisdiction over the individual must be consensually assumed by them.[[735]](#footnote-735) But the point is that we have to move away from strict orthodoxy in the present context, for the reasons given above. Once this is borne in mind, it also becomes evident there is no material difference between individuals who pay top-up fees and therefore enjoy a contract with the delegate, and individuals who do not. In both cases the delegate exercises functions that should properly be regarded as public under the LACPA.

The second level of objection draws on an argument I made in the previous chapter, in relation to *Datafin*: that the grounds of judicial review can be conceptually difficult to apply to bodies who exercise *de facto* rather than *de jure* power. This is unlikely to stand in the way of the argument I advance here, however. The problem in *Datafin* was a relative lack of judicial expertise in the field, which rendered the judges largely powerless to intervene to tell the Panel how to exercise its power – especially since the Panel, exercising *de facto* power, had determined the limits to that power itself. Whilst this problem might be typical where monopoly regulators generally are concerned, and for that reason brings into question the common view that *Datafin* expanded the concept of a public function in such a way that the source of the power no longer matters, it is less of an obstacle where delegates are concerned. Delegates do not typically regulate entire industries, such as City takeovers or horseracing, in the way *de facto* monopoly regulators do. Instead, they simply provide a service to an individual or group of individuals on terms that have been agreed with the delegator (and possibly also the individual as well). Although it would depend on the circumstances in question, the issue of expertise would not seem to arise.

## DOCTRINAL SUPPORT

The delegation argument, then, has a powerful presumptive force and can be accommodated within the LACPA’s conceptual framework. Yet it is also significant that the courts have already shown themselves to have recognised that force. There are recent clear statements to that effect. Lord Bingham stated when dissenting in *YL*, for instance, that ‘The performance by private body A by arrangement with public body B, and perhaps at the expense of B, of what would undoubtedly be a public function if carried out by B is, in my opinion, precisely the case which section 6(3)(b) was intended to embrace.’[[736]](#footnote-736) But more significantly and perhaps more surprisingly, even the earlier case-law appears to recognise the basic thrust of the delegation argument – at least when the delegator has created the delegate.

There are two relevant cases. The first is the well-known *Poplar Housing* decision.[[737]](#footnote-737) Here, Tower Hamlets LBC created a private company, Poplar Housing, to take over and run the stock of housing it was required by s 188 of the Housing Act 1996 to secure to individuals in the defendant tenant’s position. Poplar Housing later sought to evict the defendant after Tower Hamlets decided that she was intentionally homeless. The Court of Appeal held that the provision of accommodation by Poplar was a public function under s 6(3)(b) HRA, even though ‘the act of providing accommodation to rent is not, without more, a public function.’[[738]](#footnote-738) Giving the judgment of the court, Lord Woolf CJ gave a number of factors.[[739]](#footnote-739) These related principally to the ‘closeness of the relationship’ between Poplar and Tower Hamlets, in particular that five of Poplar’s board members also worked for the latter.[[740]](#footnote-740) Significantly for present purposes, however, Poplar’s role in providing the accommodation on Tower Hamlets’ behalf was also relevant. His Lordship recognised that Tower Hamlets had not privatised its functions as such but had retained its public duties while using Poplar as ‘the means by which it seeks to perform those duties’.[[741]](#footnote-741) He also emphasised that Poplar ‘stood in relation to [the tenant]… in very much the position previously occupied by Tower Hamlets’[[742]](#footnote-742) – implying, although the words were not used, that Poplar had stepped into the latter’s shoes.

The second case is *R (Beer) v Hampshire Farmers’ Markets Ltd*.[[743]](#footnote-743) The facts were similar to those in *Poplar Housing* but this time the function transferred to the newly-created private delegate, HFML, was the running of a series of farmers’ markets that the local authority had established using its statutory powers to promote local economic growth.[[744]](#footnote-744) Affirming Field J’s decision[[745]](#footnote-745) and the core of his reasoning, the Court of Appeal held that HFML was both amenable to judicial review and performing a public function under s 6(3)(b) HRA when it refused the applicant permission to participate in the markets. Dyson LJ gave the leading judgment, the thrust of which was that HFML’s function was public in two different respects. First, the function was public *per se*, because running the markets involved the exercise of a power to determine the rights of the public to access them.[[746]](#footnote-746) This is a LACPA-consistent view. The power impacts on the individual’s rights – their historical common-law rights to trade at market – and is a *de jure* power in the sense that it derives from law. The origin of this power is nowadays usually statute, as Scarman LJ observed in *R v Barnsley Metropolitan Borough Council, ex p Hook*,[[747]](#footnote-747) but the suggestion in the various market-trading cases seems to be that for ‘lawful’ as opposed to informal markets, at least, the common law provides for a general power on the part of the owners to regulate the markets they run.[[748]](#footnote-748) Indeed, if the market-holders’ rights are specifically protected at common law, the owner’s right to regulate can only be understood on the basis that such a power exists.

Second, the function was public because of HFML’s relationship with the local authority, which had (i) created it; (ii) crucially, for present purposes, allowed it to step into the local authority’s shoes; and (iii) assisted it in various respects such as lending office space and staff.[[749]](#footnote-749) Their Lordships believed this second point, especially elements (i) and (ii) of it,[[750]](#footnote-750) sufficient in itself to render the function public.[[751]](#footnote-751) Longmore LJ was unequivocal in this regard: ‘Naturally, the combination of the two reasons makes the judge's decision that much more secure but, in my view, *either reason alone would have been sufficient*.’[[752]](#footnote-752) Lord Mance therefore downplayed the significance of *Beer* when he suggested in *YL* that it was decided on the first point alone: ‘An important element… was the common law right of access of the public to such markets… There is in the present case no such right or feature in relation to Southern Cross.’[[753]](#footnote-753) Had he stated the Court of Appeal’s findings accurately, however, he should at least have gone on to ask whether any of elements (i) to (iii) above were present.[[754]](#footnote-754)

Both of these judgments are discussed in greater detail in chapter seven. The immediate point to bear in mind is that they are significant because the courts not only indicate that it is relevant to their decisions that the functions in question were delegated to a private delegate; they also accompany these remarks with indications that the delegator would itself have been performing a public function when engaging in the activity in question. Particularly clearly in *Beer*, Dyson LJ stated that ‘if the decision to refuse Mr Beer's application had been made by the council before the incorporation of HFML, it would have been amenable to judicial review.’[[755]](#footnote-755) This is an important observation. It reveals that the courts see the force in *both* essential aspects of the delegation argument – i.e. that there has been a delegation *and* that the delegated function was public when performed by the delegator in-house. This means in turn that the proponents of the delegation argument are not asking the courts to embrace an entirely new way of thinking. All that is required is for judges to attach greater weight than they currently do to a factor that they have already acknowledged is relevant. If they already believe in the force of the delegation argument at least to some extent, as their general approach to the public-private divide suggests they should and as the remarks in *Poplar Housing* and *Beer* suggest they do, then it becomes all the more important to scrutinise their reasons for refusing to embrace the argument fully by elevating it into a free-standing rule of law – that a private delegate performing a delegated public function will be performing a public function itself.

### Addressing the courts’ responses to the delegation argument

The courts have given a number of reasons for refusing to cross the Rubicon to which they have stepped. None are particularly convincing. The first is that the delegate’s power derives from a contract with the delegator. In *Goldsmith*,[[756]](#footnote-756) Servite was a private care home operator engaged to deliver residential care services on behalf of a local authority acting under the NAA. The applicants sought judicial review of Servite’s decision to close the home, claiming that it breached their legitimate expectation of a home for life. Moses J expressed sympathy for the applicants but nevertheless felt compelled by precedent to rule that Servite was not performing a public function. Having surveyed authorities such as *Datafin* and *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan*,[[757]](#footnote-757) his Lordship believed it fatal to the applicants’ claim that Servite enjoyed a contractual, commercial relationship with the local authority.[[758]](#footnote-758) With respect, this was a fundamental error – compounded, too, when Lord Mance relied on this aspect of *Goldsmith* in *YL*.[[759]](#footnote-759) Although *Datafin* preserved and *Aga Khan* demonstrated the rule against reviewing contractual jurisdiction (as Moses J observed[[760]](#footnote-760)), neither case bore directly on the particular issue in *Servite*. As Craig remarks, ‘the court could have reached the contrary conclusion without violating established precedent.’[[761]](#footnote-761) As chapters three and four showed, the contractual power principle in *Aga Khan* derives from the broader idea that any jurisdiction over the applicant that has been voluntarily assumed by them will not be amenable to judicial review. The focus therefore lies on the relationship between the defendant and the *applicant*, not the defendant and a third party like the local authority. Given the sympathy his Lordship felt for the applicants and what he saw as the delegation argument’s appeal,[[762]](#footnote-762) it is disappointing that he missed an obvious point of distinction between the case before him and those he mentioned.[[763]](#footnote-763)

The second response by the courts to the delegation argument is the reductionist one. In *YL*, Lord Scott rhetorically asked where it would end if ‘every contracting out… of a function that the… [delegator] could in exercise of a statutory power or the discharge of a statutory duty, have carried out itself’ engaged s 6(3)(b) HRA.[[764]](#footnote-764) Lord Neuberger made a similar point.[[765]](#footnote-765) Lord Scott gave examples of local authority employees engaged as lifeguards at council swimming pools and individual care home managers employed by private care home operators like Southern Cross in *YL* itself – would they then be performing public functions if the delegation argument held sway?[[766]](#footnote-766) This argument is relatively easy to refute. It is not the case that *every* instance of contracting out would involve the performance by the contractor of a public function. Only those functions which would be public when performed in-house would be caught.[[767]](#footnote-767) In this sense, their Lordships seemed to misunderstand the underlying basis of the delegation argument.[[768]](#footnote-768) Moreover, it should be remembered that the mere engagement by contract of a private body does not necessarily involve the delegation of a function to that body anyway. As seen above, ‘delegation’ requires a transfer of authority from delegator to delegate. Individual employees like lifeguards and care home managers are not the transferees of powers and duties from the local authority. Instead, to use Davies’s phrase, they are ‘just contributing to a broader enterprise managed by the authority itself.’[[769]](#footnote-769) This is what employees do. When Lord Woolf CJ opined in *Poplar Housing* that s 6(3)(b) HRA should not necessarily apply to a private body that assists a local authority to discharge the latter’s duties by providing services on its behalf,[[770]](#footnote-770) it is possible that he had this broad point in mind: helping a public authority discharge a duty does not necessarily amount to the performance of a delegated function.[[771]](#footnote-771) However, his conclusion that both a private firm engaged to analyse blood samples for the NHS and a bed-and-breakfast business agreeing to house local authority residents on a temporary basis ought therefore to escape classification as hybrid public authorities[[772]](#footnote-772) is questionable. Admittedly, the conclusion might follow for the NHS-engaged firm. It would be performing a series of discrete tasks for the immediate benefit of the NHS rather than standing in the shoes of the local authority *vis-à-vis* a member of the public by taking over the day-to-day management of their services, as the private operators in *YL* and *Leonard Cheshire* did. The bed-and-breakfast provider is not so fortunate, however. If it is performing materially the same function as a registered social landlord like Poplar Housing, for instance, then it is difficult to see why it should be treated any differently. This is especially true given that ‘right’ and ‘wrong’ in the context of the public-private divide will be so difficult to determine reliably, as chapter one explained. With this in mind, the courts should have more faith in the underlying approach that they have devised. If it generates the conclusion that a bed-and-breakfast provider is performing a public function, then so be it. This is not to say that results which are absurd or manifestly unfair to those who are caught by the notion of a public function should be ignored; rather, it is a reminder that absurdity and manifest unfairness bear a high threshold in the present context. This is especially true once it is borne in mind, as the third response to the courts’ reductionist argument, that the performance by a private body of a public function is only the first in a series of steps to establishing its liability in public law, as chapter one explained. The contents of the principles of good administration are often malleable and context-dependent and the courts enjoy discretion to withhold a remedy even if they do find that the defendant has acted unlawfully. In the HRA context, too, it seems to have been overlooked that private defendants retain Convention rights even when performing public functions, which gives them an important opportunity to defend themselves against Convention-based claims.[[773]](#footnote-773) Public-authority *status* does not necessarily mean public-law *liability*.

The courts’ third response to the delegation argument is the policy argument: subjecting private delegates to public-law norms might discourage contractors from providing privatised services.[[774]](#footnote-774) All that would be required in practice, however, is for delegates to take their potential liability in public law into account when agreeing their fee with the delegator.[[775]](#footnote-775) As Craig remarks, there is ‘no such thing as a free obligation.’[[776]](#footnote-776) Whilst it is possible that contractors may be forced to leave their markets if delegators refuse to meet these increased costs, the Joint Committee on Human Rights recently considered the issue of mass market flight and concluded that no hard evidence exists that it would necessarily occur.[[777]](#footnote-777)

The fourth point made by the courts to combat the delegation argument is the argument from incongruity. They use it to combat the point made above, that the recipients of delegated services should enjoy protection in public law against their service-provider when in-house recipients enjoy it. The courts have responded that it is more incongruous, however, to embrace the delegation argument and thereby draw distinctions between self-funded and local authority-funded users of the same service.[[778]](#footnote-778) Given that self-funders are not thought to enjoy any protection in public law against the service-user, the courts feel that neither should the latter. There seem to be two particular facets to the courts’ argument here. First, as was said in *Leonard Cheshire*, there is ‘no material distinction’ between the functions performed towards a self-funder and a local authority-funded service-user.[[779]](#footnote-779) In *YL*, too, Lord Neuberger began from the premise that providing services to self-funders would be private and reasoned that the mere identity of the person paying for the services made no difference to the nature of the function, even if it happened to be a local authority.[[780]](#footnote-780) The second facet is unfairness, in the sense that it would somehow do self-funders a disservice to confer protection in public law on publicly-funded residents. As Lord Mance remarked in *YL*, the delegate ‘should view and treat all such residents with equality.’[[781]](#footnote-781)

Again, these arguments are unpersuasive. The first facet reduces the local authority to the mere status of a bill-payer and ignores the crucial context in which the contractor’s activities occur.[[782]](#footnote-782) Context is all-important: in the abstract, few if any, activities can be said to be either public or private.[[783]](#footnote-783) With context borne properly in mind, there *is* a material distinction between services paid for by local authorities and those paid for by self-funders. If a local authority foots the bill, this is not because it is a generous benefactor like a family member or charity. It is because it will invariably have a statutory duty or power to provide the services for that individual; and in discharging that duty or exercising that power, it has decided to engage the private contractor to step into its shoes rather than delivering the services itself. There is also a theoretical distinction: in law, the self-funder has voluntarily assumed the power the service-provider wields over them. In classical LACPA terms, the latter’s activities are private. Self-funders ‘have no reason to expect’ protection in public law.[[784]](#footnote-784) Local authority-funded users are in a different position, however, because their relationship with the service-provider is determined by the state, through the decision to delegate.[[785]](#footnote-785) The second, fairness, facet to the argument from incongruity also adds nothing. Incongruity is in the nature of a public-private divide. Not all functions carry remedies in public law. Self-funders may well be remedially worse off if public-law protection is given to their publicly-funded counterparts, but this does not mean that embracing the delegation argument would be *unfair* to them. In practical terms, it is far from clear that self-funders are equally in need of protection in public law anyway. This is because they can rely on their bargaining power as relatively wealthy individuals to shop around, avoiding adverse treatment by service-users. They are not faced with the same harsh dilemma confronting state-funded users, of deciding whether to tolerate poor service-provision from the delegate or go without altogether. But even if self-funders are indeed worse off practically, this serves at most as an argument for improving their protection, either through legislation or by developing the private common law. It does not justify a remedial race to the bottom in which publicly-funded users are denied legal protection that self-funders might covet.[[786]](#footnote-786)

The courts’ fifth response to the delegation argument is that there is no need to bring the delegate within the purview of public law. This is because legal redress might exist elsewhere, either through private-law redress against the contractor or public-law redress against the delegator. The point has been made in the residential care context, in *Leonard Cheshire* and *YL*.[[787]](#footnote-787) However, once it becomes apparent that the LACPA does in fact extend naturally to delegated powers, as this chapter has argued, the courts’ argument becomes an argument in favour of *restricting* the LACPA’s natural scope. Even if the alternative redress said to be available to applicants were as useful to them as judicial review claim, which is doubtful anyway for the reasons given below, there is no reason why an applicant should be penalised in this way. The better view, as chapter four explained, is that the prior existence of an alternative remedy should bear at best on the question of whether to issue a remedy in judicial review – not on the classification of the defendant’s function in the first place.

It should also be emphasised that alternative avenues of redress may well be inferior to a judicial review action against the delegate anyway. Although the delegator typically remains responsible for the service provision in law, it may be constrained in practice in what it can do to help a service-user when the delegate threatens to close their home, for instance. As Moses J observed in *Goldsmith*, it becomes difficult to argue that a delegator owes any duty to compel the delegate to act differently once it is established that the delegate’s behaviour is lawful.[[788]](#footnote-788) Similarly, an action against the delegate in contract would typically only result in damages – contract law’s preferred remedy[[789]](#footnote-789) – rather than a more specific remedy as under judicial review or the HRA; and this presumes, moreover, that the service-user would enjoy a contract with the delegate in the first place. As *Leonard Cheshire* demonstrates, this will not always be so. These and related arguments have been made in detail elsewhere and will not be explored further here.[[790]](#footnote-790)

Sixth, then, is statutory underpinning to the body or function in question, the absence of which Moses J regarded as one of two ‘fatal impediment[s]’ to the applicants’ claim in *Goldsmith*.[[791]](#footnote-791) By this, he seemed to mean that Servite exercised no statutory power.[[792]](#footnote-792) This focus was misguided, however. The exercise of *statutory* power is not a prerequisite for amenability to judicial review, as the previous chapter saw. Furthermore, the delegation argument has an independent logical force, as seen above, which becomes greater still once the LACPA’s functional focus is borne in mind. It is enough in itself to justify the conclusion that a contractor in Servite’s position is performing a public function under the LACPA. There is no need for anything else.

## CONCLUSION

Under the LACPA the courts can, and should, embrace the delegation argument. *Poplar Housing* and *Beer* show them to recognise the basic force of this argument and their reasons for refusing to elevate it into a freestanding rule are unconvincing. Thus, once both the courts’ framework for determining the meaning of a public function and the *dicta* in *Beer* and *Poplar Housing* are borne in mind, it becomes clear that the courts have been hoisted by their own petard. The sooner they acknowledge the full thrust of their approach and make a real attempt to harness its ability to cater for the accountability deficit generated by the delegation of public power to private bodies, the better.

This finding has two main implications. First, by placing the issue of delegated power within the context of the LACPA, it undermines the arguments commonly made by authors in the field to that we should harbour ‘major concerns about the capacity of our system of public law to deal adequately with the new demands placed upon it by this process of contractualisation’;[[793]](#footnote-793) that the law is in need of a ‘new definition of the public sphere’;[[794]](#footnote-794) and that reform to bring delegates within the reach of judicial review ‘is beyond judicial interpretation and development, and requires legislation’,[[795]](#footnote-795) ‘the slate [to be] clean’,[[796]](#footnote-796) or time for the courts to complete what seems to be a gradual transition, as Hunt describes it, to an approach based on the nature of the function being performed.[[797]](#footnote-797) Once the LACPA’s potential is properly understood, these concerns seem tremendously overblown. The courts’ approach is *already* functional, or at least lies far closer to the functional end of the spectrum than it does the institutional, because the approach focuses on the kind of power being performed. With this in mind, there is no need to *reform* the law. Instead, the courts merely need persuading, as this chapter has attempted to do, that they have misapplied their *existing* approach.

Second, the analysis in this and the previous chapters sheds light on the true constitutional context in which the HRA was enacted. Properly understood, the courts’ approach to the public-private divide was already functional, relatively flexible and able to accommodate private delegates. This serves as an important piece of contextual information for the interpretation of the divide under the HRA.

# 6.

# Section 6 HRA in Context

In the context of the meaning of ‘functions of a public nature’ under s 6(3)(b) HRA, the following chapter argues that the LACPA should be taken as the constitutional blueprint for the public-private divide under s 6; that it should be taken to determine the scope of the public authority concept unless Parliament has manifested a clear intention to deviate from it. This chapter lays the groundwork for that analysis by considering the extent to which Parliament *has* manifested an intention to deviate. This is an important if complex and multi-faceted analysis.

Whilst Parliament has signalled a clear intention to deviate from the LACPA in certain respects, it still leaves courts considerable interpretative latitude to determine the meaning of a public function under s 6(3)(b). In one significant respect, which relates to the relationship between the public authority concept under the HRA and the governmental organisation concept in Strasbourg, the courts are freer, even, than they seem to believe. This argument proceeds in four steps. Part A sets the scene by exploring the basics of the public authority scheme under s 6, including the nature and key features of ‘core’ public authorities. Part B begins the analysis of the Strasbourg framework. It gives an overview of the mechanics of state responsibility under the Convention before providing a provisional explanation of how the different strands of state responsibility jurisprudence relate to the liability of public authorities in domestic law under s 6. Part C takes a closer look at Strasbourg’s governmental organisation jurisprudence. It argues that domestic courts and academic writers have chronically misunderstood the concept of a governmental organisation.[[798]](#footnote-798) Properly interpreted, it bears no relevance to the identification of hybrid public authorities under s 6(3)(b) HRA. Not only does this confirm the observations made in part B; it also establishes that private bodies remain non-governmental organisations through and through in Strasbourg. Consequently they remain capable at all times of relying on their own Convention rights, whether acting publicly or privately. This is a crucial finding with significant repercussions for the nature and scope of the hybrid public authority scheme as a whole, as the following chapter explains. With the Strasbourg scheme thoroughly analysed, part D then considers the various HRA provisions that might be thought to inform the courts’ reading of s 6. These are the interpretative obligation under s 3 HRA, the duty on the courts to take Strasbourg jurisprudence into account under s 2 HRA; and s 6(3)(a) HRA, which gives the Convention a form of ‘horizontal effect’ between private parties. It is argued that s 3’s impact is probably nil; that s 2’s impact is notable with respect to core public authorities but relatively minor with respect to hybrids; and that, whilst s 6(3)(a) has been interpreted by certain academic writers in a radical way that would effectively shrink the purpose of the hybrid public authority doctrine under s 6(3)(b) to negligibility, the correct reading of it – and one that seems to carry greater weight with the courts – is a more moderate one that amply preserves s 6(3)(b)’s role and the importance of interpreting it correctly.

## SECTION 6 HRA AND CORE PUBLIC AUTHORITIES

Section 6(1) HRA provides that ‘It is unlawful for a public authority to act in a way which is incompatible with a Convention right.’ Section 6 gives rise to three species of public authority, even though the term ‘public authority’ lacks a strict definition. Two species are given expressly: courts and tribunals (s 6(3)(a)) and ‘any person certain of whose functions are functions of a public nature’ (s 6(3)(b)). The designation of courts as public authorities means that they must comply with the Convention when developing the common law as well as when performing any other judicial function – even if the dispute in question involves only private individuals. The result is a limited form of what is called ‘horizontal effect’, which is considered in part D. The public authorities given by s 6(3)(b) are commonly known as ‘hybrid’ or ‘functional’ public authorities, so called because they are private bodies who become bound to respect the Convention when and to the extent that they perform public functions. As s 6(5) provides, ‘In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.’ Like the LACPA the hybrid public authority scheme is therefore functional in outlook, its concern being with the activity being undertaken rather than the actor’s institutional identity.

‘Core’ public authorities are the third, implicit, species of public authority. They go unmentioned by the HRA but are nevertheless said to derive from Parliament’s use of the word ‘includes’ to list the two remaining species of public authority in s 6(3), the implication being that other public authorities must exist.[[799]](#footnote-799) Core public authorities, also referred to as ‘true’, ‘obvious’ or ‘standard’ public authorities, are said to be public authorities ‘through and through’.[[800]](#footnote-800) Paradigm examples are government departments, local authorities, the police and the armed forces.[[801]](#footnote-801) Being inherently governmental in nature, core public authorities are said to lack Convention rights of their own because they are unable to fulfil the standing requirement contained in Art 34 ECHR, of being a ‘person, non-governmental organisation or group of individuals claiming to be the victim of a violation [of the Convention]’.[[802]](#footnote-802) Strasbourg’s interpretation of Art 34, which is adopted domestically by s 7 HRA,[[803]](#footnote-803) is considered in greater detail below.

Core public authorities must respect the Convention in everything they do.[[804]](#footnote-804) This is because s 6(5) only applies so as to relieve *hybrid* public authorities, in their private capacities, of the duty to comply with the Convention.[[805]](#footnote-805) It also follows implicitly from the Strasbourg scheme, which regards governmental organisations as such even when they act in private rather than public capacities.[[806]](#footnote-806) In this sense the core public authority concept therefore represents a major departure from the LACPA, because the liability of core public authorities rests not on the nature of the power they exercise in a given situation but on their *identity* instead.[[807]](#footnote-807)

### The nature and meaning of core public authority

How, then, is core public authority status to be ascribed? The concept is best understood, as Oliver argues, as resting on the fundamental, binary distinction between the individual and the state: the latter must serve the public interest whereas the former can serve whomever they wish, including themselves, to the extent that the law permits.[[808]](#footnote-808) This distinction – the ‘selflessness’ principle – was explored in chapter one. Applied to the core public authority concept, the principle aids in the identification of a core public authority by distilling the process into a single question to ask: is the body in question constitutionally required to serve the public interest or is it permitted, instead, to act for its own ends within the confines of the law? As Oliver observes, a number of factors will be relevant to this question:

‘Possession of special powers or authority or immunities, democratic accountability and the fact that the body is bound by law and constitutional principles in all that it does to exercise its functions altruistically and in the public interest and not for its own profit or that of its shareholders will be particularly persuasive.’[[809]](#footnote-809)

Additionally to representing a theoretically sensible and potentially useful test in this area, however, the selflessness principle also enjoys doctrinal support in the form of the ruling of the House of Lords in *Parochial Church Council of Aston Cantlow v Wallbank*.[[810]](#footnote-810) Here, the Parochial Church Council (PCC) sought to enforce chancel repair liability against the defendants, lay rectors, who responded by claiming that it was a public authority acting in breach of their right to respect for property under Art 1 of the First Protocol. Their Lordships found that the PCC was neither a core public authority nor (by a majority, with Lord Scott dissenting) a hybrid one. Significantly, during his analysis of the core public authority issue, Lord Nicholls described Oliver’s work on the selflessness principle as ‘valuable’ before rehearsing as relevant the very factors – possession of special powers, democratic accountability and so on – given by her in the quote above.[[811]](#footnote-811) Rejecting the argument that the PCC was a core public authority, his Lordship emphasised the lack of any general obligation on it to serve the public interest, by observing that it was ‘a church body engaged in self-governance and promotion of its own affairs’.[[812]](#footnote-812) In the same vein, Lord Hope, who also mentioned Oliver’s work,[[813]](#footnote-813) emphasised that churches’ activities concern ‘purely internal matters which do not reach out into the sphere of the state’;[[814]](#footnote-814) Lord Hobhouse that the PCC acts for the ‘diocese and the congregation of believers in the parish’ voluntarily coming to it;[[815]](#footnote-815) and Lord Rodger that the Church of England exists ‘to accomplish [its]… own mission, not the aims and objectives of the government’.[[816]](#footnote-816) Lord Scott declared himself to be ‘in complete agreement’ with Lords Hope and Rodger.[[817]](#footnote-817) The view that the courts regard the selflessness principle as underlying the notion of core public authority is further reinforced by the analysis of Strasbourg’s governmental organisation concept that follows.

## AN OVERVIEW OF THE STRASBOURG SCHEME

The broad purpose of the HRA to ‘bring rights home’ begs the question of when the claimant will have a Convention remedy: in other words, of when the state will have breached the Convention on the international plane. The state’s responsibility can be engaged in one of two broad ways in Strasbourg. First, it will be directly responsible for the actions of its own bodies. Thus, if the home secretary refuses to allow a prisoner to consult his solicitor while in prison, for instance, the state is straightforwardly responsible for the behaviour: the home secretary is a state body.[[818]](#footnote-818) Strasbourg has indicated close parallels between this direct responsibility principle and Art 34 ECHR, which was seen above, in that the bodies who directly engage the state’s responsibility are the same ‘governmental organisations’ who are implicitly precluded from filing their own Convention claims.[[819]](#footnote-819) The Art 34 jurisprudence can therefore yield interesting insights into the nature of a state body for direct responsibility purposes. The term ‘governmental organisation’ will be used to refer to both categories of body given that they cover the same ground.

The second head of state responsibility will be termed ‘indirect’ responsibility. It occurs when the state is placed under a positive obligation ‘to create an institutional and juridical structure in which human rights are positively protected from interference, whether by state or non-state actors.’[[820]](#footnote-820) There are two variants of indirect responsibility. The first, which will be termed ‘general’ indirect responsibility, occurs when the state is under an obligation to remove a victim from a situation which impinges on the enjoyment by them of their Convention rights. An example would be *Airey v Ireland*.[[821]](#footnote-821) Here, the state was responsible under Arts 6 and 8 ECHR, which guarantee the rights of access to a court and to respect for a private and family life respectively, when the victim was unable to petition the High Court for a divorce because she was unable to afford a lawyer but failed to qualify for legal aid*.* The second variant, which will be termed ‘private’ indirect responsibility, occurs when the state is under a positive obligation to regulate behaviour of a particular private individual (the ‘wrongdoer’) that affects the enjoyment by the victim of their rights. Thus, in *X and Y v The Netherlands*,[[822]](#footnote-822) the state was held to have violated the victim’s right to a private life under Art 8 ECHR when she was sexually assaulted by the son-in-law of the directress of the care home in which she lived. The state’s responsibility was engaged because its criminal law failed to provide sufficient redress against the wrongdoer’s behaviour: the victim was mentally handicapped and unable to meet the domestic requirement that she initiate proceedings against the wrongdoer by filing the complaint herself. Thus, whilst the state is responsible for its failure to regulate the wrongdoer’s behaviour, it is the wrongdoer’s behaviour that triggers that responsibility.

### Mapping the Strasbourg scheme onto the HRA: direct responsibility

The next step is to juxtapose the state responsibility scheme and s 6 HRA. As the courts have recognised, a sensible starting point would be to regard as core public authorities, and thus provide a direct cause of action against, any bodies that would directly engage the state’s responsibility – governmental organisations – in Strasbourg. In *Aston Cantlow*, Lord Nicholls remarked that:

‘[T]he phrase ‘a public authority’ in section 6(1) is essentially a reference to a body whose nature is governmental in a broad sense of that expression. It is in respect of organisations of this nature that the government is answerable under the European Convention on Human Rights.’[[823]](#footnote-823)

Although his Lordship used the broader term ‘public authority’ rather than referring more specifically to *core* public authorities, it is clear that he had only the latter in mind, and not hybrid public authorities as well. In the same paragraph he went on to state that ‘a public authority… is required to act compatibly with Convention rights in everything it does’,[[824]](#footnote-824) so he could only have been describing the former. As seen above, he also referred to Oliver’s work in the area as ‘valuable’. This is significant because she, too, uses the same broader term ‘public authority’ to refer to core public authorities,[[825]](#footnote-825) which could be why his Lordship did the same.

Perhaps because of this confusion in terminology, commentators and judges seem to have read *Aston Cantlow* in the alternative way, as establishing that the concept of a governmental organisation maps onto the *hybrid* public authority concepts as well – in other words, that the governmental organisation jurisprudence can also assist the courts to determine the meaning of a public function under s 6(3)(b).[[826]](#footnote-826) In *YL v Birmingham City Council*, for instance, Lord Mance referred to *Aston Cantlow* and stated that the governmental organisation jurisprudence ‘applies as much to the identification of a person exercising a function of a public nature under section 6(3)(b) as it does to the identification of a core public authority.’[[827]](#footnote-827) This view is mistaken for two reasons. First, it misreads *Aston Cantlow*. Quite apart from Lord Nicholls’s position, which is clear in any event, the remarks made by the remaining judges reinforce the view that the governmental organisation concept relates only to core public authorities. Lord Hope stated that:

‘The test as to whether a person or body is or is not a “core” public authority for the purposes of section 6(1) is not capable of being defined precisely. But it can at least be said that a distinction should be drawn between those persons who, in Convention terms, are governmental organisations on the one hand and those who are non-governmental organisations on the other.’[[828]](#footnote-828)

Similarly, for Lord Rodger:

‘A purposive construction of that section [6(1)] accordingly indicates that the essential characteristic of a public authority is that it carries out a function of government which would engage the responsibility of the United Kingdom before the Strasbourg organs.’[[829]](#footnote-829)

Again, while Lord Rodger, like Lord Nicholls, uses the broader term ‘public authority’, it is clear that he was nevertheless referring only to core public authorities. Lord Rodger’s *dicta* were given in the context of his analysis of the core public authority issue, which was kept distinct from the hybrid public authority analysis that featured later on in his judgment.[[830]](#footnote-830) Furthermore, Lord Scott evidently believed Lords Rodger and Hope to speak with one voice on the core public authority issue because he declared himself to be ‘in complete agreement’ with the reasoning of both of them in that respect, as seen above. Lord Hobhouse was the only member of the House not to express a clear opinion on the issue but he nevertheless appeared to share Lord Hope’s view. When deciding whether or not the PCC was a core public authority, he stated that ‘The Strasbourg jurisprudence has already been deployed… [by Lord Hope] and I need not repeat it.’[[831]](#footnote-831)

The second flaw in the alternative reading of *Aston Cantlow* is exposed by the Strasbourg jurisprudence itself, which on closer inspection reveals that the governmental organisation concept has nothing to do with the question under s 6(3)(b) HRA of when private bodies are to be treated as public. This argument is made in part C.

### Mapping the Strasbourg scheme onto the HRA: indirect responsibility

Whereas the direct responsibility principle has a fairly obvious home under s 6, the position with indirect responsibility is less clear. Ordinarily the indirect responsibility jurisprudence will be of little assistance in the identification of public authorities, core or hybrid. This is because Convention responsibility in private indirect responsibility cases arises from *systemic* failure by the state.[[832]](#footnote-832) The thrust of the victim’s complaint is therefore against the legislature, for failing to protect them when the Convention required action. Whilst this is a viable claim in Strasbourg, it has no domestic counterpart because the HRA exempts Parliament from the category of public authorities against whom Convention claims can be brought.[[833]](#footnote-833) If Parliament is the real culprit, the HRA’s clear intention to protect parliamentary sovereignty leaves the victim without a remedy in domestic law.

There are two exceptions to the ordinary position, however. First, in some indirect responsibility cases Strasbourg places a positive obligation upon the state to protect the victim but further indicates that the responsibility lies with a particular governmental organisation.[[834]](#footnote-834) Whilst couched in terms of positive obligations, these cases are perhaps better seen in substance as cases of direct responsibility by omission,[[835]](#footnote-835) especially given Strasbourg’s view that little of substance will turn on the formal classification when it comes to decide on whether the Convention has been breached on the facts: ‘In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation’.[[836]](#footnote-836) There is no reason why the wrongdoing governmental organisation in these cases cannot be rendered domestically liable as a core public authority under s 6 HRA. After all, s 6(6) HRA provides that ‘acts’ giving rise to public authority liability include omissions as well as positive action. Evidence for the idea that the governmental organisation should be treated as a core public authority in this way can be found in *Van Colle v Chief Constable of Hertfordshire Police*,[[837]](#footnote-837) in which the House of Lords applied *Osman v United Kingdom*.[[838]](#footnote-838) In *Osman*, Strasbourg held the state responsible for its failure to protect a school pupil and his family from the physical threat posed by a schoolteacher who had become infatuated with him. When deciding whether the Convention had been breached on the facts, the ECtHR’s analysis centred on the behaviour of the police force alone, implying that the responsibility to protect the victim lay specifically on the police as a governmental organisation rather than more generally with the state or Parliament:[[839]](#footnote-839)

‘In the view of the Court the applicants have failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk…’[[840]](#footnote-840)

Applying *Osman* to the case of a victim in a criminal trial who had been subjected to intimidation and eventually murdered by the defendant in that trial, Lord Bingham stated in *Van Colle* that:

‘It is plain from *Osman* and later cases that article 2 may be invoked where there has been a systemic failure by member states to enact laws or provide procedures reasonably needed to protect the right to life. But the article may also be invoked where, although there has been no systemic failure of that kind, a real and immediate risk to life is demonstrated and *individual agents of the state have reprehensibly failed to exercise the powers available to them* for the purpose of protecting life.’[[841]](#footnote-841)

On this point, Lords Phillips, Hope and Carswell clearly agreed.[[842]](#footnote-842) Although their Lordships eventually held unanimously that the positive obligation imposed by *Osman* had not been breached on the facts, *Van Colle* nevertheless demonstrates that indirect responsibility cases like *Osman* can be domestically accommodated by rendering the governmental organisation a core public authority in the manner I suggest.[[843]](#footnote-843)

The *private* indirectly responsibility strand of jurisprudence – or, rather, a particular subset of it – is the second exception to the general position that the indirect responsibility principle will be irrelevant to the meaning of public authority. Again, the starting point is that the private indirect responsibility jurisprudence will be of no relevance to the meaning of public authority under s 6 HRA. This is because the private wrongdoers whose actions trigger the state’s responsibility in Strasbourg, like the sexual offender in *X and Y*, are scarcely describable as performing public functions.[[844]](#footnote-844) Instead, the ordinary relevance of the private indirect responsibility jurisprudence will be to the courts’ duty to give horizontal effect to the Convention – discussed in greater detail below – through the common law.[[845]](#footnote-845) The courts are instructed as public authorities to act compatibly with the Convention, even when developing the common law in disputes between private individuals, so the preliminary question necessarily arises of whether the state must regulate a particular private individual’s behaviour in the circumstances. If the answer is no, the courts cannot be said to be acting incompatibly by refusing to develop the common law in the manner contended for by the ‘victim’ complaining of the behaviour of the private ‘wrongdoer’; if the answer is yes, then the courts must then decide whether s 6 requires the *common law* to remedy that incompatibility or whether it requires the issue to be left to Parliament instead. Whilst the possibility therefore remains that the courts refuse to grant a common-law remedy, which would leave the claimant’s rights judicially unprotected unless and until Parliament intervenes, common-law horizontal effect remains the private indirect responsibility principle’s natural home under the HRA.

There is a particular subset of private indirect responsibility jurisprudence that might nevertheless be relevant to the meaning of public authority, however. In certain cases the positive obligation to regulate a private wrongdoer’s behaviour appears to be triggered by the performance by that wrongdoer of a particular function, namely ‘state powers’[[846]](#footnote-846) or delegated functions transferred to the private body for the purpose of assisting the state to comply with its Convention[[847]](#footnote-847) or other international obligations.[[848]](#footnote-848) These functions may be more comfortably described as public functions under s 6(3)(b) for the purpose of granting a remedy against the private wrongdoer in domestic law.[[849]](#footnote-849) One example is *Costello-Roberts v United Kingdom*, in which a private school engaged the state’s responsibility under Arts 3 and 8 ECHR when its headmaster administered corporal punishment to a pupil. On the state responsibility point, the ECtHR stated that:

‘[T]he State has an obligation to secure to children their right to education under Article 2 of Protocol No. 1… Functions relating to the internal administration of a school, such as discipline, cannot be said to be merely ancillary to the educational process… Secondly, in the United Kingdom, independent schools co-exist with a system of public education. The fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools, no distinction being made between the two… Thirdly, the Court agrees with the applicant that the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals…’[[850]](#footnote-850)

Although *Costello-Roberts* is ‘not an easy case to analyse’, as Lord Mance remarked in *YL*,[[851]](#footnote-851) the suggestion seems to be that the school’s disciplinary function was part of a broader function of providing education, which was required by the Convention and which the state had delegated to the school by allowing the private and state school systems to coexist. The precise ambit of this subset of private indirect responsibility jurisprudence is difficult to discern and is clearly fairly *ad hoc*, no doubt both a symptom and a potential cause of Strasbourg’s refusal to articulate any general theory on which the broader doctrine of positive obligations as a whole is based.[[852]](#footnote-852) Although the focus in *Costello-Roberts* and related cases seems to be on the delegation of a function, it is unclear why the functions delegated must be directed towards helping the state to comply with its Convention or international obligations. The delegation principle in domestic law, as explored in the previous chapter, is considerably broader because it applies to the delegation of *any* function that would have been public when performed in-house. The very idea that there had been a delegation of any function in *Costello-Roberts* is also unconvincing given the apparent lack of any express transfer of authority to the school by the state. The mere coexistence of private and state school systems would count under the delegation argument in domestic law, at best, as mere implicit approval by the state of the private school’s activities. All things considered, then, this line of private indirect responsibility rulings may be relevant to the determination of a public function but is unlikely to yield much in practice. Domestic courts should certainly not take Parliament to have intended that s 6(3)(b) apply *only* to the isolated instances of liability that can be extracted from this quite cryptic area of the law. This argument is developed below, in the context of s 2 HRA.

## A CLOSER LOOK AT GOVERNMENTAL ORGANISATIONS

The foregoing analysis demonstrates that the domestic courts seem to equate the core public authority and governmental organisation concepts, and also that they believe the selflessness principle to underlie the former. One might therefore expect the selflessness principle to underlie the latter concept, too, otherwise the courts’ attempt to juxtapose the two would be misguided. This part of the chapter confirms this hypothesis by taking a closer look at Strasbourg’s treatment of the governmental organisation concept. This is a detailed analysis, but crucial for two reasons. First, it settles what was identified above as a contentious issue following *Aston Cantlow*, namely, the true relevance of the governmental organisation concept to the meaning of the term ‘functions of a public nature’ under s 6(3)(b). Properly understood, Strasbourg knows no ‘hybridity’ doctrine – in other words, a doctrine that renders a private person a governmental organisation upon the performance of a particular function – akin to that found in s 6(3)(b). Instead, the case-law mirrors the classically liberal, institutional divide discussed above, between the ‘selfless’ state and the ‘selfish’ individual. Unlike under s 6(3)(b) HRA, there is no permeation between the two. Institutionally private individuals remain private through and through in Strasbourg’s eyes. This is in spite of Strasbourg’s recent remark that the governmental organisation concept ‘has not been applied in a rigid fashion’[[853]](#footnote-853) and therefore contains a certain level of flexibility. This may be true, and is confirmed in particular by *Radio France v France*,[[854]](#footnote-854) which is discussed below, but the case-law clearly demonstrates that it nevertheless leaves the present thesis unharmed.

Second, the analysis in this part of the chapter is crucial for the reason that in reaching the finding outlined above it settles another matter of some considerable uncertainty, namely, whether hybrid public authorities are permitted to rely on their own Convention rights when performing public functions. The issue has never been considered by the courts in detail and has received little attention academically,[[855]](#footnote-855) but certain judges and academic writers nevertheless seem to presume that private bodies lose their right to rely on the Convention when performing public functions.[[856]](#footnote-856) In the Court of Appeal in *YL*, for instance, Buxton LJ bluntly remarked that ‘when discharging its public functions… [a hybrid public authority] has no such rights.’[[857]](#footnote-857) This will be called the rights-stripping idea. It warrants detailed scrutiny not just for the reason that determining the ability of hybrid public authorities to rely on the Convention is an important task in itself, but also because the *effect* of ascribing hybrid public authority status to a private body is bound to play on the judges’ minds as they determine the width of s 6(3)(b): the more draconian the impact of s 6(3)(b) on private bodies, the more reluctant the courts will be to interpret the concept of a public function generously. The following analysis of Strasbourg’s case-law reveals that the rights-stripping idea is unsustainable. If a body remains a non-governmental organisation through and through in Strasbourg regardless of the functions it performs, then it remains able to enforce its Convention rights – both under Art 34 and s 7 HRA – whether or not it performs what the HRA would regard as a public function. The next chapter examines the profound impact that this has on the nature and scope of the hybrid public authority concept.

A preliminary point should be made as to the burden of proof throughout the following analysis. Rights-stripping cannot simply be presumed. The onus lies on those who subscribe to the rights-stripping idea, or who believe Strasbourg to recognise a hybridity doctrine, to make a convincing case to that effect.[[858]](#footnote-858) Reaching too readily the conclusion that Strasbourg regards certain private bodies as governmental organisations brings with it the serious risk that those bodies will be denied Convention protection under s 7 HRA, when Strasbourg would itself regard them as victims entitled to file Convention claims. Hence, whilst this chapter makes the positive case that the selflessness principle underlies the public-private divide in Strasbourg, all it has to do for the specific purpose of defeating the rights-stripping argument is to demonstrate that there is no case to answer on that point.

Part C’s approach, then, is to analyse the governmental organisation jurisprudence with the aim of using the selflessness principle to rationalise what appears at first sight to be a plethora of confusing cases. This not only helps dispel the idea that a private person can become a governmental organisation in Strasbourg by performing a particular function; it also yields interesting insights into the nature of a governmental organisation in Strasbourg, and therefore to a core public authority under s 6 HRA. These will be briefly summarised at the end. The analysis of the governmental organisation jurisprudence proceeds in three stages: first, state responsibility cases; second, Art 34 cases; and third, the ECtHR’s rather idiosyncratic ruling in *Radio France* and subsequent cases that have applied it.

### State responsibility cases

A number of cases arise for consideration here. Two have specifically been said to evince a hybridity doctrine and will therefore be considered first. Other relevant cases that have escaped consideration in the existing literature are considered thereafter.

(1) *Costello-Roberts v United Kingdom*[[859]](#footnote-859)

This case, which concerned corporal punishment in a private school, has already been considered above. Helen Quane reads the case as indicating that a private body can become a governmental organisation by performing a particular function,[[860]](#footnote-860) but this view is mistaken. Although the precise ambit of the judgment may be difficult to discern for the reasons given above, it is nevertheless clear that it relates to private indirect, rather than direct, responsibility. Strasbourg has expressed this view in various subsequent rulings,[[861]](#footnote-861) including in a recent Grand Chamber judgment.[[862]](#footnote-862)

When the Court remarked in *Costello-Roberts* that ‘the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals’,[[863]](#footnote-863) it referred to *Van der Mussele v Belgium* to support its point.[[864]](#footnote-864) Here, a pupil advocate complained under Arts 4 and 1 of the First Protocol that he had been subjected to forced labour when he was compelled by the Order of Advocates, an institutionally independent professional regulator, to provide free legal services to indigent persons. Despite eventually finding that the Convention had not been breached, the ECtHR rejected the government’s prior contention that Belgium was not responsible for the actions of the Order of Advocates. *Van der Mussele* is itself a fairly cryptic case, but on inspection cannot be seen to evince a hybridity doctrine either. To support its conclusion on the state responsibility issue, the ECtHR made two main points. First, the obligation upon the state to provide legal assistance to indigent persons derived from Art 6 ECHR, and Belgium had chosen to ensure its compliance with that obligation by compelling the Order to compel advocates to undertake the work. This could not, the Court said, ‘relieve the Belgian state of the responsibilities it would have incurred… had it chosen to operate the system itself.’[[865]](#footnote-865) Secondly, the Order of Advocates was ‘associated with the exercise of judicial power’, created by legislation and ‘endowed with legal personality in public law’.[[866]](#footnote-866) The first point implies, along *Costello-Roberts* lines, that the Order of Advocates was a private body that engaged the state's responsibility by performing a function delegated to it by the state to ensure the state’s compliance with its Art 6 obligation to provide free legal assistance. The second point is significant because it suggests that the Order of Advocates was a body created and controlled to serve the public interest, which according to the selflessness principle would tend to indicate its status as a governmental organisation instead. The selflessness principle might therefore be thought capable of rationalising the ruling in an alternative sense. When taken together, points one and two might be thought to evince a hybridity doctrine by suggesting that the body was a governmental organisation *precisely because* it was a private person performing the ‘delegated’ function in question. In response, however, it is not clear that the two points advanced by the court were intended to be read in this way. At the very least, if *Van der Mussele* did clearly evince a hybridity doctrine, there would be a tension with *Costello-Roberts*, in which the Court relied on *Van der Mussele* but nevertheless decided the case on the basis of the private indirect responsibility principle. The Court in *Van der Mussele* should be taken, instead, as seeking to advance alternative arguments: that the body *either* engaged the state's responsibility under the private indirect responsibility principle by performing delegated Convention obligations, *or* that it did so as a governmental organisation under the direct responsibility principle by virtue of its status as a ‘selfless’ body created and controlled by the state to regulate the relevant arm of the Belgian legal profession.[[867]](#footnote-867)

Neither *Costello-Roberts* nor *Van der Mussele*, on which it relies, evince a hybridity doctrine in Strasbourg. Both cases are more convincingly seen as concerning the private indirect responsibility doctrine. Even though these cases can be accommodated under s 6(3)(b) because they imply that the state’s responsibility is triggered by the performance by the private wrongdoer of a particular function that the domestic courts could describe as public for the purpose of granting remedy against the wrongdoer in domestic law, they do not demonstrate that the wrongdoer *becomes* a governmental organisation. This is the key point for now.

(2) *Appleby v United Kingdom*[[868]](#footnote-868)

In *Appleby*, the applicants were environmental petitioners. Postel Ltd, a private company, refused them permission to petition in its shopping centre and they claimed breaches of the rights to freedom of speech and assembly under Arts 10 and 11 ECHR respectively. The applicants argued that Postel rendered the state directly responsible because the shopping centre had been built on public land and transferred into private ownership following approval by a government minister. The ECtHR rejected the argument, saying that it was ‘not persuaded that any element of State responsibility can be derived from the fact that a public development corporation transferred the property to Postel or that this was done with ministerial permission.’[[869]](#footnote-869) It then considered whether the state was responsible under the private indirect responsibility principle, concluding that it was not.[[870]](#footnote-870) Whereas Quane seems to interpret these remarks as implicitly accepting that a private body’s actions can sometimes engage the state’s responsibility under the direct responsibility principle,[[871]](#footnote-871) a far more natural reading of them is as rejecting that very idea. After all, this was what the Court decided on the facts: having observed that the alleged interference with the applicants’ rights was by an institutionally private actor (Postel’s purpose was ‘primarily the pursuit of private commercial interests’),[[872]](#footnote-872) the court was unmoved by further argument as to why that actor should nevertheless be regarded as a governmental organisation. Even if the Court did believe that a private body’s actions could theoretically engage the state’s responsibility other than through the private indirect responsibility principle, it gave no indication as to when this might occur. More significantly, however, Quane’s view that commercially-motivated organisations can engage the state’s responsibility as governmental organisations flatly contradicts two recent Strasbourg rulings, *Islamic Republic of Iran Shipping Lines v Turkey*[[873]](#footnote-873) and *Ukraine-Tyumen v Ukraine*,[[874]](#footnote-874) to the effect that bodies run as commercial businesses will be institutionally *private* in nature.[[875]](#footnote-875) Indeed, the idea that bodies possessing inherently self-serving objectives cannot be regarded as governmental organisations lies at the core of the selflessness principle, bolstering the idea that it underlies the remaining governmental organisation jurisprudence. It is no surprise that the selflessness principle also featured in the Grand Chamber’s recent analysis of the governmental organisation issue in *Kotov v Russia*,[[876]](#footnote-876) discussed below.

(3) *Kurt Nielsen v Denmark*[[877]](#footnote-877)

*Nielsen* is the first of three cases to have escaped academic discussion on the present issue. The applicant instituted domestic proceedings against three insurance companies, claiming that they were liable to compensate him following a car accident. Judgment was eventually given in the applicant’s favour but the proceedings lasted more than eight years, due largely to the tardiness of an expert witness, the National Board of Industrial Injuries (NBII), in assessing and reporting the extent of the applicant’s disability to the domestic courts. The ECtHR upheld the applicant’s claim that the delay breached his entitlement to a civil hearing within a reasonable time under Art 6(1) ECHR, agreeing with him, although Strasbourg also blamed the domestic courts for the delay,[[878]](#footnote-878) that the state could be responsible for the NBII’s behaviour:

‘[O]nly delays imputable to the relevant judicial and administrative authorities can justify a finding that a reasonable time has been exceeded… The Contracting Parties are, however, also responsible for delays attributable to public-law organs, like municipal authorities, which – although they are not organs of the State – perform official duties assigned to them by law…’[[879]](#footnote-879)

There is no suggestion in the ruling that this is an indirect responsibility case. The thrust is clearly that the state was directly responsible for the NBII’s behaviour. Whilst the ECtHR’s distinction between ‘organs of the state’ and ‘public-law organs’ may appear at first sight to mirror the distinction between ‘core’ and ‘hybrid’ public authorities drawn by s 6 HRA, it is highly doubtful that the above passage reveals a hybridity doctrine in Strasbourg. This is because the ECtHR evidently believes municipal (or local) authorities – bodies that have been classically regarded since the HRA’s inception as core or ‘obvious’ public authorities by courts,[[880]](#footnote-880) academics[[881]](#footnote-881) and government[[882]](#footnote-882) alike – to be examples of the ‘public-law organs’ to which it referred. It is highly unlikely that institutionally private bodies could qualify. There is little indication as to the NBII’s institutional motivation in *Nielsen*. However, the Court’s straightforward application of the governmental organisation concept to the NBII – a body which did not seem to be a self-serving private body and which was likened in nature by the court to a local authority – suggests that the NBII engaged the state’s responsibility under the direct responsibility principle, in keeping with the remaining body of Strasbourg’s governmental organisation jurisprudence, as a ‘selfless’ governmental organisation rather than as a private body performing governmental functions.

(4) *Novoseletskiy v Ukraine*[[883]](#footnote-883)

Here, the applicant was employed by the Melitopol State Teacher Training Institute (MSTTI), who granted him indefinite permission to occupy and use a state-owned flat on its books. Two months later the applicant resigned at the MSTTI and moved to Russia to work on his doctoral thesis. Apparently without notice, he and his wife were dispossessed of the flat in their absence and were forced to live with another family upon their return. The ECtHR upheld the applicant’s claim that there had been a breach of the right to a family life under Art 8 ECHR. It also found a breach of Art 1 of the First Protocol through the state’s failure to conduct an adequate investigation into the applicant’s complaint that a number of his personal effects had been removed from the flat.

In its analysis of the Art 8 issue, the Court observed that Art 8 can impose positive as well as negative obligations.[[884]](#footnote-884) Whilst the Court was unable to examine the MSTTI’s decision to dispossess the applicant since this fell outside of its jurisdiction *ratione temporis*,[[885]](#footnote-885) it nevertheless held that the state had breached its positive obligation through a combination of two factors:[[886]](#footnote-886) first, through the domestic courts’ failure to deal effectively with the applicant’s claim for possession of the flat;[[887]](#footnote-887) and second, through the MSTTI’s failure to investigate the applicant’s case with sufficient concern.[[888]](#footnote-888) Having observed that the MSTTI was state-owned and subject to supervision by the Ukrainian Ministry of Education or municipal councils in all decisions or actions relating to housing stock,[[889]](#footnote-889) the ECtHR stated that:

‘[T]he Institute performs “public duties” assigned to it by law and under the supervision of the authorities, namely the management and distribution of its part of the State housing stock, with the result that it can be considered as a “governmental organisation” [capable of engaging the state’s responsibility] within the meaning of the Court's case-law…’[[890]](#footnote-890)

Interestingly, *Novoseletskiy* appears to determine the MSTTI’s status as a governmental organisation in functional terms, by reference to the particular activity of managing and distributing housing stock that it performed. This might be thought at first sight to suggest the existence of a hybridity doctrine: because the functions rather than the body’s institutional nature determine its status, so the argument might go, governmental organisation status might apply equally to institutionally private bodies performing these functions as to public ones. As attractive as this reading of the judgment might be to those keen to find a European interpretative aid to the meaning of s 6(3)(b), however, it is a difficult reading to adopt. First, it is by no means evident, as it would have to be for *Novoseletskiy* to be a clear authority in this way, that the MSTTI was an institutionally private body with the ability to serve itself over the interests of the public in domestic law: the ECtHR observed that it was a ‘State-owned higher education establishment… under the direct [and general] supervision of the Ukrainian Ministry of Education’.[[891]](#footnote-891) The best way to understand the judgment is to rationalise it using the selflessness principle. The MSTTI was a governmental organisation because it was a constitutionally selfless body created and controlled by the state to serve the public interest rather than itself. Second, even if the MSTTI did become a governmental organisation by performing a given function, it is important to remember that the MSTTI’s behaviour was only one component of the breach by the state of its positive obligations. The ECtHR also reproached the domestic courts, so the case was not clearly decided on the basis of the MSTTI’s behaviour as a governmental organisation anyway. Third, even if the case did evince a hybridity doctrine, Strasbourg’s iteration of this doctrine would sit uncomfortably with s 6(3)(b) itself. Although Strasbourg’s analysis may look functional, the factors the ECtHR deploys to support its conclusion that the MSTTI was a governmental organisation (state ownership and control) were classically institutional, related as they were to the proximity between the Ministry of Education and the MSTTI rather than the nature of the function performed by the MSTTI as such. The focus given by Parliament to s 6(3)(b) is *functional*, however, as the courts have recognised.[[892]](#footnote-892) This is apparent not just from the language Parliament uses but also by the functional nature of the LACPA, which is a key aspect of the constitutional backdrop against which the HRA was enacted. The result is that even were it to exist, Strasbourg’s hybridity doctrine might be difficult to accommodate convincingly under the HRA anyway.

(5) *Woš v Poland*[[893]](#footnote-893)

In 1991, Germany and Poland concluded an agreement under which Germany would pay a sum of compensation to Poland to distribute to victims of Nazi persecution during World War Two. The money was distributed by the Polish German Reconciliation Fund (PGRF), a body created by a Polish government minister acting under statute. The applicant was subjected to forced labour in Poland during the War and applied to the PGRF for compensation. He claimed that the PGRF had incorrectly calculated his entitlement. After unsuccessful domestic action, he alleged in Strasbourg that there had been an infringement of the right to fair determination of his civil rights under Art 6(1) ECHR.

The admissibility and merits decisions must be read together. At the admissibility stage, the applicant argued that there was no effective system of appeal in place against the PGRF’s decisions *and* that its decisions were unfair.[[894]](#footnote-894) The preliminary issue therefore arose as to the state’s responsibility for the PGRF’s actions. The ECtHR held that the state was responsible. It drew attention to ‘the manner in which the governing and adjudicating bodies of the Foundation were created’,[[895]](#footnote-895) observing ‘in particular that the founder (a government minister) was empowered under statute to appoint and dismiss at his discretion all members of the Foundation’s supervisory board and management board,’[[896]](#footnote-896) and that ‘a certain degree of control and supervision over the Foundation was exercised by the Minister of the State Treasury’.[[897]](#footnote-897) Therefore, although the state did not exercise a ‘pervasive influence in the daily operations of the [Foundation],’[[898]](#footnote-898) the government nevertheless possessed ‘substantial means of influencing the Foundation’s operations’[[899]](#footnote-899) and its role was ‘crucial in establishing the overall framework within which the Foundation operated.’[[900]](#footnote-900) The Court then added that ‘the exercise of State powers which affects Convention rights and freedoms raises an issue of State responsibility regardless of the form in which these powers happen to be exercised, be it for instance by a body whose activities are regulated by private law’,[[901]](#footnote-901) stating that ‘such an arrangement cannot relieve the… State of the responsibilities it would have incurred had it chosen to discharge these obligations itself’.[[902]](#footnote-902)

Whilst the ECtHR broadly endorsed this analysis in the merits decision,[[903]](#footnote-903) it found Art 6(1) to have been violated by ‘the absolute exclusion of judicial review in respect of the decisions issued by the Foundation’[[904]](#footnote-904) rather than the actions of the PGRF as such. The case was therefore one of *general* indirect responsibility, centring around the state’s failures. Strictly speaking the PGRF’s capacity to engage the state’s responsibility was therefore irrelevant to the eventual conclusion. In any event, however, *Woš* does not stand as evidence for the existence of a hybridity doctrine. The Court’s observation that a body regulated by private law may engage the state’s responsibility by exercising state powers may seem to resemble the distinction between core and hybrid public authorities under s 6 HRA, but the broader tenor of the ruling places the emphasis quite clearly on the private indirect responsibility principle instead – a view confirmed by the Grand Chamber in *Kotov*.[[905]](#footnote-905) Citing both *Costello-Roberts* and *Van der Mussele*, both of which this chapter has argued concern private indirect responsibility, the court in *Woš* referred to the idea that the delegation of state powers to a private body can trigger a positive obligation on the state’s part to regulate that body.[[906]](#footnote-906) It also emphasised in its conclusion on the issue that Poland had ‘decided to delegate its obligations arising out of international agreements to a body operating under private law.’[[907]](#footnote-907) It is not clear why the Court felt the need to make such extensive reference to the PGRF’s institutional characteristics in its state responsibility analysis when the *Costello-Roberts* principle seems to render this unnecessary, but a possible explanation is that the Court was merely adducing the institutional links between the government and the PGRF as general contextual evidence to confirm that a delegation had indeed taken place. Strasbourg’s delegation doctrine under the private indirect responsibility principle is still fairly nascent and primitive, as discussed above. In these circumstances it is not beyond the realms of possibility that the ECtHR erroneously believed institutional factors to matter. This is a problem that has long gripped the domestic courts in both the judicial review and HRA contexts, after all. [[908]](#footnote-908)

(6) *Sychev v Ukraine*[[909]](#footnote-909)

The applicant was awarded judgment in domestic proceedings against the Lenina Coal Mine (LCM), a state-owned company, for arrears in industrial disability benefit. The writ of execution was passed to the Gorlovka City Bailiffs’ Service for enforcement. LCM was later declared bankrupt and the Regional Court of Arbitration ordered the Bailiffs’ Service to transfer the writ to LCM’s liquidation commission, which was comprised in part of representatives of several state-owned companies who were LCM’s principal creditors. The judgment remained unenforced for a number of years. The ECtHR concluded that the state’s responsibility had been engaged and that the delay amounted to a violation of Arts 6(1) and 13 ECHR. Arriving at its conclusion on the state responsibility point, the ECtHR stated as follows:

‘The Court does not find it necessary to embark on a discussion of whether the liquidation commission was or was not itself a State authority for the purposes of Article 34 § 1 of the Convention. It suffices to note that the body in question exercised certain State powers at least as regards the execution of court judgments… [T]he exercise of State powers which affects Convention rights and freedoms raises an issue of State responsibility regardless of the form in which these powers happen to be exercised, be it for instance by a body whose activities are regulated by private law (see *Wos* *v. Poland* (dec.), no. 22860/02, ECHR 2005-...).’[[910]](#footnote-910)

At first sight, the reference to Art 34 in this paragraph is significant. It appears to suggest that the court is concerned with the governmental organisation concept, which would render the distinction that it then draws between state bodies and bodies exercising state powers illuminating. It could be seen as reflecting the HRA’s distinction between core public authorities and hybrid public authorities, which would arguably render *Sychev* clear authority in favour of the idea that private bodies can become governmental organisations when performing certain functions.

The court’s remarks must be seen in context, however. The overall thrust of the court’s ruling on the state responsibility point is that it was *unnecessary* to decide whether the liquidation commission was a governmental organisation*, because* the commission exercised state powers and could therefore be said to have engaged the state’s responsibility under the private indirect responsibility principle instead. The court cited *Costello-Roberts* and *Woš*, both of which concern positive obligations rather than direct responsibility, as authority for the proposition that ‘The state cannot absolve itself from responsibility… by delegating its obligations to private bodies or individuals.’[[911]](#footnote-911) The court then continued its focus on positive obligations, emphasising the state’s failure for ‘formally putting the activity of the liquidation commission under the Court of Arbitration’s supervision, [but providing] no sanctions for its failure to act’;[[912]](#footnote-912) and concluding that ‘In the light of the above facts and considerations the… inactivity in the execution of a court judgment was due to the State’s failure to establish an effective system of enforcement’.[[913]](#footnote-913)

Like *Costello-Roberts* and *Woš* before it, then, *Sychev* is an indirect responsibility case – a view that the Grand Chamber shared in *Kotov*,[[914]](#footnote-914) discussed next. *Sychev* further evidences the idea that the state’s responsibility can be triggered by the actions of a private body to whom the state has delegated ‘state powers’ affecting Convention rights. The concept of state powers is defined no further and so *Sychev* does little to clarify the thrust of Strasbourg’s case-law in this area, but it is palpably clear that *Sychev* does not reveal a hybridity doctrine as it might initially appear to do.

(7) *Kotov v Russia*

The applicant in *Kotov* was awarded judgment in domestic law against his bank, which later became insolvent. The applicant claimed that the manner in which the liquidator distributed the bank’s assets amongst its creditors was unlawful. After unsuccessful domestic action he alleged a breach by the state of Art 1 of the First Protocol. The applicant lost his claim. Overturning the ECtHR’s first instance decision,[[915]](#footnote-915) the Grand Chamber held that, whilst the state was under a positive obligation to put in place a framework allowing those in the applicant’s position to assert their rights effectively, the framework was adequate in this case.

Having noted the basic distinction drawn in this chapter between direct and private indirect responsibility, the Grand Chamber observed that the status of insolvency liquidators for state responsibility purposes ‘requires some clarification’.[[916]](#footnote-916) *Sychev*, it said, determined the state’s responsibility by reference to the positive obligations doctrine, as observed above, rather than by asking ‘whether the liquidation committee was a “public authority”’.[[917]](#footnote-917) As its eventual focus on the positive obligations doctrine might suggest, the Grand Chamber concluded that the liquidator was ‘not a State agent’,[[918]](#footnote-918) with the result that the state ‘cannot be held directly responsible for his wrongful acts’.[[919]](#footnote-919) Although the liquidator’s appointment was confirmed by a judge, the liquidator had ‘very limited powers’[[920]](#footnote-920) – in particular, ‘no coercive or regulatory power in respect of third parties’[[921]](#footnote-921) – and thus ‘enjoyed a considerable amount of operational and institutional independence’.[[922]](#footnote-922) Clearly echoing the selflessness principle, the Court also drew attention to the lack of any public-interest objectives on the liquidator’s part: he ‘was a private individual employed by the creditors’ body, which was a self-interested entity’;[[923]](#footnote-923) and his ‘task was… similar to that of any other private businessman appointed by his own clients, in this case the creditors, to best serve their – and ultimately his own – interests.’[[924]](#footnote-924)

This endorsement of the selflessness principle is *Kotov*’s main point of significance for present purposes. The twist, however, is the tension between Strasbourg’s clear view that the liquidator was acting for self-interested reasons, on the one hand, and its lengthy analysis, on the other, of the various other factors – special powers and a lack of independence – that it thought might suggest that the liquidator could be a governmental organisation. Instead of noting the liquidator’s selfishness and stopping there, Strasbourg went on. Is *Kotov* therefore evidence that institutionally private, self-interested bodies *can* become governmental organisations if the various other factors mentioned by the Grand Chamber in its judgment are present?

The answer is probably not. First, it should be stressed that the Grand Chamber *departed* from the First Section’s ruling that the liquidator ‘may be regarded as a representative of the State’.[[925]](#footnote-925) The thrust of the ruling was therefore to lay to rest any notion of a hybridity doctrine rather than to endorse it through the back door, by some analytical sleight of hand. Second, although analytically it would have been enough to note the liquidator’s selfishness alone, there is no harm in being thorough. This was the Grand Chamber overruling the First Section’s judgment, after all. The Grand Chamber’s reference to the lack, on the facts, of the additional factors should be read as confirming the liquidator’s selfishness rather than as suggesting that private bodies can become governmental organisations if those factors are present – especially since the possession of special powers and the degree of independence enjoyed by the body are both relevant factors in determining whether a body is selfless or selfish, as noted above. Third, even if the Grand Chamber had been attempting to endorse a hybridity doctrine, the remarks are what domestic lawyers would regard as *obiter dicta*. They were not an integral part of the reasoning because the state responsibility point was determined on the alternative footing of private indirect responsibility. Confirmation of Strasbourg’s hybridity doctrine, even were it to exist, would therefore have to wait for another day.

### Article 34 cases

It is evident then that whilst some of the state responsibility cases are difficult to interpret, none of them clearly evince a hybridity doctrine. This is also true of those cases dealing with the meaning of a governmental organisation under Art 34 ECHR. Four cases have already been considered in the existing literature. Three of them are considered below. The fourth, *Radio France v France*,[[926]](#footnote-926) will be considered separately in the following section, along with the governmental organisation cases that have since relied on it.

(1) *Holy Monasteries v Greece*[[927]](#footnote-927)

The applicant monasteries alleged various breaches of the Convention after the Greek state sought to expropriate property belonging to them. The government raised the preliminary objection that the monasteries were governmental organisations precluded from filing an application under Art 25 (now Art 34) ECHR. Rejecting this argument and eventually finding that Art 1 of the First Protocol and Art 6 ECHR had been violated, the ECtHR stated as follows:

‘[T]he Court notes at the outset that the applicant monasteries do not exercise governmental powers… [They are] ascetic religious institutions… Their objectives – essentially ecclesiastical and spiritual ones, but also cultural and social ones in some cases – are not such as to enable them to be classed with governmental organisations established for public-administration purposes. From the classification as public-law entities it may be inferred only that the legislature – on account of the special links between the monasteries and the State – wished to afford them the same legal protection *vis-à-vis* third parties as was accorded to other public-law entities. Furthermore, the monastery councils’ only power consists in making rules concerning the organisation and furtherance of spiritual life and the internal administration of each monastery… The monasteries come under the spiritual supervision of the local archbishop… not under the supervision of the State, and they are accordingly entities distinct from the State, of which they are completely independent.’[[928]](#footnote-928)

Quane believes *Holy Monasteries* to suggest ‘several factors that should be taken into account in determining the status of a… [hybrid public authority under s 6(3)(b) HRA], namely, its objectives, state supervision over its activities, and the exercise of governmental powers.’[[929]](#footnote-929) This, she says, is for two reasons: first, because Art 34 jurisprudence ‘was used in *Aston Cantlow* to help interpret the concept of a functional public authority under the HRA’;[[930]](#footnote-930) and second, because the ECtHR ‘recognises [in *Holy Monasteries*] that governmental organisations include not only the central organs of the state but also bodies that perform public functions.’[[931]](#footnote-931)

Quane’s first point has been discounted above: their Lordships’ remarks in *Aston Cantlow* have been misread. Her second is also unpersuasive. Whilst the ECtHR’s use of the term ‘governmental powers’ in *Holy Monasteries* may loosely resemble the term ‘functions of a public nature’ under s 6(3)(b), the two phrases are not identical and may well have different meanings. In any event, however, it is doubtful that Strasbourg was intending to signal that private bodies can become governmental organisations upon the performance of certain functions. Strasbourg appears to employ functional phrases like ‘governmental powers’ – even the more pertinent phrase ‘public functions’ – as a shorthand term to describe the activities of bodies that are classically governmental, not as a legal term of art, in the way Quane presumes, to determine when an institutionally private body will become a governmental organisation. In the *16 Austrian Communes* case, for instance, the Commission held that ‘local government organisations such as communes, which exercise public functions on behalf of the State,’ were ‘clearly’ governmental organisations under Art 34.[[932]](#footnote-932)

*Holy Monasteries* is also significant because it lends tacit support to the idea that the selflessness principle underlies Strasbourg’s governmental organisation jurisprudence. Taken together, the factors given above by Strasbourg to support its conclusion point towards the idea that the monasteries were non-governmental organisations because they were constitutionally permitted to act for their own motivations rather than being required to serve the public interest. In particular, the ECtHR’s reference to the monasteries’ ‘ascetic’ religious nature seems to emphasise the voluntariness of their activities and thus, correspondingly with the selflessness principle, the idea that they enjoy a general legal freedom to choose their own motivations. Moreover, the ECtHR refers in its analysis to two of the principal factors that Oliver observes will be relevant to determining whether a general duty to serve the public interest exists: the possession of coercive powers, and institutional independence. The latter is not of itself sufficient to demonstrate that a body is institutionally private. Many typically core bodies like statutory regulators, for example, are institutionally independent yet exist to serve the public interest. But there is an obvious correlation at least between independence and ‘selfishness’: the more tightly a body is controlled by the state, the less likely it is to be constitutionally permitted to act for its own motivations. The ECtHR’s observation that the monasteries were institutions whose objectives were ecclesiastical and spiritual rather than of ‘public administration’ is also illuminating, because it reinforces the selflessness principle by emphasising the purpose of governmental organisations as *providers* to and *organisers* of the public. In other words, their duties are to others.

(2) *Consejo General v Spain*[[933]](#footnote-933)and *RENFE v Spain*[[934]](#footnote-934)

The applicant in *Consejo General*, the General Council of Official Economists’ Associations (GCOEA), alleged the violation of Arts 6, 8 and 13 ECHR following unsuccessful domestic attempts to challenge regulations relating to the use of tax registration numbers and tax declarations. The European Commission of Human Rights upheld the government’s objection that the GCOEA was a governmental organisation incapable of filing a claim under Art 25 (now Art 34) and declared the complaint inadmissible:

‘[T]he General Councils of Professional Associations are public-law corporations which perform official duties assigned to them by the Constitution and the legislation… [The governmental organisation concept under Art 34] excludes both governments and the central organs of the state [from filing applications in Strasbourg]. Where powers are distributed along decentralised lines, no national authority exercising public functions can introduce an application. It is clear… [that General Councils] fall into this category.’[[935]](#footnote-935)

In *RENFE*, a state-controlled railway operator was ordered to pay compensation in domestic proceedings in circumstances that it contended gave rise to a breach of Art 6(1) ECHR. Although the applicant had a distinct legal personality and enjoyed administrative independence from the state, the Commission held that the applicant was a governmental organisation precluded by Art 34 from filing a Convention claim. In support of its observation, it drew attention to: the applicant’s status as a ‘public law corporation, created by… [domestic law] to run the state rail network as an industrial company’;[[936]](#footnote-936) the fact that its board of directors was accountable to the government;[[937]](#footnote-937) that it was, ‘for the time being, the only undertaking with a licence to manage, direct and administer the state railways, with a certain public-service role in the way it does so’;[[938]](#footnote-938) and that ‘the applicant’s internal structure and manner of conducting its business’ were regulated by law.[[939]](#footnote-939)

Quane believes both *Consejo General* and *RENFE* (and *Radio France*, discussed in detail in the next section) to be relevant to the interpretation of ‘functions of a public nature’ under s 6(3)(b) HRA. Both cases, she argues, indicate a body’s status as a governmental organisation ‘when it has special powers’, performs ‘official duties’ or is ‘subject to a high degree of control by the state.’[[940]](#footnote-940) Whilst this is a fairly accurate account of the factors that Strasbourg typically considers when determining whether a body is a governmental organisation, Quane errs by presuming from these cases that a *private* body can become a governmental organisation if it bears these characteristics. My rejoinder to Quane is on two levels. First, although the Commission uses the term ‘public functions’ in *Consejo General*, which resembles the language used under s 6(3)(b), this reveals very little. As noted above, Strasbourg tends to employ this and similar terms as shorthand to describe the activities of typically governmental organisations rather than technically, as under s 6(3)(b) HRA. This is also how the Commission seemed to intend the phrase to be used in *Consejo General* itself: if it did intend a hybridity doctrine, it skimmed the pivotal part of its ruling by omitting to specify which particular function or functions triggered the GCOEA’s change in status from private body to governmental organisation. Second, *Consejo General* exposes a broader problem with recognising a hybridity doctrine, as Quane acknowledges. The Commission stated that the GCOEA, as a governmental organisation, ‘could not *at any time*’ file an application in Strasbourg,[[941]](#footnote-941) which implies one of two things: either that Strasbourg’s hybridity doctrine is too crude to cope with ‘changing social conditions and attitudes’[[942]](#footnote-942) towards governance because it appears to preclude a hybrid governmental organisation from ever invoking its Convention rights on the grounds that it sometimes happens to exercise public or governmental functions; *or*, on the other hand, that there is no such doctrine at all, and the governmental organisation concept in Strasbourg applies only to what s 6 HRA would regard as core public authorities.[[943]](#footnote-943) Quane argues that the former conclusion must follow, urging Strasbourg to reconsider its remarks in *Consejo General*. The latter conclusion, she says, sits uncomfortably with *dicta* in *Aston Cantlow* to the effect that the core public authority category should be narrowly construed, for fear that a wider interpretation would expand the category of bodies who must comply with the Convention at all times and are precluded from claiming their own Convention rights.[[944]](#footnote-944) But especially given the arguments already advanced in this chapter, the latter conclusion is by far the preferable one. It is important to remember that a number of other cases have also expressed the view that governmental organisations can never, at any time, invoke their own Convention rights.[[945]](#footnote-945) Far from urging the reconsideration of *dicta* in a single decision, therefore, Quane is seeking in reality to rewrite an established body of jurisprudence in order to make her point. Strasbourg’s case-law should not be shoehorned into s 6(3)(b) in this way.

The best way to read both *Consejo General* and *RENFE*, like other cases before them, is according to the selflessness principle. Both the GCOEA in the former case and the state-controlled railway operator in the latter were ‘selfless’ bodies who lacked the ability in domestic law to further their own interests over those of the public: the GCOEA was a public-law organisation assigned the official duty of professional regulation by the Spanish Constitution and by domestic law, as the Commission noted; and the railway operator in *RENFE* was indirectly democratically accountable to the public via the government and was created and controlled by the state to provide a public service that private-sector companies were prohibited from providing.

### *Radio France* and beyond

The *Radio France* ruling is significant for two reasons: first, because the ECtHR uses language that has been said to suggest the existence of a hybridity doctrine; and second, because the ruling is not as readily explicable with reference to the selflessness principle as others are, so it requires separate analysis – alongside other cases that have relied on it.

In *Radio France*, the applicants were the organisation itself, its editor and a journalist. They aired a repeat newsflash alleging that the former deputy mayor of Paris had been complicit in war crimes committed by the Nazis in occupied France during World War Two. Having been convicted of criminal defamation in domestic law, they claimed breaches of the rights to freedom of expression (Art 10), from retroactive criminal punishment (Art 7) and to a fair trial (Art 6) in Strasbourg. In its merits decision the ECtHR ruled that no Convention violation had occurred, but it rejected the government’s prior contention that Radio France, as a state-owned broadcaster, was a governmental organisation precluded by Art 34 from filing a Convention claim. The ECtHR began its analysis of the admissibility point by stating that governmental organisations encompass not only ‘the central organs of the State, but also… decentralised authorities that exercise “public functions”, regardless of their autonomy *vis-à-vis* the central organs’.[[946]](#footnote-946) Having examined *Holy Monasteries*, it continued:

‘[T]he category of “governmental organisation” includes legal entities which participate in the exercise of governmental powers or run a public service under government control. In order to determine whether any given legal person other than a territorial authority falls within that category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities.’[[947]](#footnote-947)

Quane takes the above distinction between ‘territorial’ authorities and bodies ‘other than’ territorial authorities to mirror the distinction between core and hybrid public authorities under s 6 HRA,[[948]](#footnote-948) but this presumes too much: the ECtHR makes no attempt to explain the distinction it draws; and the mere use by Strasbourg of HRA-like terminology generally reveals very little, as argued above.

The ruling is admittedly difficult to interpret convincingly. This is because Radio France’s institutional characteristics suggest that it should be regarded as a constitutionally selfless governmental organisation created and controlled to serve the public interest; yet the ECtHR finds, with institutional independence seemingly the critical factor, that it is able to file a Convention claim under Art 34. Despite observing that the state ‘holds all of the capital in Radio France’,[[949]](#footnote-949) that Radio France’s ‘memorandum and articles of association are approved by decree’[[950]](#footnote-950) and that it ‘performs public-service missions in the general interest’,[[951]](#footnote-951) the Court nevertheless went on to find that the broadcaster was a non-governmental organisation. It observed that Radio France ‘does not come under the aegis of the State, but is under the control of the CSA [*Le Conseil superieur de l’audiovisuel*, an independent broadcasting regulator]’,[[952]](#footnote-952) and that only a minority of its board members were state representatives.[[953]](#footnote-953) Given also that Radio France lacked a monopoly (it operated instead in a competitive environment) or any special powers ‘beyond those conferred by ordinary law’,[[954]](#footnote-954) it concluded that ‘the legislature has devised a framework… plainly designed to guarantee its editorial independence and… institutional autonomy’.[[955]](#footnote-955)

Two superficially attractive interpretations of the ruling can be discounted. The first, and perhaps the most obvious, takes the ECtHR to have held that the degree of Radio France’s institutional independence rendered it a constitutionally ‘selfish’ body rather than a ‘selfless’ one required to serve the public interest. Whilst this tends to sit uneasily with the various observations made by the Court (above) to the effect that Radio France was entirely state-owned and saddled with various public-interest obligations, it enjoys a broad fit with Strasbourg’s remaining case-law by maintaining the selflessness principle as the guiding factor in this area. It also gains a certain level of support from some of the remaining factors given by the Court to support its conclusion: that Radio France lacked any coercive powers, which are commonly possessed by typically public bodies;[[956]](#footnote-956) and that it operated in a competitive market, which may have required it to act more like a private, profit-making commercial organisation than a public-service body in order to survive. As against the latter point however is the Court’s observation that Radio France ‘depends to a considerable extent on the State for its financing’,[[957]](#footnote-957) rather than on private profit. Whilst this first interpretation of the ruling is therefore plausible, it is not entirely comfortable. The second, alternative interpretation takes the ECtHR to have held straightforwardly that Radio France’s institutional independence alone rendered it a non-governmental organisation. After all, as seen above, there is a at least some link between institutional independence and private behaviour. However, this second interpretation is difficult to stomach for the reason that it signals a departure from the selflessness principle in favour of replacing that principle with institutional autonomy as the touchstone for the meaning of a governmental organisation. Not only would this be difficult to square with the numerous governmental organisation cases that this chapter has argued reveal the selflessness principle at work, but Strasbourg has also frequently indicated that institutional independence cannot, without more, render a body a non-governmental organisation. In *Danderyds Kommun v Sweden*, for example, the ECtHR held that local municipalities, as ‘decentralised authorities that exercise public functions,’ were governmental organisations ‘notwithstanding the extent of their autonomy *vis-à-vis* the central organs.’[[958]](#footnote-958)

The third and preferable reading of *Radio France*, then, is as an exception to the selflessness principle based on public policy – an exception allowing a media broadcaster that would otherwise be a governmental organisation to be regarded as a non-governmental organisation for the purpose of allowing it to enforce its Convention right to free expression. The particular and fundamental importance of a free press has been recognised domestically[[959]](#footnote-959) and by Strasbourg,[[960]](#footnote-960) and the ECtHR was evidently concerned that Radio France should not be precluded from enforcing its Art 10 rights. In particular, the Court emphasised that its conclusion on Radio France’s status dovetailed with Recommendation No. R (96) 10 of the Committee of Ministers of the Council of Europe to member States on the guarantee of the independence of public service broadcasting, ‘whose recitals reiterate that the independence of the media is essential for the functioning of a democratic society’.[[961]](#footnote-961)

This is not an interpretation without difficulty, however. Despite the importance of a free press, it is difficult to see why media freedom especially warrants a deviation by Strasbourg from its existing case-law. *Radio France* itself appears to blur the edges of the public policy exception in any event, because the Court’s classification of Radio France as a non-governmental organisation under Art 34 enabled it to deploy not just Art 10 but *other* Convention rights (Arts 6 and 7), too. Moreover, there is as yet no clear endorsement of this reading by Strasbourg. *Radio France* has only been explored in a handful of media freedom cases, in none of which are the facts directly analogous or is there an attempt by the ECtHR to explore the meaning of *Radio France* in detail. It was applied in *Österreichischer Rundfunk v Austria*,[[962]](#footnote-962) where the ECtHR held that a public broadcaster could mount an Art 10 claim, but *Rundfunk* is easier to reconcile with the selflessness principle because the broadcaster was not as obviously created by law and subject to particular obligations to serve the public interest as Radio France was. Also, in *Mackay and BBC Scotland v United Kingdom*,[[963]](#footnote-963) the ECtHR was content to rely in part on *Radio France* ‘to proceed on the basis that BBC Scotland can be considered to be a victim’, but there was no real analysis of the Art 34 issue: the UK conceded that the BBC could bring a claim. Yet even in view of these difficulties, however, the public-policy reading of *Radio France* is still preferable to either of the first two. Significantly, it involves confining *Radio France* and its implications to its particular facts. Unlike the second interpretation above, for instance, it does not involve supplanting the selflessness principle with a different underlying principle; and nor would it necessarily imply, as it would if Radio France were not seen as an exceptional case, that it and similar broadcasters were also non-governmental organisations for the parallel purpose of state responsibility. With this in mind, *Radio France* would therefore represent a fact-based exception rather than a bastardisation of the existing *law*.

#### Subsequent cases

Finally, it should be noted that *Radio France* has also been applied in a number of significant cases outwith the media freedom context. These cases all contain the common theme of the state disclaiming responsibility for the actions of a body which is partially or even wholly state-owned, but which is a separate legal entity standing distinct from the state in domestic law. Although there is one notable exception in the form of *Saliyev v Russia*,[[964]](#footnote-964) which will be explored, these cases in turn concern what can be termed the ‘state debt’ issue. The state debt cases are a family of cases deriving from the Court’s ruling in *Mykhaylenky v Ukraine*.[[965]](#footnote-965) They concern the state’s responsibility for state-owned companies that are unable to meet domestic debt judgments against them. The applicants in Strasbourg are creditors who claim breaches of Art 1 of the First Protocol and/or Art 6 ECHR after their domestic judgments go unsatisfied for long periods of time.

A lengthy analysis of the apparent cornucopia of significant rulings in which *Radio France* has been applied is unnecessary. It suffices to note that they are relevant for two reasons. First, the ECtHR’s findings in the state debt cases further bolster one of the key arguments made in this chapter – that Strasbourg does not recognise a hybridity doctrine. This is because they hold that ‘It is not open to a State authority to cite lack of funds as an excuse for not honouring a judgment.’[[966]](#footnote-966) Hence, if private bodies *do* become governmental organisations – state authorities – upon the performance of certain functions, the state debt cases would appear to impose upon the state a rather extreme Convention obligation: to bail those bodies out in the event that they become unable to meet judgments against them, at least to the extent that the bailout relates to the particular function that is said to render them a governmental organisation. This would have profound implications for the state in relation to its dealings with the various organisations that have been taken by others to be ‘hybrid’ governmental organisations in Strasbourg. Private schools, professional regulators and utilities companies would all have to be given access to contingency funds by the state. Rendering the state directly liable for the Convention violations of these bodies would be one thing, but imposing upon states a *de facto* obligation to provide them with financial bailouts in the event that they suffer hardship would be quite another. The sheer number of bodies to whom this obligation would appear to apply would also undermine Strasbourg’s clear view that the ‘State cannot be held responsible for the obligations of a private establishment which, having become insolvent, is no longer able to pay off its debts.’[[967]](#footnote-967) The better view, as this chapter has stressed throughout, is that there is no hybridity doctrine in Strasbourg.

Second, *Saliyev* and the state debt cases, taken together, are significant because they have a potentially muddying effect on the governmental organisation jurisprudence if taken out of context. They therefore call for explanation. Although close analysis reveals *Radio France* as something of a fact-specific anomaly, the ECtHR’s relatively comprehensive analysis of prior Strasbourg rulings in that case seems to have made it a popular starting point for the Court in its rehearsal of the relevant state responsibility principles in subsequent cases. The side-effect is that isolated passages from *Radio France* now tend to be cited and applied without proper consideration of the meaning of the judgment itself. The sheer number of subsequent state debt cases perpetuating this tendency generates a risk that the meaning of what had been a relatively well-settled area of law prior to *Radio France* will be distorted.

In *Mykhaylenky v Ukraine*,[[968]](#footnote-968) the applicants instituted domestic proceedings against their former employer, a state-owned construction company called Atomspetsbud. Their domestic judgments went unsatisfied for periods of between three and seven years. The ECtHR upheld the applicants’ claim that the delay in satisfaction amounted to a breach of Arts 6(1) ECHR and Art 1 of the First Protocol. The Court drew on various factors to support its conclusion that the state was liable for Atomspetsbud’s failure to pay.[[969]](#footnote-969) These related principally to the lack of institutional independence enjoyed by the company, given that it ‘conducted its activities in the Chernobyl zone of compulsory evacuation, which is placed under strict governmental control on account of environmental and public health considerations’,[[970]](#footnote-970) and that the company, aside from being state-owned, had been managed by the Ministry of Energy since 1998.[[971]](#footnote-971) The Court concluded as follows:

‘[T]he Government have not demonstrated that Atomspetsbud enjoyed sufficient institutional and operational independence from the State to absolve the latter from responsibility under the Convention for its acts and omissions (see, *mutatis mutandis* – and with reference to Article 34 of the Convention – [*Radio France v France*]…).’[[972]](#footnote-972)

*Mykhaylenky* risks giving the impression that institutional and operational independence is the touchstone for the meaning of a governmental organisation. A number of cases have since relied on it, confounding the problem. For instance, in *Lisyanskiy v Ukraine*,[[973]](#footnote-973) in which the ECtHR ruled in similar circumstances to *Mykhaylenky* that the delay by the state-owned Artema Coal Mine in satisfying debt judgments against it amounted to a violation of Art 6(1) ECHR, the Court baldly stated that:

‘[A]s in the *Mykhaylenky and Others v Ukraine* case (see, nos. 35091/02 and following, §§ 44-45, ECHR 2004-...), the Government have failed to demonstrate that the debtor company enjoyed sufficient institutional and operational independence from the State to absolve it from liability under the Convention for its acts and omissions.’[[974]](#footnote-974)

*Saliyev v Russia* is a similar case, albeit with slightly different facts. Here, the applicant had written an article alleging high-level corruption by a Moscow official. The municipal newspaper had initially begun to publish the article but then mysteriously withdrew its print-run after an order by the editor-in-chief. The applicant successfully claimed that this constituted a breach of his right to freedom of expression under Art 10 ECHR. The ECtHR rejected the government’s claim that the state could not be directly responsible for the municipal paper’s actions. The newspaper represented the municipality, which in turn was an organ of the state.[[975]](#footnote-975) Having cited the relevant passages from *Radio France* and *Rundfunk*, the ECtHR noted that the newspaper ‘was incorporated as a separate legal entity and, in theory, its editorial board enjoyed a certain degree of freedom in deciding what to publish’.[[976]](#footnote-976) However, it concluded that the newspaper’s independence ‘was severely limited by the existence of strong institutional and economic links with the municipality and by the constraints attached to the use of its assets and property.’[[977]](#footnote-977) It noted that the paper:

‘was set up to provide a public service (informing the population about official and other events in the town)… All of its real property and equipment belonged to the municipality. The editor-in-chief was appointed and paid by the municipality. Although in theory the newspaper was allowed to have independent sources of income (from advertising, for instance), they were of marginal importance and the newspaper existed thanks to the municipality's funding. Moreover, the municipality had the right to shape the newspaper's editorial policy, at least regarding “strategic” issues.’[[978]](#footnote-978)

Despite the suggestion in *Saliyev* and the state debt cases that independence plays a central role in the meaning of a governmental organisation, this cannot be what Strasbourg is saying. To those who might be tempted to think that *Saliyev* and the state debt cases suggest a change the law in this area, three points may be made. First, whilst the degree of independence enjoyed by a body will have *some* link to its status, it cannot be the governmental organisation concept’s touchstone. For one, this would conflict with the various cases, seen above, in which Strasbourg has indicated as much. Second, even if Strasbourg had wanted to replace the selflessness principle with a guiding factor based simply on institutional autonomy, one would have expected some attempt on the European Court’s part to explain why the previous line of case-law was wrong. Third, and as an aid to understanding *Saliyev* and the state debt cases more clearly, there is a strong case for regarding these cases as *sui generis* in any event, due to the specificity of the point at stake. As observed above, all of them concern attempts by the state to hide behind a given body’s distinct legal personality as evidence that the body fails to engage the state’s responsibility. Again, in all of these cases, it is clear that the body has public-interest objectives and has been created by, largely or wholly financed by, and has relatively strong institutional links with, the state. But for the question mark over the extent of the body’s independence, the remaining evidence therefore tends to point overwhelmingly to the conclusion that the body is a ‘selfless’ organisation for whom the state is directly responsible. In these circumstances, the only real argument of any weight that the state can attempt to make is that the body’s separate legal personality renders it sufficiently autonomous to be a private person notwithstanding that all of the other factors point against it. It is not therefore surprising that the discussion of the state responsibility issue revolves around an analysis of the degree of the body’s independence in these cases: *of course* it will be central to the Court’s analysis, because in the circumstances it is the only factor that the state can realistically pray in aid. However, this does not mean that it has become central to the *law* in this area. *Saliyev* and the state debt cases, to reiterate, should not be taken as laying down a new independence-based test for the meaning of a governmental organisation in Strasbourg.

### Summary: a closer look at governmental organisations

The foregoing analysis establishes two points. First, Strasbourg knows no hybridity doctrine that allows a private body to become a governmental organisation by performing a given function. The burden of proof lay on opponents of this argument to prove their point, which they have failed convincingly to do. In Strasbourg, private bodies remain non-governmental organisations through and through. Second, it is better to understand the governmental organisation jurisprudence as relying on the selflessness principle to distinguish public from private bodies. This was suggested by *Aston Cantlow* and confirmed by the foregoing analysis.

Between them, these points in turn have two implications for the present thesis. First, they emphasise the irrelevance of the governmental organisation jurisprudence to the interpretation of s 6(3)(b), which by its nature deals with the application of Convention norms to private bodies performing public functions. The governmental organisation jurisprudence is entirely unconcerned with this issue. When the majority in *YL* took the view that s 6(3)(b) should be interpreted no broader than the governmental organisation category in Strasbourg, this was a profound mistake that imposed an arbitrary limitation on s 6(3)(b)’s width. The proper relevance of the governmental organisation jurisprudence is to the core public authority concept under s 6 HRA, a conclusion that is further bolstered by their Lordships’ view in *Aston Cantlow* that the core public authority concept rests upon the same basic foundation – the selflessness principle – as the governmental organisation concept does. Second, the points made by this chapter’s analysis confirm that as non-governmental organisations through and through, private bodies remain capable *at all times* of filing Convention claims under Art 34. That they perform what s 6(3)(b) would regard as public functions is irrelevant. Moreover, it follows that if they enjoy Convention protection in Strasbourg, then they must also enjoy it in domestic law. This is not only a point of common sense given that the contrary view would create a deluge of claims from disgruntled hybrid public authorities in Strasbourg; it is also a finer point of statutory interpretation. As s 7(7) makes clear, the ‘victims’ able to bring claims against public authorities in domestic law are those who ‘would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.’ Parliament could of course have provided otherwise as a matter of domestic law, but it has not. Nowhere in the HRA is the rights-stripping idea either mentioned expressly or necessarily implied. It is a myth to say that hybrid public authorities are denied Convention protection when exercising public functions. The implications of this finding are examined more closely in the following chapter.

## THE HRA: ‘KEY’ PROVISIONS

With the Strasbourg scheme mapped onto the various provisions of the HRA, the three HRA provisions that might be said to constrain the domestic courts’ interpretation of the public authority term now fall to be considered. These are s 3 (the interpretative obligation), s 2 (the duty to take Strasbourg jurisprudence into account) and s 6(3)(a) (which generates horizontal effect). They are considered in turn.

### The interpretative obligation

Section 3(1) HRA states that ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.’ It is not proposed to enter the longstanding debate over the meaning of the notion of ‘possibility’ under s 3,[[979]](#footnote-979) or to ask whether the courts’ approach to that term has changed over time.[[980]](#footnote-980) For present purposes it suffices to note that s 3 would seem to have no bearing at all on the meaning of a public authority under the HRA, because it is clear that the statute in question must be *prima facie* Convention-incompatible before the interpretative obligation can bite.[[981]](#footnote-981) It is difficult to see how s 6 could fulfil this requirement, given that its purpose is to secure Convention rights rather than empower public authorities to engage in activities that make inroads into them. It might be claimed that s 6 is Convention-incompatible for taking too narrow a view of the term ‘public authority’, and thus not going far enough in securing Convention rights, but this argument would fail for two reasons. First, it would fail on Convention grounds because the public authority provisions are at least as broad as the category of bodies that engage the state’s responsibility either directly, or indirectly, under the *Costello-Roberts* principle, as seen above. In other words, s 6 *expands* on the level of Convention protection available in Strasbourg, properly understood. Second, the argument would also fail on s 3 terms because it amounts to an attack on s 6 for what it *omits* to provide rather than identifying a particular provision that positively infringes the Convention. The House of Lords laid such arguments to rest in *Re S and W: Care Orders*,[[982]](#footnote-982) when it ruled that the Court of Appeal had gone too far in its use of s 3 when introducing a judicial ‘starring’ system to plug legislative gaps in the supervision by local authorities of children’s care plans. Lord Nicholls stated that the courts should ‘identify clearly the particular statutory provision or provisions whose interpretation [breaches the Convention].’[[983]](#footnote-983) Hence, whilst it is the following chapter’s central argument that the courts should expand their meaning of a public function under s 6(3)(b), this is not because the UK is in any danger of breaching the Convention if it fails to do so. The arguments rest on ordinary principles of statutory construction alone.

### The duty to take Strasbourg jurisprudence into account

Section 2(1) HRA provides that when ‘determining a question which has arisen in connection with a Convention right’, courts ‘must take into account any… [Strasbourg judgments, decisions, opinions and declarations] whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.’ Like their approach to s 3, the courts’ approach to s 2 has generated debate and often criticism since the HRA entered into force.[[984]](#footnote-984) Discussion centres around the courts’ reading of the phrase ‘take into account’.[[985]](#footnote-985) It suggests an obligation to consider rather than follow Strasbourg jurisprudence, but the courts seem overwhelmingly to have done the latter in practice. In *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions* Lord Slynn stated that ‘In the absence of special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights.’[[986]](#footnote-986) Subsequent cases contain similar statements. In *R (Ullah) v Special Adjudicator*, for instance, Lord Bingham remarked that under the HRA ‘The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.’[[987]](#footnote-987)

Critics attack the courts on the grounds that there are good reasons, in their view, for the courts to take advantage of the apparent room that s 2 gives them to depart from Strasbourg decisions.[[988]](#footnote-988) In newer literature, some writers have even observed and begun to welcome what they see as a partial retreat by the courts from their orthodox approach.[[989]](#footnote-989) Notably, in *R v Horncastle*, the Supreme Court indicated that it would be minded to depart from a Strasbourg decision, *Al-Khawaja and Tahery v United Kingdom*,[[990]](#footnote-990) on the basis of concerns ‘as to whether… [it] sufficiently appreciates or accommodates particular aspects of our domestic process.’[[991]](#footnote-991)

The critics’ reasons for disparaging the courts’ orthodox approach are many and varied. In particular, it is often said that the courts should not bind themselves to Strasbourg for the reason that the Convention is a ‘living instrument’ and a particular Strasbourg judgment might be antiquated and in need of reconsideration by the ECtHR; or that it may be unsuited for application to the United Kingdom, which as a signatory to the Convention is only bound internationally by the judgments to which it is a party; or because there may be circumstances in which it is appropriate for the domestic courts to expand on the protection provided for in Strasbourg by ‘giving a lead to’ the ECtHR as well as taking directions from its decisions.[[992]](#footnote-992) The case-law and literature on s 2 have now become fairly extensive and there is not the space to analyse them in full here, but some basic observations may be made.

First, certainly in its older form, the literature tended to explore the meaning of s 2 by posing a particular question – as Roger Masterman phrases it, the ‘question of the extent to which domestic courts should either take into consideration, or be bound by, the jurisprudence of the Strasbourg institutions.’[[993]](#footnote-993) Because it was rightly thought that the courts could not be expected to follow every single one of Strasbourg’s decisions slavishly, it was said to follow that their duty was merely to consider those decisions as s 2 seemed to suggest;[[994]](#footnote-994) and the courts were therefore criticised, following remarks in cases like *Alconbury*, for pledging to follow Strasbourg in ‘all but the most extreme circumstances.’[[995]](#footnote-995) However, the question posed in the literature was arguably flawed in two respects. First, it was too crude, seemingly presuming an artificial dichotomy between an obligation to follow all cases and no obligation to follow at all.[[996]](#footnote-996) Masterman’s above remark is a good example. Yet even in a system with a developed doctrine of precedent, it can still be acceptable to depart from a decision when the case-law as a whole otherwise binds.[[997]](#footnote-997) It is misleading to say, for instance, that the Court of Appeal is ‘not bound’ to follow its own precedents simply because in limited circumstances it may depart from individual cases under the rule in *Young v Bristol Aeroplane Co*.[[998]](#footnote-998) Instead, a more accurate way to express the position is to say that the Court of Appeal *is* bound by its previous case-law, but that this is a rule with exceptions. With this in mind, the second flaw was to elide the important conceptual distinction between Strasbourg jurisprudence as a *body of case-law*, and Strasbourg jurisprudence as a *collection of individual decisions*. Section 2 talks exhaustively about Strasbourg decisions, declarations, advisory opinions and the like, which for ease of terminology are commonly referred to in shorthand as ‘jurisprudence’, but this should not be allowed to confuse the underlying issues at stake. ‘Jurisprudence’ is an umbrella term for two different things here. As the above example shows, the fact that a court may depart from individual decisions does not necessarily mean that it is not bound to follow the others. In other words, it may still be bound as a general rule to follow the *body of case-law* in question even though there may be good reasons for it to decline to follow individual cases. The result is that, contrary to their own beliefs, the critics seem to leave the *dicta* in cases like *Alconbury* largely untouched. The mere fact that there may be good reasons not to follow *all* decisions does not mean that Parliament would not still intend to bind the courts to *some* of them. A significant counter-argument to the critics’ views therefore presents itself: what if the judges in these cases are simply making the point that s 2 binds domestic courts to Strasbourg’s interpretation of the Convention but nevertheless enables them to depart from individual decisions in certain circumstances?[[999]](#footnote-999) The argument that s 2 could not have intended to bind them to *all* decisions misses the point. Under s 2, it is both linguistically and theoretically possible for the courts to claim to be bound by Strasbourg’s case-law yet depart from individual decisions from time to time.[[1000]](#footnote-1000)

Second, then, two strands of criticism of the courts’ approach begin to emerge. ‘Shallow’ criticisms attack the domestic courts for adopting too narrow a category of situations in which they will depart from a given Strasbourg judgment. The argument that the courts should be more prepared to depart from an outdated or anomalous decision because the Convention is a living instrument Strasbourg’s interpretation of which may change, for instance, is a shallow criticism. Whilst shallow critics may quibble about when it is appropriate to follow a given Strasbourg decision,[[1001]](#footnote-1001) they do not seek to challenge Strasbourg’s general position as the authoritative interpreter of the Convention. They accept that the ultimate question that domestic courts should ask themselves when interpreting the Convention is ‘what would Strasbourg do were the case at hand to come before it?’[[1002]](#footnote-1002) As Philip Sales and Richard Ekins describe the courts’ task, it is ‘to seek to replicate what they understand the ECtHR would decide in that situation.’[[1003]](#footnote-1003) If a Strasbourg decision is antiquated or otherwise unreliable, there may well be good grounds for the domestic courts to decline to follow it on the basis that they think that Strasbourg itself, now some years down the line, would also do the same.[[1004]](#footnote-1004) As Lord Hoffmann stated in *R v Lyons (No. 3)*, for instance:

‘If… an English court considers that [Strasbourg]… has misunderstood or been misinformed about some aspect of English law, it may wish to give a judgment which invites the ECHR to reconsider the question… There is room for dialogue on such matters.’[[1005]](#footnote-1005)

However, if Strasbourg’s case-law indicates that it would follow that decision, then the domestic courts must fall in line – whether they agree with it or not. As Lord Hope once stated, we must take the Strasbourg jurisprudence ‘as we find it, not as we would like it to be.’[[1006]](#footnote-1006) Thus, there *is* room for dialogue of the sort Lord Hoffmann describes above, but the appropriateness of the domestic court’s decision to decline to follow a given Strasbourg ruling will depend on the circumstances. Domestic courts should not be able to depart simply because they believe that the relevant standard of human rights protection should be different. If they do, they subscribe to the arguments made by ‘deep’ critics, which is problematic for the reasons described below. Instead, they will need to put a very credible case to the effect that the Strasbourg ruling in question is wrong on its own terms, for example because it misunderstands domestic law or sits uncomfortably with other relevant Strasbourg decisions.[[1007]](#footnote-1007) The more arguable the domestic court’s point, the more credible will be its decision to depart. Even with what they think is a strong claim, though, the domestic courts will have to tread carefully. Trying to combat a line of clear and constant case-law in this way will be more of an affront to Strasbourg’s interpretative authority than trying to persuade it that a ‘stray’[[1008]](#footnote-1008) or unclear decision was erroneously made.

The obvious exception to the overarching idea that the domestic courts must put themselves in Strasbourg’s shoes like this, however, is if the matter in question falls within the state’s margin of appreciation.[[1009]](#footnote-1009) The mere fact that Strasbourg would vest decision-making power primarily in the state does not mean that the courts must then cede that power to the government in domestic law. The question is one of separation of power. In appropriate circumstances the courts can therefore rule that a Convention right has been breached by a public authority even though Strasbourg would apply the margin of appreciation to the state internationally. This is straightforwardly a matter of applying the Convention and does not involve departing from Strasbourg’s pronouncements, however. Strasbourg makes it clear that the margin of appreciation accrues to the state authorities *generally*, not specifically to the legislature;[[1010]](#footnote-1010) and so it falls logically to the courts to decide how to allocate the decision-making power between the state authorities in domestic law.[[1011]](#footnote-1011)

In contrast to shallow criticisms, ‘deep’ criticisms focus on the appropriateness of the domestic courts binding themselves to Strasbourg’s case-law as a body of decisions on what the Convention means. They are ‘deep’ because they strike at Strasbourg’s relative authority to interpret the Convention. Essentially, deep critics argue that Strasbourg is no better able to determine the meaning of the Convention rights than domestic courts, and therefore that there is no reason for the domestic courts to consider themselves bound to take as authoritative anything Strasbourg says. Along these lines, Elizabeth Wicks remarks that ‘Although domestic courts “must” take into account Strasbourg judgments, this does not necessarily require them *ever* to follow the Strasbourg precedent.’[[1012]](#footnote-1012) Whereas many of the criticisms levelled at the courts’ approach are shallow criticisms, some are also deep. In particular, it has been said the HRA is a municipal bill of rights and not merely a framework for making Convention remedies enforceable in domestic law: rather than incorporating the Convention rights as EU law does through the European Communities Act 1972, it reproduces them in the schedule, leaving the courts to interpret them as domestic-law provisions.[[1013]](#footnote-1013) On this view the courts, not Strasbourg, are in charge of interpreting domestic legislation; and whilst they may take into account and very often agree with Strasbourg’s interpretation of the ‘Convention’ rights given in the HRA, the question is ultimately for them alone.[[1014]](#footnote-1014) As Lord Irvine recently put it: ‘the domestic court must decide the case for itself’,[[1015]](#footnote-1015) with the result that ‘it always has a choice’ as to whether to follow a Strasbourg decision.[[1016]](#footnote-1016) According to this argument, the courts are wrong to say that they are bound to follow clear and constant jurisprudence, even as a general rule: quite simply, no such constraint operates upon them. In these circumstances, the idea that domestic courts should be able to strike out by ‘giving a lead’ to Strasbourg takes on a particular meaning. It implies not just along ‘weak’ lines that they should feel free to engage in dialogue of the sort Lord Hoffmann described in *Lyons*, inviting Strasbourg to reconsider decisions which the domestic courts, with their knowledge of their own legal system, have good reason to believe is wrong on its own terms; it implies additionally that they can also depart from Strasbourg decisions simply because they disagree with them. Indeed, this is a faintly-articulated but nevertheless detectable theme in the critics’ work – giving a lead to Strasbourg includes ‘the possibility that domestic courts could legitimately depart from the Strasbourg jurisprudence to enhance domestic rights protection.’[[1017]](#footnote-1017)

Third, my position is that deep criticisms are untenable, both theoretically and as a matter of interpretation of the HRA. In theoretical terms, Strasbourg is the international court created for the very purpose of determining the meaning of the Convention. It is somewhat fantastical to suggest that the domestic courts are generally more competent to interpret it, however able our judges may be and however technically accurate it is to say that the rights exist in domestic law rather than being incorporated.[[1018]](#footnote-1018) The rights are not *just* domestic constructs. They are ‘simultaneously domestic and international’,[[1019]](#footnote-1019) and as Buxton LJ puts it, ‘where an international court has the specific task of interpreting an international instrument it brings to that task a range of knowledge and principle that a national court cannot aspire to.’[[1020]](#footnote-1020) Domestic courts, Kavanagh rightly says, ‘must recognise the interpretative supremacy of the ECtHR.’[[1021]](#footnote-1021) Deep criticisms pose additional problems for the courts, however. First, they break the courts away from the task the HRA sets them, of establishing ‘the extent of the UK’s *legal obligations* under… the Convention.’[[1022]](#footnote-1022) This is a particular problem when the courts use the Convention to re-interpret legislation under s 3, because they need a clear mandate to engage in activity that has an effect on the legal meaning of legislation of the kind that s 3 does.[[1023]](#footnote-1023) It is clear that Parliament recognises *Strasbourg’s* authority to determine the meaning of these rights – s 2 refers the domestic courts to its jurisprudence and the UK is a signatory to the Convention, after all – but it has said nothing, by contrast, of the domestic courts’ interpretative authority in this area. The only authority that the domestic courts have to interpret the Convention as they see fit is said to come from s 2’s non-binding wording and the warrant that the critics argue this grants the courts to depart from Strasbourg, but the existence of this warrant is the very issue in question. As Sales puts it, ‘It cannot be assumed that Parliament intended to create a wider and unconstrained power in the domestic courts to change the ordinary meaning of legislation… by reference to their own idiosyncratic interpretations of Convention rights.’[[1024]](#footnote-1024) Problems with democracy, parliamentary sovereignty and the separation of powers therefore arise if ‘deep’ ideals are embraced. Conflicts also potentially arise with the rule of law, since an approach that allowed judges to depart from any Strasbourg decision of their choosing would tend to undermine the clarity of the law.[[1025]](#footnote-1025) Second, there is additional, positive evidence in the HRA that Parliament intends to eschew these ideals. The whole point of interpreting s 2 as conferring a general warrant to depart from Strasbourg jurisprudence, it seems, is to pave the way for *better* Convention protection than Strasbourg would provide.[[1026]](#footnote-1026) But it is far from clear that this could happen much in practice anyway. The more onerous the Convention’s requirements are interpreted by the domestic courts to be, the harder it will be to read domestic legislation compatibly with them under s 3 HRA. The greater will therefore be the resort to s 4 declarations, which are not an effective Convention remedy,[[1027]](#footnote-1027) and the weaker will be the political symbolism, too, in issuing them. No longer will a s 4 declaration necessarily mean what it currently does – that the state is at risk of being impugned by an international court for violating fundamental rights that it has agreed by treaty to safeguard. All of this undermines rather than protects rights, both legally and politically. It also has the potential to weaken the very idea of dialogue between Strasbourg and the domestic courts, with domestic courts ‘advising’ Strasbourg on how to interpret Convention rights, that deep critics tend to champion. Strasbourg is far more likely to take seriously an interpretation by domestic courts who ‘are doing their best to interpret and apply… [Convention] rights in the same way as… they are interpreted and applied by the ECtHR.’[[1028]](#footnote-1028) Third, ss 3 and 4 also yield an important insight into why s 2 might be drafted as it is. Given the HRA’s dual purpose in attempting to protect the Convention whilst maintaining parliamentary sovereignty, there will be circumstances in which the courts must apply Convention-incompatible legislation rather than the Convention. But if s 2 were drafted so as to *bind* domestic courts to the jurisprudence it mentions, without indicating that it could depart from Strasbourg decisions at all, an awkward contradiction would arise between that section and the general scheme of the Act: the courts would be told by s 2 to apply the decision; other provisions would appear to require them not to. This is not to say that the problem would be irresolvable – the courts would inevitably reach the commonsense conclusion that s 2 must be read subject to ss 3, 4, 6(2) and so on anyway – but the current drafting of s 2 puts the issue beyond doubt. It also emphasises the idea discussed above: pursuant to ‘shallow’ arguments the courts may deem it inappropriate to follow a particular Strasbourg judgment if they have reason to doubt its credibility in Strasbourg’s eyes. Indeed, this is the basis on which Lord Irvine defended the Government’s refusal to reword s 2 so as to ‘bind’ domestic courts to Strasbourg as the Bill was going through Parliament. Circumstances may arise, he said, ‘in which a judgment given by the European Court of Human Rights decades ago contains pronouncements which it would not be appropriate to apply to the letter in the circumstances of today in a particular set of circumstances affecting this country.’[[1029]](#footnote-1029) The upshot is that s 2’s drafting does not necessarily indicate Parliament’s intention to subscribe to the idea underlying deep criticism that the domestic courts are not bound to Strasbourg’s jurisprudence *at all*.

#### Implications for the public authority provisions

Given the foregoing, the operative presumption here is that s 2 requires the courts to examine Strasbourg jurisprudence in order to ask what they think Strasbourg would do were the case in question to come before it. It is accepted that from time to time the domestic courts may depart from what looks like an erroneous Strasbourg judgment, but it is not necessary to examine precisely in what circumstances that power to depart may arise. The main point is that deep criticisms are untenable and therefore that the courts cannot decline to follow a Strasbourg decision or line of decisions simply because they take a different view of what the Convention rights require. Unless they have reason to think that a given judgment’s credibility would be in doubt in Strasbourg’s eyes, then they are bound by s 2 to follow it – unless, of course, Parliament itself displaces this rule elsewhere in the HRA. This is the case with s 6(3)(b), as explained below.

With these observations in mind, it can be seen that s 2 operates as a direct constraint on the courts’ interpretation of the meaning of the core public authority concept under s 6. This is because that concept is designed to reflect the category of bodies regarded as governmental organisations in Strasbourg, as explained above. It is doubtful that the domestic courts would have cause to disagree with Strasbourg’s rulings on that concept given that the same fundamental principle – the selflessness principle – seems to underlie both concepts clearly. But in the event that they do disagree, s 2 will require the Strasbourg judgment to be preferred unless there is reason to think that Strasbourg itself would doubt the decision. This is without prejudice, of course, to the general exception that the courts have identified to Parliament’s intention under s 2: that, if a Strasbourg decision conflicts with an earlier but nevertheless post-HRA decision given by a higher domestic court, the court must follow the domestic precedent rather than Strasbourg.[[1030]](#footnote-1030) Parliament, it is said, did not intend to upset the ordinary rules of domestic precedent by requiring otherwise.[[1031]](#footnote-1031)

The position with the meaning of ‘functions of a public nature’ under s 6(3)(b) is slightly different. As argued above, neither the governmental organisation jurisprudence nor the bulk of the private indirect responsibility jurisprudence concern the question s 6(3)(b) asks – of when a private person performs public functions. They will not therefore be ‘relevant’ branches of case-law within the meaning of s 2. The *Costello-Roberts* line of private indirect responsibility case-law is different, however. As seen above, Strasbourg appears to determine the state’s responsibility with reference to the function performed by the private body in question. These functions might also be capable of description as ‘public’ for the purpose of granting a remedy against the body who engages the state’s responsibility in domestic law. Properly interpreted, s 2 would therefore require the courts to follow these decisions – unless, of course, they had cause to doubt that Strasbourg would do so. Because deep criticisms are untenable, the domestic courts could not expand on the level of protection given by Strasbourg under the *Costello-Roberts* line of cases simply because they disagreed with that level as determined in Strasbourg. Crucially, however, this is not to say, as Lords Mance and Neuberger suggested in *YL*,[[1032]](#footnote-1032) that Parliament must have intended s 6(3)(b) to apply no further than the category of bodies that would engage the state’s responsibility under this particular line of Strasbourg case-law. In the present context s 2 must be construed in the light of s 6(3)(b), which evidently intends to expand on the range of bodies that fall into the *Costello-Roberts* category. This is clear in a number of respects. First, and most obviously, the language in s 6(3)(b) and the *Costello-Roberts* line of cases differs starkly. Nowhere does Strasbourg use the term ‘functions of a public nature’ or even ‘public functions’ to describe the kind of activities that engage the state’s responsibility under this particular aspect of the private indirect responsibility principle.[[1033]](#footnote-1033) Second, the *Costello-Roberts* line of case-law is largely underdeveloped, as seen above. At the time the HRA was enacted, it consisted only of itself and possibly also *Van der Mussele*,[[1034]](#footnote-1034) which was explored above. It is therefore unlikely that Parliament would have intended s 6(3)(b) to reflect this line of case-law alone. Third, because the *Costello-Roberts* line appears to focus on the conferral on a private body of powers for the specific purpose of assisting the state to perform its Convention or other international obligations, the domestic courts have already exceeded s 6(3)(b)’s scope, if the argument made here is indeed wrong. In *R (Beer) v Hampshire Farmers’ Markets Ltd*,[[1035]](#footnote-1035) for instance, the Court of Appeal applied s 6(3)(b) to a body that had not been delegated powers for this purpose. The Court of Appeal could of course have erred by doing so, but *Beer* has never been criticised on this basis – even by Lord Mance, who mentioned it himself in *YL*[[1036]](#footnote-1036)but evidently overlooked the extent to which it undermined his idea that the courts should apply s 6(3)(b) no further than the *Costello-Roberts* line of cases. All of this suggests that *Beer* is a relatively uncontroversial case in the courts’ eyes, which weakens the view that *Costello-Roberts* functions are the only ones envisaged by Parliament under s 6(3)(b).[[1037]](#footnote-1037) Fourth, like all statutory provisions, s 6(3)(b) falls to be construed in context. Here, a vital piece of context is the public-private divide in judicial review, which the courts repeatedly – and rightly – claim ought to be of at least some relevance to the determination of the term ‘functions of a public nature’ under the HRA.[[1038]](#footnote-1038) The language used by the courts and by the CPR to distinguish public from private – ‘public function’ – also echoes that under s 6(3)(b). If Lords Mance and Neuberger were correct, however, then the only question the courts would have to ask themselves under s 6(3)(b) is ‘would Strasbourg apply the *Costello-Roberts* principle here or not?’. This is not only difficult to accept for the reason that it necessarily ousts a vital and obviously relevant piece of context from consideration, but it is also demonstrably not what the courts do. Never has any judicial analysis on s 6(3)(b) taken that form. This includes the analysis of Lords Mance and Neuberger themselves.

It is clear, then, that the *Costello-Roberts* line can only represent one of multiple *strands* of public function under s 6(3)(b). Section 2 requires domestic courts to adhere to that case-law, but only where it applies. Outwith the *Costello-Roberts* context, Parliament is bound to have envisaged that other public functions exist under s 6(3)(b).

### Horizontal effect

Section 6(3)(a) HRA requires courts to act compatibly with the Convention. This duty applies equally when they are developing the common law, and even if the dispute at hand involves only private parties. The Convention can therefore take a certain form of ‘horizontal effect’ against private individuals in domestic law, as one party asserts their Convention rights against the court in a way that has implications for the other.[[1039]](#footnote-1039)

There are two conceptual levels of analysis in this context.[[1040]](#footnote-1040) First, the court must ask itself whether the state would be liable in Strasbourg if the private defendant’s behaviour went unregulated in domestic law. If there is no breach by the state, the court will not be acting incompatibly with the Convention under s 6 by refusing to develop the law. As discussed above, this is where the bulk of Strasbourg’s private indirect responsibility jurisprudence belongs, because it indicates when the state *is* under a positive obligation to regulate private wrongdoers’ behaviour. The courts should look to this body of jurisprudence to answer their question. Second, if the state is potentially in breach of a positive obligation in Strasbourg, the courts must then ask themselves whether s 6(3)(a) requires them to remedy that breach by developing the common law or whether Parliament should be left to do so through legislation instead. The true meaning and extent of s 6(3)(a)’s developmental obligation are therefore crucial but are far from clear, having been a matter of considerable debate since the HRA entered into force. Whilst I have written on this topic before,[[1041]](#footnote-1041) here is not the place to explore it in detail; although, for two reasons, it nevertheless warrants a certain level of consideration in the present context. First, the courts’ duty has previously been said by distinguished writers to involve ‘direct’ or ‘full indirect’ horizontal effect; that is, as requiring the courts to develop new common-law causes of action between private individuals.[[1042]](#footnote-1042) If this were true, s 6(3)(b)’s purpose would be negligible. There would little point in providing a statutory Convention-based cause of action against private defendants when the common law would already do so; and on this view, the courts should certainly not waste precious time bothering about the finer points of s 6(3)(b)’s scope.[[1043]](#footnote-1043) It is therefore worth explaining why full indirect horizontal effect represents an untenable reading of the courts’ duty under s 6(3)(a). Second, it is useful to explore the basic position that the courts have adopted in their interpretation of their duty under s 6(3)(a). This is relevant to the following chapter’s analysis on the nature of the hybrid public authority scheme. As that chapter explains, a proper understanding of the mechanics of the hybrid public authority scheme reveals that it has far more in common with the common-law horizontal effect scheme than appears at first sight; and that the courts should be much more willing to embrace a broader interpretation of s 6(3)(b) once this observation is considered alongside their approach to the parallel common law issue.

#### The true construction of the courts’ duty under s 6(3)(a)

First, it is necessary to clarify the difference between ‘direct’ and ‘indirect’ horizontal effect. Direct horizontal effect involves the application of constitutional rights to a *person*; indirect horizontal effect to the *law*.[[1044]](#footnote-1044) Since s 6 applies only to public authorities and not to private defendants, there is no question of any direct horizontal effect.[[1045]](#footnote-1045) The only exception to this is s 6(3)(b), which establishes a cause of action directly against a private person performing public functions, but this is explored in the following chapter. In the common law context, the only horizontal effect can be indirect – by the courts applying Convention rights so as to develop the *law*. The view that the courts should create new causes of action can be termed ‘full’ indirect horizontal effect: if the law lacks a Convention remedy, the courts must create brand new law to provide it. Whilst direct and full indirect horizontal effect are conceptually distinct mechanisms, they therefore yield the same result in practice – new Convention-based causes of action – and are often referred to interchangeably in the literature.[[1046]](#footnote-1046)

The full indirect horizontal effect model was first advanced by Sir William Wade, and defended by Jonathan Morgan[[1047]](#footnote-1047) and Shaun Pattinson and Deryck Beyleveld.[[1048]](#footnote-1048) The proponents’ claims are based principally on the wording of s 6: by imposing a duty on the courts to act compatibly with the Convention by developing the common law, ‘a court will be unable to give a lawful judgment, if a Convention rights point arises, except in accordance with that right.’[[1049]](#footnote-1049) Pattinson and Beyleveld also draw heavily on the Convention scheme, which they say is fully horizontally ‘applicable’ in the sense that the rights are conceptually capable of applying between private individuals, so as to argue that it would run counter to the HRA’s intention to give ‘effect’ to the Convention by not creating new causes of action to protect the rights in the common law.[[1050]](#footnote-1050)

The full indirect view is not a plausible reading of s 6(3)(a). It would be odd for Parliament to have manifested only an implicit intention to reform the common law in such a sweeping way, and without providing for a procedural framework and scheme of remedies against private individuals under ss 7 and 8.[[1051]](#footnote-1051) It is also doubtful that the rights are fully horizontally applicable in the way Beyleveld and Pattinson suggest – or for the reasons they give, at least.[[1052]](#footnote-1052)

Even to the extent that full horizontal effect can be extracted from the language of s 6, however, it is thoroughly unattractive for failing to take account of what chapter one termed the ‘constitutional constraint’ on the courts. The chief flaw inherent in the full indirect model is that it requires the courts to develop the common law without any reference to its existing content. It requires them to pluck brand new causes of action from thin air, and therefore simply to supplant the existing common law with Convention norms.[[1053]](#footnote-1053) Whilst the result itself is not necessarily undesirable (after all, the purpose of the HRA was to overhaul large parts of the existing law to guarantee Convention-compatibility), the *process* by which this is achieved is alien to the courts’ constitutional function as developers of the common law.[[1054]](#footnote-1054) Parliamentary sovereignty, democracy, the rule of law and the separation of powers all require a break on the courts’ ability to develop the law in leaps and bounds as Parliament might.[[1055]](#footnote-1055) Unlike legislators, the courts cannot design a new legal scheme from scratch. They must have some regard, at least, to the state of the law as it currently stands if the law-making in which they engage can realistically be called ‘development’ rather than ‘legislation’ *simpliciter*.[[1056]](#footnote-1056) The full indirect horizontal effect model ignores this, however, which deals it a fatal blow.[[1057]](#footnote-1057) Parliament would not intend to ride roughshod over the deep-seated constitutional fundamentals mentioned above without saying so clearly.

The better reading of s 6(3)(a) is the ‘constitutional constraint’ model: the courts *are* required to develop the common law compatibly with the Convention – their designation as public authorities must connote some sort of positive duty in this respect, after all[[1058]](#footnote-1058) – but they cannot do so more than ‘incrementally’, i.e. in a judicial rather than legislative fashion.[[1059]](#footnote-1059) There is nothing to stop them developing new causes of action *per se* under this model, because this is a power that top common-law courts have always had, but that development must be an incremental one.[[1060]](#footnote-1060) If the courts believe that the development requested by the claimant would involve a transgression of the divide between judicial and legislative law-making, the courts are duty bound to refuse the development and leave the issue to Parliament to tackle as it sees fit. In some situations the claimant may therefore be left without a domestic remedy when they would receive one in Strasbourg, but this is the price to pay for preserving the constitutional constraint.

Full horizontal effect, then, is an incorrect reading of s 6(3)(a). The courts are not bound to create new Convention-based causes of action, nor can they engage in any development beyond the incremental. Whilst debate may exist over whether the courts’ development of the common law in a given situation is indeed incremental, this does not call for exploration here.[[1061]](#footnote-1061) It is an issue with which the courts have had to grapple since long before the HRA entered into force. For present purposes, the point is that the full indirect model is untenable, so the hybrid public authority scheme under s 6(3)(b) has a real substantive role to play by generating a Convention-based cause of action against private individuals. It breaks ground that common-law horizontal effect may not. It is therefore essential that the courts construe its scope meaningfully and accurately. Their interpretation of s 6(3)(b) *matters*.

#### The courts’ approach

Before considering s 6(3)(b)’s meaning more closely in the following chapter, however, it is necessary to examine briefly the courts’ approach to the common-law horizontal effect issue. Their treatment of the issue has been markedly less forensic than the academics’ treatment in the literature, which has left the exact judicial position unclear.[[1062]](#footnote-1062) Again, this has been extensively written about[[1063]](#footnote-1063) and need not be pored over here, but some key observations can be made. First, it is clear that the judges have embraced the idea that s 6 requires them to give *some* level of horizontal effect through the common law.[[1064]](#footnote-1064) This is evident from the raft of cases in which the courts have used Art 8 ECHR to fashion the common-law tort of breach of confidence into a tort of misuse of private information.[[1065]](#footnote-1065) Second, it is also palpably clear that the courts have rejected the full indirect horizontal effect model discussed above. In *Campbell v MGN*, for example, Baroness Hale stated that the HRA ‘does not create any new cause of action between private persons.’[[1066]](#footnote-1066) This view has been challenged by authors like Tom Bennett[[1067]](#footnote-1067) and Nichole Moreham,[[1068]](#footnote-1068) however, who contend that the courts have used Art 8 ECHR to create a brand new cause of action under the guise of ‘development’ of the pre-HRA law. Indeed, as Lord Nicholls remarked in *Campbell*, ‘The essence of the tort is better encapsulated now as misuse of private information.’[[1069]](#footnote-1069) In the light of the arguments made above, however, Gavin Phillipson’s response is convincing: such views erroneously presume the existence of a new cause of action to indicate a necessary judicial preference for the full horizontal effect model.[[1070]](#footnote-1070) Instead, what matters is *how* the law developed from its ‘old’ to its ‘new’ state. For it to be clear beyond doubt that Wade’s model underlies the courts’ approach, it would need to be evident both that the cause of action was *Convention-based* and that it was *brand new* (i.e. created instantaneously, as Wade’s model requires). Neither requirement is met, however. As Phillipson points out, ample evidence exists that the shift from protecting confidence to protecting privacy at common law had been occurring gradually in some form, at least, since before the HRA entered into force; and there is no evidence to suggest that the creation of the new tort of misuse of private information had occurred instantaneously.[[1071]](#footnote-1071) Indeed, it was only in *Campbell*, some years after the courts had begun to get to work on the breach of confidence action through a series of cases, that it was suggested that the new law should be rebranded. Far from revealing Wade’s model at work, then, the courts’ approach better resembles the constitutional constraint model contended for here: the courts use the Convention as a catalyst to develop the common law *incrementally.*

This is about as far as judicial *dicta* on the issue can reliably be taken, however. Whilst the outcomes of the various cases seem quietly to suggest an incremental approach, judicial attempts to explain the extent of the s 6 duty more precisely have been perfunctory, conflicting and unclear.[[1072]](#footnote-1072) In *Campbell*, for instance, Lord Nicholls suggested both that the courts were under a weaker obligation simply to *consider* the Convention values,[[1073]](#footnote-1073) on the one hand, and a more concrete obligation to *apply* the rights,[[1074]](#footnote-1074) which would involve over-writing the existing common law in much the same way as Wade’s model would,[[1075]](#footnote-1075) on the other. Remarks in more recent cases also suggest this stronger approach – in *Murray v Express Newspapers Plc*, Sir Anthony Clarke MR stated in the breach of confidence context that the Convention was ‘now the very content of the domestic tort that the English court must enforce’[[1076]](#footnote-1076) – but they are too underdeveloped on the whole to yield a reliable answer. In particular, these remarks sit uncomfortably with the acknowledged *reality* that the courts have fashioned the new tort of misuse of private information over a series of cases, rather than by supplanting the common law with Convention norms in a single move. In short, the courts’ approach is best described as one of indirect horizontal effect, albeit somewhere between the weaker and stronger formulations described above. This is the key point to bear in mind for the next chapter.

## CONCLUSION

No attempt will be made to summarise any further the findings of what is already a lengthy chapter. The overall point is that neither the HRA itself nor the Strasbourg scheme act as significant contextual constraints on the meaning of a public function under s 6(3)(b). Aside from the *Costello-Roberts* line of case-law, which the courts will have to apply by virtue of their duty under s 2, they seem to have a relatively free interpretative hand in determining the notion of a public function. With this in mind it becomes necessary to look to the deeper constitutional context to determine Parliament’s likely intention in doing so. The following chapter explores what it argues is the most accurate reflection of that intention: the ‘two-strand’ approach to s 6(3)(b).

# 7.

# Public Functions and s 6(3)(b) HRA

This chapter considers the meaning of the term ‘functions of a public nature’ under s 6(3)(b) HRA in detail. Its overall argument bolsters the commonly-made argument that the courts have construed the term ‘functions of a public nature’ more narrowly than Parliament is likely to have intended.[[1077]](#footnote-1077) However, it makes that argument from a number of different, new, angles. This is because it is important to progress the debate as to s 6(3)(b)’s proper scope beyond its present format of the courts adopting a relatively narrow interpretation, with academic writers responding that they feel that the concept of a public function should be broader. Whilst the Court of Appeal seems very recently to have broadened s 6(3)(b) beyond the earlier case-law,[[1078]](#footnote-1078) something which is discussed below, it became clear in *YL v Birmingham City Council*[[1079]](#footnote-1079) that the courts were overwhelmingly unpersuaded by the academics’ arguments as they were formulated at the time – especially in relation to the important issue of delegated functions. Judges and academics have therefore reached something of a stalemate. If a convincing way forward is to be found, a subtler and more sophisticated approach to convincing the courts is required. Greater efforts must be made to persuade the judges and allay any concerns they may have about expanding their interpretation of s 6(3)(b). Greater use must also be made of doctrine, since this is the one thing to which judges are most likely to respond.

There are various flaws in the courts’ approach to interpreting s 6(3)(b), which are examined throughout this chapter. Loosely, these can be classed as either ‘interpretative’ or ‘contextual’ flaws. Interpretative flaws relate to the end result in the courts’ treatment of s 6(3)(b) – to their construction of the term ‘functions of a public nature’. Examples are that the courts’ interpretation is too narrow and too focussed on institutional rather than functional factors. I consider interpretative flaws in part A, to make the basic case for a change in the law. Contextual flaws relate to the courts’ arrival at the particular interpretation that they reach – in other words, to the steps they take along the way. These concern their approach to the relationship between s 6(3)(b) and the law on amenability to judicial review; to the relevance of Strasbourg jurisprudence, which was addressed in the previous chapter and will not be considered in further detail here; and to s 6(5) HRA, which relieves bodies performing public functions of Convention liability when they perform a particular, private act. All of these colour the courts’ interpretation of a public function. Contextual flaws deserve consideration but will be dealt with at various points throughout the chapter rather than being discussed separately as the interpretative flaws are.

Having set the scene in part A, I proffer a novel interpretation of the law in this area in parts B and C. I do this on two levels: first, the hybrid public authority scheme itself; and, second, the meaning of a public function, which I consider in part C. The academic literature on s 6(3)(b) has focussed overwhelmingly on the second level, which is understandable given that the litigation in this area has also done so, but the first level is also important. It is only when the nature and effect of the hybrid public authority scheme is properly understood that a workable interpretation of the notion of a public function can be found. After all, what the hybrid public authority scheme *does* to the private defendants brought within it is bound to be linked to s 6(3)(b)’s scope: the more draconian the impact on a private individual of being labelled a hybrid public authority, the more reluctant the courts will be to construe s 6(3)(b) widely.[[1080]](#footnote-1080) Part B aims to address this first-level question by arguing that the hybrid public authority scheme is best construed as generating what may be termed ‘chameleonic’ horizontal effect.[[1081]](#footnote-1081) In brief, under the chameleonic model the nature of the dispute in question switches – from ‘vertical’ to horizontal in nature – once the court becomes seised of the matter. This is generated by the dual status that the HRA gives to hybrid public authorities: as public for the purpose of being brought to court as defendants, but private – as the previous chapter found – for the purpose of making Convention claims themselves. With the scheme reconceptualised, part C then turns to the issue of s 6(3)(b)’s scope. It proffers and explains its novel and broader ‘two-strand’ approach to the meaning of a public function, discounting along the way the alternative approaches to s 6(3)(b) that have been advanced elsewhere. Part D then puts the two-strand approach to the test, explaining how it would apply in various different situations.

As a point of clarification, readers will see that this chapter draws in part from the arguments made in chapter five, in relation to delegation under the LACPA. I do not revisit the delegation issue in detail in this chapter, however. The focus here is on the courts’ general approach to the meaning of a public function under s 6(3)(b). There is no need to reconsider the delegation issue as it relates to the HRA. This is not just because many of the sources referred to in chapter five related to the HRA anyway; it is also because chapter five’s arguments are automatically carried through into the s 6(3)(b) context by virtue of the two-strand approach itself. This is because LACPA functions represent one of the two distinct ‘strands’ of public function under s 6(3)(b), as I explain in detail below. What passes under the LACPA in the delegation context therefore passes also under the HRA.

## ‘INTERPRETATIVE’ FLAWS IN THE COURTS’ APPROACH

There are three interpretative flaws in the courts’ approach to the meaning of a public function under s 6(3)(b). First, it is narrower than Parliament is likely to have intended; second, it sits uncomfortably with the focus placed by s 6(3)(b) on the nature of the function being performed; and third, as the most recent cases seem to indicate, it is becoming increasingly incoherent.

The first two flaws are closely linked and are most evident in the specific context of delegated functions, which I explored in chapter five. There, it was seen that the courts seem to accept the basic force of the delegation argument in part, at least, but only where there are strong institutional links between the delegator of the function and the delegate.[[1082]](#footnote-1082) Where there are no such links, the fact of delegation seems irrelevant in the courts’ eyes. In other words, institutional factors such as the closeness of the relationship between delegate and delegator make all the difference to the courts.[[1083]](#footnote-1083) Indeed, in *R (Heather) v Leonard Cheshire Foundation*, where the Court of Appeal ruled that a charity was not a hybrid public authority when delivering residential care services on a local authority’s behalf, it was the lack of a close relationship between the two bodies of the kind present in *Poplar Housing and Regeneration Community Association v Donoghue*[[1084]](#footnote-1084)that killed the applicants’ claim that the delegate performed public functions under s 6(3)(b).[[1085]](#footnote-1085) These are significant observations because they illustrate the fine line that the judges are trying to tread. Since the courts already acknowledge that the delegation argument bears some force, the onus falls upon them to explain why that force disappears when the relationship between delegate and delegator differs. Without this justification, they will have been shown up not just by the logical force of the delegation argument and the wording of s 6(3)(b) but by their own case-law as well.

The courts’ treatment of institutional links under s 6(3)(b) makes for meagre justification, however, for three reasons – quite apart from the inadequacy of their attempts to address the delegation argument more specifically. First, the courts seem to proffer little at all by way of positive justification for attaching so much weight to institutional factors. The cases reveal something more akin to an instinctive preference for relying on such factors than anything else.[[1086]](#footnote-1086) For instance, Lord Woolf CJ simply stated in *Leonard Cheshire* that ‘it does not follow’ that a delegated function will be of the same nature when delegated as when performed in-house.[[1087]](#footnote-1087) In other words, it seemed not to follow that the nature of the function should be the courts’ only concern, but no further effort was made to explain why institutional factors like those mentioned above should be relevant.

Second, the courts’ formal position in relation to institutional factors is confusing in any event. The judges have issued mixed signals. They acknowledge in more recent cases that Parliament seems to have intended a focus on the body’s functions rather than on institutional factors, but they nevertheless stop short of formally overruling the clearly institutional approach in earlier cases like *Poplar Housing* and *Leonard Cheshire*. Lord Hope suggested a functional approach to s 6(3)(b) in *Aston Cantlow v Wallbank*: ‘It is the function that the person is performing that is determinative of the question whether it is… a “hybrid” public authority.’[[1088]](#footnote-1088) But neither *Poplar Housing* nor *Leonard Cheshire* were mentioned at all by their Lordships in that case. In *YL*, too, similar problems arose. Here, the House of Lords decided by a bare majority that a private care home operator was not performing a public function when delivering residential care services on behalf of a local authority. Both Lord Mance, for the majority, and Baroness Hale, dissenting, criticised the Court of Appeal’s focus on institutional factors in *Poplar Housing*, but neither went as far as to suggest that this aspect of the ruling should be overturned.[[1089]](#footnote-1089) Most recently, in *R (Weaver) v London and Quadrant Housing Trust*,[[1090]](#footnote-1090) the Court of Appeal ruled by a bare majority (Rix LJ dissenting) that a registered social landlord (RSL) was a hybrid public authority when seeking to terminate the claimant’s tenancy for rent arrears. *Weaver* differed materially from *Poplar Housing* because the landlord had not been created and assisted in its management by a local authority, as Poplar Housing had. The institutional links were therefore much weaker. Their Lordships all seemed to believe that *YL* had cast doubt over the force of *Poplar Housing*, albeit that *YL* left the ultimate question of whether it should be applied in future unresolved, but their overall view as to whether *Poplar Housing* remained binding was nevertheless confused. Lord Collins MR’s view was fairly straightforward: *Poplar Housing*’s authority had ‘been undermined by *YL*’.[[1091]](#footnote-1091) However, Elias LJ noted the failure of the House of Lords to ‘indicate whether the decision itself was correct notwithstanding the [*Poplar Housing*’s] defective reasoning’ and stated that ‘Accordingly, I do not gain any assistance from that case.’[[1092]](#footnote-1092) This is a curious position that seems to treat *Poplar Housing* neither as overruled nor as binding but somehow in abeyance, instead, until the Supreme Court clarifies the issue. Rix LJ’s stance was also unclear. On the one hand he noted that *Poplar Housing* was ‘of now uncertain authority’,[[1093]](#footnote-1093) but on the other he appeared to think it of some force at least, applying it in his dissenting judgment because ‘it recognises… that providing accommodation to rent is not without more a public function, irrespective of the section of society for whom the accommodation is provided.’[[1094]](#footnote-1094) Quite apart from evincing obvious confusion as to the status of *Poplar Housing* in their Lordships’ eyes, these *dicta* are also problematic because they focus only on that case – as if it were the only one to have taken an institutional approach. It certainly set the approach in motion, by emphasising that the links between the local authority and the landlord were important, but *Leonard Cheshire* was the equally significant sequel. If anything, the latter more clearly encapsulates the institutional approach because it completes the jigsaw by making it clear beyond doubt that functions performed on behalf of central or local government will *not* be public without the presence of institutional links of the kind in *Poplar Housing*. Thus, the issue for the Court of Appeal in *Weaver* was not whether to follow *Poplar Housing* as such, but whether to apply a particular *approach* that had found favour in two previous cases. Not surprisingly, lower courts seem to be unsure what to do – not least because the House of Lords focussed only on *Poplar Housing* in its criticism of the institutional approach in *YL* – and the confusion will no doubt continue unless the Supreme Court unambiguously clarifies the status of the institutional approach. Understandably, lower courts will lack the confidence to make a clean and explicit break from precedent without this warrant. Along with the remarks in *Weaver*, remarks in *R (Beer) v Hampshire Farmers’ Markets Ltd* also seem to reinforce this idea. Notwithstanding the apparent preference for a functional approach in *Aston Cantlow*, the Court of Appeal in *Beer* nevertheless believed *Aston Cantlow* to have left both *Poplar Housing* and *Leonard Cheshire* intact: it remained good law.[[1095]](#footnote-1095) Not only is the timidity of the House of Lords in *YL* confusing in itself; it also speaks to the first point, above – that the courts should be bolder in justifying their approach or do more to retreat from it. As things stand, they are trying to chart an unsustainable middle ground.

The third reason why the courts’ approach to institutional factors makes for meagre justification is that a further tension exists between their remarks in earlier cases and the substance of their approach. This adds to the confusion described above. Even if it is clear from recent cases that the courts now believe Parliament to have intended a functional rather than an institutional approach, they still place heavy emphasis in their reasoning on who the body in question *is*, rather than what it does. This is most evident from *YL*. In finding that a private care home operator was not performing a public function when delivering residential care services on behalf of a local authority, their Lordships in the majority attached considerable weight to the operator’s status as a commercially-motivated, profit-making organisation. This, said Lord Mance, ‘point[ed] against’ treating its functions as public.[[1096]](#footnote-1096) Similarly, in *Weaver*, Rix LJ, dissenting, believed that it was ‘counter-intuitive’ to superimpose Convention liability on bodies acting in the commercial sphere.[[1097]](#footnote-1097) Jonny Landau refers to this approach as the ‘motivational’ approach. It classifies the function according to the reason why the actor performs it.[[1098]](#footnote-1098) In essence the approach draws a bright line between self-interested activity such as making profit, on the one hand, and constitutionally selfless activity, on the other. Whilst this is one fairly uncontroversial way of drawing the public-private line, as chapter one explained, it cannot be the public-private divide that Parliament envisaged when it enacted s 6(3)(b).[[1099]](#footnote-1099) Because ‘selfless’, institutionally public bodies are regarded as core public authorities under s 6 HRA,[[1100]](#footnote-1100) a cause of action will straightforwardly exist against all such bodies under the HRA by virtue of the core public authority concept alone. Clearly, then, by enacting s 6(3)(b), Parliament intended Convention norms to be applied further, to at least some institutionally *private* bodies. These are the very bodies who will be constitutionally permitted to engage in ‘selfish’ activity of the kind described in *YL* and that was said to fall outside of that provision’s scope. With respect, the motivational approach leads to an impossible reading of s 6(3)(b). When taken to its logical limits, it would seem to exclude *all* activity undertaken by private bodies from the scope of s 6(3)(b). Indeed, under this approach it is difficult even to see how the private, profit-making psychiatric hospital, exercising statutory powers to detain and treat inpatients against their will in *R (A) v Partnerships in Care Ltd*,[[1101]](#footnote-1101) could be said to qualify. This is worrying not least because the idea that s 6(3)(b) should apply to the exercise of coercive powers of detention is eminently sensible, complying as it does with the LACPA’s fundamental tenets.

This is not to say that the courts will never find that a private body exercises a public function under s 6(3)(b) again. In fact, as *Weaver* shows, they already have. But it does suggest that the true basis of the courts’ approach is likely to become further obscured as the judges will inevitably have to draw fine, and potentially arbitrary, distinctions to defend their decisions to go against the natural grain of their case-law when they believe the circumstances to require it. Indeed, this is exactly what appeared to happen in *Weaver* itself. Here Elias LJ drew on *YL*, noting its emphasis on commercial motivation, and argued that in the instant case the landlord’s status as a not-for-profit organisation told in favour of regarding the function of allocating and managing housing stock as public.[[1102]](#footnote-1102) The provision of subsidised housing was governmental *per se* because ‘Almost by definition it is the antithesis of a private commercial activity.’[[1103]](#footnote-1103) In other words, his Lordship was able to circumvent the *YL* approach towards commercial activity by drawing on the landlord’s not-for-profit objectives. However, this distinction between commercial and charitable organisations is extremely tenuous. First, it is suspect for the reason that both types of organisation are institutionally similar in the sense that they are constitutionally selfish bodies with the freedom to choose their own motivations,[[1104]](#footnote-1104) even if charities’ founding members do decide to use this freedom to act for others rather than to make profit; and second, it also drives the wedge even deeper between the courts’ approach and their description of it. Notwithstanding the remarks in *Aston Cantlow* and *YL* to the effect that s 6(3)(b) is functional in outlook, *Weaver* is yet another example of the judges attaching weight to a body’s institutional characteristics – its motivation – when determining the nature of its functions. The *Weaver*-style focus on not-for-profit objectives also conflicts with the approach in previous cases. Whereas the Court of Appeal regarded the delegate’s not-for-profit objectives as a relevant factor pointing towards public-ness in *Beer*,[[1105]](#footnote-1105) Lord Woolf CJ was much stricter in *Poplar Housing*. Charitable motivations, he said, do ‘not point to the body being a public authority.’[[1106]](#footnote-1106) Moreover, at no point in *Leonard Cheshire* was it suggested, either at first instance or in the Court of Appeal, that the private care home operator’s status as a charity helped the applicants’ case that it performed a public function under s 6(3)(b). All of the foregoing supports the argument that, far from being able to justify their focus on institutional factors, the courts are confused and inconsistent in their approach to them. Especially in relation to the delegation argument, as chapter five argued, their focus should be firmly on the nature of the function being performed. Despite the remarks made in certain cases, it is still a long way off.

Returning then to the interpretative flaws in the courts’ approach to s 6(3)(b), the third and final one is the worsening incoherence in the case-law. Not only is the approach unsatisfactory for the reasons described above, it is also descending further into confusion over time. The obvious manifestation of this is *Weaver*, which renders RSLs hybrid public authorities in their capacities as providers of accommodation to publicly-funded tenants – even though those landlords may not have been created by local authorities as the landlord was in *Poplar Housing*. Since the focus in *Poplar Housing* was overwhelmingly on the relationship between the local authority and the landlord, this represents a significant departure from a Court of Appeal precedent that, whilst recently judicially criticised, has not been formally overruled.[[1107]](#footnote-1107) It is definitely a step in the right direction to broaden s 6(3)(b) beyond the scope set by *Poplar Housing*, but *Weaver* is a pyrrhic victory. At a time when the state of the law is already unsatisfactory, it simply exacerbates the problem for the Court of Appeal to depart so obviously from one of its own precedents without even being clear as to whether that precedent had been overruled by the House of Lords. *Weaver* therefore represented a break from *Poplar Housing*, but not by any means a clean one. If the Court of Appeal had produced a workable and defensible definition of a public function in the process, then maybe this would have gone some way in mitigation. But it did not. For one, there are distinct problems with some of the individual points their Lordships made. Elias LJ thought it highly relevant that the landlord worked ‘in very close harmony’ with the local authority in the provision of social housing,[[1108]](#footnote-1108) even though – as he recognised – it had not stepped into the latter’s shoes by acting on its behalf as the bodies had done in *Poplar Housing* and *Beer*, for example. The ‘close harmony’ criterion strongly resembles the ‘statutory underpinning’ criterion that features in some of the more recent cases on amenability to judicial review.[[1109]](#footnote-1109) This observation is strengthened by looking to the importance that their Lordships attached in *Weaver* to the heavy statutory regulation to which RSLs are subject. As Elias LJ said, the ‘intrusive regulation’ ensures ‘that the objectives of government policy with respect to this vulnerable group in society are achieved.’[[1110]](#footnote-1110) Like its ‘statutory underpinning’ cousin, the ‘close harmony’ test is unworkably vague. It reduces the public-ness issue to a question of degree and says little, if anything, of how close the harmony must be before a given function becomes public. It also involves a focus on institutional factors because it essentially asks how close the relationship is between the body in question and the core of the state. Back, then, to the second interpretative flaw mentioned above: the courts’ approach is distinctly institutional in substance, even if they now believe it to be functional.

It is also necessary to step back, though, and look beyond the detail to the broader approach taken in *Weaver*. The overriding problem with the judgment is that it perpetuates the fashionable myth that there can be no universal test for a public function under s 6(3)(b), which must therefore involve what in *Weaver* was somewhat disingenuously called a ‘multi-factorial assessment’.[[1111]](#footnote-1111) This is consonant with remarks made in earlier cases to the effect that there can be ‘no single test of universal application’,[[1112]](#footnote-1112) or ‘single litmus test’,[[1113]](#footnote-1113) and that the outcome will depend instead on balancing various factors – the role and responsibility of the state, the extent of regulation over the function in question and the like[[1114]](#footnote-1114) – to reach a conclusion. However, the reality seems to be that the approach allows the judges simply to engage in an intellectual free-for-all, adducing any and every factor that they believe justifies what is probably little more than an instinctive view as to how the body ought to be treated. Dissenting in *Weaver*, Rix LJ listed no less than ten different factors that he said generated the conclusion that the landlord was not performing a public function when managing and allocating housing stock.[[1115]](#footnote-1115) Although listing fewer factors, Elias LJ’s (majority) approach was similar. In his view, factors such as the extent of public finance, and whether the body is taking the place of central or local government, were insufficient of themselves to evince a public function, but ‘when considered cumulatively, they establish sufficient public flavour to bring the provision of social housing by this particular RSL within that concept.’[[1116]](#footnote-1116) Even though some of these factors appeared in earlier cases like *Aston Cantlow*,[[1117]](#footnote-1117) very little guidance appears in those cases as to how to weigh most of them relative to each other. The effect of the multi-factorial approach is to leave individual judges with considerable discretion from case to case, even though on a superficial level they may be able to support their conclusions with some reference to previous case-law and therefore to give the impression, at least, that they are simply applying and building on earlier precedents. The fact that both Elias and Rix LJJ can adopt a factor-based approach and make extensive reference to the same precedents, but nevertheless reach opposite conclusions, is testimony to how ineffective the approach is at prescribing the outcome in a given case. As Feldman remarks, ‘The disagreements in this case show how uncertain the law now is.’[[1118]](#footnote-1118) The term ‘sufficient public flavour’, used by Elias LJ to sum up his conclusion on the issue,[[1119]](#footnote-1119) also adds nothing. It is a mere ‘conclusory label’, in Paul Craig’s words,[[1120]](#footnote-1120) that masks the true position: the courts are unable to identify clearly the features that they believe indicate the existence of a public function under s 6(3)(b).

Evidently, then, *Weaver* exacerbates much of what was wrong with the courts’ approach in this area. It is a case in which the judges decide to depart from the reasoning in *Poplar Housing*, which in theory is still binding, for the reason that they wish to avoid taking the institutional approach that in substance they end up taking anyway; and in the process they further endorse an analysis of s 6(3)(b) that requires courts to do nothing more than consider a number of different factors that can then be weighed very largely according to the discretion of the individual judge. Coupled with the motivational approach in *YL*, which casts doubt on *Partnerships in Care* and carried with it its own problems in *Weaver*, as discussed above, it is clear that the law is in a worsening state of decline. It is tangled, heavily unprincipled and deeply opaque. A new interpretation of s 6(3)(b) is essential.

## UNDERSTANDING THE HYBRID SCHEME[[1121]](#footnote-1121)

As observed above, the search for a reliable interpretation of the term public function must begin with a thorough appreciation of the nature of the hybrid public authority scheme and its impact on the private bodies that are brought within it as hybrid bodies. ‘Chameleonic’ horizontal effect, this chapter argues, represents the best reading of the scheme. The following section explains the chameleonic model; the second draws doctrinal support for the model from an analysis of the courts’ approach to the parallel common-law horizontal effect issue.

### Explaining the chameleonic model

As the previous chapter explained, it is imperative that hybrid public authorities are able to rely on the Convention in their public as well as their private capacities. This follows from the idea that they remain non-governmental organisations under Art 34 ECHR when acting publicly. They therefore enjoy standing to rely on the Convention in domestic law.[[1122]](#footnote-1122) The idea is also buttressed by Art 14 ECHR, which prohibits discrimination in the enjoyment of Convention rights on the grounds of ‘sex, race, colour… or other status.’ All things considered, it is clear that Parliament would not intend to strip bodies of Convention protection simply because they happen to be saddled with hybrid public authority status in domestic law – at least, that is, without making its intentions crystal clear. No such intentions manifest themselves in the HRA.

Acknowledging that hybrid public authorities can rely on the Convention in their public capacities is one thing, however; protecting those rights in practice is another.[[1123]](#footnote-1123) For the most part, the courts should not find this too difficult a task. A hybrid public authority might seek to rely on the Convention in one of four different ways when acting in its public capacity,[[1124]](#footnote-1124) the first three of which the courts can permit relatively straightforwardly. First, a hybrid public authority might wish to rely on the Convention vertically (i.e. against another public authority), as a sword (by mounting a claim against it). In order to permit the body to mount this claim, all the court has to do is ignore the fact that the body may be acting in its public capacity when doing so. Thus, if a local authority applies to revoke a private care home operator’s licence without notice, with the result that its business is ruined,[[1125]](#footnote-1125) the operator should be able to claim under the HRA that the local authority has breached Art 6 and Art 1 of the First Protocol. The fact that the operator’s business may consist of delivering contracted out care services, and thus that under s 145 HSCA it performs public functions when doing so, will be irrelevant to its ability to make that claim.[[1126]](#footnote-1126) Second, the hybrid public authority might wish to rely on the Convention vertically but as a shield, i.e. defensively, by way of ‘collateral challenge’,[[1127]](#footnote-1127) in a dispute initiated by another public authority. Were the Inland Revenue to make tax demands of a defendant that breached its Convention rights, for example, it would be able to pray that argument in aid in its defence. Again, all that is required is for the court to ignore any possibility that the defendant is a hybrid public authority acting in its public capacity when making this claim. The same would be true of the third way – relying on the Convention *horizontally*, as a sword. As the previous chapter saw, private claimants can enforce their Convention rights indirectly against private defendants by pleading an existing cause of action and then relying on the court’s duty as a public authority to develop that cause of action Convention-compatibly. Here, the court simply needs to appreciate that when a private body seeks to deploy its Convention rights in this way, it makes no difference that it is a hybrid public authority acting publicly. It is still a private body deserving of the Convention protection in question.

The fourth, more complex scenario, is when a hybrid public authority seeks to use its Convention rights horizontally, as a shield, against a private claimant who brings a s 6(3)(b) claim against it. It is complex because Convention rights are drafted to apply primarily against institutionally public bodies. If a claimant brings an Art 8 claim against a core public authority like a local authority, for example, the court assessing the merits of the claim will work through the standard analysis of deciding whether there has been an interference by the local authority with the claimant’s right and, if so, whether the interference is prescribed by law, has a legitimate aim and is necessary in a democratic society. At this stage the defendant can rely on applicable Convention qualifications by responding that it interfered with the claimant’s right for the protection of the rights and freedoms of others, or for the prevention of disorder or crime, and so on. But complications arise if the defendant is a hybrid public authority and the court works through the same analytical process. As Stanley Burnton J observed at first instance in *Leonard Cheshire*, ‘the justifications referred to in Article 8.2 are all matters relevant to government, but not to non-governmental bodies.’[[1128]](#footnote-1128) As institutionally private bodies, hybrid public authorities will ordinarily find it much more difficult to rely on the Convention qualifications than core public authorities would. Whilst they might be able to make use of certain qualifications in isolated situations – private prison operators could claim that they were acting for the prevention of disorder or crime or in the interests of national security by intercepting prisoners’ communications, for example[[1129]](#footnote-1129) – it will be generally tricky. This is a thorny issue: the qualifications are important because they provide the defendant with a number of legitimate aims allowing it to override the claimant’s Convention right lawfully. It is difficult to see how a private care home operator could claim to be acting for the economic well-being of the country under Art 8(2), for instance, when attempting to serve notice on residents to quit as the defendants did in *Leonard Cheshire* and *YL*. Most importantly, it is difficult to see how it could realistically claim to be acting for the protection of the rights and freedoms of ‘others’ when seeking to advance its *own* Convention right, say, to respect for property under Art 1 of the First Protocol, by serving notice. This is problematic if we are to take the need to protect hybrid public authorities’ Convention rights seriously.[[1130]](#footnote-1130)

Contrast the position of ordinary private defendants in the parallel common law horizontal effect context, however. If a private person finds itself on the receiving end of a Convention claim in this context, relying defensively on the Convention is straightforward. This is because the Convention rights are not deployed directly against the private defendant in that context but *indirectly*, instead, through the court as a public authority. If the claimant relies on a qualified right such as Art 8 ECHR and the defendant feels that the common-law development sought by the claimant would interfere with its own Convention rights, it can plead those rights as a defence using the ‘rights of others’ qualification under Art 8(2). This is because the court is an obvious public authority, and so the focus is on whether *it* has breached Convention rights. When the Convention qualifications are examined, the focus is therefore on whether *it* is acting for the rights and freedoms of others, and so on, by refusing to develop the common law in the manner sought by the claimant. The court must then undertake a balancing act between the competing rights, as it did for example with the rights to privacy and freedom of expression in *Douglas v Hello!*.[[1131]](#footnote-1131) Whether the court decides that the balance should come down in favour of claimant or defendant in a given case is less the issue; the point is that the court can at least strike the balance in the defendant’s favour, preferring the latter’s Convention rights rather than the claimant’s, without any conceptual problems of the kind described above. The court is not an institutionally private body,[[1132]](#footnote-1132) so it has no problems claiming that *it* is acting for the protection of the rights and freedoms of others by upholding the defendant’s rights. The upshot is that ordinary private individuals can deploy their Convention rights defensively in horizontal disputes, because the rights are asserted indirectly through the court, whereas hybrid public authorities will find it much more difficult to the point where they risk being rights-stripped; that is, if they are treated straightforwardly as *core* public authorities would be. Clearly, greater account must therefore be taken of the hybrid public authority’s institutionally private nature – of the necessarily *horizontal* nature of the dispute in question.

Before an appropriate reading of the hybrid public authority scheme that does this can be explained, however, it is worth discounting two alternative solutions to the problem. First, as Stanley Burnton J appeared to suggest at first instance in *Leonard Cheshire*, the problem might be contained by reading down the scope of s 6(3)(b) – in other words, by treating the fact that hybrid public authorities may have difficulty relying defensively on the Convention as a reason not to give a generous reading to the term public function.[[1133]](#footnote-1133) Rather than pursuing direct Convention claims against private bodies as hybrid public authorities, claimants would then be forced to seek indirect Convention protection against them through the common-law horizontal effect mechanism, or the interpretative obligation under s 3 HRA, instead. This is unsuitable for two reasons. First, it fails to solve the rights-stripping problem. Unless the scope of s 6(3)(b) was interpreted down to vanishing point, which would flout Parliament’s intention by side-lining s 6(3)(b) altogether, it would still apply to some hybrid public authorities and the problem of rights-stripping these bodies would remain. Second, s 3 HRA and the common-law horizontal effect mechanism are inadequate substitutes for a direct action under s 6(3)(b) anyway, because neither provides the claimant with a Convention-based cause of action against a private defendant. There will be some cases, at least, in which claimants are unable to bring the defendant to court without relying on s 6(3)(b) because there is no relevant cause of action on which to rely.

The second solution is to fudge the text of the qualified Convention rights, taking the rights of ‘others’ to include the defendant’s rights as well.[[1134]](#footnote-1134) Again, however, this is unsatisfactory. Despite its alluring simplicity, it maintains a textual fiction that it is better to avoid than embrace.

The third and preferable solution is to develop a more sophisticated understanding of the hybrid public authority scheme as a whole, in which it is read as generating ‘chameleonic’ horizontal effect. To avoid the risk of rights-stripping hybrid public authority defendants by failing to take sufficient account of the defendant’s status as a private body, the hybrid public authority scheme should be read, in substance, in the same way as its common law counterpart; that is, as a dispute in which the claimant asserts their Convention rights indirectly via the court, rather than directly against the defendant itself. In essence, and as the term chameleonic suggests, the nature of the dispute therefore switches – from vertical, to begin with, to horizontal, once the dispute gets underway. Section 6(3)(b) deems the private defendant to be a public authority in order to allow the claimant to bring it to court, which makes the scheme look like one of *vertical* Convention protection. But this is merely a temporary fiction. Once the court begins to hear the substance of the case, it must treat the defendant like it would treat an ordinary private person. The defendant is a public authority in form; a private individual in substance. The dispute is therefore vertical in form; *horizontal* in substance.

### Support for the chameleonic model

Not only does the chameleonic model fully guarantee the ability of hybrid public authorities to rely on the Convention; it also illustrates the similarities between the hybrid public authority scheme and the scheme of horizontal effect operating through s 6(3)(a) HRA under the common law. In turn, this lends the model potentially valuable doctrinal support.

The hybrid public authority scheme is a complex one. As well as being ostensibly vertical for creating a cause of action against a ‘public authority’, it also contains elements of both direct and indirect horizontal effect. It is directly horizontal in the sense that s 6(3)(b) generates a statutory cause of action against a body which is in reality a private individual, and must be treated as such. And yet to some extent the scheme is also indirectly horizontal – albeit not perfectly so, since an indirectly horizontal scheme applies the Convention rights to the *law* rather than generating a cause of action directly against the defendant itself, as the hybrid scheme does. But common law indirect horizontal nevertheless bears an additional defining characteristic, which *is* shared by the hybrid scheme once the dispute reaches court: the claimant asserts their Convention rights *through the court*, which sits at the apex of the dispute and balances the competing rights of claimant and defendant. Under the chameleonic model, the switch that occurs in the nature of the dispute therefore represents a switch from a vertical framework to one which can be described as roughly indirectly horizontal in nature.

When the substance of the hybrid public authority scheme is seen in this way, the rough parallels with the scheme of horizontal effect endorsed by the courts in the common law context come into focus. The courts have recognised – rightly, as the previous chapter explained – that the common law scheme is also one of indirect horizontal effect, concerning, as it does, their duties to use Convention rights to develop the existing law. The courts also seem to accept that they are *bound* in some sense to develop existing causes of action – in other words, to apply rather than merely consider the Convention rights, which supplant the existing law with Convention norms.[[1135]](#footnote-1135) This is only a tentative suggestion, given the indeterminacy of the judges’ views in the breach of confidence context and the suggestion, by Gavin Phillipson,[[1136]](#footnote-1136) that that context may yield little about the courts’ general approach anyway. But it is safe to say that the courts’ basic task in the common law context, with full indirect horizontal effect discounted, is not dissimilar to the courts’ task under the chameleonic model: they apply the Convention between claimant and defendant, balancing the competing rights, determining which shall prevail. The two schemes are analogous in key respects. This is significant. In both contexts, Parliament has instructed the courts to apply Convention rights to private parties but left them with hardly any explicit guidance as to when and how far they should do so. Judges are likely to be operating in part, at least, on the basis of their own ‘feel’ for how far Convention rights should be permitted to infuse the private sphere here. If the judges are prepared to endorse a particular model of Convention liability against private individuals in one context, they should not be too unhappy with endorsing a similar one in the other. The courts’ approach to the common law puzzle therefore suggests that they would be potentially receptive to the chameleonic model as a scheme of Convention liability against private individuals under s 6(3)(b).

This is not to suggest that the chameleonic model is identical in nature and scope to the model adopted by the courts in the common law context, however.[[1137]](#footnote-1137) There are three principal contrasts. First, it is clear that the remedial provisions differ under each scheme. The court’s remedial powers are governed by s 8 HRA under the hybrid scheme whereas the court awards remedies according to its own domestic precedents in the common law context. Second, the scope of each scheme, i.e. *when* a claimant can assert their Convention rights against the defendant, also differs. Under the common law scheme, the claimant can only assert their Convention rights against the defendant if the state would be liable under the private indirect responsibility principle for leaving the defendant’s behaviour unregulated.[[1138]](#footnote-1138) By contrast, it is clear that the claimant can allege the breach of any Convention right under the hybrid public authority scheme – that is, if the behaviour complained of falls within the subject-matter of (i.e. engages) the right in question. Third, and along the same lines, there are limits to what the courts can do when applying Convention rights in the common law context. As the previous chapter explained, their duty to apply those rights is bounded by the need to ensure that common-law development remains incremental. Under the hybrid public authority scheme, however, no such restriction exists. It confers a statutory cause of action against the defendant public authority and has nothing to do with the common law.

### Impact of the chameleonic model

Aside from settling the nature of the hybrid public authority scheme, the chameleonic model also sets the scene for the analysis of the scope of s 6(3)(b) that follows in part C. Whilst the model does not of itself compel any particular interpretation of a public function, it does expose the hybrid scheme as something of a sheep in wolf’s clothing. It establishes a framework of Convention liability much closer to horizontal effect than to the vertical scheme that it resembles at first sight. Now that it is clear that hybrid public authorities must be treated in much the same way as ordinary private defendants when in court, and in particular that they can assert their own Convention rights as a potential defence to a claim under s 6(3)(b), it becomes apparent that the courts have considerable room to expand their interpretation of a public function before they begin to overburden private defendants with Convention liability. With the nature of the scheme properly understood, it would do no harm, in other words, for the courts to cast the net wider. This is not simply an abstract point based on the logical link between the scope of the hybrid public authority scheme and its impact on hybrid public authorities; it is also something that the judges themselves should appreciate, given the judicial concerns that seem to surface from time to time to the effect that hybrid public authorities should be able to respond adequately to Convention claims. In *YL*, for instance, Lord Mance believed that the care operator would be able to rely on its ‘ordinary private law freedom to carry on operations under agreed contractual terms’ under Art 8(2) ECHR, presumably under the ‘rights and freedoms of others’ limitation.[[1139]](#footnote-1139) There is scope to doubt whether this is true as a matter of the construction of Art 8 given Strasbourg’s view that the limitations are to be ‘narrowly interpreted’[[1140]](#footnote-1140) and that there is ‘no room for the concept of implied limitations’,[[1141]](#footnote-1141) but this is less the issue. The point is that judges themselves seem to be concerned to ensure that hybrid public authorities are not simply paralysed by Convention liability; and with this in mind, the courts should find the chameleonic model and its attempt to guarantee Convention protection appealing.

The similarities between the chameleonic model and the common law scheme should also help to assuage any concerns to the effect that it would be unacceptable for the courts to broaden their interpretation of s 6(3)(b). Even on a broader construction that included delegated functions of the sort described in chapter five, the vast majority of private activity would still be untouched by that provision. This contrasts with the relatively claimant-friendly position in the common-law horizontal effect context: in order to bring the defendant to court, all the claimant needs to do here is plead an existing cause of action that is ‘relevant’, as one judge has put it, to the nature of the Convention claim being made.[[1142]](#footnote-1142) Subject to the constitutional constraint of incrementalism, the courts will then get to work by applying the right in the dispute before them. The extent to which the courts have been prepared to stretch the breach of confidence action to ensure compatibility with Art 8 demonstrates the relative ease with which claimants can assert their rights in the common law context. This is not to say that the hybrid scheme is somehow ineffective, or toothless. Given the contrasts between that scheme and the common law scheme that were described above, it has its place. But it is not so draconian that the courts need to constrain it as tightly as they have done. It should be remembered that the width of the term ‘functions of a public nature’ under s 6(3)(b) is not the only factor responsible for determining the defendant’s liability in court. Even if a claimant succeeds in demonstrating that a private defendant performs public functions, the claimant must still be able to demonstrate that their rights should prevail over any Convention rights that the hybrid public authority might advance in response. It is at this stage that the court will be able to conduct an intricate and context-sensitive balancing exercise between the competing rights. This is the forum in which judges should air and accord due weight to any concerns that they might harbour about the impact on the defendant if the claimant’s claim is upheld. Foreclosing the issue at the threshold stage by construing the meaning of a public function unduly narrowly is not the answer.

## THE MEANING OF ‘FUNCTIONS OF A PUBLIC NATURE’

It is clear, then, that a broader interpretation of the notion of a public function is in order. It is argued that, properly understood, s 6(3)(b) gives rise to a ‘two-strand’ approach, i.e. one with two conceptually distinct strands of public function. The first strand are *Costello-Roberts* functions; the second, LACPA functions. Each strand is explained below, followed by a discussion and dismissal of the various alternative interpretations of s 6(3)(b) that have been proffered. Finally, part C ends by examining s 6(5) HRA and the meaning of a private act.

### Strand one: *Costello-Roberts* functions

The first strand is relatively straightforward. As the previous chapter explained, the kinds of functions that engage the state’s responsibility under the somewhat cryptic *Costello-Roberts* line of cases differ from other activities by private individuals, such as violence or sexual assault, that tend to engage the state’s responsibility under the private indirect responsibility principle. *Costello-Roberts* functions seem to involve the delegation of a particular function from the state to a private individual for the purpose of assisting the state to perform its Convention or other international obligations. For the purposes of granting a Convention remedy in domestic law against the bodies who perform them, it would seem appropriate to label them functions of a public nature under s 6(3)(b). This is all the more so given that the courts may not always be able to ensure Convention protection through the common law, where the private indirect responsibility jurisprudence typically belongs. This is because they are limited in their developmental capabilities by the constitutional constraint of incrementalism, as the previous chapter explained. It is safe to say that Parliament is likely to have intended that s 6(3)(b) encompass at least those functions that engage the state’s responsibility under the *Costello-Roberts* principle.[[1143]](#footnote-1143)

### Strand two: LACPA functions

For the reasons given in the previous chapter, however, it is equally safe to say that Parliament is unlikely to have intended s 6(3)(b) to stop there. There are good reasons to believe that the notion of a public function was intended to be broader, not least because the phrase ‘functions of a public nature’ does not appear anywhere in the *Costello-Roberts* line of cases. Moreover, there is no reason why all public functions under s 6(3)(b) should share a common conceptual basis. A public function is difficult if not impossible to define reliably in the abstract, as chapter one explained. Especially given that s 6(3)(b) exists against two different backdrops (the Strasbourg scheme and judicial review), Parliament may well have intended functions to be included within s 6(3)(b) that are not necessarily linked by any higher theoretical underpinning.

So what, then, are the other public functions that s 6(3)(b) envisages? It is argued that these are the LACPA functions that the courts would regard as public for the purposes of determining a body’s amenability to judicial review. This is a multi-faceted argument. At the outset, it should be stressed that there are sound constitutional reasons for thinking that Parliament intended for these functions to be brought within s 6(3)(b). The argument is therefore a positive rather than a negative one: it is not simply a case of adhering to a pre-HRA body of case-law for the reason that no better guidance on the meaning of a public function exists.

The argument proceeds as follows. First, it is important to appreciate the significance of the way in which s 6(3)(b) is drafted. It is obvious that the term ‘functions of a public nature’ is imprecise on its face and admits of a potentially infinite number of differing interpretations. The range of possible interpretations is due to the conceptual difficulty of determining the scope of a public function and the general lack of contextual guidance given on the matter by the HRA. Whilst certain of Parliament’s intentions can be inferred relatively straightforwardly, for example that the House of Lords erred in *YL* in its blanket exclusion from s 6(3)(b) of functions performed for profit,[[1144]](#footnote-1144) the HRA as a whole is largely unrevealing. But judges and academics tend to view this negatively, concluding that s 6(3)(b) is poorly drafted and that Parliament should ideally have done more to make its intentions clear. In a seemingly plaintive tone, Lord Neuberger stated in *YL*, for example, that:

‘Any reasoned decision as to the meaning of section 6(3)(b) risks falling foul of circularity, preconception and arbitrariness. The centrally relevant words, “functions of a public nature”, are so imprecise in their meaning that one searches for a policy as an aid to interpretation. The identification of the policy is almost inevitably governed, at least to some extent, by one's notions of what the policy should be, and the policy so identified is then used to justify one's conclusion.’[[1145]](#footnote-1145)

The message is somewhat defeatist. It suggests that s 6(3)(b) is drafted so imprecisely that it is somehow impossible to arrive at a reasoned, dispassionate and convincing construction of that provision. It is echoed, too, in the popular judicial view that s 6(3)(b) requires a ‘multi-factorial’ assessment, which was discussed above.[[1146]](#footnote-1146) Yet whilst a reliable abstract definition of a public function may be difficult to determine, it does not follow that Parliament intended the courts to take such a malleable and open-textured approach to s 6(3)(b). As Lord Reed recently remarked, ‘If [legislative] language is used whose meaning is not immediately plain, the court does not throw up its hands in bafflement’.[[1147]](#footnote-1147) The question of which bodies must comply with the Convention is an important one that deserves a clear answer.

The view that Parliament has set the courts a difficult or insurmountable task risks obscuring an alternative view of its intention in drafting s 6(3)(b) as it did. Statutory interpretation is a complex task. As chapter one explained, the old view that it involves determining the literal meaning of Parliament’s words is outdated. Nowadays, statutory interpretation is acknowledged to occur in context; it is an exercise in determining the meaning of words against a backdrop of principles that are typically supplied by the courts.[[1148]](#footnote-1148) The interpretation arrived at therefore represents the sum total of these principles and Parliament’s language. This in turn generates some thorny theoretical questions. In particular, if the courts are to supply the principles that complete the meaning of a provision, do they apply modern principles or those obtaining at the time of the enactment in question? In other words, do they seek to ascertain the intention of the enactment’s framers or to understand the enactment as it would be understood today? The debate itself lies beyond the scope of the present thesis, but commentators’ remarks in the course of the debate nevertheless shed some light on Parliament’s possible intention when enacting s 6(3)(b).

The term ‘functions of a public nature’ might be thought to be ambiguous. As Randal Graham would argue, this would be a mistake. Instead, s 6(3)(b) is *vague*. This is different. Ambiguity occurs ‘where language leaves the interpreter with a choice between an easily ascertainable number of specific interpretative choices’;[[1149]](#footnote-1149) vagueness when ‘the language being interpreted leads to a broad continuum of meanings (giving rise to “marginal questions of degree”)’.[[1150]](#footnote-1150) As an ambiguous statement, Graham gives the example of a letter of reference saying ‘You will be lucky if you can get Jarrod to work for you’. This, he says, can reasonably mean either, but must mean one, of the following two things:

‘(A) that Jarrod is an excellent worker and that the recipient of the letter would be lucky to have Jarrod join his or her workforce, or (B) that Jarrod is lazy and the recipient of the letter would be well advised to refrain from offering Jarrod a job.’[[1151]](#footnote-1151)

It is clear that s 6(3)(b) is vague rather than ambiguous. Parliament has not simply presented the courts with a choice between an ‘easily ascertainable number of specific choices’, as in the Jarrod example. For the reasons given above, the courts, in Graham’s words, have ‘the freedom to choose from an almost infinite number of meanings that can be plotted along a continuum starting with A (an exceedingly broad interpretation) and ranging to narrow interpretations such as B (or even beyond).’[[1152]](#footnote-1152) This is an important observation. As Graham notes, genuine ambiguity is relatively rare – and overwhelmingly negative. It suggests ‘nothing more than a fallible drafter’[[1153]](#footnote-1153) who is only partially able to narrow down the range of possible interpretations of the provision in question, leaving the courts to do the remainder of the work by arbitrating between the finite number of competing interpretations left to them. Statutory context will not provide a clear answer to how the courts should make their choice, because otherwise the provision would not be ambiguous.[[1154]](#footnote-1154) The courts may use context to prefer one competing interpretation to the other(s) – if the words are ambiguous, they will have no other choice – but they could reasonably have adopted any of the other interpretations left to them. By enacting ambiguous provisions, Parliament has effectively left the courts hanging by doing an incomplete job. As one commentator puts it, ‘beyond human fallibility, there is no reason why a legal instrument need be ambiguous.’[[1155]](#footnote-1155)

Vague statutory terms, by contrast, tend to be more common.[[1156]](#footnote-1156) Unlike ambiguous terms, they may serve a valuable constitutional purpose. Parliament may intend when enacting vague provisions to leave the courts to determine the finer details themselves. As Francis Bennion puts it, ‘By use of a word or phrase of wide meaning, legislative power is delegated to the processors whose function is to work out the detailed effect.’[[1157]](#footnote-1157) Graham explains that Parliament might enact vague provisions for various reasons. It might recognise the courts’ relative expertise at defining the term in question, for instance.[[1158]](#footnote-1158) As the previous chapter saw, Parliament’s law-making capacity is fundamentally different to the courts’. Whereas the latter are necessarily constrained into developing the law piecemeal, with regard to precedent and in a backward-looking way, the legislature’s eye is on the bigger picture. Its interest is more on forward-looking, root-and-branch reform.[[1159]](#footnote-1159) This is not to say that it will not also seek to prescribe the finer detail from time to time,[[1160]](#footnote-1160) but there will inevitably be situations in which it opts for vaguer formulations with the intention that the courts then fill the interpretative gaps, as it were. The more open-ended the provision, the more this possibility must be countenanced. The upshot is that s 6(3)(b)’s vagueness is not necessarily indicative of bad drafting. Instead, it could be a positive signal that Parliament deliberately intends the courts to decide the finer meaning of a public function themselves.

The point that Parliament has left the courts to determine the meaning of a public function under s 6(3)(b) is by no means new. Lord Mance said as much himself in *YL*: ‘The interpretation and application of section 6(3)(b) have been left by Parliament to the courts.’[[1161]](#footnote-1161) It is obvious that the courts must do most of the interpretative work because the language itself yields so little. But the foregoing argument puts an important spin on this view. It stresses that it could have been deliberate – that Parliament thought the courts better-suited to resolve the issue than it was itself. All things considered, greater effort must therefore be made to understand why this might have been.

This is the second stage in the argument. Because the concept of a public function is a deeply political question in the abstract, it is presumptively better resolved by Parliament than the courts, who are politically constrained, as chapter one explained, by the need to decide the issue on the basis of commonly-accepted political principles. If Parliament thinks the courts better suited to determining the issue, it cannot, therefore, be because they are *courts*. It must be because something else renders them fit to decide the issue in Parliament’s view. This is where the law on amenability to judicial review becomes relevant: the courts already have considerable experience at resolving the meaning of a public function in a similar setting. As chapters three to five revealed, the courts’ approach to the public-private divide in judicial review is built on decades of common-law reasoning. For this reason, it enjoys an inherent normative force that Parliament is bound to have found appealing. As chapters three and four argued, it is also a relatively consistent body of case-law in the sense that some of its most fundamental aspects – the idea that consensually-assumed power is merely private being a good example – can be traced from older cases right through into modern decisions today. The courts’ approach, in other words, is therefore relatively developed, stable and workable. The law in this area had commonly been regarded as ‘functionally’ rather than ‘institutionally’ focussed at least since *Datafin*, over a decade before the HRA was enacted. A proper understanding of the courts’ approach, moreover, reveals that this functional approach has probably endured for far longer than many have thought. This point was made in chapters four and five. The emerging picture is of a Parliament that may well have intended to leave the meaning of a public function to the courts to determine, and intended also that the vacuum should be filled by the definition of a public function as it relates to the courts’ approach to amenability to judicial review.[[1162]](#footnote-1162) This would also be a sensible intention on Parliament’s part given the arguments made in chapters three to five: that the LACPA is a theoretically workable and consistently-applied model. Properly understood, the courts’ approach is not only functional like s 6(3)(b), but flexible too. Its functional focus renders it better able to cater for the delegation of functions to private bodies, at least, than many have thought.[[1163]](#footnote-1163)

Two potential counter-arguments need dispatching. First, it might be thought that this account of the law on amenability is overly favourable: even though the basics of the approach remain in the recent case-law, the law on amenability is generally a mess and seems to have been descending further into confusion since *Datafin*, as chapter four argued. Even if it can be rationalised according to the LACPA, so the criticism might run, this is by virtue of the arguments made in those chapters; it is new knowledge, in other words, that Parliament could not have had when enacting the HRA. There are three responses. First, the argument is that the law is stable and clear enough for Parliament to have potentially intended that the courts use it as a blueprint when interpreting s 6(3)(b). The idea does not become implausible simply because some confusion and disagreement exists over the precise ambit and scope of the courts’ approach. If Parliament did not intend the law on amenability to feature in s 6(3)(b), it was courting disaster by drafting that provision in almost identical terms to CPR Pt 54.4, which uses the phrase ‘public function’ and entered into force on the same day as the HRA.[[1164]](#footnote-1164) Second, and in any event, even if the law as it stood when the HRA was enacted was in such a poor state that the idea that Parliament intended the courts to rely on it is weakened, Parliament should nevertheless be presumed to have known of the correct state of the law all along. Thus, when a new interpretation of the law – the LACPA – comes to light, Parliament must be deemed to have known that it obtained throughout. Because Parliament is the sovereign law-maker, the contrary view would be untenable, suggesting as it does that Acts of Parliament could somehow become *per incuriam* if enacted in ignorance of the proper state of the relevant law. Third, even if the previous two points are unpersuasive, and the law as rationalised under the LACPA would be regarded as ‘new’ law of which Parliament was unaware when it enacted the HRA, there is a case to be made that Parliament would intend the courts to interpret s 6(3)(b) dynamically, in the light of modern principles, anyway. Thus, the courts would be free to define a public function under s 6(3)(b) according to the LACPA rather than the law on amenability as it supposedly stood when the HRA was enacted. There is some force in Graham’s argument that, if Parliament enacts a vague term, the courts can take it to have intended the meaning of the term to develop over time according to changes in social policy.[[1165]](#footnote-1165) For one, the more open-ended the term, the harder it is for the courts to ascertain the framers’ intention anyway.[[1166]](#footnote-1166) It would transcend the scope of the present thesis to examine the correctness of Graham’s claim in the abstract, but it does have a certain appeal in the present context: s 6(3)(b) is particularly loosely drafted, which makes it difficult to believe that Parliament would intend to be so prescriptive as to require the courts to interpret it according only to the applicable principles as they obtained when the HRA was enacted.

The second counter-argument is more straightforward: if Parliament intended the courts to use their approach to the amenability issue as a blueprint when interpreting s 6(3)(b), it could easily have said so. This is perhaps true, but the mere fact that it omitted to do so does not necessarily harm the present thesis. It is not unheard of for Parliament to manifest a clear but nevertheless merely tacit intention that the courts continue with their definition of a particular concept. Take the concept of dishonesty, for example, which is a staple part of the mens rea for various offences under the Theft Act 1968 (TA). Nowhere in the Act is ‘dishonesty’ expressly defined. But in *R v Ghosh*,[[1167]](#footnote-1167) which primarily concerned the offence of obtaining money by deception under s 15(1) TA, the Court of Appeal devised a test of its own that has been applied in countless subsequent cases and has now become settled law.[[1168]](#footnote-1168) When the Fraud Act 2006 (FA) was enacted, again using dishonesty but not expressly defining the term, the courts simply carried on applying the *Ghosh* test. In *R v Woods*,[[1169]](#footnote-1169) the defendant had been charged with fraud by virtue of s 4 FA, which requires proof of a dishonest abuse of position by the defendant. The Court of Appeal noted that the trial judge had issued the jury with a *Ghosh* direction but at no point did it take issue with that aspect of the judge’s decision. This is a significant example: it is evidence of the very sensible proposition that if Parliament uses a concept that is identical or very similar to a concept that the courts have already defined, and in a similar context to the context in which that definition arose, then the courts can assume it safe to continue using that definition to the extent that Parliament has not manifested a contrary intention. Indeed, the Government seemed to think that *Ghosh* would apply[[1170]](#footnote-1170) but evidently thought that there was no need to spell this out by defining dishonesty more precisely when drafting the FA itself. Instead, it was perfectly acceptable to expect the courts to take the hint, as *Woods* shows they have done. For present purposes, the point is that s 6(3)(b)’s language is more than close enough to the ‘public function’ terminology contained in the amenability case-law in the judicial review context for the link between the two schemes described above to be plausible. Also, it is possible that Parliament opted for the term ‘functions of a public nature’ rather than simply referring the courts to CPR Pt 54.4 in order to reflect its intention that other, strand one (i.e. *Costello-Roberts*) functions fall under s 6(3)(b) too.

The idea that LACPA functions form the second strand of functions under s 6(3)(b) also provides a clear and definite role for the law on amenability in the HRA context. The courts have long struggled to give a convincing, coherent account of how the concepts of a public function under each of the judicial review and HRA schemes relate to each other. This is one of the various ‘contextual’ flaws in their approach to s 6(3)(b). Particularly in the pre-*Aston Cantlow* case-law, before they had begun to look to Strasbourg jurisprudence as potentially bearing on the meaning of public authority under s 6, the courts’ view seemed to be that the concept of a public function under both the HRA and judicial review schemes was near-identical. In *Poplar Housing*, Lord Woolf stated that the public authority provisions under s 6 were ‘clearly inspired by the approach developed by the courts in identifying bodies and activities subject to review.’[[1171]](#footnote-1171) Stanley Burnton J went further at first instance in *Leonard Cheshire*, remarking that it was ‘clearly right’ that the test for amenability to judicial review under CPR Part 54.1 bore the ‘same meaning’ as the term ‘functions of a public nature’ under s 6(3)(b).[[1172]](#footnote-1172) Similar remarks appear in the Court of Appeal’s *Leonard Cheshire* ruling and also in *Partnerships in Care*.[[1173]](#footnote-1173) *Aston Cantlow* represented an improvement in this respect: Lord Hope stated that the amenability case-law cannot ‘be regarded as determinative of the question whether a body falls within the “hybrid” class.’[[1174]](#footnote-1174) However, subsequent cases continued the courts’ earlier trend.[[1175]](#footnote-1175) For instance, in a remark that was later echoed by Buxton LJ in *YL*,[[1176]](#footnote-1176) Dyson LJ said in *Beer* that ‘on the facts of this case, and I would suggest on the facts of most cases, the two issues march hand in hand: the answer to one provides the answer to the other.’[[1177]](#footnote-1177) In *YL*, members of both the majority and minority in the House of Lords emphasised once again that the s 6(3)(b) and judicial review schemes do not necessarily cover the same ground,[[1178]](#footnote-1178) but Lord Mance appeared to undermine this position by citing from judicial review cases including *Datafin* to guide his interpretation of s 6(3)(b).[[1179]](#footnote-1179) There is a real risk that lower courts will continue the trend started in the earlier cases. At first instance in *Weaver*, Richards LJ thought it ‘better to leave the question of amenability to judicial review out of account when considering the issue of public authority’ under s 6(3)(b),[[1180]](#footnote-1180) but then appeared to suggest that the two schemes covered the same ground. Having found that the RSL exercised a public function, his Lordship remarked that ‘it should equally be amenable to judicial review on conventional public law grounds… [because it] would be strange if a function had a public character sufficient to engage the application of the [HRA]… yet insufficient to engage the court's normal public law jurisdiction.’[[1181]](#footnote-1181) Elias LJ echoed these remarks in the Court of Appeal, recognising that the two schemes could cover different ground but then asserting that counsel was right not to challenge Richards LJ’s view on the issue in the instant case.[[1182]](#footnote-1182)

Commentators were right to argue that the two schemes of liability were unlikely to cover *identical* ground. As Dawn Oliver argued in a remark that was later echoed by Richards LJ in *Weaver*, the term ‘public function’ in the judicial review context is ‘shorthand for a sophisticated set of principles that were in the course of development well before the CPR came into effect’;[[1183]](#footnote-1183) whereas s 6 is concerned, at least partially, with Parliament’s intention of making Convention rights available in domestic law.[[1184]](#footnote-1184) At the same time, however, it would have been difficult to believe, especially given the foregoing arguments, that Parliament intended there to be no connection at all. At the root of both schemes lies a very similar question: to whom do norms designed to regulate public activity apply? The courts’ seeming inability to explain the link in any greater detail is perhaps unsurprising given that the ambit of their approach in the judicial review context has been open to debate, but it is nevertheless useful if the link can be precisely explained. Under the present approach, it can: LACPA functions form one of two distinct strands of public function under s 6(3)(b).

This is not to say that the courts must apply each judicial review case by rote in the strand-two context, however. This is why I have been keen throughout to use the term ‘blueprint’ to describe the LACPA’s role in the HRA context. As chapters three and four saw, some of those cases are probably out of kilter with the courts’ broad approach anyway.[[1185]](#footnote-1185) Instead, the courts must ask themselves whether the body in question exercises legally-authorised coercive power, as they would in the judicial review context. The judicial review cases will be helpful – determinative, in most cases – but it is the *test*, ultimately, that the courts must apply under strand two. In this sense, their approach would equate loosely with the approach demanded of them by s 2 HRA when applying Strasbourg case-law: ordinarily following the cases in question, but with the room to depart from decisions that seem erroneous. For this reason, Dyson LJ’s prediction that the answer to the public function question would likely march ‘hand in hand’ in each context, *in practice*, was probably not too far from the truth.

### Discounting alternative approaches to s 6(3)(b)

With the two-strand approach to the meaning of a public function expounded, it is useful to explain why none of the various alternative approaches that have been advanced are suitable. The approaches fall into four broad categories: first, Oliver’s ‘coercive powers’ approach; second, Buxton LJ’s approach in *YL*; third, the approaches that rely on ‘assumption of responsibility’ as the touchstone; and fourth, the approaches taken in past bills that would have amended the HRA. These were all abandoned shortly after being laid before Parliament but are nevertheless worth examining in brief.

At the outset it should be stressed that all of the approaches examined are deficient for the reason that their definitions lack the theoretical framework and grounding in doctrine that the LACPA enjoys. Thus, they fail to grapple with central questions like the meaning of a public function in the judicial review context and the relationship between the law on amenability to judicial review and s 6(3)(b). Whilst the approaches examined represent textually plausible readings of s 6(3)(b) – Parliament’s language is so vague that it permits of a number of possible interpretations, after all – they therefore resemble relatively unsupported and thus unconvincing attempts to discern Parliament’s intention. There are also problems with the approaches on their own terms, however, as will be seen.

#### Oliver’s approach

Oliver believes that ‘the only principled approach’ to s 6(3)(b) is to regard as public functions ‘only those activities which involve the exercise by private bodies of specifically legally authorised coercion or authority over others which it would normally be unlawful for the private body to exercise.’[[1186]](#footnote-1186) This is for two reasons: first, she agrees with the basic thrust of the delegation argument but disagrees that it ought to have been applied in *Leonard Cheshire*.[[1187]](#footnote-1187) She attacks the view that the function of providing accommodation would have been public had it been performed by the local authority in-house: the local authority ‘is performing a *public, statutory duty* [but it]… does not follow that when it does so the activity it engages in is necessarily a *function* of a public nature.’[[1188]](#footnote-1188) Second, she believes that a generous interpretation of s 6(3)(b) would have undesirable side-effects. Her concerns are that it would generate litigation between private parties and require the courts to balance the competing Convention rights of private parties in a manner to which they are unaccustomed, and that an interpretation that brought contracted-out service provision under s 6(3)(b) would generate incongruity between privately and publicly-funded service-users.[[1189]](#footnote-1189) Any shortfalls in legal protection against private bodies, she argues, can best be compensated for by developing the private law – either through legislation or the common law.[[1190]](#footnote-1190) Some of these arguments are readily answered by conclusions already reached in this thesis. The local authority *is* performing a public function when delivering services of the kind in *Leonard Cheshire*, as the LACPA shows. For this reason Oliver’s incongruity argument then drops away, since she accepts the basic idea that a function should be public under s 6(3)(b) if delegated to a private body and if public when performed in-house.[[1191]](#footnote-1191) In any event, however, the incongruity argument was explored and discounted in chapter six: it is a poor reason to construe s 6(3)(b) narrowly. The rights-balancing argument also drops away, once the significance of the chameleonic model is borne in mind. Oliver makes a similar point to Stanley Burnton J in *Leonard Cheshire*, seen above – that balancing the hybrid public authority’s rights with those of the claimant is difficult in view of the fact that the Convention is drafted with interferences with only institutionally public wrongdoers in mind.[[1192]](#footnote-1192) However, it is clear that under the chameleonic model the court’s rights-balancing task is materially similar to that in the common law context: the parties assert their rights through the court, which sits at the apex of the dispute and balances the rights accordingly.

This leaves Oliver’s argument as to the increase in litigation. In response, the idea that a broad interpretation of s 6(3)(b) would generate litigation should not be the courts’ concern. They are not in a position to make reliable judgments about the extent of the problem and how to combat it. Their job is simply to reach what they believe is the most accurate interpretation of Parliament’s intention, whether this increases litigation or not. As for her final point, that private law can fill the accountability gaps left by a narrow interpretation of s 6(3)(b), this can only go so far. We should only resign ourselves to having to rely on private law if there is no room left for a broader interpretation of the meaning of a public function; and as the foregoing analysis reveals, Oliver’s reasons for thinking that this is the case are unpersuasive. Moreover, her formulation would also be narrower than the meaning of a public function in the judicial review context, properly understood, which brings it further into question. Whilst she couches her approach to s 6(3)(b) in terms of ‘coercive authority’, she seems to presume that only *overtly* and *specifically authorised* coercive power such as detaining an individual or altering their legal status would count.[[1193]](#footnote-1193) In reality, however, the courts’ approach to the idea of legally-authorised coercive power is more loosely defined: coercion is broader, encompassing any behaviour that can impact on the individual’s rights and interests;[[1194]](#footnote-1194) and whilst the LACPA rightly focuses on the need for specific legal authority, there are exceptional cases in which it can encompass *de facto* power, too.[[1195]](#footnote-1195) All things considered, Oliver’s approach has the benefit of resembling the LACPA but it is a stricter and less desirable variant of it. She also makes no mention of the second strand of public function, namely *Costello-Roberts* functions. For the reasons given above, there is strong reason to believe that Parliament intended these to feature.

#### Buxton LJ’s approach

In *YL*, the issue for consideration was the status under s 6(3)(b) of a commercial care home provider delivering residential services on behalf of a local authority. At all levels it was held that the function was only private.[[1196]](#footnote-1196) The Court of Appeal unanimously held that this was because the ruling in *Leonard Cheshire* was binding upon it.[[1197]](#footnote-1197) Having decided this issue, however, Buxton LJ went on, *obiter*, to explain how he believed the issue should have been decided had the Court of Appeal not been so constrained.[[1198]](#footnote-1198) He began by emphasising that the term ‘functions of a public nature’ must be read according to its ‘simple meaning.’[[1199]](#footnote-1199) He then advocated a factor-based approach. For Buxton LJ, the ultimate question under s 6(3)(b) is whether ‘it is necessary and justified’ to regard the body in question as a hybrid public authority in order to protect the claimant’s Convention rights. This depends on numerous factors such as the extent to which the body stands in the local authority’s shoes when providing a service and the extent to which the body’s activities are integrated into and depend on the work of local authorities. In particular, whether it is necessary to designate the body a public authority ‘will vary according to the article of the Convention that it is sought to assert.’[[1200]](#footnote-1200) This is because hybrid public authorities may have difficulties relying on the Convention qualifications, as seen above, which he argues involves a hardship for them by effectively translating qualified rights into unqualified ones. This hardship, he believes, must be taken into account. The result is that public-ness may be found less readily in the case of qualified rights than unqualified ones.

With respect, the House of Lords was right not to endorse these remarks. Lord Mance simply stated that Buxton LJ’s ‘was not a theme pursued by any side before the House.’[[1201]](#footnote-1201) Buxton LJ’s approach contains a number of flaws. First, the approach is plucked from thin air. It is far from a ‘simple meaning’ of s 6(3)(b), if such a thing even exists. Second, the overall criterion of ‘necessity and justification’ is hopelessly vague. From the relevant factors he described, it also seems overwhelmingly concerned with the delegation context, where (as in *YL* itself) private providers deliver services on behalf of central and local government. Quite what it would say of the meaning of a public function in *Aston Cantlow* or *Partnerships in Care*, for instance, is even more unclear. The vagueness inherent in Buxton LJ’s approach is not only problematic in itself given the importance of being able to tell with reasonable clarity where the HRA’s contours lie, but there is no reason why the meaning of a public function should be so open-ended anyway. His Lordship seems to believe it unavoidable that hybrid public authorities are unable to rely on the Convention qualifications, but this does not follow. As argued above, hybrid public authorities can rely adequately on the Convention qualifications if the chameleonic model is embraced. In other words, whilst the ability of hybrid public authorities to rely on the Convention does pose problems, they are surmountable by adopting a particular reading of the hybrid public authority scheme as a whole. They need not bear on the meaning of a public function in the way Buxton LJ suggests. Third, the remaining factors his Lordship cites as being relevant to the nature of the function are also questionable. Although the reference to the body standing in the local authority’s shoes is welcome given the arguments relating to delegation that were made in chapter five, the reference to ‘integration’ between the body and other public authorities risks wrongly imbuing s 6(3)(b) with an institutional focus. Like the Court of Appeal’s approach in *Weaver*, it would also seem to reduce the meaning of a public function into a vague question of degree.

#### ‘Assumption of responsibility’

Some interpretations of the term public function have relied on the notion of the assumption of responsibility by the state. For the Joint Committee on Human Rights (JCtHR), ‘The key test of whether a function is public is whether it is one for which the government has taken responsibility in the public interest.’[[1202]](#footnote-1202) This is rightly thought to extend beyond ‘traditionally’ coercive powers identified by Oliver such as detaining psychiatric inpatients,[[1203]](#footnote-1203) to functions, such as providing residential care services, that take place ‘as part of a government programme of State provision of such care.’[[1204]](#footnote-1204) The JCtHR is right to argue that s 6(3)(b) is broader than Oliver has argued, but its means of identifying public-ness is problematic. First, it is unclear from a theoretical perspective why the mere fact that the government has assumed responsibility for a function should render it public. There is more to both the psychiatric inpatient and residential care examples than a government taking responsibility to provide the services in question. Both contexts involve the creation of statutory schemes by Parliament that provide for the performance by a body of functions that have the potential to impact on the individual’s fundamental rights and interests, for example. If this is the true basis of the test, then it resembles the LACPA and the focus on the assumption of responsibility should be abandoned. Indeed, as Lord Bingham observed when seemingly proposing a similar test in *YL*,[[1205]](#footnote-1205) whether there is a statutory scheme in the frame seems to be an important factor: ‘the absence of any statutory intervention [by Parliament] will tend to indicate parliamentary recognition that the function in question is private and so an inappropriate subject for public regulation.’[[1206]](#footnote-1206) In *YL*, Baroness Hale proffered a slightly different test to that of the JCtHR that asks whether the *state* has assumed responsibility for the task in question,[[1207]](#footnote-1207) but this renders the broad ‘assumption of responsibility’ touchstone no more workable. First, it can be difficult to define the state in domestic law, owing to the lack of any developed consensus as to what the body is as distinct from government, Parliament or the Crown.[[1208]](#footnote-1208) There are theoretical givens as to how the state does or should behave, as chapter one explained, but these are not the same thing. Second, and on a practical level, it is unclear in any event what ‘taking responsibility’ – whether by the government or the state – means. In particular, the implication is that government-funded functions become public under s 6(3)(b). Especially during a period of economic downturn when public money is in short supply, there can be no greater indication of the government’s decision to take responsibility for the provision of a function than by paying for it. Baroness Hale described funding as an ‘important factor’ in *YL*,[[1209]](#footnote-1209) but a raft of functions will inevitably receive government funding that do not belong under s 6(3)(b).[[1210]](#footnote-1210) If the government pledges to banks that it will underwrite housing mortgages, for instance, it would seem fanciful to suggest that this should render the banks’ functions in providing mortgage services public.

Kate Markus’s variant on the assumption of responsibility theme identifies a public function under s 6(3)(b) by reference to two factors: first, ‘whether the state discharges its responsibilities or… recognises [the function] as being in the public interest;’[[1211]](#footnote-1211) and second, whether the body ‘is in a position to evaluate the fair balance that must be struck by the state when interfering with Convention rights.’[[1212]](#footnote-1212) The first criterion resembles the tests discussed above and would therefore contain the same flaws; the second is particularly problematic for its breadth. Any private individual, properly legally advised, would surely be ‘in a position to evaluate’ the balance to strike.

#### Bills previously before Parliament

In its second report into the meaning of public authority, the JCtHR called for a ‘separate, supplementary statute’ to s 6(3)(b).[[1213]](#footnote-1213) Two bills were subsequently introduced into Parliament by the JCtHR’s then chairman, Andrew Dismore MP. Each fell by the wayside. The Human Rights Act 1998 (Meaning of Public Authority) Bill was introduced into the Commons in January 2007, prior to *YL* reaching the House of Lords. It would have included under s 6(3)(b) ‘a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform that function.’[[1214]](#footnote-1214) Whilst this is far from a comprehensive definition of a public function, it nevertheless emphasises the basic idea that delegated public functions should be caught by s 6(3)(b) and for that reason would have been a welcome addition to the law. The Bill was superseded by the Human Rights Act (Meaning of Public Function) Bill,[[1215]](#footnote-1215) however, which was introduced in October 2008 and reintroduced rather confusingly with identical wording, but with the title of the older bill, in July 2009 and again in February 2010.[[1216]](#footnote-1216) It aimed higher than its predecessor, attempting both to bring within s 6(3)(b) ‘a function which is required or enabled to be performed wholly or partially at public expense’[[1217]](#footnote-1217) and to provide more general guidance on the definition of a public function, by listing various factors, such as the extent to which the state has assumed responsibility and pays for the function, that the courts must take into account.[[1218]](#footnote-1218) This Bill would probably have done nothing to help the clarity of the law and breadth of s 6(3)(b), however. The ‘public expense’ formulation is overly broad and would have carried with it the same problems discussed above, in relation to public funding under the notion of ‘assumption of responsibility.’ The list of factors given as general guidance, moreover, was non-exhaustive and unaccompanied by any advice at all on how to weigh those factors against each other. It was far from the ideal of a clear and satisfactory definition of a public function that was needed in the wake of the case-law in this area.

### Private acts under s 6(5)

It is clear, then, that none of the alternative approaches proffered would be more attractive than the two-strand approach. Aside from being unworkable in various respects on their own terms, they also lack the two-strand approach’s theoretical underpinning and its roots in doctrinal context.

Having identified what this chapter argues is the best interpretation of s 6(3)(b), the meaning and role of s 6(5) HRA become relevant. Section 6(5) provides that ‘In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private’. In theory at least, the hybrid public authority issue thus involves a two-stage determination: first, of the nature of the function performed; and second, of the nature of the act complained of. The language of s 6(5) suggests, in other words, that some acts will be performed pursuant to a public function that are nevertheless private.

The interplay between ss 6(3)(b) and 6(5) has long been unclear from the case-law, however. As indicated above, this is one of the contextual flaws in the courts’ approach. Courts in earlier cases seemed to ignore the provision altogether. In *Poplar Housing* Lord Woolf CJ gave a list of relevant factors indicating that the landlord in question was a hybrid public authority, but he gave no indication as to whether those factors bore on the nature of its function under s 6(3)(b) or its act under s 6(5).[[1219]](#footnote-1219) The message, therefore, is that s 6(5) can be ignored. This message was restated by Lord Nicholls in *Aston Cantlow*, albeit more elaborately, when deciding on the status under s 6 of a parochial church council (PCC) seeking to enforce chancel repair liability against lay rectors. His Lordship seemed to suggest that a private act under s 6(5) was nothing more than the antithesis of a private function under s 6(3)(b): ‘What matters is whether the particular act done… is a private act as contrasted with the discharge of a public function.’[[1220]](#footnote-1220) Baroness Hale made a similar statement in *YL*,[[1221]](#footnote-1221) as did Rix LJ in *Weaver*.[[1222]](#footnote-1222) With respect, these remarks are unpersuasive. They amount to saying that s 6(5) merely restates what is already implied by s 6(3)(b) – that functions which are not public are private. Moreover, it is clear that s 6(5) does not have private *functions* in mind: it refers instead to ‘acts.’ There must be some conceptual distinction between functions and acts, which their Lordships seem to overlook. This is significant, not least for the reason that the possibility must be left open that some acts can occur under s 6 that are not performed pursuant to any function at all. Individual acts of criminal violence, such as a fight in the street, would be an obvious example.

Lord Hobhouse acknowledged the conceptual act-function distinction in *Aston Cantlow* when he stated that ‘The nature of the person's functions are not to be confused with the nature of the act complained of, as s.6 makes clear’,[[1223]](#footnote-1223) but he elaborated no further on what he thought the conceptual distinction was. *YL* represented an improvement in this respect – Lord Neuberger explained that ‘acts’ under s 6(5) are more specific than ‘functions’ under s 6(3)(b) and that a ‘number of different acts can be involved in the performance of a single function’[[1224]](#footnote-1224) – but it is disappointing that Lord Scott was the only member of the House of Lords to go on to apply the functions-acts distinction to the facts of the case. When determining the status under s 6 of Southern Cross Healthcare, a private care home operator, he found both that the function of providing accommodation was private under s 6(3)(b) *and* that the particular act of terminating the resident’s tenancy was private under s 6(5): it took place ‘in purported reliance on a contractual provision in a private law agreement.’[[1225]](#footnote-1225) The Court of Appeal elaborated further on the meaning of s 6(5) in *Weaver*. Having examined the function of providing social housing and found it to be public in nature, Elias LJ then examined the act of terminating the claimant’s tenancy. In his view:

‘the act of termination is so bound up with the provision of social housing that once the latter is seen… as the exercise of a public function, then acts which are necessarily involved in the regulation of the function must also be public acts. The grant of a tenancy and its subsequent termination are part and parcel of determining who should be allowed to take advantage of this public benefit.’[[1226]](#footnote-1226)

Lord Collins MR agreed: ‘the act… is inextricably linked to the provision of social housing as part of the trust's public function…. [T]he Divisional Court's decision… [that the act was public] was right.’[[1227]](#footnote-1227)

The true meaning of s 6(5) is difficult to discern, not least because the courts have only begun to take notice of it in recent cases. *Hansard*, moreover, is of no help. Whilst there was debate in both Commons and Lords over the meaning of a public function as the HRA proceeded through Parliament, hardly any treatment was given to the s 6(5) issue; and at no point was a definition of what would become s 6(5) attempted. Separating ‘acts’ and ‘functions’ is also not something to which the courts are accustomed in either of the contexts – *Costello-Roberts* functions and amenability to judicial review – that form the basis of the two strands of public function under s 6(3)(b), properly understood. In each case the courts’ focus is simply on the function the body performs, and the concept of a function tends to be only loosely conceptualised in the case-law. Broadly speaking, it is the activity or kind of power that the defendant exercises towards the claimant in the given case.

Whilst s 6(5)’s language may suggest that certain acts can be private notwithstanding that they are performed pursuant to public functions, the meaning of a private act is therefore anybody’s guess. But it can be tentatively argued that Elias LJ and Lord Collins took an appropriate line in *Weaver*, by taking the act to be of the same nature as the function pursuant to which it is performed.[[1228]](#footnote-1228) This performs an important practical function because in most cases it will probably relieve the courts of the need to bog themselves down in technical conceptual act-function distinctions by considering the nature of the act in detail: ordinarily there will be no credible suggestion that the act is not ‘part and parcel’, to uses Elias LJ’s words, of the function in question. But it still leaves s 6(5) a conceptual purpose, so it is preferable to the earlier judicial suggestions that it should effectively be ignored altogether: in extreme cases where the act is performed pursuant to a different (and private) function, or no function at all, then s 6(5) will bite. Whether this is so will inevitably have to depend on the circumstances. A care home should not be able to escape liability under s 6, for example, by claiming that the abuse of residents by its nursing staff was a private act because it was not part and parcel of the function of providing residential care.[[1229]](#footnote-1229) Thus, a cautious and restrictive approach to s 6(5) – albeit not one that shrinks it to vanishing point – is probably best.[[1230]](#footnote-1230) But if it is clear that the act is not part and parcel of the function, it is sensible that the body should be relieved of Convention liability. The two-strand approach to s 6(3)(b) is precise enough to target accurately the kind of power that should be regulated using public-law norms, so it should be the nature of the body’s function that presumptively determines its Convention liability. If the act in question genuinely has little or nothing to do with the function that is found to be public under s 6(3)(b), then the case for applying the Convention against that body drops away.

With the nature of s 6(5) explored, it is necessary to make clear one last point on the interplay between that provision and s 6(3)(b). Properly understood, s 6(3)(b) requires the particular function performed towards the claimants to be public before the body becomes a hybrid public authority. Parliament did not intend to fix private bodies with Convention liability simply because they *sometimes* perform public functions. Jonny Landau argues that because s 6(3)(b) attaches Convention liability to any person ‘*certain* of whose functions are… of a public nature’,[[1231]](#footnote-1231) it will be satisfied if any one of the body’s functions is public – even if the function pursuant to which the impugned act is performed is private.[[1232]](#footnote-1232) This can be termed the ‘abstract function’ approach, to reflect the idea that the public function that satisfies s 6(3)(b) can be ‘abstract’ in the sense that it has no connection with the claimant in the particular case. Under this approach a private body would fulfil s 6(3)(b) if it sometimes exercised coercive powers of detention (for example), even though it might not contemplate using those powers against the claimants in question.[[1233]](#footnote-1233) Landau’s approach therefore broadens the scope of s 6(3)(b) by allowing the public function requirement to be relatively easily satisfied, with the result that the courts’ line of enquiry then shifts to s 6(5) HRA and the determination of the nature of the particular act being performed.

Judicial opinion on the correctness of the approach is mixed. Lord Nicholls seemed to dismiss the idea in *Aston Cantlow* by remarking that ‘it is not necessary to analyse each of the functions… and see if any of them is a public function.’[[1234]](#footnote-1234) Similarly, Lord Collins MR said in *Weaver* that the abstract function approach ‘deflects attention from what I consider to be an essential prerequisite… namely that the act [under s 6(5)] is in pursuance of, or at least connected with, performance of functions of a public nature.’[[1235]](#footnote-1235) Rix LJ, dissenting, seemed to express agreement when he remarked that in *Poplar Housing* the Court of Appeal ‘correctly… concentrated not so much on the question whether *any* functions of an RSL might be of a public nature, but on whether the particular act of seeking possession with which that case was concerned was of a public or private nature.’[[1236]](#footnote-1236) The abstract function approach found favour with Elias LJ in *Weaver*, however. When deciding on the landlord’s status, he noted the wording of s 6(3)(b) and remarked that ‘once it is determined that the body concerned is a hybrid authority – in other words that it exercises functions at least some of which are of a public nature – the only relevant question is whether the act in issue is a private act [under s 6(5)].’[[1237]](#footnote-1237) On this basis his Lordship was heavily critical of the Divisional Court’s approach to the s 6(3)(b) issue, which ‘focused on the wrong question… [by posing] the issue whether… management and allocation of housing was a public function such as to render the trust a hybrid public authority.’[[1238]](#footnote-1238) Since counsel had conceded that the landlord would be performing public functions when engaging in activities such as obtaining parenting and anti-social behaviour orders,[[1239]](#footnote-1239) for example, s 6(3)(b) was satisfied and the inquiry should then have shifted to the nature of the *act* of terminating a tenancy.

With the greatest respect to Elias LJ, the abstract function approach is pure sophistry and his criticism of the Divisional Court’s approach unjustified. The abstract function approach is only useful if a public act is performed pursuant to a *private* function: if the act complained of is performed pursuant to a public function instead, there is no need to search around for an abstract public function. Whilst s 6(5) can be interpreted to allow for this possibility, it is practically implausible, as Lord Collins recognised, to suggest that ‘an act could be of a public nature where it is not done in pursuance, or purportedly in pursuance, of public functions.’[[1240]](#footnote-1240) Not only does this remark make sense on its face, but its appeal also derives from the very interpretation of s 6(5) that Elias LJ, joined by Lord Collins, took himself in *Weaver*. Both judges believed – rightly, as argued above – that, unless exceptionally, an act will be of the same nature as the function pursuant to which it is performed. Thus, for all the suggestion of s 6(3)(b) being satisfied by an abstract public function, the courts must pay close attention to the nature of the function in the case at hand in order to decide the nature of the act under s 6(5) anyway. The upshot is that the abstract function approach neither adds anything in practice nor even, by Elias LJ’s own admission, relieves the courts from having to decide the same issues that they would ordinarily need to decide. The nature of the function is the overarching issue on which the litigation will therefore turn. Indeed, in *Weaver* itself, it was disagreement over the nature of the function of allocating and managing housing stock that caused Rix LJ to dissent.

There are two further problems with the abstract function approach, however. First, it sits uncomfortably with the idea of a functional approach to public-law liability. At least in the judicial review context, the purpose of determining a body’s status by reference to its functions seems to be to target and regulate using public-law norms the kind of power exercised in a given situation. Strange, then, that the abstract function approach allows s 6(3)(b) to be satisfied by the performance of a function that might have nothing at all to do with the case at hand. Second, it is unnecessary as a means of expanding s 6(3)(b). Even if it did make a difference in practice by broadening the scope of that provision beyond the court’s current treatment of it, it would be no substitute for adopting a more appropriate definition of a public function. It is a quick fix that fails to address the root cause of the deficiencies in the law, and therefore fails where the two-strand approach succeeds.

## THE TWO-STRAND APPROACH APPLIED

This section explains how the two-strand approach would work in a variety of situations. It draws on the arguments made in previous chapters as well as in this one. First, it considers the simpler cases of bodies exercising clear-cut legal coercive powers and delegated powers; second, the arguably harder cases of RSLs and the BBC;[[1241]](#footnote-1241) and third, some remaining cases, in which the courts have correctly found the bodies in question to perform only private functions.

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### Simpler cases

Perhaps the most straightforward example of a public function under the two-strand approach is *Partnerships in Care*.[[1242]](#footnote-1242) The private psychiatric hospital would not be a core public authority because it is a profit-making institution rather than a constitutionally selfless body created and controlled to serve the public interest, but the exercise of powers under the Mental Health Act 1983 (MHA) to detain and treat inpatients against their will would qualify as a LACPA function under strand two of s 6(3)(b). It would also potentially qualify as a *Costello-Roberts* function under strand one. Although the ambit of the *Costello-Roberts* principle is difficult to discern precisely, it seems hard to resist the conclusion that if a positive obligation exists upon the state to protect an individual from moderately severe corporal punishment in a private school, as in *Costello-Roberts* itself, then an obligation will similarly exist when the state has specifically authorised measures allowing the potential for a private organisation to abrogate the rights of a vulnerable individual in the particularly severe way provided for by the MHA.

As chapter four explained, the concept of legally-authorised coercive power can also extend to a function that is so intertwined with the exercise of coercive legal powers by others that the performer of that function can itself be regarded as exercising coercive legal power. It therefore extends to the *de facto* regulatory function of the Panel of Take-overs and Mergers. This is the *Datafin* principle, properly understood. Hence, as well as being amenable to ordinary judicial review, the PTM would also be exercising a public function under strand two of s 6(3)(b) when regulating City takeovers. This conclusion is confirmed by the recent enactment of the Companies Act 2006, in two respects. First, the Act places the PTM’s regulatory function on a statutory footing by conferring on it a broad general power to ‘do anything that it considers necessary or expedient for the purposes of, or in connection with, its functions.’[[1243]](#footnote-1243) Thus, whereas the PTM was previously exercising law-like coercive power, its power now enjoys a definite legal basis. Second, the Act clearly envisages that the PTM will be a public authority under the HRA. Section 961(1) exempts the PTM from liability in damages as a result of the performance of its functions, but s 961(3)(b) provides that the exemption is ineffective ‘so as to prevent an award of damages… on the ground that… [the PTM’s behaviour] was unlawful as a result of section 6(1) of the Human Rights Act 1998’. The PTM is therefore a public authority of sorts under s 6 HRA, although s 961 fails to specify whether core or hybrid. For the sake of completeness it is worth emphasising that the PTM is probably not a core public authority. This is because it is a body created voluntarily by private individuals, which means that it more closely resembles a charity than a core organ of state created and controlled to serve the public interest – even if its functions do serve the public interest and do now generally derive from statute.[[1244]](#footnote-1244) This is especially so given that the PTM lacks any obligations of political accountability to the public that pertain, say, to central and local government. The extent of political accountability is not the be-all-and-end-all, admittedly, but it is a relevant factor; and in this case, one that tends to confirm that the PTM is a hybrid public authority instead.

Beyond the strictures of the *Datafin* principle, the LACPA does not and should not extend to the exercise of *de facto* monopoly power generally, as chapter four argued. Bodies like the National Greyhound Racing Club and the Football Association would therefore not perform public functions under strand two of s 6(3)(b) HRA. Absent any indication that their regulatory functions would fall under the *Costello-Roberts* principle and therefore under strand one, which they would not seem to do, these bodies would therefore not be hybrid public authorities at all. This would also be true of the Jockey Club, another sporting regulator, which has rightly been found not to be a hybrid public authority under s 6(3)(b).[[1245]](#footnote-1245)

Delegated functions can also fall under s 6(3)(b), in two different respects: as strand-one functions, if they are the kind of state powers that satisfy the *Costello-Roberts* principle; and as strand-two functions, if they qualify as legally-authorised coercive powers under the LACPA. As the previous chapter argued, the LACPA extends to functions delegated to private individuals that would have been public when performed in-house by the delegator. On this basis, albeit not for the reasons given by the Court of Appeal, both *Poplar Housing* and *Beer* rightly held that the relevant functions were caught by s 6(3)(b). In both of these cases the delegator had delegated to a private body a function that would have been public under the LACPA when performed in-house, i.e. a function with a legal basis and which has the potential to impact on the individual’s fundamental rights and interests. In *Poplar Housing* this was the provision of social housing under s 188 of the Housing Act 1996; in *Beer*, so the Court of Appeal said, it was the regulation of markets to which the public enjoyed a right of access at common law.[[1246]](#footnote-1246)

With the foregoing in mind, it follows that *Leonard Cheshire* and *YL* were wrongly decided for ruling that the delivery of residential care services on behalf of a local authority fell outwith s 6(3)(b). Lord Neuberger stated in *YL* that ‘it is meaningless, and therefore potentially misleading, to describe a function of a core public authority as being “of a public nature”, as that concept… has relevance only to hybrid authorities.’[[1247]](#footnote-1247) With respect, however, these remarks were misguided. Even though a core public authority’s legal liability is unaffected by the nature of the function it performs, it is nevertheless clear that they can still be regarded *conceptually* as performing private functions. This is what happens in the judicial review context under the LACPA. Moreover, examining the nature of core public authorities’ functions assists in the determination of the nature of the function performed by *private* individuals in the contracting-out context, so there is every reason to believe that Parliament would intend for the courts to be able to make this determination for that reason alone.[[1248]](#footnote-1248) With the foregoing in mind, it is clear that the care operators’ functions were of the kind that qualify as legally-authorised coercive powers under the LACPA, as chapter five argued, in that they had been transferred to the delegate and would have been public had they been performed by the delegator in-house.[[1249]](#footnote-1249) They are therefore strand-two functions under s 6(3)(b) as well as functions to which domestic judicial review applies. Section 145 HSCA is to be welcomed for reversing these decisions.[[1250]](#footnote-1250)

### Harder cases

There are three cases here. Registered social landlords (RSLs) are the first. The foregoing arguments make it clear that they will perform public functions under s 6(3)(b) if, as in *Poplar Housing*, they provide accommodation on behalf of a core public authority that has delegated that function to them. As seen above, however, the position was different in *Weaver*. The RSL was not the local authority’s delegate, so the question arose as to whether the provision of accommodation by an RSL would be a public function *per se* – at least when the RSL accommodates tenants who are in social, rather than self-funded, housing.[[1251]](#footnote-1251) In a judgment that was criticised above, the Court of Appeal held that the function was public.

Under the two-strand approach it is palpably clear that an RSL would *not* perform public functions in this situation. First, it is doubtful that a positive obligation would exist under the *Costello-Roberts* line of case-law sufficient to bring the RSL within strand one. The closest Strasbourg authority to the RSL situation is *Novoseletskiy v Ukraine*,[[1252]](#footnote-1252) which held that the state was responsible for the actions of the Melitopol State Teacher Training Institute (MSTTI) in its capacity as a provider of accommodation to a former employee. As Rix LJ observed in *Weaver*, however, and rightly given the previous chapter’s analysis, this was because ‘the organisation in question was part of that essential “core” or “governmental” fabric of the state which is at the heart of Convention liability for these purposes.’[[1253]](#footnote-1253) As for *private* providers of social housing, no case clearly points the way.[[1254]](#footnote-1254) It might be said that RSLs are in an analogous position to the private school in *Costello-Roberts* because RSLs ‘co-exist’ with a public scheme of local authority housing in the same way that the ECtHR believed private schools to do with their state counterparts, but there remains a material difference: the state owes no Convention duties to provide housing in the same way it does to provide secondary education. As the previous chapter saw, it was significant in *Costello-Roberts* that the state was (indirectly) using the private school to discharge its obligations under Art 2 of the First Protocol. RSLs, it is safe to say, do not seem to fall under strand one.

Second, it is similarly difficult to describe the function of providing accommodation as public under strand two. RSLs do not exercise any legal powers of their own nor, as explained above, do they generally act as delegates for core public authorities. However, whilst not working on behalf of local authorities, they do work very closely *with* them. As Elias LJ remarked in *Weaver*, ‘the RSL is deeply involved in assisting local authorities in their obligations towards the homeless.’ This manifests itself in various senses, in particular through the receipt by RSLs of grants from the Housing Corporation (now the Homes and Communities Agency) and the statutory duty upon them, when asked, to ‘co-operate to such extent as is reasonable in the circumstances in offering accommodation to people with priority under the [local] authority’s allocation scheme.’[[1255]](#footnote-1255) Would this be enough to bring them within the *Datafin* principle, as bodies that can nevertheless be said to exercise coercive legal power because they play an integral role in the exercise of such power by the local authorities?

The answer is no. The relationship between RSLs and local authorities is not of the kind between the PTM and Department of Trade and Industry (DTI) seen in *Datafin*. The partnership there was such that the former identified persons, transgressors of the City Code, for the latter to penalise using its own legal powers. In other words the DTI was ‘driving’ in its use of coercive legal power, but the PTM ‘steering’. Even having regard to the duty of co-operation, the relationship between RSLs and local authorities is different. The steering here is done by the local authority when it identifies individuals as housing priority cases; the RSL merely discharges its statutory duty to co-operate by attempting to accommodate those individuals as best it can in the circumstances. It is an obligation that may benefit the public, but not one that evinces the kind of dynamic between the functions of RSLs and local authorities that was evident between the bodies in *Datafin*. All things considered, *Weaver* was wrongly decided: the function was private.[[1256]](#footnote-1256)

The second harder case is the BBC, whose HRA status has never been judicially determined. Helen Fenwick and Gavin Phillipson describe the issue as an ‘interesting question’,[[1257]](#footnote-1257) but admit to finding it somewhat perplexing for reasons explored below. The BBC is undoubtedly a body whose overarching purpose is to serve the public interest rather than its own. Aside from receiving funding from licence money,[[1258]](#footnote-1258) the royal charter under which it was incorporated is littered with references to its public-interest mission. It ‘*exists* to serve the public interest’,[[1259]](#footnote-1259) in other words; and is driven by the ‘sovereign’ BBC Trust,[[1260]](#footnote-1260) which sets ‘the overall strategic direction of the BBC’ and ‘will perform these roles in the public interest’.[[1261]](#footnote-1261) It was also created ‘at the Government’s behest’ following a radio broadcasting pilot by the Post Office;[[1262]](#footnote-1262) and it remains subject to ultimate control by the Secretary of State, who determines the level of remuneration that the BBC is to grant the Trust[[1263]](#footnote-1263) and can influence how the BBC is wound up and its assets dissolved.[[1264]](#footnote-1264)

In addressing this question, Fenwick and Phillipson take as their starting point the idea that the BBC cannot be a core public authority, since core public authorities lack Convention rights of their own and ‘it would seem absurd to disallow it from claiming that its freedom of expression had been interfered with.’[[1265]](#footnote-1265) However, they note the case of *R (ProLife Alliance) v BBC*.[[1266]](#footnote-1266) Here, the House of Lords presumed without argument that the BBC (and other, independent broadcasters) performed a public function for judicial review purposes when refusing to screen a party election broadcast (PEB) that the broadcasters thought would put them in breach of the taste and decency standards to which they were subject. These standards were contained in s 6(1)(a) of the Broadcasting Act 1990 (BA) in the case of the independent broadcasters; and its agreement with the Secretary of State for National Heritage, in the case of the BBC.[[1267]](#footnote-1267) From *ProLife*, Fenwick and Phillipson observe that the BBC ‘*is* acting as a public authority when it acts, effectively, as a regulator.’[[1268]](#footnote-1268) Since all broadcasts will be preceded by a decision as to whether to broadcast, they then reason that the BBC could be seen as performing a public function under s 6(3)(b) when broadcasting generally; but they observe on the other hand that if this were true, the BBC would be disabled from asserting its own rights against the government when performing that function.[[1269]](#footnote-1269) The authors thus conclude that ‘*no* satisfactory answer [exists] to this conundrum’:[[1270]](#footnote-1270) *ProLife* suggests that the BBC is a public authority of one sort or another, but this classification would seem unduly burdensome given the need for it to be able to safeguard its own Art 10 rights against the state.

The foregoing chapters’ findings can assuage the authors’ concerns. In particular, the BBC’s Convention rights would be unaffected by its performance of a public function under s 6(3)(b): as a hybrid public authority it would be perfectly entitled to rely on Art 10, even in its public capacity. However, the idea that it is a hybrid rather than a core public authority is nevertheless open to doubt. First, it presumes the BBC to be an institutionally private person, when the evidence given above suggests that it is a ‘selfless’, other-regarding body – a core public authority – instead. In answer to the authors’ concerns that the BBC would lose its Convention rights as a core public authority, *Radio France v France*[[1271]](#footnote-1271) says otherwise. As the previous chapter explained, the case seems to suggest that a state-owned broadcaster that would otherwise be classified as a governmental organisation can nevertheless be regarded as a non-governmental organisation in order to file a Convention claim relating to its right to free speech. Whilst itself required to comply with the Convention in everything it does, the BBC would therefore enjoy Convention protection of its own.

Second, the idea that the BBC is a hybrid public authority is also doubtful in light of the two-strand approach to s 6(3)(b). Under this approach, it is far from clear that the BBC would be exercising a public function when deciding whether to broadcast. First, it is highly doubtful that the function would fall under strand one through the *Costello-Roberts* principle. No case suggests that it does, which is not surprising given that the BBC’s institutional characteristics point towards it being a governmental organisation capable of *directly* engaging the state’s responsibility.[[1272]](#footnote-1272) For strand-two purposes, moreover, the BBC does not appear to be exercising any legal powers when making broadcasting decisions. It acts according to its royal charter and the relevant taste and decency standards were given in its agreement with the Secretary of State; there is no scheme of *law* in place.[[1273]](#footnote-1273)

There is a counter-argument to this, however, that needs exploring. Since the concept of legal authority is malleable to a certain extent, as *Datafin* shows, why cannot the BBC’s functions nevertheless be regarded as the exercise of legal power under the LACPA? As there was a catalyst for stretching the LACPA to fit the PTM in *Datafin*, so too, the argument might run, is there a catalyst here: the BBC’s functions ought to be regarded as LACPA functions because it will otherwise be in an anomalously privileged position compared to all of the independent broadcasters (ITV, Channel 4 and Channel 5) whose obligations not to broadcast offensive material derive instead from the BA, and whose decisions in this area *are* therefore regarded as the exercise of public functions. Indeed, in *ProLife* the House of Lords seemed keen to ensure that the BBC and independent broadcasters were treated equally given that the taste and decency obligations pertaining to each of them were expressed in identical terms. As Lord Nicholls stated, ‘It is common ground that nothing in the present case turns on the fact that the obligation on independent television companies is statutory in form, whereas the obligation on the BBC is contained in an agreement.’[[1274]](#footnote-1274)

The answer, it is suggested, is that it was wrong for the House of Lords to presume the independent broadcasters to be amenable to judicial review in *ProLife*, so any attempt to treat the BBC as performing a public function by analogy therefore drops away. I would accept that Channel 4 could be regarded as performing a public function for judicial review purposes when deciding whether to broadcast, since the Channel Four Corporation was created by statute (s 23 BA) and is invested, like the PTM under the Companies Act, with the general power to ‘do anything which appears to them to be incidental or conducive to the carrying out of their functions.’[[1275]](#footnote-1275) When deciding whether to broadcast it is therefore exercising this statutory power, which is coercive in the broad-brush sense that, in LACPA terms, it can interfere with the individual’s fundamental rights and interests. For HRA purposes it would probably be a core public authority, too, given Channel 4’s not-for-profit status,[[1276]](#footnote-1276) its particular public-interest objectives[[1277]](#footnote-1277) and the control that OFCOM, the new communications regulator, and the Secretary of State can exert over appointments to the Corporation’s board and the remuneration of its members.[[1278]](#footnote-1278) But the position of ITV and Channel 5 is different. Under the LACPA, they are certainly not performing any public functions by virtue of their obligations under s 6(1)(a) BA. All this provision did is impose upon the Independent Television Commission (ITC), the (then) regulator for independent broadcasters,[[1279]](#footnote-1279) an obligation to ensure that ‘nothing is included in its programmes which offends against good taste or decency’. When the independent broadcasters refused to air material that they thought would breach these standards, all they were therefore doing was anticipating the ITC’s likely actions in the event that they did broadcast the material, and making their decision accordingly.[[1280]](#footnote-1280) The decision to refuse to broadcast the PEB did not entail the exercise of any legal power by the broadcasters themselves. Their position was no different to that of any other private individual who makes a decision on the basis of what the legal consequences might be. I am not exercising any legal powers when I decide to refuse to lend my car to a drunk friend, for example, knowing that the police could use their legal powers to arrest me of a road traffic offence if I accede to his request. I am simply complying with a standard imposed upon me by the law, just as the independent broadcasters in *ProLife* were doing. So with the exception of Channel 4, which seems to be performing a public function for the different reason given above, none of the broadcasters mentioned are performing public functions under the LACPA, and thus under strand two of s 6(3)(b), when deciding whether to broadcast. The more natural and compelling answer to the question Fenwick and Phillipson pose is the one given above, that the BBC is a *core* rather than a hybrid public authority. In this sense it is in a somewhat curious position: a core public authority, who can nevertheless enforce its Convention rights,[[1281]](#footnote-1281) but who is not amenable to judicial review on traditional, ‘domestic’ grounds when deciding whether to broadcast material. Its position under domestic judicial review also differs from that of Channel 4, because the latter’s power to make broadcasting decisions is clearly rooted in law and would therefore satisfy the LACPA.

The third and final harder case is the Internet Watch Foundation (IWF), a UK-based charity whose function is to censor internet content that it regards to be potentially criminally obscene. It exercises no legal powers itself but its power to interfere with individuals’ free speech unfairly is nevertheless considerable. It works by compiling blacklists of offending sites and then instructing its members, many of whom are UK-based internet service providers (ISPs), to block the material from view.

There has been no judicial determination of the IWF’s HRA status but one commentator, Emily Laidlaw, has recently explored the issue.[[1282]](#footnote-1282) She argues that there is a good case for regarding the IWF as a hybrid public authority, based principally on the fact that it has received donations from bodies such as the European Union and the Home Office and on its links with government.[[1283]](#footnote-1283) She admits that the precise nature of these links is unclear, but emphasises that they exist at least on some level:[[1284]](#footnote-1284) the IWF was founded by the internet industry ‘in cooperation with the Home Office and the police’ following a threat by the UK Government to legislate to create a similar body to do the job,[[1285]](#footnote-1285) and it has since received praise from Government officials and from OFCOM;[[1286]](#footnote-1286) and its internal restructuring in 2000 was ‘endorsed by’ the Department of Trade and Industry.[[1287]](#footnote-1287) Laidlaw also argues that the state may have positive obligations under Art 10 ECHR to regulate the IWF’s censorship function.[[1288]](#footnote-1288)

The IWF is not a core public authority because it is a private charity rather than a ‘selfless’ body created and controlled to serve the public interest, even though, as seen above, governmental pressure seemingly caused it to be established. The issue is therefore whether it is a hybrid public authority instead. Under the two-strand approach the IWF is indeed performing a public function for HRA purposes, but this would be under strand one rather than the (LACPA) second strand. The function is a strand-one public function because it would almost certainly fall under the *Costello-Roberts* principle, as Laidlaw rightly observes.[[1289]](#footnote-1289) The ECtHR is likely to regard the IWF’s regulatory function as a function delegated to it by the state for the purpose of assisting the state to perform its international obligations, along the lines of *Sychev v Ukraine*.[[1290]](#footnote-1290) The notion of delegation seems to be very broad in Strasbourg’s eyes (counter-intuitively so, even), as discussed in chapter six, so the IWF’s links would probably be enough to qualify here. The state’s ‘international obligations’ would be those given by EU law, for instance, that require it to block access to obscene material such as child pornography.[[1291]](#footnote-1291) The IWF’s functions are integral to the performance of these obligations.

The IWF’s regulatory function is undoubtedly coercive in the sense that it can impact on the fundamental rights and interests of the owner of the blacklisted material by removing it from view, but there is no strand-two LACPA public function here. This is because the IWF exercises no *de jure* powers of its own, nor does it appear to be exercising specific delegated functions – that is, delegation in the domestic sense seen in chapter five rather than the Strasbourg sense described above – on behalf of a core public authority. It is also doubtful that the *Datafin* principle would apply. The IWF’s *de facto* regulatory power differs fundamentally from the PTM’s because the latter was integrally involved in the exercise of coercive legal authority by others, such as the Stock Exchange, in a way the IWF is not. If the IWF issued a clearly irrational instruction to block material, for example, it is difficult to see what legal power it would have to compel the ISPs to comply if they refused. The conclusion that the IWF would be immune from judicial review under the LACPA might be disappointing to some but is nevertheless not particularly problematic, either practically or conceptually. Practically, this is because the IWF’s main threat is to free speech, and ample recourse would lie to Art 10 ECHR given that the IWF is still a hybrid public authority under strand one of s 6(3)(b). Conceptually, moreover, the mere fact that the IWF wields power that can be used unfairly is not enough to render its functions public. More than this is needed, as I have argued throughout: the notion of public-ness is not a theory of justice in itself.

### Private functions, rightly determined

There are three cases to consider here. The first is *R (West) v Lloyd’s of London*,[[1292]](#footnote-1292) in which the Court of Appeal held that Lloyd’s, the insurance underwriter, was performing only private functions when deciding to approve minority buyouts of the applicant’s memberships, or potential memberships, in four syndicates. The applicant claimed that his share of syndicate capacity was purchased at an undervalue and claimed a breach of Arts 1 of the First Protocol, 6 and 14 ECHR. In a judgment with which Mummery and Dyson LJJ agreed, Brooke LJ drew heavily from the courts’ approach to the status of Lloyd’s in the domestic judicial review context. Although Lloyd’s was incorporated by a private Act of Parliament, the Lloyd’s Act 1871, and is empowered to make byelaws under the Lloyd’s Act 1982, another private Act, ‘membership of Lloyd’s was entirely voluntary’ and the byelaws under which it operated ‘are binding on each member in contract’ only.[[1293]](#footnote-1293) As Leggatt LJ put it in *R v Lloyd’s of London, ex p Briggs*:

‘Its powers are derived from a private Act which does not extend to any persons in the insurance business other than those who wish to operate in the section of the market governed by Lloyd’s and who, in order to do so, have to commit themselves by entering into the uniform contract prescribed by Lloyd’s.’[[1294]](#footnote-1294)

Thus, the position is that members enjoy legal choice through and through; this is a classic application of the reasoning underlying the LACPA. In the first-order sense members enjoy the freedom to decide whether to join the market regulated by Lloyd’s, and in the second-order sense they also enjoy the legal freedom to negotiate, through contract, the terms on which they will be treated having done so. Lloyd’s is free to make the byelaws under which it operates and free, in a theoretical sense at least, to alter them at a member’s request. In this sense its position is materially similar to that of the Jockey Club or the National Greyhound Racing Club: the regulator makes the rules, and the regulator can change them. Whether the regulator would be likely to do so is another matter – a factual, rather than a legal one – with which the LACPA is unconcerned, as chapter four explained. It might be thought that Lloyd’s is in an analogous position to the PTM in *Datafin* since both are regulators who wield considerable power over areas of commercial activity, but much of the reasoning in *Datafin*, it is recalled, was driven by the desire to avoid the clear injustice that would have ensued had the PTM not been regulated through judicial review. The position in the insurance market is different, however, as their Lordships observed in *West*,[[1295]](#footnote-1295) because the Financial Services Authority now plays an extensive regulatory role in the area concerned.[[1296]](#footnote-1296) All things considered, Lloyd’s is neither exercising a public function under strand two of s 6(3)(b) nor, it would seem, by virtue of the *Costello-Roberts* principle under strand one. *West* was rightly decided.

The second case is *Aston Cantlow*,[[1297]](#footnote-1297) in which the House of Lords found that the PCC was not exercising a public function when seeking to enforce chancel repair liability against lay rectors. The law of chancel repair liability is ‘arcane and unsatisfactory’, as Lord Nicholls recognised,[[1298]](#footnote-1298) but on the basis of their account of it the case seems correctly decided. It is clear that the PCC performed no strand-one functions, so the outcome for s 6(3)(b) purposes will depend on strand two. The starting point is that when the PCC seeks to enforce chancel repair liability, it is not exercising any delegated functions on a core public authority’s behalf. Although PCCs form the ‘basic building block’ of the Church of England,[[1299]](#footnote-1299) the Church itself is not a core public authority, as their Lordships rightly observed.[[1300]](#footnote-1300) Everything will therefore turn on whether the PCC exercises any legally-authorised coercive powers of its own. At first sight it might appear to do. The PCC’s power to seek chancel repairs was grounded in s 2 of the Chancel Repairs Act 1932, which provides for powers to serve notice on the lay rector to repair the chancel and to bring proceedings to recover the sum due.[[1301]](#footnote-1301) Since it can interfere with the individual’s fundamental rights and interests by rendering them liable to a sizeable bill, the power to issue notice therefore appears to be a legally-authorised coercive power. However, the obligation to repair was merely a ‘civil debt’[[1302]](#footnote-1302) that the lay rectors had assumed by purchasing the land to which it was attached, as their Lordships observed. In LACPA terms, the lay rectors therefore enjoyed the first-order choice in law to decide whether to assume the obligation. But like the Lloyd’s members discussed above, they also enjoyed the second-order choice to negotiate the terms on which they would be treated having done so. This is because the PCC could theoretically make a valid decision in law to extinguish the lay rector’s obligation to repair. Although its members could be in breach of their fiduciary obligations if they failed to act in the best interests of the PCC by doing so,[[1303]](#footnote-1303) this is not something that would render the PCC’s decision itself ultra vires or in excess of its legal authority. Admittedly it would be rare for the PCC to relinquish this obligation, because under the Ecclesiastical and Dilapidations Measure 1923 it only enjoyed the power to do so in return for payment, from the lay rector, of a sum equivalent to the PCC’s estimation of the cost of future repairs.[[1304]](#footnote-1304) But the Measure is internal to the Church of England and therefore lacks the force of *law*; there would have been no *legal* impediment to the PCC waiving its rights had it wanted to. The lay rectors’ obligation was therefore like any other in private law, even though the 1932 Act provided for recovery of the debt in court.

Third, then, is Network Rail, the privatised rail operator. The position of privatised operators in previously nationalised industries under the LACPA was briefly considered in chapter five: unless their powers are grounded in law, which generally speaking they are not, then they will not be performing public functions. Thus, both the finding and *obiter* observations of Sir Michael Turner in *Cameron v Network Rail Infrastructure Ltd*,[[1305]](#footnote-1305) with respect, were correct. The applicants were the family of a woman killed in the Potters Bar rail crash who claimed that Network Rail had breached the right to life under Art 2 by failing to maintain the track points properly. Rejecting their argument that the defendant was a hybrid public authority, his Lordship remarked that it had a ‘central role in regard to safety’ but that ‘so, too, does every other employer [in the industry].’[[1306]](#footnote-1306) Interestingly, however, and rightly according to the LACPA, his Lordship opined, *obiter*, that the position could well have been different at an earlier stage in the privatisation process, before the defendant’s various statutory powers and regulatory functions had been removed in order to open up the newly-privatised market to competition. Prior to the accident it (or rather, Railtrack, under its previous name) was invested with the statutory regulatory function of ‘maintain[ing] railway group standards as well as to monitor and control the safety cases of others who used the railway infrastructure’,[[1307]](#footnote-1307) the exercise of which his Lordship suggested could have been a public function, but ‘by the date of the Potters Bar accident, it had been relieved of this function.’[[1308]](#footnote-1308) This was because the Railways (Safety Case) Regulations 2000 had removed it, replacing Railtrack’s specific regulatory function with a general obligation, on all railway operators in control of any railway infrastructure, to prepare a safety case for approval by the Health and Safety Executive before using or allowing the infrastructure to be used.[[1309]](#footnote-1309) Again, given that privatised operators do not appear to fall under the *Costello-Roberts* principle and therefore that Network Rail does not perform any public functions under strand one, *Cameron* was rightly decided according to the two-strand approach: Network Rail is not a hybrid public authority under s 6(3)(b).

## CONCLUSION

My overriding argument in this chapter has been that the LACPA serves as the basic constitutional blueprint for the public-private divide under s 6, being altered only by the advent of the core public authority concept and by Parliament’s intention that s 6(3)(b) encompass an additional strand of functions – *Costello-Roberts* functions – that bring Convention rights home in a way that the common-law horizontal effect scheme, under the constitutional constraint model, does not. Hence, s 6(3)(b) contains two distinct strands of public function. The following chapter offers some broader conclusions on my thesis as a whole.

# 8.

# Conclusion

The LACPA lies at the root of the law on amenability in both the judicial review and HRA contexts, properly understood. When they are determining the reach of principles of good administration and the Convention rights in domestic law, the courts must ask themselves not whether the body is exercising monopoly power, or whether it is performing a governmental function or whether the government would intervene to perform the function in the event that the body in question did not exist, for instance. Instead, they must ask whether the body exercises legally-authorised coercive power. It is decisions taken pursuant to these powers that are amenable to judicial review and to Convention challenges in domestic law.

There are distinct variations on this theme, however. First, as we have seen, the LACPA itself can, within limits, be applied creatively. The courts have given a broad-brush construction to the concept of coercion, which extends beyond physical coercion and interference with individuals’ legal rights, to subtler coercion affecting the individual’s interests more generally. The concept of legal authority also extends beyond statutory, prerogative and third-source power to *de facto* power that plays an integral role in the exercise of legally-authorised coercive power by others. This is the *Datafin* principle, properly understood. *Datafin* was an exceptional judgment – a creative application of the LACPA motivated by the need to regulate the Panel of Take-overs and Mergers in circumstances where their Lordships saw the alternative of leaving it unregulated as unthinkable. It did not signal a general shift in the courts’ approach from a source-of-power test to a function-based test, as is often said. The reality is that the source of the power has always mattered, and still does matter, but that the nature of the function being performed has been the courts’ overriding concern under the LACPA all along. It is the *kind* of power – legally-authorised coercive or not – that matters. For this reason the LACPA also extends to delegated functions, properly understood; that is, to functions that are transferred from delegator to delegate and would be public in nature when performed in-house. Private bodies are not simply providing ordinary commercial or charitable services when performing such functions: they are performing functions that can, and should, be regarded as legally-authorised coercive powers.

Second, there are significant deviations from the LACPA under the HRA. The most obvious is the core public authority concept, which requires constitutionally selfless bodies – governmental organisations, in Strasbourg – to respect the Convention whether or not they perform what the LACPA would regard as public functions. The other is under s 6(3)(b), via the *Costello-Roberts* principle in Strasbourg. Since private bodies can trigger the state’s positive obligations by performing certain functions loosely describable as ‘public’ in nature, there is every reason to think that Parliament intended to bring these functions within s 6(3)(b), especially given that the domestic courts will not necessarily be able to provide a Convention remedy against these bodies through the common-law horizontal effect mechanism. But this is not the complete picture under s 6(3)(b). Especially given that the *Costello-Roberts* principle is indeterminate and relatively under-developed, there is every reason to believe that Parliament would intend other functions to be public, too. These are LACPA functions. Given the LACPA’s normative underpinnings, its settled foundations in domestic common law, its flexibility in applying to the more modern practice of delegating functions and the similar language used in both the CPR and s 6(3)(b), the persuasive force of the argument that s 6(3)(b) should incorporate LACPA functions in some way or another is overwhelming. Hence, the two-strand approach: *Costello-Roberts* functions and LACPA functions. It is an approach made even more plausible once the nature of the hybrid public authority scheme as a whole is properly understood. Given that hybrid public authorities are able to fight their own corner by relying on Convention rights whether they perform public or private functions, it becomes clear that the hybrid scheme has more in common with its common law counterpart than appears at first sight. All things considered, it would be a Herculean task for the courts to make a convincing case against broadening their present approach to the meaning of a public function.

Considering my thesis in the round, I make three concluding points. First, some might see the LACPA as being relatively conservative in outlook; as lending only a modest scope to the notion of a public function, particularly given that it does not extend to monopoly power *per se*. As chapter one stressed, however, there are sound theoretical and constitutional reasons for this. For as long as the application of Convention rights and the principles of good administration is determined by a public-private divide, the courts must take this divide seriously. Any approach that conceives of a public function simply in terms of *power*, whether monopoly power or not, and that therefore overlooks fundamental distinctions between the power held by the individual and by the state, such as the relative authority of each, is failing in this task. Such approaches also risk taking the courts down the road of ‘competence creep’; that is, they encourage the courts to think that the scope of judicial review and the HRA must be extended to respond to the unfair use of power generally, by institutionally private as well as public bodies alike. In turn, this risks gradually encroaching upon Parliament’s legislative role in policing power imbalances between private individuals. It also requires the courts to engage with trickier questions, for which they are not necessarily suited, about how these power imbalances should be policed. Both eventualities can be avoided if the courts adhere to the LACPA, however.

Second, the LACPA’s focus on legal power also brings into question the relationship between public law and the torts of breach of statutory duty and misfeasance in public office. For the avoidance of doubt, the LACPA by no means renders these redundant. As torts, both are directed towards compensating the claimant for loss by allowing them to recover damages. Damages are unavailable in judicial review unless a private-law cause of action can also be established,[[1310]](#footnote-1310) however, and the HRA only allows damages as a secondary remedy, if the court is convinced that ‘the award is necessary to afford [the victim] just satisfaction.’[[1311]](#footnote-1311) For this reason judicial review and the HRA will sometimes – perhaps even often – be unable to do for claimants what these private-law doctrines can. There are also substantive differences between these torts and the principles of good administration and the Convention. Breach of statutory duty concerns *duties*, of course; the LACPA concerns decisions taken pursuant to legally-authorised coercive *powers*. Moreover, not all breaches of statutory duty will be actionable in tort anyway: all depends on a construction of the statute in question.[[1312]](#footnote-1312) Similarly, a claimant in an action for misfeasance in public office will have to prove more than that a public official has acted beyond the scope of their powers. They must also prove intention or recklessness on the part of the defendant to injure them, as well (perhaps) as a bad-faith motive.[[1313]](#footnote-1313) Neither of these requirements is necessary for a successful judicial review or HRA claim.[[1314]](#footnote-1314)

Third, although it has not been my argument that the LACPA is normatively the best blueprint for the public-private divides in the contexts concerned, it is noteworthy that the model nevertheless goes some way to assuaging some authors’ concerns about how the law in the area should look. Paul Craig, for instance, has criticised both the idea of a source-of-power test and the idea of a public function test, which are usually the two broad alternatives authors believe the case-law to present to us.[[1315]](#footnote-1315) The first, he says, risks rather bluntly encompassing all forms of statutory power,[[1316]](#footnote-1316) while the latter is too conceptually vague and open-ended, opening up the fore to judgments founded on judicial instinct rather than common law principle.[[1317]](#footnote-1317) The LACPA answers to both concerns. First, the model emphasises that not *all* statutory power is amenable to judicial review, because it must allow for the coercion of the subject, within the courts’ definition of that term, in order to be regarded as public. Second, it is underlain by a conceptual framework that has its roots in uncontroversial theoretical givens, as chapter one explained. It therefore limits the extent to which the judges can allow their interpretation of a public function to be driven by simple instinct: there is a theoretical lodestar around which their interpretations must be based. But it is not simply the fact that the LACPA is a functional test with a theoretical framework that should appeal to commentators. It is also the *content* of that framework. Analysing some of the more theoretical models for controlling power through judicial review that other authors have proffered, John Allison, for instance, expresses two further significant concerns: first, that the contours of models based primarily on the idea of controlling authority are unclear given the difficulty of defining the notion of authority in the abstract;[[1318]](#footnote-1318) and second, that the reach of models focussing more on controlling *power*, at the other end of the spectrum, are equally problematic because of the trickiness of formulating a ‘genealogy of power’.[[1319]](#footnote-1319) Again, the LACPA should appeal here, because it incorporates both of these important concepts – authority and power – without requiring the courts to develop abstract definitions from scratch themselves. The model therefore proceeds on the basis of workable presumptions as to these concepts’ meanings, leaving Parliament and the private law to correct any significant injustices that arise in the event that these presumptions are insufficiently sophisticated to reflect reality. The model strikes an attractive balance, in other words, between conceptual pragmatism and conceptual idealism, and between the competing needs of legal certainty and individual justice. In this sense, the LACPA is a model constitutional employee: competent in its day-to-day job without spending so much time nervously chasing perfection that it gets nowhere; and industrious, keen and dependable without trying to usurp the role of Parliament, its colleague. Once again, this is not to suggest that the LACPA is a normative panacea. But it does hint at the possibility that the model’s theoretical appeal could go further than demonstrating simply that the descriptive account it gives of the courts’ case-law is *reliable*: it may also begin to answer to some of the more perfectionist wishes of those who have been bold enough to put the case-law to one side and to think more experimentally about how their ideal public-private divide would look.

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R (Hooper) v Secretary of State for Work and Pensions [2005] UKHL 29, [2005] 1 WLR 1681

* R (Javed) v Secretary of State for the Home Department [2001] EWCA Civ 789, [2002] QB 129

R (Jenkins) v Marsh Farm Community Development Trust [2011] EWHC 1097 (Admin)

R (Johannes Mooyer) v Personal Investment Authority Ombudsman Bureau Ltd [2001] EWHC Admin 247

* R (Koyama) v University of Manchester [2007] EWHC 1868 (Admin)

R (Kilroy) v Governing Body of Parrs Wood High School [2011] EWHC 3489 (Admin)

R (M) v University of the West of England [2001] ELR 77 (QB)

R (Manydown Co Ltd) v Basingstoke BC [2012] EWHC 977 (Admin)

R (Matin) v University College London [2012] EWHC 2474 (Admin)

R (McKoy) v Oxford Brookes University[2009] EWHC 667 (Admin)

R (Molinaro) v Royal Borough of Kensington and Chelsea [2001] EWHC Admin 896

R (Moreton) v Medical Defence Union Ltd [2006] EWHC 1948

* R (Mullins) v The Appeal Board of the Jockey Club[2005] EWHC 2197 (Admin)

R (Oxford Study Centre) v British Council [2001] EWHC Admin 207

R (Pepper) v Bolsover District Council (2001) 3 LGLR 20 (QB)

R (ProLife Alliance) v BBC [2004] 1 AC 185 (HL)

R (Quintavalle) v Secretary of State of Health [2003] UKHL 13, [2003] 2 AC 687

R (Ruddy) v Chief Constable of Strathclyde [2012] UKSC 57

R (Rudewicz) v Ministry of Justice [2012] EWCA, [2012] 3 WLR 901

R (Siborurema) v Office of the Independent Adjudicator [2007] EWCA Civ 1365

R (Smith) v Parole Board (No. 2) [2005] UKHL 1, [2005] 1 WLR 350

R (Sunspell) v Association of British Travel Agents [2001] ACD 16 (QB)

R (Tucker) v Director General of the National Crime Squad [2003] EWCA Civ 57

R (Ullah) v Special Adjudicator [2004] UKHL 26, [2004] 2 AC 323

R (Weaver) v London and Quadrant Housing Trust [2008] EWHC 1377 (Admin)

R (Weaver) v London and Quadrant Housing Trust [2009] EWCA Civ 587, [2010] 1 WLR 363

R (West) v Lloyd’s of London [2004] EWCA 506 (Civ)

R (Wright) v Secretary of State for the Home Department [2001] EWHC Admin 520

R v A (No. 2) [2002] 1 AC 45 (HL) 68 (Lord Steyn)

R v Advertising Standards Authority, ex p The Insurance Service plc [1990] 2 Admin LR 77 (QB)

R v Advertising Standards Authority Ltd, ex p Vernons Organisation Ltd [1992] 1 WLR 1289 (QB)

R v Aston University Senate, ex p Roffey [1969] 2 QB 538 (QB)

R v Barnsley Metropolitan Borough Council, ex p Hook [1976] 1 WLR 1052 (CA)

R v Barker (1762) 3 Burr 1265

R v BBC, ex p Lavelle [1983] 1 WLR 23 (QB)

R v BBC, ex p The Referendum Party [1997] EMLR 605 (QB)

R v Board of Visitors of Hull Prison, ex p St Germain (No. 2) [1979] 1 WLR 1401 (QB)

R v Boycott, ex p Keasley [1939] 2 KB 651 (KB)

R v Bishop of Ely (1794) 5 Durn & E 475

R v Bury Park Imam, ex p Ali [1994] COD 142 (CA)

R v Chief Rabbi of the United Hebrew Congregations of Great Britain, ex p Wachmann [1992] 1 WLR 1036 (QB)

R v Civil Service Appeal Board, ex p Bruce [1988] ICR 649 (QB)

R v Code of Practice Committee of the British Pharmaceutical Industry, ex p Professional Counselling Aids Ltd [1991] 3 Admin LR 697 (QB)

R v Commissioners of Customs and Excise, ex p Cook [1970] 1 WLR 450 (QB)

R v Criminal Injuries Compensation Board, ex p Lain [1967] 2 QB 864 (QB)

R v Derbyshire County Council, ex p Noble [1990] ICR 808 (CA)

R v Disciplinary Committee of the Jockey Club, ex p Aga Khan [1993] 1 WLR 909 (CA)

R v Disciplinary Committee of the Jockey Club, ex p Massingberd-Mundy [1993] 2 All ER 207 (CA)

R v Ealing LBC, ex p Times Newspapers [1987] IRLR 129 (QB)

R v East Berkshire Health Authority, ex p Walsh [1985] QB 152 (CA)

R v Electricity Commissioners, ex p London Electricity Joint Committee Co (1920) Ltd [1924] 1 KB 171 (CA)

R v Eurotunnel Developments Ltd, ex p Stephens (1997) 73 P & CR 1 (QB)

R v Fernhill Manor School, ex p Brown [1993] Admin LR 159 (QB)

R v Football Association Ltd, ex p Football League Ltd [1993] 2 All ER 833 (QB)

R v Gaming Board for Great Britain, ex p Benaim and Khaida [1970] 2 QB 417 (CA)

R v General Council of the Bar, ex p Percival [1991] 1 QB 212 (QB)

R v General Medical Council, ex p Gee [1986] 1 WLR 1247 (CA)

R v Ghosh [1982] QB 1053 (CA)

R v Greater London Council, ex p Westminster City Council The Times, 22 January 1985 (QB)

* R v Hinks [2001] 2 AC 241 (HL)

R v Horncastle [2009] UKSC 14, [2010] 2 AC 373 [11] (Lord Phillips PSC)

R v Immigration Appeal Tribunal, ex p Nelson [2001] Imm A R 76 (CA)

R v Industrial Court, ex p A.S.S.E.T. [1965] 1 QB 377 (QB)

R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses [1982] AC 617 (HL)

R v Inns of Court Visitors, ex p Calder [1994] QB 1 (CA)

R v Insurance Ombudsman Bureau, ex p Aegon Ltd [1994] CLC 88 (QB)

R v Jockey Club, ex p RAM Racecourses Ltd [1993] 2 All ER 225 (QB)

R v Legal Aid Board, ex p Donn [1996] 3 All ER 1 (QB)

R v Lewisham LBC, ex p Shell UK Ltd [1988] 1 All ER 938 (QB)

R v Liverpool Corporation, ex p Liverpool Taxi Fleet Operators’ Association [1972] 2 QB 299 (CA)

R v Lloyd’s of London, ex p Briggs [1993] 1 Lloyd's Rep 176

R v London Beth Din, ex p Bloom [1998] COD 131 (QB)

R v London Metal Exchange, ex p Albatros Warehousing (QB, 30 March 2000)

R v Lord Chancellor, ex p Witham [1998] QB 575 (QB)

R v Lord Chancellor’s Department, ex p Nangle [1991] ICR 743

R v Lord President of the Privy Council, ex p Page [1993] 2 AC 682 (HL)

R v Lyons (No. 3) [2002] UKHL 447, [2003] 1 AC 976

R v Minister of Health, ex p Villiers [1936] 2 KB 29 (KB)

R v Ministry of Defence, ex p Smith [1996] QB 517 (CA)

R v Muntham House School, ex p R [2000] BLGR 255 (QB)

R v National Joint Council for the Craft of Dental Technicians, ex p Neate [1953] 1 QB 704 (QB)

R v National Trust, ex p Scott [1998] 1 WLR 226 (QB)

R v North and East Devon Health Authority, ex p Coughlan [2001] QB 213 (CA)

R v Paddington Valuation Officer, ex p Peachey (No. 2) [1966] 1 QB 380 (CA)

R v Panel of Take-overs and Mergers, ex p Datafin Plc [1987] QB 815 (CA)

R v Panel of Take-overs and Mergers, ex p Guinness Plc [1990] 1 QB 146 (CA)

R v Post Office, ex p Byrne [1975] ICR 221 (QB)

R v Postmaster-General, ex p Carmichael [1928] 1 KB 291 (KB)

R v R [1992] 1 AC 599 (HL)

R v Secretary of State for Foreign Affairs, ex p World Development Movement [1995] 1 WLR 306 (QB)

R v Secretary of State for the Home Department, ex p Al-Fayed (No. 1) [1998] 1 WLR 763 (CA)

R v Secretary of State for the Home Department, ex p Benwell [1985] QB 554 (QB)

R v Secretary of State for the Home Department, ex p Northumbria Police Authority [1989] QB 26 (CA)

R v Secretary of State for the Home Department, ex p Pierson [1998] AC 539 (HL)

R v Secretary of State for the Home Department, ex p Simms [2000] 2 AC 115 (HL)

R v Secretary of State for Transport, ex p Factortame (No. 2) [1991] 1 AC 603 (HL)

R v Servite Houses, ex p Goldsmith (2001) 33 HLR 35 (QB)

R v Somerset County Council, ex p Fewings [1995] 1 All ER 513 (QB)

R v University of Cambridge, ex p Persaud [2001] ELR 64 (QB)

R v University of Cambridge, ex p Persaud [2001] EWCA Civ 534

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Ridge v Baldwin [1964] AC 40 (HL) 75

Roberts v Hopwood [1925] 2 AC 578 (HL)

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S and W: Care Orders, Re [2002] UKHL 10, [2002] 2 AC 291

Secretary of State for the Home Department v AF (No. 3) [2009] UKHL 28, [2010] 2 AC 269

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Vauxhall Estates v Liverpool Corporation [1932] 1 KB 733 (KB)

Vidyodaya University of Ceylon v Silva [1965] 1 WLR 77 (PC)

West Kent Housing Association Ltd v Haycraft [2012] EWCA Civ 276

Wheeler v Leicester City Council [1985] AC 1054 (HL)

YL v Birmingham City Council [2006] EWHC 2681 (Fam)

* YL v Birmingham City Council [2007] EWCA Civ 26, [2008] QB 1

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Young v Bristol Aeroplane Co. [1944] KB 718 (CA)

**European Court and Commission of Human Rights**

* 16 Austrian Communes and some of their councillors v Austria App nos 5767/72 and 922/72 (ECommHR, 31 May 1974)

A v Ireland (2011) 53 EHRR 13

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* Government of the Basque Country Community v Spain App no 29134/03 (ECtHR, 3 February 2004)

Grainger v United Kingdom App no 34940/10 (ECtHR, 10 July 2012)

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Saliyev v Russia App no 35016/03 (ECtHR, 21 October 2010)

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Steel v United Kingdom (1999) 28 EHRR 603

Storck v Germany (2006) 43 EHRR 6

Sunday Times v United Kingdom (1979-80) 2 EHRR 245

Sychev v Ukraine App no 4773/02 (ECtHR, 11 October 2005)

Transpetrol v Slovakia App no 28502/08 (ECtHR, 15 November 2011)

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Van der Mussele v Belgium (1984) 6 EHRR 163

Vostokmash Avanta v Ukraine App no 8878/03 (ECtHR, 20 September 2007)

Woś v Poland (2007) 45 EHRR 28

X and Y v The Netherlands (1986) 8 EHRR 235

Y v United Kingdom App no 14229/88 (ECommHR, 8 October 1991)

Yershova v Russia App no 1387/04 (ECtHR, 8 April 2010)

**Other jurisdictions**

Staatspresident v United Democratic Front 1988(4) SA 830(A)

1. It is also evident from the procedural exclusivity concept developed from *O’Reilly v Mackman* [1983] 2 AC 237 (HL), which I consider in chapter three. [↑](#footnote-ref-1)
2. See chapter six. [↑](#footnote-ref-2)
3. See Catherine MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989); Joan Scott and Debra Keates (eds), *Going Public: Feminism and the Shifting Boundaries of the Private Sphere* (Illinois University Press 2004). [↑](#footnote-ref-3)
4. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Liberty Fund 1915) 254. [↑](#footnote-ref-4)
5. Dawn Oliver, ‘Public Law Procedures and Remedies – Do We Need Them?’ [2002] PL 91. [↑](#footnote-ref-5)
6. David Mullan, ‘Administrative Law at the Margins’, in Michael Taggart (ed), *The Province of Administrative Law* (Hart 1997) 154. [↑](#footnote-ref-6)
7. See also Matthew Conaglen, ‘Public-Private Intersection: Comparing Fiduciary Conflict Doctrine and Bias’ [2008] PL 58. This is not to say that the fiduciary principle itself can be transplanted into public law comfortably, however: see Ian Leigh, *Law, Politics, and Local Democracy* (OUP 2000) 131-138. See also Martin Loughlin, *Legality and Locality* (Clarendon 1996) ch 4. [↑](#footnote-ref-7)
8. Dawn Oliver, *Common Values and the Public-Private Divide* (Butterworths 1999). For discussion of the nature and role of dignity in the law, see David Feldman, ‘Human Dignity as a Legal Value: Part I’ [1999] PL 682; and Part II [2000] PL 61. [↑](#footnote-ref-8)
9. Carol Harlow, ‘“Public” and “Private” Law: Definition Without Distinction’ (1980) 43 MLR 241. [↑](#footnote-ref-9)
10. *ibid*., 247 and 250. [↑](#footnote-ref-10)
11. *ibid*., 242. [↑](#footnote-ref-11)
12. *ibid*., 250. [↑](#footnote-ref-12)
13. Indeed, the Bill of Rights Commission recently recommended an appraisal of the courts’ approach rather than an abandonment of the divide altogether: Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us: Volume 1* [12.26] <http://www.justice.gov.uk/about/cbr> accessed 21st December 2012. [↑](#footnote-ref-13)
14. Discussed in chapter six. [↑](#footnote-ref-14)
15. The terminology is from Ronald Dworkin, *Law’s Empire* (Hart 1986) 254-255. [↑](#footnote-ref-15)
16. In particular those relating to universities: see chapter three. [↑](#footnote-ref-16)
17. R.A.W. Rhodes, ‘The Hollowing Out of the State: The Changing Nature of the Public Service in Britain’ (1994) 65 Pol Q 138. [↑](#footnote-ref-17)
18. Michael Taggart, ‘The Province of Administrative Law Determined?’, in Taggart (fn ) 2. [↑](#footnote-ref-18)
19. On the changing administrative landscape see Rodney Austin, ‘Administrative Law’s Reaction to the Changing Concepts of Public Service’, in Peter Leyland and Terry Woods (eds), *Administrative Law Facing the Future: Old Constrains & New Horizons* (Blackstone Press 1997); Andrew Gamble and Robert Thomas, ‘The Changing Context of Governance: Implications for Administration and Justice’, in Michael Adler (ed), *Administrative Justice in Context* (Hart 2010). See also Sabino Cassesse, ‘New Paths for Administrative Law: A Manifesto’ (2012) 10 IJCL 603. [↑](#footnote-ref-19)
20. Harlow (fn ) 257. [↑](#footnote-ref-20)
21. Patrick Birkinshaw, Ian Harden and Norman Lewis, *Government by Moonlight: The Hybrid Parts of the State* (Hyman 1990) 22. [↑](#footnote-ref-21)
22. See e.g. *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 1 WLR 909 (CA); *R (West) v Lloyd’s of London* [2004] EWCA 506 (Civ). [↑](#footnote-ref-22)
23. *R v Panel of Take-overs and Mergers, ex p Datafin Plc* [1987] QB 815 (CA) is the obvious exception. [↑](#footnote-ref-23)
24. See e.g. *R v Jockey Club, ex p Massingberd-Mundy* [1993] 2 All ER 207 (QB) 219, 222 (Roch J). [↑](#footnote-ref-24)
25. Colin D. Campbell is a particular critic: ‘Monopoly Power as Public Power for the Purposes of Judicial Review’ (2009) 125 LQR 491, 503-504. [↑](#footnote-ref-25)
26. *R v Servite Houses, ex p Goldsmith* (2001) 33 HLR 35; *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95. [↑](#footnote-ref-26)
27. *Poplar Housing and Regeneration Community Association v Donoghue* [2001] EWCA Civ 595, [2002] QB 48. [↑](#footnote-ref-27)
28. See Lord Bingham and Baroness Hale in *YL* (fn ), for instance. [↑](#footnote-ref-28)
29. E.g. Paul Craig, ‘Contracting Out, the Human Rights Act and the Scope of Judicial Review’ (2002) 118 LQR 551; Alexander Williams, ‘*YL v Birmingham City Council:* Contracting Out and “Functions of a Public Nature”’ [2008] EHRLR 524. [↑](#footnote-ref-29)
30. Joint Committee on Human Rights, *The Meaning of Public Authority Under the Human Rights Act* (2003-04, HL 39, HC 382); Joint Committee on Human Rights, *The Meaning of Public Authority Under the Human Rights Act* (2006-07, HL 77, HC 410). [↑](#footnote-ref-30)
31. See also the Bill of Rights Commission’s recommendations: fn [12.26]. [↑](#footnote-ref-31)
32. cf David Pannick, ‘Functions of a Public Nature’ [2009] JR 109, 112. [↑](#footnote-ref-32)
33. Campbell (fn ) 492 (emphasis added). [↑](#footnote-ref-33)
34. See e.g. Peter Cane, ‘Accountability and the Public/Private Distinction’, in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003) 257. For a thorough and critical analysis of the various tests said to exist, see Colin D. Campbell, ‘The Nature of Power as Public in English Judicial Review’ [2009] CLJ 90. [↑](#footnote-ref-34)
35. Examples are Gordon Borrie, ‘The Regulation of Public and Private Power’ [1989] PL 552; Gillian Morris and Sandra Fredman, ‘Public or Private? State Employees and Judicial Review’ (1991) 107 LQR 298; Barry Hough, ‘Public Law Regulation of Markets and Fairs’ [2005] PL 586; Stephen Bailey, ‘Judicial Review of Contracting Decisions.’ [2007] PL 444. [↑](#footnote-ref-35)
36. Examples are Julia Black, ‘Constitutionalising Self-Regulation’ (1996) 59 MLR 24; Anna Grear, ‘Theorizing the Rainbow? The Puzzle of the Public-Private Divide’ (2003) Res Publica 169; Cane (fn ). [↑](#footnote-ref-36)
37. A similar variant features in Dawn Oliver, ‘Functions of a Public Nature Under the Human Rights Act’ [2004] PL 329. [↑](#footnote-ref-37)
38. *Datafin* (fn ). [↑](#footnote-ref-38)
39. Christopher Forsyth, ‘The Scope of Judicial Review: “Public Duty” Not “Source of Power”’ [1987] PL 356. [↑](#footnote-ref-39)
40. William Wade, ‘New Vistas of Judicial Review’ (1987) 103 LQR 323. [↑](#footnote-ref-40)
41. Jack Beatson, ‘Financial Services: Who Will Regulate the Regulators?’ (1987) 8 Comp Law 34, 37. [↑](#footnote-ref-41)
42. Murray Hunt, ‘Constitutionalism and the Contractualisation of Government in the United Kingdom’, in Taggart (fn ) 28. [↑](#footnote-ref-42)
43. Oliver (fn ) 95, 101. Many other authors agree, including Lexa Hilliard, ‘The Take-Over Panel and the Courts’ (1987) 50 MLR 372; Michael Beloff, ‘Pitch, Pool, Rink, … Court? Judicial Review in the Sporting World’ [1989] PL 95, 108; Lord Woolf, ‘Droit Public – English Style’ [1995] PL 57, 62-64; Stephanie Palmer, ‘Public Functions and Private Services: A Gap in Human Rights Protection’ (2008) 6 IJCL 585, 600. Certain judges concur: e.g. *R v Chief Rabbi of the United Hebrew Congregations of Great Britain, ex p Wachmann* [1992] 1 WLR 1036 (QB) 1039 (Simon Brown J); *Poplar Housing* (fn ) 69 (Lord Woolf CJ); *R (Beer) v Hampshire Farmers’ Markets Ltd* [2003] EWCA Civ 1056, [2004] 1 WLR 233 [12] (Dyson LJ). cf Mark Aronson, ‘A Public Lawyer’s Response to Privatisation and Outsourcing’, in Taggart (fn ). [↑](#footnote-ref-43)
44. See e.g. Forsyth (fn ) 362; Wade (fn ) 325-326. [↑](#footnote-ref-44)
45. For instance, Campbell’s monopoly power model (fn ) is deployed only in the judicial review context; Oliver’s coercive power model (fn ) only under the HRA. [↑](#footnote-ref-45)
46. Oliver (fn ) 346-347; Peter Cane, *Administrative Law* (OUP 2011) 269-270. [↑](#footnote-ref-46)
47. Convention rights may nevertheless be horizontally applicable, however: see e.g. Andrew Clapham, *Human Rights in the Private Sphere* (Clarendon 1993) and the discussion of the Convention’s ‘horizontal effect’ (below, chapter six). [↑](#footnote-ref-47)
48. In Williams (fn ); Alexander Williams, ‘A Fresh Perspective on Hybrid Public Authorities Under the Human Rights Act: Private Contractors, Rights-Stripping and “Chameleonic” Horizontal Effect’ [2011] PL 139; Alexander Williams, ‘What is a Hybrid Public Authority Under the HRA?’, in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011); Gavin Phillipson and Alexander Williams, ‘Horizontal Effect and the Constitutional Constraint’ (2011) 74 MLR 878. [↑](#footnote-ref-48)
49. *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [6]. [↑](#footnote-ref-49)
50. As one commentator has acknowledged in the HRA context: Mark Elliott, ‘”Public” and “Private”: Defining the Scope of the Human Rights Act’ [2007] CLJ 485, 487. [↑](#footnote-ref-50)
51. The Cabinet Office, ‘Big Society’ <http://www.cabinetoffice.gov.uk/big-society> accessed 14 October 2012. [↑](#footnote-ref-51)
52. This is one sense in which a binary public-private distinction is probably too blunt to apply to real life. Charities are neither entirely public nor private. They differ from typically private organisations because they exist to serve others, but neither do their rationale and the means by which they are made accountable for their actions match those of the public sector (on which see e.g. Alison Dunn (ed), *The Voluntary Sector, The State and The Law* (Hart 2000)). Within a binary public-private framework, however, charities should be regarded as private organisations, as I argue below: text to fn . [↑](#footnote-ref-52)
53. For comment see Paul Ransome, ‘“The Big Society” Fact or Fiction? – A Sociological Critique’ (2011) 16 *Sociological Research Online* 18. [↑](#footnote-ref-53)
54. Robert Nozick, *Anarchy, State, and Utopia* (Blackwell 1980) ix. [↑](#footnote-ref-54)
55. Conversely, disagreement also arises over whether to subject typically public bodies to judicial review when they exercise contractual power, on which see e.g. Terence Daintith, ‘Regulation by Contract: The New Prerogative’ (1979) 32 CLP 41; Bailey (fn ). [↑](#footnote-ref-55)
56. Taggart (fn ) 4; William Lucy, ‘What’s Private About Private Law?’, in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart 2009); Gerdy Jurgens and Frank Van Ommeren, ‘The Public-Private Divide in English and Dutch Law: A Multifunctional and Context-Dependant Divide’ [2012] CLJ 172. See also Paul Craig, ‘Theory, “Pure Theory” and Values in Public Law’ [2005] PL 440, 445-447. [↑](#footnote-ref-56)
57. cf *YL* (fn ) [128] (Lord Neuberger); Taggart (*ibid*.) 20. [↑](#footnote-ref-57)
58. Nicholas Bamforth, ‘The Public Law-Private Law Distinction: A Comparative and Philosophical Approach’, in Leyland and Woods (fn ). [↑](#footnote-ref-58)
59. See also Harry Woolf, ‘Public Law-Private Law: Why the Divide? A Personal View’ [1986] PL 220. [↑](#footnote-ref-59)
60. *ibid*., 140-141. [↑](#footnote-ref-60)
61. John Allison, *A Continental Distinction in the Common Law* (OUP 1996). [↑](#footnote-ref-61)
62. *ibid*., 72-81. See also John Allison, ‘Theoretical and Institutional Underpinnings of a Separate Administrative Law’, in Taggart (fn ). [↑](#footnote-ref-62)
63. For recent treatment, however, see N.W. Barber, *The Constitutional State* (OUP 2010); Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (CUP 2012). [↑](#footnote-ref-63)
64. Allison (fn ) 88-90. In response, see Paul Craig, ‘Public Law Control Over Private Power’, in Taggart (fn ) 207-208. [↑](#footnote-ref-64)
65. And also, as Taggart remarks, of administrative law: fn , 4-5. [↑](#footnote-ref-65)
66. Bamforth (fn ) 153. [↑](#footnote-ref-66)
67. David Feldman, ‘None, One or Several? Perspectives on the UK’s Constitution(s)’ [2002] CLJ 329, 334-335. Feldman was drawing here from a famous quote by St Augustine. [↑](#footnote-ref-67)
68. H.L.A. Hart, *The Concept of Law* (2nd edn, OUP 1994); Leslie Green, *The Authority of the State* (Clarendon 1988). [↑](#footnote-ref-68)
69. See also Evan Fox-Decent, *Sovereignty’s Promise: The State as Fiduciary* (OUP 2011). [↑](#footnote-ref-69)
70. [1995] 1 All ER 513 (QB) 524. [↑](#footnote-ref-70)
71. Dawn Oliver, ‘The Frontiers of the State: Public Authorities and Public Functions Under the Human Rights Act’ [2000] PL 476, 483. See further Dawn Oliver, ‘Psychological Constitutionalism’ [2010] CLJ 639. [↑](#footnote-ref-71)
72. For an evolutionary analysis see Peter Kropotkin, *Mutual Aid: A Factor of Evolution* (Dover Publications 2006). [↑](#footnote-ref-72)
73. A charity may be amenable to judicial review if it exercises statutory power, however: *R v National Trust, ex p Scott* [1998] 1 WLR 226 (QB). [↑](#footnote-ref-73)
74. Barber (fn ) 30. [↑](#footnote-ref-74)
75. Catherine Donnelly, Delegation of Governmental Power to Private Parties: A Comparative Perspective (OUP 2007) 113; Fox-Decent (fn ) 37. [↑](#footnote-ref-75)
76. Fox-Decent (*ibid*.) 36-37. [↑](#footnote-ref-76)
77. See Hart (fn ) ch 2; Green (fn ) 71-75. Barber also recognises this as being a key distinguishing feature of the state (fn , 33), although his overall thesis is that the state should be seen first and foremost as a complex social group. [↑](#footnote-ref-77)
78. Green (*ibid*.) 1. [↑](#footnote-ref-78)
79. See the discussion by Hart (fn ) ch 2. [↑](#footnote-ref-79)
80. Green (fn ) 1. [↑](#footnote-ref-80)
81. See Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (Yale University Press 2008). [↑](#footnote-ref-81)
82. As defined by Gabriele Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (Sweet & Maxwell 1987) 2. The term was first coined by Robert Megarry, ‘Administrative Quasi-Legislation’ (1944) 60 LQR 125. [↑](#footnote-ref-82)
83. John Kenneth Galbraith, *The Anatomy of Power* (Houghton Mifflin 1983) chs 2 and 3. [↑](#footnote-ref-83)
84. Birkinshaw, Harden and Lewis (fn ) 11. [↑](#footnote-ref-84)
85. Daintith (fn ); Ian Harden, *The Contracting State* (Open University Press 1992); Craig (fn ) 445; Christopher McCrudden, ‘Buying Social Justice: Equality and Public Procurement’ (2007) 60 CLP 121. *Roberts v Hopwood* [1925] 2 AC 578 (HL) illustrates the point. [↑](#footnote-ref-85)
86. *ibid*., 76 (emphasis added). [↑](#footnote-ref-86)
87. Birkinshaw, Harden and Lewis (fn ) 3. [↑](#footnote-ref-87)
88. See e.g. Jack Beatson, Andrew Burrows and John Cartwright, *Anson’s Law of Contract* (29th edn, OUP 2010) 1. [↑](#footnote-ref-88)
89. Dicey (fn ) ch 4. [↑](#footnote-ref-89)
90. For discussion see Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) ch 7. The ‘thin’/’thick’ terminology is taken from Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame Press 2006). [↑](#footnote-ref-90)
91. Joseph Raz, ‘The Rule of Law and its Virtue’ (1997) 93 LQR 195. [↑](#footnote-ref-91)
92. Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] PL 467, 467. [↑](#footnote-ref-92)
93. See Tamanaha (fn ) ch 8. [↑](#footnote-ref-93)
94. Tom Bingham, *The Rule of Law* (Allen Lane 2010) ch 7. [↑](#footnote-ref-94)
95. T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Clarendon 1993) ch 2. [↑](#footnote-ref-95)
96. John Laws, ‘Is the High Court the Guardian of Fundamental Constitutional Rights?’ [1993] PL 59; ‘Law and Democracy’ [1995] PL 72; ‘The Constitution: Morals and Rights’ [1996] PL 622. For discussion see Craig (fn ) 477-484. [↑](#footnote-ref-96)
97. As does Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 11-32; although, as Craig notes (fn , 48-49), Dworkin sees the rule of law as part and parcel of his broader theory on law and adjudication rather than a separate concept. Craig himself subscribes to Dworkinian interpretivism: fn , 441. [↑](#footnote-ref-97)
98. *ibid*., 467. [↑](#footnote-ref-98)
99. Raz (fn ) 196. [↑](#footnote-ref-99)
100. *ibid*. [↑](#footnote-ref-100)
101. *ibid*. [↑](#footnote-ref-101)
102. Indeed, Dicey’s work (fn , chs 4 and 12) illustrates that there need not even *be* a system of public law in order for the rule of law’s requirements to be satisfied. [↑](#footnote-ref-102)
103. As was the case in e.g. *R v Servite Houses, ex p Goldsmith* (2001) 33 HLR 35 (QB). [↑](#footnote-ref-103)
104. Lord Steyn, ‘Democracy Through Law’ [2002] EHRLR 723, 730. See also e.g. Borrie (fn ); Hunt (fn ). [↑](#footnote-ref-104)
105. As do Lord Steyn (*ibid.*, 731); Borrie (*ibid*., 559); Hunt (*ibid*., 38-39). [↑](#footnote-ref-105)
106. See also Lucy (fn ) 72-73. [↑](#footnote-ref-106)
107. Remedies, of course, are discretionary in the judicial review context: see e.g. Timothy Endicott, *Administrative Law* (OUP 2009) 381-382. [↑](#footnote-ref-107)
108. The courts may even develop private-law doctrine *ex tempore* in order to provide for this: *Nagle v Feilden* [1966] 2 QB 633 (CA); *R v BBC, ex p Lavelle* [1983] 1 WLR 23 (QB). [↑](#footnote-ref-108)
109. John Bell, *Policy Arguments in Judicial Decisions* (OUP 1985) explores this aspect of the adjudication process. [↑](#footnote-ref-109)
110. See further Austin (fn ) 31-34. [↑](#footnote-ref-110)
111. *Aga Khan* (fn ) 933. [↑](#footnote-ref-111)
112. There is no sharp boundary between law and politics, however, which is evidenced by the demise of the non-justiciability doctrine through cases such as *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL). Isolated areas of executive activity involving political judgement *simpliciter*, such as international relations, will nevertheless remain non-justiciable: *R (Gentle) v Prime Minister* [2008] UKHL 20, [2008] 1 AC 1356. [↑](#footnote-ref-112)
113. Although, as Feldman observes, the injection of constitutional rights into domestic law by the HRA has brought the political and legal spheres closer together: David Feldman, ‘Injecting Law Into Politics and Politics Into Law: Legislative and Judicial Perspectives on Constitutional Human Rights’ (2005) 34 CLWR 103, 109-110. [↑](#footnote-ref-113)
114. On which see Murray Hunt, ‘Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of “Due Deference”’, in Bamforth and Leyland (fn ); Jeff King, ‘Institutional Approaches to Judicial Restraint’ (2008) 28 OJLS 409; Aileen Kavanagh, ‘Defending Deference in Public Law and Constitutional Theory’ (2010) 126 LQR 222; T.R.S. Allan, ‘Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory’ (2011) 127 LQR 96. [↑](#footnote-ref-114)
115. [2007] UKHL 27, [2008] 1 AC 95. [↑](#footnote-ref-115)
116. See chapter seven. [↑](#footnote-ref-116)
117. As Lord Neuberger seemed to in *YL*, for instance: fn , [128]. [↑](#footnote-ref-117)
118. Harlow (fn ) 263. [↑](#footnote-ref-118)
119. See especially Lord Reid, ‘The Judge as Law Maker’ (1972) 12 JSPTL 22; Anthony Lester, ‘English Judges as Law Makers’ [1993] PL 269. [↑](#footnote-ref-119)
120. Aileen Kavanagh, ‘The Elusive Divide Between Interpretation and Legislation Under the Human Rights Act 1998’ (2004) 24 OJLS 259. [↑](#footnote-ref-120)
121. See *R (Quintavalle) v Secretary of State of Health* [2003] UKHL 13, [2003] 2 AC 687, 700 (Lord Steyn). [↑](#footnote-ref-121)
122. *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 (HL) 587 (Lord Steyn). [↑](#footnote-ref-122)
123. *R v R* [1992] 1 AC 599 (HL) 616 (Lord Keith). [↑](#footnote-ref-123)
124. Kavanagh (fn ) 271-272. Her comments were made in the context of statutory interpretation but are equally applicable to common-law reasoning. [↑](#footnote-ref-124)
125. Tom Bingham, *The Business of Judging* (OUP 2000) 167. [↑](#footnote-ref-125)
126. See Phillipson and Williams (fn ) 888-890. [↑](#footnote-ref-126)
127. For discussion see Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (CUP 2010). [↑](#footnote-ref-127)
128. *Sunday Times v United Kingdom* (1979-80) 2 EHRR 245 [49]. [↑](#footnote-ref-128)
129. So termed in Phillipson and Williams (fn ). [↑](#footnote-ref-129)
130. See the discussion of *Datafin* (fn ) in chapter four. [↑](#footnote-ref-130)
131. Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart 2001). [↑](#footnote-ref-131)
132. In support of the ultra vires principle, in its own right and in its modified form, see especially Christopher Forsyth, ‘Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review’ [1996] CLJ 122; Mark Elliott, ‘The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law’ [1999] CLJ 129; Christopher Forsyth and Mark Elliott, ‘The Legitimacy of Judicial Review’ [2003] PL 286. [↑](#footnote-ref-132)
133. Forsyth (*ibid*.)129-133. [↑](#footnote-ref-133)
134. Allan contests the idea that Parliament enjoys unfettered legislative sovereignty but nevertheless agrees with Forsyth and Elliott that the ultra vires principle is logically correct if it does: see, notably, ‘The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?’ [2002] CLJ 87, 92-93; ‘Legislative Supremacy and Legislative Intent: A Reply to Professor Craig’ (2004) 24 OJLS 536, 564. [↑](#footnote-ref-134)
135. Forsyth (fn ) 134. [↑](#footnote-ref-135)
136. *ibid*., 135. [↑](#footnote-ref-136)
137. See especially Paul Craig, ‘Ultra Vires and the Foundations of Judicial Review’ [1998] CLJ 63. [↑](#footnote-ref-137)
138. John Laws, ‘Law and Democracy’ [1995] PL 72, 79; Craig (*ibid*.) 67. This concession is made by Forsyth (fn ) 134, albeit later retracted and superseded by the claim that the judicial development and application of the principles of good administration will usually involve ‘considerable recourse to the legislative frameworks within which administrative power subsists’: Forsyth and Elliott (fn ) 300. [↑](#footnote-ref-138)
139. Craig (*ibid*.) 68; Paul Craig, ‘Constitutional and Non-Constitutional Review’ (2001) 54 CLP 147, 176. [↑](#footnote-ref-139)
140. Elliott (fn ); Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart 2001). [↑](#footnote-ref-140)
141. Elliott (fn ) 143. See also David Feldman, ‘Democracy, the Rule of Law and Judicial Review’ (1990) 19 Fed LR 1. [↑](#footnote-ref-141)
142. Elliott (*ibid*.). [↑](#footnote-ref-142)
143. *ibid*., 149-150. See also Mark Elliott, *Beatson, Matthews and Elliott’s Administrative Law* (4th edn, OUP 2011) 22. [↑](#footnote-ref-143)
144. Paul Craig, ‘Competing Models of Judicial Review’ [1999] PL 428, 430-431; Paul Craig and Nicholas Bamforth, ‘Constitutional Analysis, Constitutional Principle and Judicial Review’ [2001] PL 763. [↑](#footnote-ref-144)
145. *ibid*., 431. [↑](#footnote-ref-145)
146. *ibid*., 436. [↑](#footnote-ref-146)
147. Forsyth (fn ) 133; Mark Elliott, ‘The Demise of Parliamentary Sovereignty? The implications for Justifying Judicial Review’ (1999) 115 LQR 119, 122-123. [↑](#footnote-ref-147)
148. See also Allan, The Constitutional Foundations of Judicial Review’ (fn ) 92-93. [↑](#footnote-ref-148)
149. Forsyth (fn ) 133. [↑](#footnote-ref-149)
150. *ibid*., 128. [↑](#footnote-ref-150)
151. *ibid*., 134. [↑](#footnote-ref-151)
152. Mark Freedland, ‘The Evolving Approach to the Public/Private Distinction in English Law’, in Mark Freedland and Jean-Bernard Auby (eds), *The Public Law/Private Law Divide: Une Entente Assez Cordiale?* (Hart 2006) 105-107. [↑](#footnote-ref-152)
153. Nicholas Bamforth, ‘The Scope of Judicial Review: Still Uncertain’ [1993] PL 239, 242. [↑](#footnote-ref-153)
154. Craig (fn ) 77-78. [↑](#footnote-ref-154)
155. Elliott (fn ) 165-186. [↑](#footnote-ref-155)
156. *ibid*., 194. [↑](#footnote-ref-156)
157. *ibid*., 193. [↑](#footnote-ref-157)
158. Although Parliament can still provide for limits on the capacity of private bodies to act, however: e.g. *Ashbury Railway & Iron Co Ltd v Riche* (1874-75) LR 7 HL 653 (in relation to companies’ memoranda of association). [↑](#footnote-ref-158)
159. *ibid*. [↑](#footnote-ref-159)
160. Craig (fn ) 77; Craig and Bamforth (fn ). [↑](#footnote-ref-160)
161. Elliott (fn ) 191-193. [↑](#footnote-ref-161)
162. This is how Elliott refers to it throughout. [↑](#footnote-ref-162)
163. I discuss third-source powers in chapter three. [↑](#footnote-ref-163)
164. The rule of law will be unable to do much work in determining the scope of judicial review in the private sphere, as chapter one explained. [↑](#footnote-ref-164)
165. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Liberty Fund 1915) 3-4. [↑](#footnote-ref-165)
166. The second limb represents a necessary modification to Dicey’s idea (*ibid*.) that *only* Parliament can set Acts of Parliament aside. Instead, other bodies enjoy this power if Parliament grants it, as under the European Communities Act 1972 and devolution legislation such as the Scotland Act 1998. [↑](#footnote-ref-166)
167. The rule of recognition terminology comes from H.L.A. Hart, *The Concept of Law* (2nd edn, OUP 1994). [↑](#footnote-ref-167)
168. William Wade, ‘The Basis of Legal Sovereignty’ [1955] CLJ 172. [↑](#footnote-ref-168)
169. *ibid*., 187. See also Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 49. For an interesting albeit not immensely convincing argument to the effect that Parliament *can* alter the rule of recognition, see Michael Gordon, ‘The Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade’ [2009] PL 519. [↑](#footnote-ref-169)
170. Wade (fn ) 189. [↑](#footnote-ref-170)
171. *ibid*., 196. [↑](#footnote-ref-171)
172. Paul Craig, ‘Public Law, Political Theory and Legal Theory’ [2000] PL 211, 224. [↑](#footnote-ref-172)
173. T.R.S. Allan, ‘Parliamentary Sovereignty: Law, Politics and Revolution’ (1997) 113 LQR 443, 444 (emphasis original). See also T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Clarendon 1993) 280; Mark Elliott, ‘Embracing “Constitutional Legislation”: Towards Fundamental Law?’ (2003) 54 NILQ 25, 39-40. [↑](#footnote-ref-173)
174. *ibid*.,449. See also Hamish Gray, ‘The Sovereignty of Parliament Today’ (1953-1954) 10 U Toronto LJ 54, 54; T.R.S. Allan, ‘Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism’ (2011) 9 IJCL 155. [↑](#footnote-ref-174)
175. A concern shared by Alison Young, ‘Sovereignty: Demise, Afterlife, or Partial Resurrection?’ (2011) 9 IJCL 163, 170. The view that the common law confers legislative authority on Parliament is echoed in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 [59]-[70] (Laws LJ). [↑](#footnote-ref-175)
176. Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP 1999) 240. See also Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP 2010) 51. [↑](#footnote-ref-176)
177. This is also a significant problem with the views of Stuart Lakin, ‘Debunking Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution’ (2008) 28 OJLS 709, who argues that the British constitution rests not on sovereignty but, instead, on the principle of legality or ‘government under the law’. [↑](#footnote-ref-177)
178. Goldsworthy *The Sovereignty of Parliament* (fn ) 240. Other scholars share this view, e.g. Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2009) 83-84, 90; Tom Mullen, ‘Reflections on *Jackson v Attorney-General*: Questioning Sovereignty’ (2007) 27 LS 1, 22. [↑](#footnote-ref-178)
179. Goldsworthy, *The Sovereignty of Parliament* (fn ) ch 6. [↑](#footnote-ref-179)
180. *ibid*., 196. Goldsworthy also defends his views in Jeffrey Goldsworthy, ‘Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty’ (2005) 3 NZJPIL 7. [↑](#footnote-ref-180)
181. Goldsworthy, *The Sovereignty of Parliament* (fn ) 196. [↑](#footnote-ref-181)
182. Goldsworthy, *Contemporary Debates* (fn ) 105. At opposite ends of the spectrum on this debate are J.A.G. Griffith, ‘The Political Constitution’ (1979) 42 MLR 1 and Allan (fn ). For a thesis similar to Allan’s in effect, see Evan Fox-Decent, *Sovereignty’s Promise: The State as Fiduciary* (OUP 2011). [↑](#footnote-ref-182)
183. For general criticism see Vernon Bogdanor, ‘Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty’ (2012) 32 OJLS 179; Lakin (fn ) 726-730. [↑](#footnote-ref-183)
184. Adam Tucker, ‘Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty’ (2011) 31 OJLS 61. See also T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001) 223-225; and, along similar lines, Craig (fn ) 227. [↑](#footnote-ref-184)
185. Tucker (*ibid*.) 80. [↑](#footnote-ref-185)
186. Nicholas Bamforth, ‘Ultra Vires and Institutional Interdependence’, in Christopher Forsyth (ed.), *Judicial Review and the Constitution* (Hart 2000) 125. [↑](#footnote-ref-186)
187. Anthony Lester, ‘English Judges as Law Makers’ [1993] PL 269. [↑](#footnote-ref-187)
188. Nicholas Bamforth, ‘Parliamentary Sovereignty and the Human Rights Act 1998’ [1998] PL 572, 579 (emphasis original). [↑](#footnote-ref-188)
189. See further Goldsworthy (fn ) 22-23. Tucker (fn , 69-70) criticises Goldsworthy’s investigation but stops short of arguing that the historical findings themselves are wrong. [↑](#footnote-ref-189)
190. [2000] 2 AC 115 (HL). [↑](#footnote-ref-190)
191. *ibid*., 131. See also e.g. *Liversidge v Anderson* [1942] 2 AC 206 (HL) 260-261 (Lord Wright); *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 (PC) 723 (Lord Reid); *Jackson* (fn ) [9] (Lord Bingham). In *R v Lord Chancellor, ex p Witham* [1998] QB 575 (QB) 854 Laws J remarked that Parliament could abrogate fundamental rights if it wished, but hinted that the common law could nevertheless curtail Parliament’s sovereignty in future. [↑](#footnote-ref-191)
192. [2010] UKSC 2, [2010] 2 AC 534 [117]. [↑](#footnote-ref-192)
193. The classic example is *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL). [↑](#footnote-ref-193)
194. Goldsworthy (fn ) 32-33; Goldsworthy, *Contemporary Debates* (fn ) 100. [↑](#footnote-ref-194)
195. See especially Allan (fn ) ch 7; Laws (fn ); Lord Woolf, ‘Droit Public – English Style’ [1995] PL 57, 67-69; Jeffrey Jowell, ‘Parliamentary Sovereignty Under the New Constitutional Hypothesis’ [2006] PL 562. For arguments similar in effect but different in reason, see C.J.S. Knight, ‘Bi-Polar Sovereignty Restated’ [2009] CLJ 361; John McGarry, ‘The Principle of Parliamentary Sovereignty’ (2012) 32 LS 577. [↑](#footnote-ref-195)
196. I make this argument partly to answer Craig’s point (fn , 219) that adherence to the notion of unfettered sovereignty cannot, historically, be disaggregated from the *reasons* in favour of adherence. See also Paul Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon 1990) ch 3; ‘Dicey: Unitary, Self-Correcting Democracy and Public Law’ (1990) 106 LQR 105; ‘What Should Public Lawyers Do? A Reply’ (1992) 12 OJLS 564. [↑](#footnote-ref-196)
197. For discussion of the reasons in favour of this position, see Thomas Poole, ‘Back to the Future? Unearthing the Theory of Common Law Constitutionalism’ (2003) 23 OJLS 435, 439-447. To some, this argument alone is controversial: e.g. Jeremy Waldron, ‘A Rights-Based Critique of Constitutional Rights’ (1993) OJLS 18; ‘The Core of the Case Against Judicial Review’ (2006) 115 Yale LJ 1346. For recent critiques of the political constitutionalist philosophy to which Waldron subscribes, see Paul Craig, ‘Political Constitutionalism and the Judicial Role: A Response’ (2011) 9 IJCL 112; Marco Goldoni, ‘Two Internal Critiques of Political Constitutionalism’ (2012) 10 IJCL 926. Dimitrios Kyritsis, ‘Constitutional Review in a Representative Democracy’ (2012) 32 OJLS 297 argues that constitutional review of statutes, whilst theoretically permissible, is nevertheless not mandatory. [↑](#footnote-ref-197)
198. cf David Jenkins, ‘Common-Law Declarations of Unconstitutionality’ (2009) 7 IJCL 183, who argues that the courts enjoy an inherent power to issue non-binding common-law declarations of incompatibility. [↑](#footnote-ref-198)
199. Allan (fn ) 41, citing Robin Cooke, ‘Fundamentals’ [1988] NZLJ 158, 164. See also Laws (fn ) 84. For criticism of Allan on this basis, see Paul Craig, ‘Constitutional Foundations, the Rule of Law and Supremacy’ [2003] PL 92, 110. [↑](#footnote-ref-199)
200. See also Lord Irvine, ‘Judges and Decision-Makers: The Theory and Practice of *Wednesbury* Review’ [1996] PL 59, 75-78. [↑](#footnote-ref-200)
201. This is also a problem with Knight’s argument (fn ), albeit perhaps not to the same degree: see C.J.S. Knight, ‘Striking Down Legislation Under Bi-Polar Sovereignty’ [2011] PL 90. [↑](#footnote-ref-201)
202. Lord Irvine, ‘Response to Sir John Laws 1996’ [1996] PL 636, 638; Forsyth and Elliott (fn ) 295. [↑](#footnote-ref-202)
203. Forsyth and Elliott (*ibid*.). [↑](#footnote-ref-203)
204. Craig (fn ) 113-114. [↑](#footnote-ref-204)
205. [1991] 1 AC 603 (HL). [↑](#footnote-ref-205)
206. ‘Appears to’, because some authors have argued that the ruling might nevertheless be reconcilable with the doctrine of implied repeal: Paul Craig, ‘Sovereignty of the United Kingdom Parliament After *Factortame*’ (1991) 11 BYIL 221; Young (fn ) 51. cf Elliott (fn ) 82; William Wade, ‘Sovereignty – Revolution or Evolution?’ (1996) 112 LQR 568. [↑](#footnote-ref-206)
207. Dicey (fn ) 22. On the change engendered by *Factortame*, see N.W. Barber, ‘The Afterlife of Parliamentary Sovereignty’ (2011) 9 IJCL 144. [↑](#footnote-ref-207)
208. See *Vauxhall Estates v Liverpool Corporation* [1932] 1 KB 733 (KB); *Ellen Street Estates v Minister of Health* [1934] 1 KB 590 (CA). It is unclear why the courts believed implied repeal to be a necessary corollary to sovereignty, however. In *Vauxhall Estates*, for instance, Humphreys J simply stated that he was ‘unable to understand’ why a Parliament able to repeal statutes expressly could not also do so by necessary implication (at 745). [↑](#footnote-ref-208)
209. *Factortame (No. 2)* (fn ) 658-659. [↑](#footnote-ref-209)
210. Wade (fn ) 573; Mark Elliott, ‘Embracing “Constitutional Legislation”: Towards Fundamental Law?’ (2003) 54 NILQ 25, 29. [↑](#footnote-ref-210)
211. *ibid*., 573-574. [↑](#footnote-ref-211)
212. As does Tucker (fn ) 75. [↑](#footnote-ref-212)
213. Allan (fn ). [↑](#footnote-ref-213)
214. Goldsworthy, *The Sovereignty of Parliament* (fn ) 244-245. [↑](#footnote-ref-214)
215. Although see the Northern Ireland Act 1998, s 1(1) and the European Union Act 2011, ss 2-4 for what look like attempts by Parliament to ensure that future legislation in these areas is preceded by referendums. For comment see Bogdanor (fn ) 186-190. [↑](#footnote-ref-215)
216. *ibid*., 245. See also W. Ivor Jennings, *The Law and the Constitution* (4th edn, University of London Press 1955) 147-153; Vernon Bogdanor, *The New British Constitution* (Hart 2009) 281-282; Young (fn ) 165. [↑](#footnote-ref-216)
217. Gray (fn ) 54. [↑](#footnote-ref-217)
218. See further Goldsworthy, *Contemporary Debates* (fn ) 174. cf Bogdanor (fn ) 182. [↑](#footnote-ref-218)
219. Gray (fn ) 71; John Laws, ‘Judicial Review and the Meaning of Law’, in Forsyth (fn ) 187; Goldsworthy, *The Sovereignty of Parliament* (fn ) 245. It might still be *politically* unlikely that Parliament would effect certain legislative changes such as withdrawal from the EU, however: Mark Elliott, ‘Parliamentary Sovereignty Under Pressure’ (2004) 2 IJCL 545. [↑](#footnote-ref-219)
220. [2005] UKHL 56, [2006] 1 AC 262. [↑](#footnote-ref-220)
221. See also Bogdanor (fn ) 285-289. [↑](#footnote-ref-221)
222. *Jackson* (fn ) [102] (Lord Steyn), [126] (Lord Hope). Lord Carswell more conservatively believed the doctrine of sovereignty to be a ‘judicial product’ deriving from ‘carefully observed mutual respect which has long existed between the legislature and the courts’: [168]. [↑](#footnote-ref-222)
223. *ibid*., [102]. See further [159] (Baroness Hale). [↑](#footnote-ref-223)
224. *ibid*., [104]. His Lordship further remarked in *AXA General Insurance v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 [50] that the issue of whether Parliament’s sovereignty is unfettered was ‘still under discussion.’ Although talking only of the legal limits to the Scottish Parliament’s competence, he tacitly echoed his *Jackson* views by remarking that ‘The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind [i.e. that abolishes judicial review] is not law which the courts will recognise.’: [51]. [↑](#footnote-ref-224)
225. As Jowell argues, ‘Some of the *dicta* in *Jackson* confirm the real possibility that, in the words of Lord Hope: “The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based”’: Jeffrey Jowell, ‘Parliamentary Sovereignty Under the New Constitutional Hypothesis’ [2006] PL 562, 579. See also *AXA* (*ibid*.) [51] (Lord Hope). [↑](#footnote-ref-225)
226. E.g. Mullen (fn ) 21. [↑](#footnote-ref-226)
227. Jowell (fn ) 563-564. [↑](#footnote-ref-227)
228. *Jackson* (fn ) [9]. [↑](#footnote-ref-228)
229. *ibid*., [168]. [↑](#footnote-ref-229)
230. See further Richard Ekins, ‘Acts of Parliament and the Parliament Acts’ (2007) 123 LQR 91, 103. [↑](#footnote-ref-230)
231. Rivka Weill, ‘Centennial to the Parliament Act 1911: The Manner and Form Fallacy’ [2012] PL 105 argues that the 1911 Act was a revolutionary constitutional document that changed the contours of sovereignty enduringly. Despite the author’s views to the contrary, however, it is difficult to infer reliably along Goldsworthy lines that the 1911 Parliament was offering the courts the opportunity to alter the rule in the manner she suggests. By her own admission, the courts could reasonably have interpreted the purported effect of the 1911 Act – Parliament’s ‘offer’ – in various different ways. [↑](#footnote-ref-231)
232. *Jackson* (fn) [102]. [↑](#footnote-ref-232)
233. E.g. Aileen Kavanagh, *Constitutional Review Under the UK Human Rights Act* (CUP 2009); Bogdanor (fn ) 285-289. [↑](#footnote-ref-233)
234. cf Martin Bevir, ‘The Westminster Model, Governance and Judicial Reform’ (2008) 61 *Parliamentary Affairs* 559. [↑](#footnote-ref-234)
235. *R v A (No. 2)* [2002] 1 AC 45 (HL) 68 (Lord Steyn). [↑](#footnote-ref-235)
236. Mullen (fn ) 22. See also Goldsworthy, *Contemporary Debates* (fn ) 299-304 for a response to the views of Kavanagh (fn ). For further support see Thomas Poole, ‘The Reformation of English Administrative Law’ [2009] CLJ 142, 164-167. [↑](#footnote-ref-236)
237. As Craig remarks, ‘It is self-evident [even under the common law model] that the enabling legislation must be considered when determining the ambit of a body's powers’: *ibid*., 65. [↑](#footnote-ref-237)
238. Forsyth (fn ) 129. [↑](#footnote-ref-238)
239. Ronald Dworkin, *Law’s Empire* (Hart 1986) 353-354. [↑](#footnote-ref-239)
240. *ibid*., 52-53. [↑](#footnote-ref-240)
241. Elliott (fn ) 139. [↑](#footnote-ref-241)
242. This is even theoretically true in ‘easy’ cases, save that there is no *need* to resort to interpretative principle in these cases because the language itself is so clear: Dworkin (fn ) 354. [↑](#footnote-ref-242)
243. Elliott (fn ) 89. [↑](#footnote-ref-243)
244. John Laws, ‘An Extract From: Illegality: The Problem of Jurisdiction’, in Forsyth (fn ) 78. [↑](#footnote-ref-244)
245. *ibid*., 78-79; Paul Craig, ‘Legislative Intent and Legislative Supremacy: A Reply to Professor Allan’ (2004) 24 OJLS 585, 591-592. [↑](#footnote-ref-245)
246. See further Elliott (fn ) 94-96. [↑](#footnote-ref-246)
247. *ibid*., 94. [↑](#footnote-ref-247)
248. Elliott (fn ) 146. Allan remarks that it is a ‘fundamental and ineradicable’ presumption that Parliament would intend to comply with the rule of law: ‘The Constitutional Foundations of Judicial Review’ (fn ) 104. [↑](#footnote-ref-248)
249. Elliott (*ibid*.) 145; Elliott (fn ) 132. [↑](#footnote-ref-249)
250. Elliott (fn ) 142-144. [↑](#footnote-ref-250)
251. In Elliott’s words: *ibid*., 132. [↑](#footnote-ref-251)
252. N.W. Barber, ‘The Academic Mythologians’ (2001) 21 OJLS 369, 375. [↑](#footnote-ref-252)
253. *ibid*. [↑](#footnote-ref-253)
254. *ibid*. Forsyth’s argument that ‘Even the most dim-witted legislator’ would intend the rule of law to apply (‘Heat and Light: A Plea for Reconciliation’, in Forsyth (fn ) 401) is therefore unpersuasive. [↑](#footnote-ref-254)
255. See Elliott (fn ) 150-151. *Anisminic* (fn ) is the classic example. [↑](#footnote-ref-255)
256. *ibid*., 151. [↑](#footnote-ref-256)
257. Admittedly this would conflict with Dworkin’s view (fn , 354) that the same interpretative approach underlies the interpretation of all statutory provisions, however. [↑](#footnote-ref-257)
258. See chapter one. [↑](#footnote-ref-258)
259. See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1997) ch 1; Roderick Munday, ‘In the Wake of “Good Governance”: Impact Assessments and the Politicisation of Statutory Interpretation’ (2008) 71 MLR 385. A *perfectly* literal interpretation may be impossible to achieve given the difficulty in disaggregating language from principle (on which see, recently, Brian Flanagan, ‘Revisiting the Contribution of Literal Meaning to Legal Meaning’ (2010) 30 OJLS 255), but courts can nevertheless attempt to try. [↑](#footnote-ref-259)
260. David Feldman echoes this in ‘The Constitution and the Social Fund: A Novel Form of Legislation’ (1991) 107 LQR 39, 44, by remarking that ‘it is not unreasonable to construe Acts of Parliament in the context of the constitutional framework’. Not unreasonable – not *logically necessary*. [↑](#footnote-ref-260)
261. Philip Sales, ‘Judges and Legislature: Values into Law’ [2012] CLJ 287, 289. [↑](#footnote-ref-261)
262. Although, as Feldman (fn , 22-23) cautions, it is doubtful that political reform could eradicate the need for judicial review entirely. [↑](#footnote-ref-262)
263. Elliott (fn ) 138-139. [↑](#footnote-ref-263)
264. T.R.S. Allan, ‘Constitutional Dialogue and the Justification of Judicial Review’ (2003) 23 OJLS 563, 566. See also Dworkin (fn ) 57-58. [↑](#footnote-ref-264)
265. Allan (*ibid*.) 566-567; T.R.S. Allan, ‘Legislative Supremacy and Legislative Intention: Interpretation, Meaning and Authority’ [2004] CLJ 685, 691; Allan, ‘The Constitutional Foundations of Judicial Review’ (fn ) 104. [↑](#footnote-ref-265)
266. Allan, ‘Legislative Supremacy and Legislative Intent’ (fn ) 573-578. [↑](#footnote-ref-266)
267. *ibid*., 573-574. [↑](#footnote-ref-267)
268. *ibid*., 576. [↑](#footnote-ref-268)
269. Peter Cane, *An Introduction to Administrative Law* (3rd edn, OUP 1996). [↑](#footnote-ref-269)
270. *Attorney-General and Board of Education v County Council of the West Riding of Yorkshire* [1907] AC 29 (HL) 38. [↑](#footnote-ref-270)
271. Elliott (fn ) 28-29. [↑](#footnote-ref-271)
272. See Paul Craig, ‘The Common Law, Shared Power and Judicial Review’ (2004) 24 OJLS 237, 246. The requirements of the doctrine in any given situation depend ultimately on a highly fact-sensitive determination of what fairness requires: *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 21 (CA) [56]-[58] (Lord Woolf MR). Although Lord Woolf observed that the court must consider ‘the nature of the statutory… discretion’ when determining whether an applicant’s expectation is legitimate, this does not necessarily mean that the *contents* of the doctrine depend to any real degree on the terms of the statute in question. [↑](#footnote-ref-272)
273. See Elliott (fn ) 164-168. [↑](#footnote-ref-273)
274. Craig (fn ) 242. [↑](#footnote-ref-274)
275. Allan, ‘Legislative Supremacy and Legislative Intent’ (fn ) 571. [↑](#footnote-ref-275)
276. Craig (fn ) 87-88. [↑](#footnote-ref-276)
277. *ibid*., 66-67. [↑](#footnote-ref-277)
278. Elliott (fn ) 143, 151. [↑](#footnote-ref-278)
279. See Craig (fn ) 432-434. [↑](#footnote-ref-279)
280. Elliott (fn ) 114-116. [↑](#footnote-ref-280)
281. Craig’s answer is yes: fn , 433-435. [↑](#footnote-ref-281)
282. Elliott (fn ) 118-119. [↑](#footnote-ref-282)
283. The courts may need to do so in order to apply *public*-law principles, however, as mentioned above and as chapters three and four explain. [↑](#footnote-ref-283)
284. *F. Hoffman-La Roche & Co. A.G. v Secretary of State for Trade and Industry* [1975] AC 295 (HL) 365 (Lord Diplock). [↑](#footnote-ref-284)
285. Forsyth (fn ) 129-132; Elliott (fn ) 154-156. [↑](#footnote-ref-285)
286. Forsyth (*ibid.*) 130; Elliott (*ibid*.) 155. *Anisminic* (fn ) is a case in point. [↑](#footnote-ref-286)
287. Elliott (*ibid*.) 157-161. See also Forsyth and Elliott (fn ) 288-289. [↑](#footnote-ref-287)
288. [1999] 2 AC 143 (HL) 173 (Lord Steyn). [↑](#footnote-ref-288)
289. Craig (fn ) 71-73. See also Stephen Broach, ‘Illegality: The Problem of Jurisdiction’, in Michael Supperstone, James Goudie and Paul Walker (eds), *Judicial Review* (4th edn, LexisNexis 2010) 114. [↑](#footnote-ref-289)
290. [1993] QB 473 (QB). [↑](#footnote-ref-290)
291. For criticism see David Feldman, ‘Collateral Challenge and Judicial Review: The Boundary Dispute Continues’ [1993] PL 37. [↑](#footnote-ref-291)
292. 1988(4) SA 830(A). [↑](#footnote-ref-292)
293. Public Safety Act 1953, s 5B. [↑](#footnote-ref-293)
294. For discussion see Forsyth (fn ) 129-132. [↑](#footnote-ref-294)
295. Allan, ‘The Constitutional Foundations of Judicial Review’ (fn ) 108, citing David Dyzenhaus, ‘Reuniting the Brain: The Democratic Basis of Judicial Review’ (1998) 9 PLR 98, 107. [↑](#footnote-ref-295)
296. Jeffrey Jowell, ‘Of Vires and Vacuums: The Constitutional Context of Judicial Review’, in Forsyth (fn ) 336. [↑](#footnote-ref-296)
297. Craig (fn ) 253. [↑](#footnote-ref-297)
298. cf Craig (fn ) 431. [↑](#footnote-ref-298)
299. Elliott (fn ) 141. [↑](#footnote-ref-299)
300. Allan (fn ) 568. [↑](#footnote-ref-300)
301. Craig (fn ) 253. [↑](#footnote-ref-301)
302. Craig and Bamforth (fn ) 769. [↑](#footnote-ref-302)
303. This does not mean more generally that Allan’s context argument in favour of the analytical claim is right, however. [↑](#footnote-ref-303)
304. An example is the idea under s 6(3)(b) that hybrid public authorities enjoy Convention rights in their public capacity (discussed in chapters six and seven). The conclusion is logically inescapable, but only once the Strasbourg jurisprudence and public authority scheme as a whole are properly understood. [↑](#footnote-ref-304)
305. cf Bamforth (fn ) 114. [↑](#footnote-ref-305)
306. Craig also observes that the common law knows no historical distinction between public and private (fn , 87). The public-private divide has existed for some considerable time, at least, however: see chapter three. [↑](#footnote-ref-306)
307. Craig (fn ) 231-232. For discussion see Ian Loveland, ‘Public Law, Political Theory and Legal Theory – A Response to Professor Craig’s Paper’ [2000] PL 205. [↑](#footnote-ref-307)
308. *ibid*., 236. [↑](#footnote-ref-308)
309. [1987] QB 815 (CA). [↑](#footnote-ref-309)
310. For discussion see William Wade and Christopher Forsyth, *Administrative Law* (10th edn, OUP 2009) ch 1. [↑](#footnote-ref-310)
311. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Liberty Fund 1915) 254. [↑](#footnote-ref-311)
312. On the French system see Neville Brown and John Bell, *French Administrative Law* (5th edn, OUP 1998). [↑](#footnote-ref-312)
313. Stanley de Smith, *Judicial Review of Administrative Action* (2nd edn, Stevens 1968) 4. [↑](#footnote-ref-313)
314. See also Louis Jaffe and Edith Henderson, ‘Judicial Review and the Rule of Law: Historical Origins’ (1956) 72 LQR 345. [↑](#footnote-ref-314)
315. Habeas corpus is the fourth prerogative writ (de Smith, fn , ch 8) but, not being a ‘public-law’ remedy, is not discussed here. For detailed treatment see Judith Farbey and R. J. Sharpe, *The Law of Habeas Corpus* (3rd edn, OUP 2011). [↑](#footnote-ref-315)
316. Wade and Forsyth (fn ) 500. This was not a *distinct* system of public law, however, as John Allison reminds us: ‘Variations on English Legal Distinctions Between Public and Private’ [2007] CLJ 698, 705. [↑](#footnote-ref-316)
317. de Smith (fn ) 367. [↑](#footnote-ref-317)
318. Law Commission, *Remedies in Administrative Law* (Cmnd 6407, 1976). [↑](#footnote-ref-318)
319. Originally named the Supreme Court Act 1981; renamed by the Constitutional Reform Act 2005. [↑](#footnote-ref-319)
320. This followed reports by Lord Woolf MR, *Access to Justice: Final Report* (1996) and the Lord Chancellor’s Department, *Judicial Review: Proposed New Procedures and Draft Rules* (2000). [↑](#footnote-ref-320)
321. CPR Pt 54.2. [↑](#footnote-ref-321)
322. CPR, Pt 54.1(2)(a)(ii). [↑](#footnote-ref-322)
323. Although, as de Smith observes, the King’s Bench was already using the writ of certiorari to function as something akin to an administrative court by around 1700 (fn , 376). [↑](#footnote-ref-323)
324. [1983] 2 AC 237 (HL). [↑](#footnote-ref-324)
325. Wade and Forsyth (fn ) 28. See also de Smith (fn ) 376; Lord Woolf, ‘Droit Public – English Style’ [1995] PL 57, 59-60; Kevin Costello, ‘The Writ of Certiorari and Review of Summary Criminal Convictions, 1660-1848’ (2012) 128 LQR 443, 443. [↑](#footnote-ref-325)
326. Seemingly as in *O’Reilly* (fn ) itself. [↑](#footnote-ref-326)
327. Especially following *Mercury Communications v Director General of Telecommunications* [1996] 1 WLR 48 (HL); *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 (CA). For analysis of *Mercury* see Paul Craig, ‘Proceedings Outside Order 53: A Modified Test?’ (1996) 112 LQR 531. [↑](#footnote-ref-327)
328. See also Oliver’s work, discussed at text to fn . [↑](#footnote-ref-328)
329. Although not always convincingly: see Ian Leigh, *Law, Politics, and Local Democracy* (OUP 2000) ch 9. Joined by writers like Anne Davies, *The Public Law of Government Contracts* (OUP 2007), Leigh calls for a more developed public law of contracts. On public-law contracts, see also J.D.B. Mitchell, *The Contracts of Public Authorities* (Bell 1954); Sue Arrowsmith, *Civil Liability And Public Authorities* (Earlsgate 1994) ch 2. [↑](#footnote-ref-329)
330. [1966] 2 QB 633 (CA). [↑](#footnote-ref-330)
331. [1983] 1 WLR 23 (QB). [↑](#footnote-ref-331)
332. Paul Craig, *Administrative Law* (7th edn, Sweet & Maxwell) 849. See also Paul Craig, ‘Public Law, Political Theory and Legal Theory’ [2000] PL 211, 234-235. [↑](#footnote-ref-332)
333. *ibid*. The view is echoed by Dawn Oliver, ‘Public Law Procedures and Remedies – Do We Need Them?’ [2002] PL 91, 100-105, but she admits that the modern law ‘does not favour the old view.’ [↑](#footnote-ref-333)
334. Craig (*ibid*.). [↑](#footnote-ref-334)
335. See generally Wade and Forsyth (fn ) ch 15. [↑](#footnote-ref-335)
336. See e.g. *R v Commissioners of Customs and Excise, ex p Cook* [1970] 1 WLR 450 (QB). [↑](#footnote-ref-336)
337. *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses* [1982] AC 617 (HL). [↑](#footnote-ref-337)
338. Wade and Forsyth (fn ) 509; de Smith (fn ) 386. [↑](#footnote-ref-338)
339. See *R v Barker* (1762) 3 Burr 1265, 1267 (Lord Mansfield). [↑](#footnote-ref-339)
340. Wade and Forsyth (fn ) 522-523. [↑](#footnote-ref-340)
341. *ibid*., 523 (emphasis added). [↑](#footnote-ref-341)
342. *ibid*. [↑](#footnote-ref-342)
343. de Smith makes similar comments (fn ) 559-561, as does Paul Craig, *Administrative Law* (Sweet & Maxwell 1983) 473. On administrative centralisation over the last two centuries, see Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (CUP 2012) ch 2. [↑](#footnote-ref-343)
344. *Baldwin & Francis Ltd v Patents Appeal Tribunal* [1959] AC 663 (HL) 693-694 (Lord Denning); *R v Paddington Valuation Officer, ex p Peachey (No. 2)* [1966] 1 QB 380 (CA) 419 (Salmon LJ). [↑](#footnote-ref-344)
345. See also Clive Lewis, *Judicial Remedies in Public Law* (3rd edn, Sweet & Maxwell 2004) [2-003]. [↑](#footnote-ref-345)
346. One example is *R v East Berkshire Health Authority, ex p Walsh* [1985] QB 152 (CA). [↑](#footnote-ref-346)
347. As in *Walsh* (*ibid*.). [↑](#footnote-ref-347)
348. As in e.g. *O’Reilly* (fn ) itself; *Cocks v Thanet District Council* [1983] 2 AC 286 (HL); *Trim v North Dorset District Council* [2010] EWCA Civ 1446, [2011] 1 WLR 1901. [↑](#footnote-ref-348)
349. In other cases, claimants will be permitted to pursue claims in either public or private law: e.g. *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (HL); *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624 (HL). [↑](#footnote-ref-349)
350. *R v Electricity Commissioners, ex p London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171 (CA). [↑](#footnote-ref-350)
351. Wade and Forsyth (fn ) 540. [↑](#footnote-ref-351)
352. *Electricity Commissioners* (fn ) 205. [↑](#footnote-ref-352)
353. [1965] 1 QB 377 (QB). [↑](#footnote-ref-353)
354. E.g. *R v Postmaster-General, ex p Carmichael* [1928] 1 KB 291 (KB); *R v Boycott, ex p Keasley* [1939] 2 KB 651 (KB). [↑](#footnote-ref-354)
355. [1964] AC 40 (HL) 75 (Lord Reid), 86 (Lord Evershed). [↑](#footnote-ref-355)
356. [1967] 2 QB 864 (QB) 882 (Lord Parker CJ), 892 (Ashworth J). [↑](#footnote-ref-356)
357. In *Ridge*, Lord Reid argued that in *Electricity Commissioners* Atkin and Bankes LJJ simply ‘inferred the judicial element from the nature of the power’ the Commissioners exercised anyway: fn , 75-76. [↑](#footnote-ref-357)
358. *O’Reilly* (fn ) 279. See further *Council of Civil Service Unions v Minister for the Civil Service* (herein *GCHQ*) [1985] AC 374 (HL) 399-400 (Lord Fraser). [↑](#footnote-ref-358)
359. This is also reflected in *Cocks* (fn ), on procedural exclusivity, for instance. [↑](#footnote-ref-359)
360. [1953] 1 QB 704 (QB). [↑](#footnote-ref-360)
361. *ibid*., 707. [↑](#footnote-ref-361)
362. *ibid*., 706. [↑](#footnote-ref-362)
363. *ibid*., 709. [↑](#footnote-ref-363)
364. See also *A.S.S.E.T.* (fn ), discussed at text to fn . [↑](#footnote-ref-364)
365. *Datafin* is one exception, however, as the following chapter explains. [↑](#footnote-ref-365)
366. *Nagle* (fn ). [↑](#footnote-ref-366)
367. *ibid*., 644. [↑](#footnote-ref-367)
368. *ibid*., 645-646. The applicant in *Nagle* was merely appealing against previous decisions to strike out her claim. The outcome was not therefore decided by the Court of Appeal. In *Bradley v Jockey Club* [2005] EWCA Civ 1056 the Court of Appeal refused to extend the right to work to individuals who had joined the profession but were alleged to have broken the rules. [↑](#footnote-ref-368)
369. See e.g. *Walsh* (fn ). [↑](#footnote-ref-369)
370. [1975] ICR 221 (QB). Along similar lines, see also *Vidyodaya University of Ceylon v Silva* [1965] 1 WLR 77 (PC). [↑](#footnote-ref-370)
371. *Lavelle* (fn ). [↑](#footnote-ref-371)
372. [1983] 1 WLR 1302 (CA). [↑](#footnote-ref-372)
373. *Lain* (fn ) 881. [↑](#footnote-ref-373)
374. Law does occasionally compel private bodies to enter into contracts, however, e.g. when designated telecommunications providers are required to provide cost-ineffective telecoms services to certain members of the public whom the market would not otherwise serve: see Communications Act 2003, ss 65-72. [↑](#footnote-ref-374)
375. *A.S.S.E.T.* (fn ) 389. [↑](#footnote-ref-375)
376. Leigh (fn ) 279. See also Peter Cane, ‘Do Banks Dare Lend to Local Authorities?’ (1994) 110 LQR 514. [↑](#footnote-ref-376)
377. Recently reiterated in *R (Manydown Co Ltd) v Basingstoke BC* [2012] EWHC 977 (Admin). [↑](#footnote-ref-377)
378. For discussion see Leigh (fn ) ch 9 and, as background, ch 2. [↑](#footnote-ref-378)
379. See e.g. *R v Greater London Council, ex p Westminster City Council* The Times, 22 January 1985 (QB); *R v Ealing LBC, ex p Times Newspapers* [1987] IRLR 129 (QB); *R v Lewisham LBC, ex p Shell UK Ltd* [1988] 1 All ER 938 (QB). [↑](#footnote-ref-379)
380. [1985] AC 1054 (HL). [↑](#footnote-ref-380)
381. *ibid*., 1077 (Lord Roskill); 1080 (Lord Templeman). [↑](#footnote-ref-381)
382. This is how Sir George Waller seemed to see it in the Court of Appeal: reported *ibid*., 1066-1068. After all, the statutory powers in question seemed only loosely related to the facts. The 1906 Act (s 10) imposes a general obligation upon local authorities to hold open spaces on trust for the public enjoyment, and s 76(1)(b) of the Public Health Amendment Act 1907 allows the council to set apart space for games or recreation and exclude the public ‘while it is in actual use for that purpose.’ Sir George’s analysis seems the more convincing. Leigh also criticises *Wheeler*: fn , 45-46. [↑](#footnote-ref-382)
383. *Cocks* (fn ). [↑](#footnote-ref-383)
384. *Roy* (fn ). [↑](#footnote-ref-384)
385. Leigh (fn ) 304. [↑](#footnote-ref-385)
386. de Smith (fn ) 388. [↑](#footnote-ref-386)
387. For an institutional conception of the public-private divide in judicial review, see e.g. Davies (fn ) 64-66. [↑](#footnote-ref-387)
388. *Neate* (fn ) 709. This even seemed to deteriorate in the post-*Datafin* case of *R (Sunspell) v Association of British Travel Agents* [2001] ACD 16 (QB) [14] into a two-fold analysis by counsel of whether the *body* was public, and then, whether the *function* it performed was a public function. See also *R (Hopley) v Liverpool Health Authority* [2002] EWHC 1723 (Admin) [39]. [↑](#footnote-ref-388)
389. This is not to say that a functional test is necessarily *preferable* to an institutional one, however. Indeed, s 6 HRA embraces an institutional test for core public authorities, *all* of whose activities must comply with the Convention (see chapter six). [↑](#footnote-ref-389)
390. W.N. Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913-1914) 23 Yale LJ 16, 30-44. [↑](#footnote-ref-390)
391. The LACPA’s conception of legal authority is therefore narrower than Hohfeld’s definition of legal power, which is any person who has paramount volitional control over fact(s) that can change legal relations (*ibid*., 44). Under the LACPA, it matters *how* that person came to acquire such control, however: i.e. whether it has been positively conferred by law or merely exists as a privilege. This is theoretically sound for the reasons given in chapter one. Departure from Hohfeld at this point is not problematic. His taxonomy was designed for the private-law context and was not intended to distinguish public from private functions in the context of judicial review. [↑](#footnote-ref-391)
392. See the discussion in chapter one. [↑](#footnote-ref-392)
393. See also Bas Van der Vossen, ‘Assessing Law’s Claim to Authority’ (2011) 31 OJLS 481. [↑](#footnote-ref-393)
394. It could be said that rights entrenched in written constitutions are not always mandated by the requirements of morality, however, in the sense of enjoying any normative force beyond the mere fact that they are termed and legally protected as constitutional rights. If for example a statute is struck down for breaching citizens’ constitutionally-enshrined right to bear arms, it would be difficult to say that the statute is *morally* as well as legally invalid. The position is presumably different in unwritten constitutions in which the courts assume a legislative strike-down power, however, since the rights would arise instead from inherent normative – moral – constraints on the legislature’s democratic power: see T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001) ch 7. [↑](#footnote-ref-394)
395. For a positivist exegesis of the issue, see H.L.A. Hart, *The Concept of Law* (2nd edn, Clarendon 1997). [↑](#footnote-ref-395)
396. Sir William Wade, for one, doubted this aspect of the Court of Appeal’s analysis, preferring instead to regard the executive as acting under third-source authority through the Board: William Wade, *Constitutional Fundamentals* (Sweet & Maxwell 1989) 58-66. Giving *R v Secretary of State for the Home Department, ex p Northumbria Police Authority* [1989] QB 26 (CA) as an example, Harris also notes that judges sometimes stretch the scope of statutory and prerogative power in order to find legal authority for executive acts when third-source power would have sufficed: fn , 231. [↑](#footnote-ref-396)
397. *Lain* (fn ) 881. [↑](#footnote-ref-397)
398. *ibid*., 884 (Diplock LJ) and 891 (Ashworth J). [↑](#footnote-ref-398)
399. Although there may be debate as to the meaning of ‘the prerogative’: see Wade (fn ) 58-66. [↑](#footnote-ref-399)
400. See *GCHQ* (fn ) 423-424. [↑](#footnote-ref-400)
401. *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61, [2009] 1 AC 453. For comment see Richard Moules, ‘Judicial Review of Prerogative Orders in Council’ [2009] CLJ 14. [↑](#footnote-ref-401)
402. B.V. Harris, ‘The “Third Source” of Authority for Government Action Revisited’ (2007) 123 LQR 225. [↑](#footnote-ref-402)
403. *ibid*., 226. See also B.V Harris, ‘The “Third Source” of Authority for Government Action’ (1992) 108 LQR 626; ‘Government “Third Source” Action and Common Law Constitutionalism’ (2010) 126 LQR 373. Local authorities are an exception by virtue of s 111, Local Government Act 1972, which restricts their general competence to activities facilitative of or incidental to the authority’s main functions. It has been restrictively construed: see e.g. *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1 (HL). The Localism Act 2011, which modifies this position, is discussed below. [↑](#footnote-ref-403)
404. As Laws J recognised in *R v Somerset County Council, ex p Fewings* [1995] 1 All ER 513 (QB) 524. Leigh criticises *Fewings*: fn , 42-45. [↑](#footnote-ref-404)
405. *Fewings* (*ibid*.) is one example. [↑](#footnote-ref-405)
406. E.g. *Malone v Metropolitan Police Commissioner* [1979] Ch 344 (Ch). Harris argues that *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681 represents more recent judicial acknowledgment of the existence of third-source powers: fn , 230. [↑](#footnote-ref-406)
407. Harris (*ibid*.) 226. [↑](#footnote-ref-407)
408. *ibid*., 227. [↑](#footnote-ref-408)
409. Action taken under such measures can generate enforceable legitimate expectations, however, as commentators recognise: David Feldman, ‘Public Law Values in the House of Lords’ (1990) 106 LQR 246, 250; Paul Craig, ‘Perspectives on Process: Common Law, Statutory and Political’ [2010] PL 275, 294-295. [↑](#footnote-ref-409)
410. Harris, ‘Government “Third Source” Action and Common Law Constitutionalism’ (fn ) 378. [↑](#footnote-ref-410)
411. *Gillick* (fn ) 163 (Lord Fraser), 178 (Lord Scarman). [↑](#footnote-ref-411)
412. [2008] EWCA Civ 148, [2008] 3 All ER 548. [↑](#footnote-ref-412)
413. See also Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart 2001) 186-193. Third-source powers are discussed again below. [↑](#footnote-ref-413)
414. Gabriele Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (Sweet & Maxwell 1987) 6. [↑](#footnote-ref-414)
415. See Ganz (*ibid*.) 26-41. [↑](#footnote-ref-415)
416. *Gillick* (fn ) 163 (Lord Fraser), 178 (Lord Scarman). Lord Bridge (192-194) had reservations, however. [↑](#footnote-ref-416)
417. Although cf Ganz (fn ) 44-46. [↑](#footnote-ref-417)
418. For discussion of the provision as it stood in the then Localism Bill, see Ian Leigh, ‘The Changing Nature of Local and Regional Democracy’, in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (7th edn, OUP 2011) 237, 244-246. [↑](#footnote-ref-418)
419. *ibid*., 244. [↑](#footnote-ref-419)
420. They may not resort to s 1(1) frequently in practice anyway, however, as the express permission to contract given by other enactments remains unaffected: Leigh (*ibid*.). [↑](#footnote-ref-420)
421. cf *R (Molinaro) v Royal Borough of Kensington and Chelsea* [2001] EWHC Admin 896 [67]-[69] (Elias J), which comes close to suggesting that local-authority contractual powers be designated in general as public functions. Stephen Bailey, ‘Judicial review of contracting decisions’ [2007] PL 444, welcomes *Molinaro*’s simplicity. [↑](#footnote-ref-421)
422. See further the discussion of the firs/second-order choice distinction in part D. [↑](#footnote-ref-422)
423. *Ridge* (fn ). [↑](#footnote-ref-423)
424. *R (Smith) v Parole Board (No. 2)* [2005] UKHL 1, [2005] 1 WLR 350. [↑](#footnote-ref-424)
425. *R v Barnsley Metropolitan Borough Council, ex p Hook* [1976] 1 WLR 1052 (CA). [↑](#footnote-ref-425)
426. *McInnes v Onslow-Fane* [1978] 1 WLR 1520 (Ch) 1528-1529 (Sir Robert Megarry V-C). [↑](#footnote-ref-426)
427. So termed following *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 QB 223 (CA). [↑](#footnote-ref-427)
428. For discussion see Mark Elliott, *Beatson, Matthews and Elliott’s Administrative Law Text and Materials* (4th edn, OUP 2011) 248-252. [↑](#footnote-ref-428)
429. [1986] AC 240 (HL). This was the interpretation given to *Nottinghamshire* by Lord Phillips MR in *R (Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789, [2002] QB 129, 152. [↑](#footnote-ref-429)
430. *R v Ministry of Defence, ex p Smith* [1996] QB 517 (CA). [↑](#footnote-ref-430)
431. ‘Green light’ theorists, for instance,, perceive administrative law, instead, as ‘a vehicle for political progress’: Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, CUP 2009) 31. [↑](#footnote-ref-431)
432. For theoretical discussion see Martin Loughlin, *The Idea of Public Law* (OUP 2003). [↑](#footnote-ref-432)
433. As in *R v Board of Visitors of Hull Prison, ex p St Germain (No. 2)* [1979] 1 WLR 1401 (QB). [↑](#footnote-ref-433)
434. See also Craig (fn ) 831-832. The courts’ view of coercion therefore transcends what Hart believed to be paradigmatic instances of coercion – i.e. a gunman ordering a bank clerk to hand over money – in *The Concept of Law* (fn ) 19. [↑](#footnote-ref-434)
435. *Electricity Commissioners* (fn ) 205. [↑](#footnote-ref-435)
436. *Lain* (fn ) 881. See also *R v Gaming Board for Great Britain, ex p Benaim and Khaida* [1970] 2 QB 417 (CA) 429-430 (Lord Denning MR). [↑](#footnote-ref-436)
437. *Lain* (*ibid*.) 884. See also 881 (Lord Parker CJ). [↑](#footnote-ref-437)
438. *ibid*., 888. [↑](#footnote-ref-438)
439. *ibid*., 892. [↑](#footnote-ref-439)
440. *GCHQ* (fn ) 408. [↑](#footnote-ref-440)
441. It has since developed to include *substantive* as well as procedural expectations: *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 (CA). [↑](#footnote-ref-441)
442. See e.g. *R v Liverpool Corporation, ex p Liverpool Taxi Fleet Operators’ Association* [1972] 2 QB 299 (CA). [↑](#footnote-ref-442)
443. *ibid*., 409. [↑](#footnote-ref-443)
444. Craig (fn ) 832 puts it in stronger terms. It is especially sensible given that the existence of an unprosecuted alternative remedy is a discretionary bar to judicial review (*R (Koyama) v University of Manchester* [2007] EWHC 1868 (Admin)), which would place claimants who did have existing legal rights at a perverse disadvantage in public-law terms. [↑](#footnote-ref-444)
445. Even though rights and liberties are conceptually distinct: Hohfeld (fn ). [↑](#footnote-ref-445)
446. *St Germain (No. 2)* (fn ). [↑](#footnote-ref-446)
447. *Ridge* (fn ). See also e.g. *R v General Medical Council, ex p Gee* [1986] 1 WLR 1247 (CA). [↑](#footnote-ref-447)
448. *R v Secretary of State for the Home Department, ex p Al-Fayed (No. 1)* [1998] 1 WLR 763 (CA). [↑](#footnote-ref-448)
449. *R v Immigration Appeal Tribunal, ex p Nelson* [2001] Imm A R 76 (CA). [↑](#footnote-ref-449)
450. *Fewings* (fn ). [↑](#footnote-ref-450)
451. *R v Secretary of State for Foreign Affairs, ex p World Development Movement* [1995] 1 WLR 306 (QB). In standing terms the courts allowed a pressure group to bring this claim, however, partly out of concern at ‘the likely absence of any other responsible challenger’: 395 (Rose LJ). [↑](#footnote-ref-451)
452. *R v Minister of Health, ex p Villiers* [1936] 2 KB 29 (KB). [↑](#footnote-ref-452)
453. *Lain* (fn ) 889. [↑](#footnote-ref-453)
454. *GCHQ* (fn ) 408. [↑](#footnote-ref-454)
455. *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL) 653 (Lord Scarman). [↑](#footnote-ref-455)
456. SCA, s 31(3). [↑](#footnote-ref-456)
457. See e.g. *Walsh* (fn ) 164 (Sir John Donaldson MR), 167 (May LJ); *Hook* (fn ) 1060 (Scarman LJ). [↑](#footnote-ref-457)
458. *Law* (fn ) 1307. In *Walsh* (*ibid*., 164) Sir John Donaldson MR borrowed the term from Lord Wilberforce in *Malloch v Aberdeen Corporation (No. 1)* [1971] 1 WLR 1578 (HL) 1596, who had concluded in that case that the public-law element derived from the fact that the body in question was exercising statutory powers. [↑](#footnote-ref-458)
459. Wade and Forsyth share this concern: fn , 543. [↑](#footnote-ref-459)
460. In the cases discussed above, such as *Law* (fn ) and *Lain* (fn ). [↑](#footnote-ref-460)
461. *Byrne* (fn ) 227. [↑](#footnote-ref-461)
462. *Lavelle* (fn ) 30-31. [↑](#footnote-ref-462)
463. Although the dichotomy is not always as sharp in the local government context, as seen above. [↑](#footnote-ref-463)
464. Mark Freedland terms it the ‘contractual fallacy’: ‘The Evolving Approach to the Public/Private Distinction in English Law’, in Mark Freedland and Jean-Bernard Auby (eds), *The Public Law/Private Law Divide: Une Entente Assez Cordiale?* (Hart 2006) 98. [↑](#footnote-ref-464)
465. As illustrated by e.g. *Law* (fn ). [↑](#footnote-ref-465)
466. John Laws, ‘Public Law and Employment Law: Abuse of Power’ [1997] PL 455, 458. [↑](#footnote-ref-466)
467. *The Amphitrite* [1921] 3 KB 500 (KB). Indeed, this is the basis of the doctrine against the fettering of discretion: see e.g. *Barnard v National Dock Labour Board* [1953] 2 QB 18 (CA). For analysis, see Mitchell (fn ) 57-65. [↑](#footnote-ref-467)
468. *Walsh* (fn ). [↑](#footnote-ref-468)
469. *ibid*., 166 (Sir John Donaldson MR), 173 (May LJ), 178 (Purchas LJ). [↑](#footnote-ref-469)
470. The defendant’s status as an obviously public body could not of itself inject the case with a sufficient public-law element: 164 (Sir John Donaldson MR). [↑](#footnote-ref-470)
471. Woolf and McCowan and LJJ applied *Walsh* in the post-*Datafin* case of *R v Derbyshire County Council, ex p Noble* [1990] ICR 808 (CA) 820. [↑](#footnote-ref-471)
472. *Walsh* (fn ) 180. [↑](#footnote-ref-472)
473. [1985] QB 554 (QB). [↑](#footnote-ref-473)
474. *ibid*., 574. [↑](#footnote-ref-474)
475. I do not discuss the law relating to university visitors here. This is an ancient and exclusive jurisdiction with which the courts are clearly – and rightly, under the LACPA – reluctant to interfere, even though the prerogative writs may be used to control visitors who clearly exceed or refuse to exercise their jurisdiction: *Thomas v University of Bradford* [1987] AC 795 (HL); *R v Lord President of the Privy Council, ex p Page* [1993] 2 AC 682 (HL). Although *Thomas* and *Page* appear to suggest a slightly different focus, the judicial reluctance to interfere was previously explained according to the LACPA idea that voluntarily assumed jurisdiction is not reviewable: *R v Bishop of Ely* (1794) 5 Durn & E 475 (Lord Kenyon CJ), cited in *Ex parte Buller* (1855) 1 Jur (NS) 709 (Coleridge J). [↑](#footnote-ref-475)
476. The scheme only provides for student complaints and does not extend to matters relating to academic judgment: EA, ss 12(1) and 12(2). The Office itself is judicially reviewable, albeit on only limited grounds: *R (Siborurema) v Office of the Independent Adjudicator* [2007] EWCA Civ 1365. [↑](#footnote-ref-476)
477. See e.g. *Koyama* (fn ). [↑](#footnote-ref-477)
478. ERA, ss 124(2) and (1). There is a close analogy here with the Local Government Act 1972, s 111, discussed at fn . [↑](#footnote-ref-478)
479. See e.g. *R (M) v University of the West of England* [2001] ELR 77 (QB); *Clark* (fn ); *R (McKoy) v Oxford Brookes University*[2009] EWHC 667 (Admin). Further education institutions exercising similar powers under ss 18-19 of the Further and Higher Education Act 1992 are also, and rightly, amenable to judicial review: see e.g. *R (Griffiths) v Lewisham College* [2007] EWHC 809 (Admin). [↑](#footnote-ref-479)
480. This is especially so in the light of the changing nature of the university-student relationship, from one of master-subject to one of commercial bargain: see e.g. Dennis Farrington, *The Law of Higher Education* (Butterworths 1994) ch 7. [↑](#footnote-ref-480)
481. [1969] 2 QB 538 (QB). [↑](#footnote-ref-481)
482. *ibid*., 554. [↑](#footnote-ref-482)
483. *ibid*., 556. [↑](#footnote-ref-483)
484. *ibid*., 559. [↑](#footnote-ref-484)
485. *A.S.S.E.T.* (fn ). [↑](#footnote-ref-485)
486. *Silva* (fn ). [↑](#footnote-ref-486)
487. *ibid*., 79. [↑](#footnote-ref-487)
488. *Roffey* (fn ) 543. [↑](#footnote-ref-488)
489. [1993] 1 WLR 909 (CA). [↑](#footnote-ref-489)
490. *ibid*., 932. See also *R v Disciplinary Committee of the Jockey Club, ex p Massingberd-Mundy* [1993] 2 All ER 207 (CA). [↑](#footnote-ref-490)
491. *Byrne* (fn )226. [↑](#footnote-ref-491)
492. [1973] 3 All ER 569 (CA) 585. [↑](#footnote-ref-492)
493. William Wade, ‘Judicial Control of Universities’ (1969) 85 LQR 468, 471. For similar doubt over *Roffey*, see *Glynn v Keele University* [1971] 1 WLR 487 (Ch) 494-495 (Sir John Pennycuick V-C), albeit not a public-law case. [↑](#footnote-ref-493)
494. *Clark* (fn ) [29]. [↑](#footnote-ref-494)
495. *ibid*., [15]. [↑](#footnote-ref-495)
496. [2001] ELR 64 (QB). [↑](#footnote-ref-496)
497. [2001] EWCA Civ 534. Along similar lines, see *R (Clarke) v Cardiff University* [2009] EWHC 2148 (Admin). [↑](#footnote-ref-497)
498. [2012] EWHC 2474 (Admin). [↑](#footnote-ref-498)
499. Christopher Forsyth, ‘The Scope of Judicial Review: “Public Duty” Not “Source of Power”’ [1987] PL 356, 360. [↑](#footnote-ref-499)
500. *ibid*., 360-362. [↑](#footnote-ref-500)
501. *R v Panel of Take-overs and Mergers, ex p Datafin Plc* [1987] QB 815 (CA). [↑](#footnote-ref-501)
502. These include those mentioned at fnn - and additionally at fn . [↑](#footnote-ref-502)
503. Colin D. Campbell, ‘Monopoly Power as Public Power for the Purposes of Judicial Review’ (2009) 125 LQR 491. [↑](#footnote-ref-503)
504. *Datafin* (fn ) 824. [↑](#footnote-ref-504)
505. *ibid*., 826. [↑](#footnote-ref-505)
506. *ibid*. [↑](#footnote-ref-506)
507. *ibid*., 834. [↑](#footnote-ref-507)
508. *ibid*., 826. [↑](#footnote-ref-508)
509. *ibid*., 835. It has a statutory base now, however, through s 942 of the Companies Act 2006. [↑](#footnote-ref-509)
510. [1967] 2 QB 864 (QB) 882. [↑](#footnote-ref-510)
511. *Datafin* (fn ) 838. [↑](#footnote-ref-511)
512. *ibid*. [↑](#footnote-ref-512)
513. *ibid*. [↑](#footnote-ref-513)
514. *ibid*. [↑](#footnote-ref-514)
515. *ibid*., 845. [↑](#footnote-ref-515)
516. *ibid*. [↑](#footnote-ref-516)
517. *ibid*. [↑](#footnote-ref-517)
518. *ibid*. [↑](#footnote-ref-518)
519. [1965] 1 QB 377 (QB). [↑](#footnote-ref-519)
520. [1983] 1 WLR 23 (QB). [↑](#footnote-ref-520)
521. *Datafin* (fn ) 847. [↑](#footnote-ref-521)
522. *ibid*., 849. [↑](#footnote-ref-522)
523. *ibid*. [↑](#footnote-ref-523)
524. See *Lain* (fn ) 882 (Lord Parker CJ). [↑](#footnote-ref-524)
525. *Datafin* (fn ) 850. [↑](#footnote-ref-525)
526. *ibid*., 851. [↑](#footnote-ref-526)
527. *ibid*., 852. [↑](#footnote-ref-527)
528. *R (Beer) v Hampshire Farmers’ Markets Ltd* [2003] EWCA Civ 1056, [2004] 1 WLR 233 [12] (Dyson LJ). [↑](#footnote-ref-528)
529. *R v Chief Rabbi of the United Hebrew Congregations of Great Britain, ex p Wachmann* [1992] 1 WLR 1036 (QB) 1039 (Simon Brown J). [↑](#footnote-ref-529)
530. Murray Hunt, ‘Constitutionalism and the Contractualisation of Government in the United Kingdom’, in Michael Taggart (ed), *The Province of Administrative Law* (Hart 1997) 29. See also *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48, 69 (Lord Woolf CJ). [↑](#footnote-ref-530)
531. Lexa Hilliard, ‘The Take-over Panel and the Courts’ (1987) 50 MLR 372, 372. [↑](#footnote-ref-531)
532. See *Datafin* (fn ) 835 (Sir John Donaldson MR). [↑](#footnote-ref-532)
533. The appeal hearing began on 25 November 1986 and judgment was issued on 5 December. [↑](#footnote-ref-533)
534. *Datafin* (fn ) 838. [↑](#footnote-ref-534)
535. *ibid*., 849. [↑](#footnote-ref-535)
536. *Council of Civil Service Unions v Minister for the Civil Service* (herein *GCHQ*) [1985] AC 374 (HL). [↑](#footnote-ref-536)
537. *A.S.S.E.T.* (fn ). [↑](#footnote-ref-537)
538. *Lavelle* (fn ). [↑](#footnote-ref-538)
539. [1953] 1 QB 704 (QB). [↑](#footnote-ref-539)
540. Wade’s view, it is recalled, was that the executive was actually acting under third-source authority when it created the CICB: William Wade, *Constitutional Fundamentals* (Sweet & Maxwell 1989) 58-66. [↑](#footnote-ref-540)
541. *Datafin* (fn ) 838. [↑](#footnote-ref-541)
542. [1983] 2 AC 237 (HL). [↑](#footnote-ref-542)
543. *Datafin* (fn ) 838. [↑](#footnote-ref-543)
544. *GCHQ* (fn ). [↑](#footnote-ref-544)
545. *Datafin* (fn ) 838. [↑](#footnote-ref-545)
546. [1986] AC 112 (HL). [↑](#footnote-ref-546)
547. *Datafin* (fn ) 838. [↑](#footnote-ref-547)
548. Although the first case to lay the requirement of the duty to act judicially to rest was actually *Ridge v Baldwin* [1964] AC 40 (HL), and in *Gillick* the guidance circulars were issued under *third-source* powers rather than something more nebulous, as Sir John suggests: see text to fnn -. [↑](#footnote-ref-548)
549. As explained in chapter three. [↑](#footnote-ref-549)
550. *Datafin* (fn ) 838. [↑](#footnote-ref-550)
551. See e.g. *R v Civil Service Appeal Board, ex p Bruce* [1988] ICR 649 (QB) 656 (May LJ); *R v Derbyshire County Council, ex p Noble* [1990] ICR 808 (CA) 822-824 (Dillon LJ); *R v Lord Chancellor’s Department, ex p Nangle* [1991] ICR 743, 755 (Stuart-Smith LJ); *R v Jockey Club, ex p Massingberd-Mundy* [1993] 2 All ER 207 (QB) 219 (Neill LJ). [↑](#footnote-ref-551)
552. This is quite apart from the conceptual difficulty of attempting to define a public function so vaguely: see Paul Craig, ‘Public Law and Control Over Private Power’, in Taggart (fn ) 200. [↑](#footnote-ref-552)
553. [1985] QB 152 (CA) 164. See also 167 (May LJ). [↑](#footnote-ref-553)
554. As in *Noble* (fn ) 820. [↑](#footnote-ref-554)
555. *Datafin* (fn ) 838. [↑](#footnote-ref-555)
556. *ibid*., 834. [↑](#footnote-ref-556)
557. Nicholls LJ called these powers a ‘major element’ in the regulation of the City Code: *ibid*., 851. [↑](#footnote-ref-557)
558. *ibid*., 826 (Sir John Donaldson MR). [↑](#footnote-ref-558)
559. *ibid*., 849. [↑](#footnote-ref-559)
560. See also *ibid*., 852 (Nicholls LJ). [↑](#footnote-ref-560)
561. Once *Datafin* is understood in this way, Sir John Donaldson’s remark that other organisations might also exercise *contractual* powers to penalise the transgressors following a ruling by the PTM (*ibid*., 826) becomes otiose: such powers would not be public functions under the LACPA. [↑](#footnote-ref-561)
562. Tom Lowe, ‘Public Law and Self-Regulation’ (1987) Comp Law 115, 119 (emphasis original). [↑](#footnote-ref-562)
563. *Datafin* (fn ) 845. [↑](#footnote-ref-563)
564. Sir John Donaldson described counsel’s attempt to employ private-law causes of action as ‘wholly unconvincing’: *ibid*., 839. [↑](#footnote-ref-564)
565. *ibid*., 827. [↑](#footnote-ref-565)
566. This is primarily for the reason that the courts are constitutionally constrained by the common-law framework they have devised (see chapter one). cf Peter Vincent-Jones, ‘Citizen Redress in Public Contracting for Human Services’ (2005) 68 MLR 887, 903, however, for a more instrumental argument. [↑](#footnote-ref-566)
567. See Peter Cane, ‘Self Regulation and Judicial Review’ [1987] CJQ 324, 346; Hilliard (fn ) 377, 379; Nigel Pleming, ‘Judicial Review of Regulators’, in Christopher Forsyth and others (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (OUP 2010) 336-340. [↑](#footnote-ref-567)
568. Christopher Forsyth, ‘The Scope of Judicial Review: “Public Duty” Not “Source of Power”’ [1987] PL 356, 367. [↑](#footnote-ref-568)
569. *Datafin* (fn ) 841. [↑](#footnote-ref-569)
570. *ibid*. [↑](#footnote-ref-570)
571. *ibid*. [↑](#footnote-ref-571)
572. *ibid*. [↑](#footnote-ref-572)
573. *ibid*. [↑](#footnote-ref-573)
574. *ibid*., 842. [↑](#footnote-ref-574)
575. See also *R v Panel of Take-overs and Mergers, ex p Guinness Plc* [1990] 1 QB 146 (CA) 159-160 (Lord Donaldson MR). [↑](#footnote-ref-575)
576. Janet McLean, ‘Public Function Tests: Bringing Back the State?’, in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart 2009) 185, 197. [↑](#footnote-ref-576)
577. Although they will still need on occasion to defer to governmental or democratically-elected bodies when interpreting the law, however. [↑](#footnote-ref-577)
578. E.g. *R v General Council of the Bar, ex p Percival* [1991] 1 QB 212 (QB). [↑](#footnote-ref-578)
579. Properly understood it does extend to delegated functions, however: see chapter five. [↑](#footnote-ref-579)
580. [1993] 2 All ER 833 (QB) 847 (emphasis added). [↑](#footnote-ref-580)
581. See e.g. Forsyth (fn ) 356; Hunt (fn ) 29; Peter Cane, ‘Accountability and the Public/Private Distinction’, in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003) 274; Maurice Sunkin, ‘Pushing Forward the Frontiers of Human Rights Protection: The Meaning of Public Authority Under the Human Rights Act’ [2004] PL 643, 651; *R v Jockey Club, ex p RAM Racecourses Ltd* [1993] 2 All ER 225 (QB) 246 (Simon Brown J). Keene J also drew a similar principle (erroneously, it is submitted) from *GCHQ* (fn ) in *R (Pepper) v Bolsover District Council* (2001) 3 LGLR 20 (QB) [30]-[36]. [↑](#footnote-ref-581)
582. *Massingberd-Mundy* (fn ) 219. [↑](#footnote-ref-582)
583. *Noble* (fn ) 819. See also *R v BBC, ex p The Referendum Party* [1997] EMLR 605 (QB) 623 (Auld LJ). [↑](#footnote-ref-583)
584. For a recent example, see *R (Jenkins) v Marsh Farm Community Development Trust* [2011] EWHC 1097 (Admin) [54]-[55], in which the Deputy High Court judge simply gave a list of apparently miscellaneous factors to support his view that the body in question was a public authority. [↑](#footnote-ref-584)
585. [1996] 3 All ER 1 (QB) 11. [↑](#footnote-ref-585)
586. [2003] EWCA Civ 57 [13]. [↑](#footnote-ref-586)
587. *Datafin* (fn ) 845. This is seized on by e.g. Forsyth (fn ) 362 and Hunt (fn ) 29. [↑](#footnote-ref-587)
588. *ibid*., 845. [↑](#footnote-ref-588)
589. As McLean states (fn , 195): ‘source of power still matters’. With that in mind, however, she seems then to downplay the significance of the source of the power in the Court’s reasoning when going on to state (at 196) that *Datafin* ‘effectively extended… judicial review to a private or quasi-private body – based on the public nature of the function that it was performing.’ [↑](#footnote-ref-589)
590. Forsyth remarks (fn , 364) that ‘the source of powers has been abandoned as the determinant of their reviewability’. [↑](#footnote-ref-590)
591. See especially *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 1 WLR 909 (CA); *Massingberd-Mundy* (fn ). cf *RAM Racecourses* (fn ). [↑](#footnote-ref-591)
592. Mark Elliott, *Beatson, Matthews and Elliott’s Administrative Law Text and Materials* (4th edn, OUP 2010) 133. [↑](#footnote-ref-592)
593. *Aga Khan* (fn ) 932. [↑](#footnote-ref-593)
594. *Datafin* (fn ) 847. [↑](#footnote-ref-594)
595. Even if it can sometimes be difficult to apply, e.g. where local authorities are concerned: see text to fnn -. [↑](#footnote-ref-595)
596. E.g. Colin D. Campbell, ‘The Nature of Power as Public in English Judicial Review’ [2009] CLJ 90; Julia Black, ‘Constitutionalising Self-Regulation’ (1996) 59 MLR 24, 32-37. [↑](#footnote-ref-596)
597. *Wachmann* (fn ) 1041. See also *R v Advertising Standards Authority, ex p The Insurance Service plc* [1990] 2 Admin LR 77 (QB) 86 (Glidewell LJ). [↑](#footnote-ref-597)
598. *ibid*., 1041-1042. The but-for test also appeared in e.g. *R (Sunspell) v Association of British Travel Agents* [2001] ACD 16 (QB) [32] (Keene J). [↑](#footnote-ref-598)
599. *Football Association* (fn ) 845. [↑](#footnote-ref-599)
600. *ibid*., 848. [↑](#footnote-ref-600)
601. *ibid*. [↑](#footnote-ref-601)
602. For criticism see Black (fn ) 35; Campbell (fn ) 92-96. cf Cane (fn ) 338-339. [↑](#footnote-ref-602)
603. As chapter one explained. [↑](#footnote-ref-603)
604. *Aga Khan* (fn ). [↑](#footnote-ref-604)
605. *ibid*., 923. [↑](#footnote-ref-605)
606. *ibid*., 926. [↑](#footnote-ref-606)
607. CPR Part 54.1(2)(a)(ii). [↑](#footnote-ref-607)
608. Little has changed since Black’s observation to that effect in 1996 (fn , 42). [↑](#footnote-ref-608)
609. In relation to the judicial review of employment decisions, see Bernadette Walsh, ‘Judicial Review of Dismissal from Employment: Coherence or Confusion?’ [1989] PL 131, 154. [↑](#footnote-ref-609)
610. E.g. *R (Broadway Care Centre Ltd) v Caerphilly CBC* [2012] EWHC 37 (Admin) (exercise of a local authority’s contractual discretion not amenable to judicial review); *R (Moreton) v Medical Defence Union Ltd* [2006] EWHC 1948 (private company, not exercising any legal powers, not amenable when refusing to indemnify an orthodontist with the result that the applicant – a patient – would be unable to recover against him in civil proceedings); *R (West) v Lloyd’s of London* (CA) [2004] EWCA Civ 506 (Lloyd’s of London’s exercise of contractual power to approve a buy-out scheme not amenable); *R v Fernhill Manor School, ex p Brown* [1993] Admin LR 159 (QB) (private school’s exercise of contractual power to expel a student not amenable). [↑](#footnote-ref-610)
611. E.g. *R (Hopley) v Liverpool Health Authority* [2002] EWHC 1723 (Admin). Here, the defendant’s statutory decision to withhold consent to a damages settlement proposed by the applicant in private litigation was not amenable to judicial review, despite the clear impact it had on the applicant in the sense that it denied him considerable tax breaks to which he otherwise would have been entitled. The decision is difficult to square, too, with Pitchford J’s *obiter* remark that knowingly offering inflated damages for an oblique motive *would* have been amenable: [55]. See also *Percival* (fn ), in which Watkins LJ and Garland J held that the Bar Council *was* amenable to judicial review when deciding not to pursue a charge of professional misconduct against a Queen’s Counsel. Reference was made (227-228) to the Bar Council performing functions which historically had been delegated from the Crown, but it is not clear that their Lordships saw these as delegated *legal* powers and thus that the ruling accorded with the LACPA. [↑](#footnote-ref-611)
612. cf e.g. the divergent remarks in *RAM Racecourses* (fn ) 246 (Simon Brown J) and *Football Association* (fn ) 847 (Rose J). [↑](#footnote-ref-612)
613. [1994] CLC 88 (QB) 93 (emphasis added). [↑](#footnote-ref-613)
614. See also *R v Bury Park Imam, ex p Ali* [1994] COD 142 (CA). [↑](#footnote-ref-614)
615. (1997) 73 P & CR 1 (QB). [↑](#footnote-ref-615)
616. *ibid*., 7. [↑](#footnote-ref-616)
617. *ibid*. [↑](#footnote-ref-617)
618. [1988] AC 533 (HL) 580. See also *R v Code of Practice Committee of the British Pharmaceutical Industry, ex p Professional Counselling Aids Ltd* [1991] 3 Admin LR 697 (QB) 709 (Popplewell J) – although his Lordship reluctantly (and erroneously, given this chapter’s arguments) felt bound by *Datafin* and *Insurance Service* (fn ) to rule that the defendant was amenable to judicial review. [↑](#footnote-ref-618)
619. See the remarks in *Donn* (text to fn ) and *Tucker* (text to fn ). [↑](#footnote-ref-619)
620. Hunt is too generous when describing the law as in a state of incomplete transition from an orthodox, Diceyan form of constitutionalism to a more modern, power-based form: fn , 26. [↑](#footnote-ref-620)
621. *Leech* (fn ) 561. [↑](#footnote-ref-621)
622. *ibid*. [↑](#footnote-ref-622)
623. *ibid.,* 562. In keeping with the pre-*Datafin* law, the courts also seem to maintain their broad-brush approach to coercion. See e.g. *R (Rudewicz) v Ministry of Justice* [2012] EWCA, [2012] 3 WLR 901 (review of decision to licence disinterment of a distant relative’s remains); *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20, [2006] 1 WLR 3343 (review of decision to enter a *nolle prosequi* to halt a private prosecution brought by the applicant against a third party). [↑](#footnote-ref-623)
624. Courts should certainly be prepared to look behind a contractual relationship between the defendant and a third party such as the applicant’s employer, as Lloyd Jones J did in *R (A) v B Council* [2007] EWHC 1529 (Admin). [↑](#footnote-ref-624)
625. *Aga Khan* (fn ) 932. See also *R v London Metal Exchange, ex p Albatros Warehousing* (QB, 30 March 2000) [27] (Richards J). [↑](#footnote-ref-625)
626. [2011] UKPC 27. [↑](#footnote-ref-626)
627. See also *Ramoutar v Commissioner of Prisons* [2012] UKPC 29. [↑](#footnote-ref-627)
628. See also *R (Kilroy) v Governing Body of Parrs Wood High School* [2011] EWHC 3489 (Admin) (amenability not in issue when school governor suspended under statutory powers). The distinction can also explain the outcomes in *Donn* (fn ) and *Bruce* (fn ). [↑](#footnote-ref-628)
629. cf Gillian Morris and Sandra Fredman, Public or Private? State Employees and Judicial Review’ (1991) 107 LQR 298, 303-304, who argue that the courts’ approach to contractual jurisdiction in the public-service employment context is arbitrary on the basis that public employees whose conditions of employment are enshrined in statute rather than contract are in a stronger position judicial review-wise. As this and the previous chapter have explained, however, what seems like an arbitrary practical distinction is mandated by sound theory – the distinction between *de facto* and *de jure* power. [↑](#footnote-ref-629)
630. E.g. *Broadway*; *West*; *Brown* (all fn ); *R (Boyle) v Haverhill Pub Watch* [2009] EWHC 2441 (Admin) (pub watch scheme, created voluntarily by private organisations, not amenable to judicial review when banning the applicant from its venues). [↑](#footnote-ref-630)
631. *Aga Khan* (fn ) 931. [↑](#footnote-ref-631)
632. *ibid*., 924. [↑](#footnote-ref-632)
633. *ibid*., 923. [↑](#footnote-ref-633)
634. It is recalled that even in Lloyd LJ’s more ‘progressive’ judgment, as it has been interpreted, his Lordship stressed that contractual jurisdiction was paradigmatically private in nature: *Datafin* (fn ) 845. [↑](#footnote-ref-634)
635. See also *Ali* (fn ). [↑](#footnote-ref-635)
636. *Aegon* (fn ). [↑](#footnote-ref-636)
637. *Football Association* (fn ). [↑](#footnote-ref-637)
638. *R (Johannes Mooyer) v Personal Investment Authority Ombudsman Bureau Ltd* [2001] EWHC Admin 247. [↑](#footnote-ref-638)
639. *West* (fn ). In relation to the tort of misfeasance in public office, see also *Society of Lloyd’s v Henderson* [2007] EWCA Civ 930, [2008] 1 WLR 2255, 2263 (Buxton LJ). [↑](#footnote-ref-639)
640. *Sunspell* (fn ). [↑](#footnote-ref-640)
641. *R (Oxford Study Centre) v British Council* [2001] EWHC Admin 207. [↑](#footnote-ref-641)
642. *Evans v University of Cambridge* [2002] EWHC 1382 (Admin); *Tucker* (fn ) [29]-[30], [36] (Scott Baker LJ). [↑](#footnote-ref-642)
643. *Massingberd-Mundy* (fn ) 222. [↑](#footnote-ref-643)
644. *ibid*. See also *Sunspell* (fn ) [27] (Keene J). [↑](#footnote-ref-644)
645. *Wachmann* (fn ) 1040. [↑](#footnote-ref-645)
646. E.g. *R v Inns of Court Visitors, ex p Calder* [1994] QB 1 (CA) 48 (Stuart-Smith LJ). See also *Aga Khan* (fn ) 924 (Sir Thomas Bingham MR); *RAM Racecourses* (fn ) 241-244 (Stuart-Smith LJ). [↑](#footnote-ref-646)
647. *West* (fn ) [30]. [↑](#footnote-ref-647)
648. *Football Association* (fn ) 848-849. [↑](#footnote-ref-648)
649. Campbell (fn ) 493. [↑](#footnote-ref-649)
650. *ibid*., 492. The private common law has historically adapted to control monopoly power, however, as Campbell acknowledges. [↑](#footnote-ref-650)
651. See *Datafin* (fn ); *Guinness* (fn ); *Insurance Service* (fn ); *R v Advertising Standards Authority Ltd, ex p Vernons Organisation Ltd* [1992] 1 WLR 1289 (QB). [↑](#footnote-ref-651)
652. See also David Pannick, ‘Who Is Subject to Judicial Review and In Respect of What?’ [1992] PL 1, 4-5. [↑](#footnote-ref-652)
653. Jack Anderson, ‘An Accident of History: Why the Decisions of Sports Governing Bodies are not Amenable to Judicial Review’ (2006) 35 CLWR 173; Eileen Kelly, ‘Judicial Review of Sports Bodies’ Decisions: Comparable Common Law Perspectives’ (2011) 11 ISLR 71; Jonathan Morgan, ‘A Mare’s Nest? The Jockey Club and Judicial Review of Sports Governing Bodies’ [2012] LIM 102. [↑](#footnote-ref-653)
654. Campbell (fn ) 495 (emphasis original). [↑](#footnote-ref-654)
655. ‘Typically’, because powers are not always exclusive: see e.g. *R v Secretary of State for the Home Department, ex p Northumbria Police Authority* [1989] QB 26 (CA). Parliament can also provide for local authorities to co-operate in the exercise of functions by other bodies, as under the Local Government Act 2000, s 2(4)(d). [↑](#footnote-ref-655)
656. Campbell (fn ) 499. [↑](#footnote-ref-656)
657. *ibid* (emphasis added). [↑](#footnote-ref-657)
658. *ibid*., citing A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Liberty Fund 1915) 421. [↑](#footnote-ref-658)
659. Campbell (*ibid*.) 499. [↑](#footnote-ref-659)
660. *ibid*., 500. [↑](#footnote-ref-660)
661. *ibid*., 500-501. [↑](#footnote-ref-661)
662. As in e.g. *Northumbria* (fn ). [↑](#footnote-ref-662)
663. The example is for illustrative purposes only. The idea in *Malone v Metropolitan Police Commissioner* [1979] Ch 344 (Ch), that the government could validly phone-tap without specific legal authority, was not particularly convincing because it appeared to overlook that phone-tapping was, or could be construed as, breaking the then common law of confidentiality. Third-source powers should not be regarded as extending this far. [↑](#footnote-ref-663)
664. This chapter rejects Campbell’s analysis of *Datafin*, of course, for the reasons given in parts A and B. It is also doubtful in relation to the Advertising Standards Authority because the reasoning in the *Insurance Service* case (fn ) centred heavily around the idea that the Director General of Fair Trading would have performed the ASA’s function had the ASA not. Such reliance on the but-for test is also misguided given the arguments in this chapter, but it nevertheless defeats Campbell’s claim that the case can be explained on the basis of monopoly power. [↑](#footnote-ref-664)
665. Others are the decisions contained at fnn -, as well as *Wachmann* (fn ). [↑](#footnote-ref-665)
666. Campbell (fn ) 503-504. [↑](#footnote-ref-666)
667. *Ali* (fn ). [↑](#footnote-ref-667)
668. See also *R v London Beth Din, ex p Bloom* [1998] COD 131 (QB). [↑](#footnote-ref-668)
669. *Ali* (fn ). [↑](#footnote-ref-669)
670. As mentioned in chapter one: text to fn . [↑](#footnote-ref-670)
671. T.R.S. Allan, ‘Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory’ (2011) 127 LQR 96, 108. [↑](#footnote-ref-671)
672. Campbell (fn ) 515-517. [↑](#footnote-ref-672)
673. *ibid*., 516. [↑](#footnote-ref-673)
674. *ibid*. [↑](#footnote-ref-674)
675. *ibid*., 515. [↑](#footnote-ref-675)
676. cf Janet McLean, ‘The Crown in Contract and Administrative Law’ (2004) 24 OJLS 129, 130; 138, who argues, taking her lead from Lon Fuller, ‘The Forms and Limits of Adjudication’ 92 Harv L Rev 353 (1978), that ‘when the executive enters into legally enforceable contracts, it is… effectively creating law between the Government and the citizen.’ Even if this is the *effect*, however, the conceptual distinction between contract and law remains: contracts are concluded pursuant to the individual’s legal freedom to negotiate; law is *imposed*. [↑](#footnote-ref-676)
677. They may of course lack the *factual* ability to do so, but this is not the point. For the reasons given in the previous chapter, the distinction between legal power and factual power remains a fundamental theoretical distinction. [↑](#footnote-ref-677)
678. Black (fn ) 30. [↑](#footnote-ref-678)
679. As Dawn Oliver explains in the HRA context, ‘specifically legally authorised coercion or authority over others… are the features of a function that give it the character “of a public nature.’”: Dawn Oliver, ‘Functions of a Public Nature Under the Human Rights Act’ [2004] PL 329, 330. [↑](#footnote-ref-679)
680. Although *de facto* authorities can sometimes still *claim* the power to act, at least: Joseph Raz, *Between Authority and Interpretation* (OUP 2009) 128. [↑](#footnote-ref-680)
681. Campbell (fn ) 511-515. [↑](#footnote-ref-681)
682. *ibid*., 505-506. Examples are *Allnutt v Inglis* (1810) 12 East 527; *Stamford Corp v Pawlett* (1830) 1 Cr & J 57. For analysis of the historical position see Paul Craig, ‘Constitutions, Property and Regulation’ [1991] PL 538. [↑](#footnote-ref-682)
683. *ibid*., 505. [↑](#footnote-ref-683)
684. *R v Servite Houses, ex p Goldsmith* (2001) 33 HLR 35 (QB). [↑](#footnote-ref-684)
685. Lord Woolf CJ makes the point clearly in the HRA context: *Poplar Housing and Regeneration Community Association v Donoghue* [2001] EWCA Civ 595, [2002] QB 48, 67; *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] HRLR 30 [15]. [↑](#footnote-ref-685)
686. Paul Craig, ‘Contracting Out, the Human Rights Act and the Scope of Judicial Review’ (2002) 118 LQR 551, 556. [↑](#footnote-ref-686)
687. Catherine Donnelly, *Delegation of Governmental Power to Private Parties: A Comparative Perspective* (OUP 2007) chs 6 and 7; Kate Markus, ‘Leonard Cheshire Foundation: What is a Public Function?’ [2003] EHRLR 92, 97-98; Anne Davies, *The Public Law of Government Contracts* (OUP 2007) ch 8. [↑](#footnote-ref-687)
688. Murray Hunt, ‘Constitutionalisation and the Contractualisation of Government’, in Michael Taggart (ed), *The Province of Administrative Law* (Hart 1997). [↑](#footnote-ref-688)
689. Donnelly (fn ) 228. [↑](#footnote-ref-689)
690. Peter Vincent-Jones, ‘Citizen Redress in Public Contracting for Human Services’ (2005) 68 MLR 887, 902. [↑](#footnote-ref-690)
691. See also *Goldsmith* (fn ) [93] (Moses J). cf Craig (fn ) 565. [↑](#footnote-ref-691)
692. Donnelly (fn ) 3, quoting Dan Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Clarendon 1999) 5. [↑](#footnote-ref-692)
693. It can also occur through e.g. grant: *ibid*., 5. [↑](#footnote-ref-693)
694. *ibid*., 4. [↑](#footnote-ref-694)
695. Paul Brest, ‘State Action and Liberal Theory: A Casenote on *Flagg Brothers v Brooks*’ (1982) 130 UPa L Rev 1296, 1301. Brest’s conclusion that the US state action doctrine must therefore apply to all such private activity is suspect, however: Frank Goodman, ‘Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone’ (1982) UPa L Rev 1331, 1338. [↑](#footnote-ref-695)
696. As in *R (Boyle) v Haverhill Pub Watch* [2009] EWHC 2441 (Admin). [↑](#footnote-ref-696)
697. Donnelly (fn ) 3. Along similar lines, see Dawn Oliver, ‘Functions of a Public Nature Under the Human Rights Act’ [2004] PL 329, 336. [↑](#footnote-ref-697)
698. Davies (fn ) 235. [↑](#footnote-ref-698)
699. *ibid*., 246. [↑](#footnote-ref-699)
700. *ibid*. [↑](#footnote-ref-700)
701. Davies is right to argue, however, that the onus should be on the delegate to prove that no transfer of authority occurred: *ibid*. The latter would have had input into the service agreement with the government, after all. [↑](#footnote-ref-701)
702. [2007] UKHL 27, [2008] 1 AC 95. [↑](#footnote-ref-702)
703. See also *Goldsmith* (fn ) [52]-[54]. [↑](#footnote-ref-703)
704. cf David Pannick, ‘Functions of a Public Nature’ [2009] JR 109, 112. [↑](#footnote-ref-704)
705. Craig (fn ); Davies (fn ) 246; Alexander Williams, ‘*YL v Birmingham City Council*: Contracting Out and “Functions of a Public Nature”’ [2008] EHRLR 524, 528-529. [↑](#footnote-ref-705)
706. As Moses J recognised in *Goldsmith* (fn ) [40]. [↑](#footnote-ref-706)
707. This is significant because the effect on the contractor of being held to public-law standards seems to be on the judges’ minds, in the HRA context at least, when determining the meaning of a public function: Alexander Williams, ‘Public Authorities: What is a Public Authority?, in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011) 52-53. [↑](#footnote-ref-707)
708. *YL* (fn ) [141]. [↑](#footnote-ref-708)
709. Although Lord Neuberger and the remaining members of the majority disagreed of course that the function had been transferred in this case. [↑](#footnote-ref-709)
710. This is despite the fact that ‘privatisation’ is sometimes used to describe *any* means, including delegation, of engaging private bodies in the delivery of public services: see e.g. *Goldsmith* (fn ) [5] (Moses J). [↑](#footnote-ref-710)
711. *James v London Electricity Plc* [2004] EWHC 3226 (QB); *Cameron v Network Rail Infrastructure Ltd* [2006] EWHC 1133 (QB), [2007] 1 WLR 163. [↑](#footnote-ref-711)
712. Mark Freedland, ‘Government by Contract and Public Law’ [1994] PL 86, 87. See also Craig (fn ) 565. [↑](#footnote-ref-712)
713. The circumstances under which delegators can outsource their *responsibilities* are rare indeed. Even when delegators make use of their extensive powers under the Deregulation and Contracting Out Act 1994 (ss 69-71) they remain responsible by default for the delegate’s actions: s 72(2). [↑](#footnote-ref-713)
714. Davies (fn ) 232. [↑](#footnote-ref-714)
715. *ibid*. [↑](#footnote-ref-715)
716. Craig (fn ) 556. [↑](#footnote-ref-716)
717. *R (A) v Partnerships in Care* [2002] EWHC 529 (Admin), [2002] 1 WLR 2610. [↑](#footnote-ref-717)
718. This explains why local authorities’ decisions as to whether to contract can be amenable to judicial review whereas those of private individuals cannot: the former’s power to contract derives from statute. [↑](#footnote-ref-718)
719. Donnelly (fn ) 228. [↑](#footnote-ref-719)
720. *ibid*., 231. I discuss the point further in chapter six. [↑](#footnote-ref-720)
721. It would also be a core public authority under s 6 HRA and therefore bound to respect the Convention in all of its activities: see chapter six. [↑](#footnote-ref-721)
722. See chapter three. [↑](#footnote-ref-722)
723. [1987] QB 815 (CA). [↑](#footnote-ref-723)
724. See chapter four. [↑](#footnote-ref-724)
725. ‘Typically’, because in limited circumstances public authorities can of course still act, under third-source powers, without having to show positive legal authority for their actions: see chapter three. [↑](#footnote-ref-725)
726. Donnelly (fn ) 229. [↑](#footnote-ref-726)
727. Markus (fn ) 97. [↑](#footnote-ref-727)
728. Donnelly (fn ) 228. [↑](#footnote-ref-728)
729. *Goldsmith* (fn ) 389. See also Craig (fn ) 566. [↑](#footnote-ref-729)
730. Craig (fn ) 567. [↑](#footnote-ref-730)
731. For discussion of the arrangements see *YL* (fn ) [39]-[44] (Baroness Hale). [↑](#footnote-ref-731)
732. *Goldsmith* (fn ). [↑](#footnote-ref-732)
733. *Leonard Cheshire* (fn ). [↑](#footnote-ref-733)
734. *YL* (fn ) [168]. [↑](#footnote-ref-734)
735. cf *YL* (*ibid*.) [118] (Lord Mance). [↑](#footnote-ref-735)
736. *YL* (fn ) [20]. [↑](#footnote-ref-736)
737. *Poplar Housing* (fn ). [↑](#footnote-ref-737)
738. *ibid*., 69. [↑](#footnote-ref-738)
739. *ibid*., 69-70. [↑](#footnote-ref-739)
740. *ibid*., 70. [↑](#footnote-ref-740)
741. *ibid*., 69. [↑](#footnote-ref-741)
742. *ibid*., 70. [↑](#footnote-ref-742)
743. [2003] EWCA Civ 1056, [2004] 1 WLR 233. [↑](#footnote-ref-743)
744. Under the Local Government and Housing Act 1989, s 33(1). [↑](#footnote-ref-744)
745. [2002] EWHC 2559 Admin. [↑](#footnote-ref-745)
746. *Beer* (fn ) [30]-[33]. [↑](#footnote-ref-746)
747. [1976] 1 WLR 1052 (CA) 1059. In *Hook* the statute was the Barnsley Corporation Act 1969. [↑](#footnote-ref-747)
748. Barry Hough, ‘Public Law Regulation of Markets and Fairs’ [2005] PL 586. Hough notes (588) that the market in *Beer* was *informal*, however, because it was ‘neither created by statute, charter nor letters patent’. This casts doubt over Dyson LJ’s claim that the public enjoyed rights of access and therefore that the function was public *per se* – although it should still be public as a delegated function under the LACPA. [↑](#footnote-ref-748)
749. *Beer* (fn ) [35]-[38]. [↑](#footnote-ref-749)
750. *ibid*., [39] (Dyson LJ). [↑](#footnote-ref-750)
751. *ibid*., [35] (Dyson LJ, with whom Sir Martin Nourse agreed). [↑](#footnote-ref-751)
752. *ibid*., [46] (emphasis added). [↑](#footnote-ref-752)
753. *ibid*., [122]. [↑](#footnote-ref-753)
754. Although, of course, they were not. [↑](#footnote-ref-754)
755. *Beer* (fn ) [30]. Similar remarks were made in *Poplar Housing* (fn ) 67, 69 (Lord Woolf CJ). [↑](#footnote-ref-755)
756. *Goldsmith* (fn ). [↑](#footnote-ref-756)
757. [1993] 1 WLR 909 (CA). [↑](#footnote-ref-757)
758. *Goldsmith* (fn ) [89]. Richards J made a similar point in *R v Muntham House School, ex p R* [2000] BLGR 255 (QB) in relation to a claim for judicial review against a non-maintained residential school for students with special educational needs: ‘When a local education authority places a child in… [such a school] pursuant to a statement of special educational needs…, it enters into a purely contractual relationship with the school.’ [↑](#footnote-ref-758)
759. *YL* (fn ) [120]. [↑](#footnote-ref-759)
760. *Goldsmith* (fn ) [66]. [↑](#footnote-ref-760)
761. Craig (fn ) 565. [↑](#footnote-ref-761)
762. See *Goldsmith* (fn ) [105]. [↑](#footnote-ref-762)
763. See also Paul Craig, ‘Access to Mechanisms of Administrative Law’, in David Feldman (ed), *English Public Law* (OUP 2005) 905. [↑](#footnote-ref-763)
764. *YL* (fn ) [30]. [↑](#footnote-ref-764)
765. *ibid*., [153]. [↑](#footnote-ref-765)
766. *ibid*., [30]. [↑](#footnote-ref-766)
767. Alexander Williams, ‘A Fresh Perspective on Hybrid Public Authorities Under the Human Rights Act 1998: Private Contractors, Rights-Stripping and “Chameleonic” Horizontal Effect’ [2011] PL 139, 144. [↑](#footnote-ref-767)
768. cf Oliver (fn ) 340, discussed in *YL* [110] (Lord Mance). [↑](#footnote-ref-768)
769. Davies (fn ) 246. [↑](#footnote-ref-769)
770. *Poplar Housing* (fn ) 67. [↑](#footnote-ref-770)
771. See also Oliver (fn ) 335. [↑](#footnote-ref-771)
772. *Poplar Housing* (fn ) 67. [↑](#footnote-ref-772)
773. Williams (fn ), discussed in chapter six. [↑](#footnote-ref-773)
774. *YL* (fn ) [152] (Lord Neuberger). Along similar lines see Rix LJ, dissenting, in *R (Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587, [2010] 1 WLR 363 [158]. [↑](#footnote-ref-774)
775. Donnelly (fn ) 233. [↑](#footnote-ref-775)
776. Craig (fn ) 555. [↑](#footnote-ref-776)
777. Joint Committee on Human Rights, *The Meaning of Public Authority Under the Human Rights Act* (2006-07, HL 77, HC 410) [105]. [↑](#footnote-ref-777)
778. *YL* (fn ) [119] (Lord Mance), [169] (Lord Neuberger). See also Paul Rishworth and Janet McLean, ‘Human Rights Obligations in the Private Sector: Reflections on *YL v Birmingham City Council* and the Meaning of “Public Function”’, in Christopher Forsyth and others (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (OUP 2010). [↑](#footnote-ref-778)
779. *Leonard Cheshire* (fn ) [35] (Lord Woolf CJ). [↑](#footnote-ref-779)
780. *YL* (fn ) [133]-[144]. See also Oliver (fn ) 343. [↑](#footnote-ref-780)
781. *ibid*., [119]. [↑](#footnote-ref-781)
782. Donnelly (fn ) 249. [↑](#footnote-ref-782)
783. Catherine Donnelly, ‘*Leonard Cheshire* Again and Beyond: Private Contractors, Contract and s.6(3)(b) of the Human Rights Act’ [2005] PL 785, 804. [↑](#footnote-ref-783)
784. Donnelly (fn ) 236. [↑](#footnote-ref-784)
785. Markus (fn ) 97. [↑](#footnote-ref-785)
786. cf Rishworth and McLean (fn ). [↑](#footnote-ref-786)
787. *Leonard Cheshire* (fn ) [33] (Lord Woolf CJ); *YL* (fn ) [119] (Lord Mance), [149] (Lord Neuberger). Lord Mance appeared to contradict himself when stating at [79] that ‘Whether the… [function is public] under section 6(3)(b) does not depend upon whether other common law, statutory or contractual protection anyway exists.’ [↑](#footnote-ref-787)
788. *Goldsmith* (fn ) [96]. [↑](#footnote-ref-788)
789. Jack Beatson, Andrew Burrows and John Cartwright, *Anson’s Law of Contract* (29th edn, OUP 2010) ch 17. [↑](#footnote-ref-789)
790. For discussion see Donnelly (fn ) ch 8. [↑](#footnote-ref-790)
791. *Goldsmith* (fn ) [89]. The second fatal impediment was the contractual source of Servite’s powers: see text to fnn -. [↑](#footnote-ref-791)
792. *ibid*., [77]. [↑](#footnote-ref-792)
793. Freedland (fn ) 86. [↑](#footnote-ref-793)
794. Donnelly (fn ) 228. [↑](#footnote-ref-794)
795. Vincent-Jones (fn ) 902. [↑](#footnote-ref-795)
796. *Goldsmith* (fn ) [85] (Moses J). [↑](#footnote-ref-796)
797. Hunt (fn ) 38. [↑](#footnote-ref-797)
798. This analysis derives in part from Alexander Williams, ‘A Fresh Perspective on Hybrid Public Authorities Under the Human Rights Act: Private Contractors, Rights-Stripping and “Chameleonic” Horizontal Effect’ [2011] PL 139. [↑](#footnote-ref-798)
799. See Dawn Oliver, ‘The Frontiers of the State: Public Authorities and Public Functions Under the Human Rights Act’ [2000] PL 476, 478-479. [↑](#footnote-ref-799)
800. *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [35] (Lord Hope). [↑](#footnote-ref-800)
801. *ibid*., [7] (Lord Nicholls). [↑](#footnote-ref-801)
802. *ibid*., [8] (Lord Nicholls). [↑](#footnote-ref-802)
803. HRA, s 7(7): ‘a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.’ [↑](#footnote-ref-803)
804. *Aston Cantlow* (fn ) [35] (Lord Hope). [↑](#footnote-ref-804)
805. cf *R (Haggerty) v St Helens Borough Council* [2003] EWHC 803 (Admin) [24]-[25] (Silber J). [↑](#footnote-ref-805)
806. *Ayuntamiento de Mula v Spain* App no 55346/00 (ECtHR, 1 February 2001); *Danderyds Kommun v Sweden* App no 52559/99 (ECtHR, 7 June 2001). [↑](#footnote-ref-806)
807. It is occasionally said, however, that core public authorities must be bodies *all* of whose functions are public: e.g. Hansard HC vol 314 col 409 (17 June 1998) (Jack Straw MP). Not only does this set the bar impossibly high (it is doubtful that any bodies engage in functions none of which are more comfortably described as private), but it shifts the HRA’s clear focus away from the *institution* (on which see Oliver, fn , 478-479). It also sits uncomfortably with *Aston Cantlow*, discussed below. [↑](#footnote-ref-807)
808. Oliver (*ibid*.) 483. [↑](#footnote-ref-808)
809. *ibid*., 485-486. [↑](#footnote-ref-809)
810. *Aston Cantlow* (fn ). [↑](#footnote-ref-810)
811. *ibid.,* [7]. [↑](#footnote-ref-811)
812. *ibid*., [14]. [↑](#footnote-ref-812)
813. *ibid*., [47]. [↑](#footnote-ref-813)
814. *ibid*., [62]. As a further indicator of that the PCC was not constitutionally selfless he also drew attention, at [59], to the fact that it was not accountable to the public. [↑](#footnote-ref-814)
815. *ibid*., [86]. [↑](#footnote-ref-815)
816. *ibid*., [156]. [↑](#footnote-ref-816)
817. *ibid*., [129]. [↑](#footnote-ref-817)
818. *Golder v United Kingdom* (1979-80) 1 EHRR 524. [↑](#footnote-ref-818)
819. *Hautaniemi v Sweden* (1996) 22 EHRR CD155; *Danderyds* (fn ), applied in that respect in *Grampian University Hospitals NHS Trust v Napier* 2004 JC 117; *Novoseletskiy v Ukraine* (2006) 43 EHRR 53 [82]. [↑](#footnote-ref-819)
820. John Wadham and others, *Blackstone’s Guide to the Human Rights Act 1998* (4th edn, OUP 2007) [2.44]. [↑](#footnote-ref-820)
821. (1979-80) 2 EHRR 305. See also e.g. *Marckx v Belgium* (1979-80) 2 EHRR 330 (failure of intestacy law to take appropriate steps to ensure adopted child’s integration into the family). [↑](#footnote-ref-821)
822. (1986) 8 EHRR 235. [↑](#footnote-ref-822)
823. *Aston Cantlow* (fn ) [7]. [↑](#footnote-ref-823)
824. *ibid*. [↑](#footnote-ref-824)
825. See Oliver (fn ) 479-480. [↑](#footnote-ref-825)
826. Especially Helen Quane, ‘The Strasbourg Jurisprudence and the Meaning of “Public Authority” Under the Human Rights Act’ [2006] PL 106, 107-108. [↑](#footnote-ref-826)
827. [2007] UKHL 27, [2008] 1 AC 95 [88]. [↑](#footnote-ref-827)
828. *Aston Cantlow* (fn )[47]. [↑](#footnote-ref-828)
829. *ibid*., [160]. [↑](#footnote-ref-829)
830. *ibid*., [169]-[173]. [↑](#footnote-ref-830)
831. *ibid*., [87]. [↑](#footnote-ref-831)
832. Sometimes the systemic failure can arise from multiple governmental organisations collectively failing to protect the victim’s rights. An example is *Edwards v United Kingdom* (2002) 35 EHRR 487, where the European Court held that the Art 2 positive obligation to protect life was breached by the cumulative failure on the part of various state authorities (police, prosecution and Magistrates) to ensure that the prison authorities were adequately informed of the danger posed by a mentally unstable prisoner who kicked and stamped his cellmate to death. [↑](#footnote-ref-832)
833. HRA, ss 6(3) and 6(6). [↑](#footnote-ref-833)
834. See Wadham and others (fn ) [2.49]. [↑](#footnote-ref-834)
835. Strasbourg has also indicated that direct responsibility can apply to the omissions of governmental organisations as well as their acts: *Yershova v Russia* App no 1387/04 (ECtHR, 8 April 2010) [55]. [↑](#footnote-ref-835)
836. *López Ostra v Spain* (1995) 20 EHRR 513 [51]; *Novoseletskiy* (fn ) [69]; *Kotov v Russia* App 54522/00 (ECtHR, Grand Chamber, 3 April 2012) [110]; *Eweida v United Kingdom* App no 48420/10 (ECtHR, 15 January 2013) [84]. cf the earlier approach in *Marckx* (fn ) [31]: ‘in the context of Art 8, the lack of an identifiable ‘interference’ by a public authority means that ‘a law that fails to satisfy [the positive obligation to facilitate a child’s integration into its family]… violates paragraph 1 of Article 8 without there being any call to examine it under paragraph 2.’ [↑](#footnote-ref-836)
837. [2008] UKHL 50, [2009] 1 AC 225. [↑](#footnote-ref-837)
838. (2000) 29 EHRR 245. [↑](#footnote-ref-838)
839. See also *Plattform ‘Ärzte für das Leben' v Austria* (1991) 13 EHRR 204 [32]-[38]. [↑](#footnote-ref-839)
840. *Osman* (fn ) [121]. [↑](#footnote-ref-840)
841. *Van Colle* (fn ) [31] (emphasis added). [↑](#footnote-ref-841)
842. *ibid*., [85] (Lord Phillips), [66] (Lord Hope), [114] (Lord Carswell). [↑](#footnote-ref-842)
843. cf *R (Wright) v Secretary of State for the Home Department* [2001] EWHC Admin 520, which applied the Art 2 obligation bearing generally upon ‘state authorities’ to investigate the death of a victim at the hands of state agents to the *home secretary* specifically. However, warrant for this comes from *Jordan v United Kingdom* (2003) 37 EHRR 2 [143], where Strasbourg emphasised that the issue of *who* conducts the investigation is a matter for the Contracting State in question: see [42], relied on in *Wright* [42] (Jackson J). [↑](#footnote-ref-843)
844. cf Quane (fn ) 108. [↑](#footnote-ref-844)
845. Gavin Phillipson, ‘Clarity Postponed: Horizontal Effect After *Campbell*’, in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning Under the UK Human Rights Act* (CUP 2007) 149. [↑](#footnote-ref-845)
846. *Sychev v Ukraine* App no 4773/02 (ECtHR, 11 October 2005) [54]. [↑](#footnote-ref-846)
847. *Van der Mussele v Belgium* (1984) 6 EHRR 163 [29]; *Costello-Roberts v United Kingdom* (1995) 19 EHRR 112 [27]. [↑](#footnote-ref-847)
848. *Woś v Poland* (2007) 45 EHRR 28 (admissibility decision of 1 March 2005) [73]. [↑](#footnote-ref-848)
849. Williams (fn ) 147; *YL* (fn ) [92]-[99] (Lord Mance). [↑](#footnote-ref-849)
850. *Costello-Roberts* (fn ) [27]. [↑](#footnote-ref-850)
851. *YL* (fn ) [95]. [↑](#footnote-ref-851)
852. See *Plattform* (fn ) [31]. [↑](#footnote-ref-852)
853. *Döşemealti Belediyesi v Turkey* App no 50108/06 (ECtHR, 23 March 2010). The judgment is available only in French: ‘*Les organes de la Convention n’ont toutefois pas appliqué d’une manière rigide cette notion d’«organisation gouvernementale*»…’ [↑](#footnote-ref-853)
854. (2005) 40 EHRR 29. The relevant decision is the admissibility decision of 23 September 2003. [↑](#footnote-ref-854)
855. Baroness Hale left the issue ‘for another day’ in her dissent in *YL* (fn ) [74]. Lord Nicholls stated simply that hybrid public authorities should be able to rely on their own Convention rights ‘when necessary’ in *Aston Cantlow* (fn ) [11]. For brief discussion of the issue see Howard Davis, ‘Public Authorities as ‘Victims’ Under the Human Rights Act’ [2005] CLJ 315, 321. [↑](#footnote-ref-855)
856. E.g. Oliver (fn ) 492; Helen Fenwick and Gavin Phillipson, *Media Freedom Under the Human Rights Act* (OUP 2006) 122; Quane (fn ) 109. [↑](#footnote-ref-856)
857. [2007] EWCA Civ 26, [2008] QB 1 [75]. [↑](#footnote-ref-857)
858. Williams (fn ) 146. [↑](#footnote-ref-858)
859. *Costello-Roberts* (fn ). [↑](#footnote-ref-859)
860. Quane (fn ) 110. [↑](#footnote-ref-860)
861. *Storck v Germany* (2006) 43 EHRR 6; *Kalucza v Hungary* App no 57693/10 (ECtHR, 24 April 2012); *Remetin v Croatia* App no 29525/10 (ECtHR, 11 December 2012) [90]. See also Ruth Costigan, ‘Determining “Functions of a Public Nature” Under the Human Rights Act 1998: A New Approach’ (2006) 12 EPL 577, 583. *Costello-Roberts* is factually similar, too, to *Y v United Kingdom* App no 14229/88 (ECommHR, 8 October 1991), which was evidently a private indirect responsibility case. [↑](#footnote-ref-861)
862. *Kotov* (fn ) [92]. [↑](#footnote-ref-862)
863. *Costello-Roberts* (fn ) [27]. [↑](#footnote-ref-863)
864. *Van der Mussele* (fn ). [↑](#footnote-ref-864)
865. *ibid*., [29]. [↑](#footnote-ref-865)
866. *ibid*. [↑](#footnote-ref-866)
867. Williams (fn ) 152. [↑](#footnote-ref-867)
868. (2003) 37 EHRR 38. [↑](#footnote-ref-868)
869. *ibid*., [41]. [↑](#footnote-ref-869)
870. *ibid*., [49]. [↑](#footnote-ref-870)
871. Quane (fn ) 112-114. [↑](#footnote-ref-871)
872. *Appleby* (fn ) [44]. [↑](#footnote-ref-872)
873. (2008) 47 EHRR 24 [81]. [↑](#footnote-ref-873)
874. App no 22603/02 (ECtHR, 22 November 2007) [27]. [↑](#footnote-ref-874)
875. See further *Transpetrol v Slovakia* App no 28502/08 (ECtHR, 15 November 2011) [62]; *Granitul S.A. v Romania* App no 22022/03 (ECtHR, 22 March 2011) [27]. [↑](#footnote-ref-875)
876. *Kotov* (fn ). [↑](#footnote-ref-876)
877. App no 33488/96 (ECtHR, 15 February 2000). [↑](#footnote-ref-877)
878. *ibid*., [26]. [↑](#footnote-ref-878)
879. *ibid*., [25]. [↑](#footnote-ref-879)
880. *Aston Cantlow* (fn ) [7] (Lord Nicholls); *YL* (fn ) [91], [119] (Lord Mance), [132] (Lord Neuberger). cf *R (Haggerty) v St Helens Council* [2003] EWHC 803 (Admin) [24]-[25] (Silber J). [↑](#footnote-ref-880)
881. Oliver (fn ) 480; Paul Craig, ‘Contracting Out, the Human Rights Act and the Scope of Judicial Review’ (2002) 118 LQR 551, 556-557. [↑](#footnote-ref-881)
882. Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997) [2.2]. [↑](#footnote-ref-882)
883. (2006) 43 EHRR 53. [↑](#footnote-ref-883)
884. *ibid*., [68]. [↑](#footnote-ref-884)
885. *ibid*., [72]. [↑](#footnote-ref-885)
886. *ibid*., [89]. [↑](#footnote-ref-886)
887. *ibid*., [73]-[78]. [↑](#footnote-ref-887)
888. *ibid*., [83]-[88]. [↑](#footnote-ref-888)
889. *ibid*., [80]-[81]. [↑](#footnote-ref-889)
890. *ibid*., [82]. [↑](#footnote-ref-890)
891. *ibid*., [81]. [↑](#footnote-ref-891)
892. *Aston Cantlow* (fn ) [41] (Lord Hope); *YL* (fn ) [61] (Baroness Hale), [81] (Lord Mance). See also Alexander Williams, ‘*YL v Birmingham City Council*: Contracting Out and “Functions of a Public Nature”’ [2008] EHRLR 524, 528. This would also present problems for *Mykhaylenky v Ukraine* App no 35091/02 (ECtHR, 30 November 2004) [45] (discussed below). I examine the nature of s 6(3)(b) in detail in chapter seven. [↑](#footnote-ref-892)
893. *Woš* (fn ). [↑](#footnote-ref-893)
894. App no 22860/02 (ECtHR, 1 March 2005) (Admissibility) [51]. [↑](#footnote-ref-894)
895. *ibid*., [68]. [↑](#footnote-ref-895)
896. *ibid*. [↑](#footnote-ref-896)
897. *ibid*. [↑](#footnote-ref-897)
898. *ibid*., [71]. [↑](#footnote-ref-898)
899. *ibid*., [68]. [↑](#footnote-ref-899)
900. *ibid*., [71]. [↑](#footnote-ref-900)
901. *ibid*., [72]. [↑](#footnote-ref-901)
902. *ibid*., [73]. [↑](#footnote-ref-902)
903. (2007) 45 EHRR 28 [53]. [↑](#footnote-ref-903)
904. *ibid*., [111]. [↑](#footnote-ref-904)
905. *Kotov* (fn ) [92]. [↑](#footnote-ref-905)
906. Fn (Admissibility) [60], [73]. [↑](#footnote-ref-906)
907. *ibid*., [73]. [↑](#footnote-ref-907)
908. See chapters five and seven. [↑](#footnote-ref-908)
909. App no 4773/02 (ECtHR, 11 October 2005). [↑](#footnote-ref-909)
910. *ibid*., [54]. [↑](#footnote-ref-910)
911. *ibid*., [53]. [↑](#footnote-ref-911)
912. *ibid*., [55]. [↑](#footnote-ref-912)
913. *ibid*., [56]. [↑](#footnote-ref-913)
914. *Kotov* (fn ) [97]. [↑](#footnote-ref-914)
915. App no 54522/00 (ECtHR, 14 January 2010). [↑](#footnote-ref-915)
916. *Kotov* (fn ) [98]. [↑](#footnote-ref-916)
917. *ibid*., [97]. [↑](#footnote-ref-917)
918. *ibid*., [107]. [↑](#footnote-ref-918)
919. *ibid*. [↑](#footnote-ref-919)
920. *ibid*., [105]. [↑](#footnote-ref-920)
921. *ibid*. [↑](#footnote-ref-921)
922. *ibid*., [107]. [↑](#footnote-ref-922)
923. *ibid*., [100]. [↑](#footnote-ref-923)
924. *ibid*., [104]. [↑](#footnote-ref-924)
925. *Kotov* (fn ) [52]. [↑](#footnote-ref-925)
926. *Radio France* (fn ). [↑](#footnote-ref-926)
927. (1995) 20 EHRR 1. [↑](#footnote-ref-927)
928. *ibid*., [49]. [↑](#footnote-ref-928)
929. Quane (fn ) 115. [↑](#footnote-ref-929)
930. *ibid*. [↑](#footnote-ref-930)
931. *ibid*. [↑](#footnote-ref-931)
932. *16 Austrian Communes and some of their councillors v Austria* App nos 5767/72 and 5922/72 (ECommHR, 31 May 1974). See also *Rothenthurm Commune v Switzerland* App no 13252/87 (ECommHR, 14 December 1988); *Ayuntamiento de Mula* (fn ). [↑](#footnote-ref-932)
933. *Consejo General de Colegios Oficiales de Economistas de España v Spain* (1995) DR 82-B. [↑](#footnote-ref-933)
934. (1997) DR 90-B. [↑](#footnote-ref-934)
935. *Consejo General* (fn ). [↑](#footnote-ref-935)
936. *RENFE* (fn ). [↑](#footnote-ref-936)
937. *ibid*. [↑](#footnote-ref-937)
938. *ibid*. [↑](#footnote-ref-938)
939. *ibid*. [↑](#footnote-ref-939)
940. Quane (fn ) 117. [↑](#footnote-ref-940)
941. *Consejo General* (fn ) (emphasis added); Quane (*ibid*.). [↑](#footnote-ref-941)
942. *ibid*. [↑](#footnote-ref-942)
943. *ibid*. [↑](#footnote-ref-943)
944. *Aston Cantlow* (fn ) [11] (Lord Nicholls), [41] (Lord Hope). [↑](#footnote-ref-944)
945. See *RENFE* (fn ); *16 Austrian Communes* (fn ); *Rothenthurm Commune* (fn ); *Danderyds* (fn ); *Ayuntamiento de Mula* (fn ). Whilst a settled principle of Strasbourg case-law, Davis (fn ) has criticised Strasbourg’s denial of Convention rights to governmental organisations from a normative perspective. [↑](#footnote-ref-945)
946. *Radio France* (fn ) [26]. [↑](#footnote-ref-946)
947. *ibid*. [↑](#footnote-ref-947)
948. Quane (fn ) 118. [↑](#footnote-ref-948)
949. *Radio France* (fn ) [26]. [↑](#footnote-ref-949)
950. *ibid*. [↑](#footnote-ref-950)
951. *ibid.* [↑](#footnote-ref-951)
952. *ibid*. [↑](#footnote-ref-952)
953. *ibid*. [↑](#footnote-ref-953)
954. *ibid*. [↑](#footnote-ref-954)
955. *ibid*. [↑](#footnote-ref-955)
956. Oliver (fn ) 481. [↑](#footnote-ref-956)
957. *Radio France* (fn ) [26]. [↑](#footnote-ref-957)
958. *Danderyds* (fn ), applied in *Government of the Basque Country Community v Spain* App no 29134/03 (ECtHR, 3 February 2004). See also *Province of Bari v Italy* App no 4177/98 (ECommHR, 15 September 1998); *Consejo General* (fn ); *RENFE* (fn ). [↑](#footnote-ref-958)
959. *Derbyshire County Council v The Times Newspapers Ltd* [1993] AC 534 (HL). [↑](#footnote-ref-959)
960. *Observer and Guardian v United Kingdom* (1992) 14 EHRR 153; *Jersild v Denmark* (1995) 19 EHRR 1. [↑](#footnote-ref-960)
961. *Radio France* (fn ) [26]. [↑](#footnote-ref-961)
962. App no 35841/02 (ECtHR, 7 December 2006). [↑](#footnote-ref-962)
963. App no 10734/05 (ECtHR, 7 December 2010) [19]. [↑](#footnote-ref-963)
964. App no 35016/03 (ECtHR, 21 October 2010). [↑](#footnote-ref-964)
965. *Mykhaylenky* (fn ). [↑](#footnote-ref-965)
966. *Sharenok v Ukraine* App no 35087/02 (ECtHR, 22 February 2005). [↑](#footnote-ref-966)
967. *Kotov v Russia* App no 54522/00 (ECtHR, 14 January 2010) [51], citing *Bobrova v Russia* App no 24654/03 (ECtHR, 17 November 2005) [16]. See also *Grainger v United Kingdom* App no 34940/10 (ECtHR, 10 July 2012) [42], the private entity being post-bailout Northern Rock. [↑](#footnote-ref-967)
968. *Mykhaylenky* (fn ). [↑](#footnote-ref-968)
969. *ibid*., [45]. [↑](#footnote-ref-969)
970. *ibid*. [↑](#footnote-ref-970)
971. *ibid*. [↑](#footnote-ref-971)
972. *ibid*. [↑](#footnote-ref-972)
973. App no 17899/02 (ECtHR, 4 April 2006). [↑](#footnote-ref-973)
974. *ibid*., [20]. For similarly crude reliance on *Mykhaylenky*, see *Kucherenko v Ukraine* App no 27347/02 (ECtHR, 15 December 2005) [25]; *Kletsova v Russia* App no 24842/04 (ECtHR, 12 April 2007) [29]; *Vostokmash Avanta v Ukraine* App no 8878/03 (ECtHR, 20 September 2007) [23]; *Stanskovskaya v Ukraine* App no 20984/04 (ECtHR, 11 December 2008) [25], [29]; *Yershova* (fn ) [62]. [↑](#footnote-ref-974)
975. *Saliyev* (fn ) [69]. [↑](#footnote-ref-975)
976. *ibid*., [65]. [↑](#footnote-ref-976)
977. *ibid*., [67]. [↑](#footnote-ref-977)
978. *ibid*., [66]. [↑](#footnote-ref-978)
979. Though for discussion see especially Danny Nicol, ‘Statutory Interpretation and Human Rights After *Anderson*’ [2004] PL 274; Aileen Kavanagh, ‘Statutory Interpretation and Human Rights After *Anderson*: A More Contextual Approach’ [2004] PL 537; Philip Sales and Richard Ekins, ‘Rights-Consistent Interpretation and the Human Rights Act 1998’ (2011) 127 LQR 217. [↑](#footnote-ref-979)
980. It is perhaps becoming more robust, however: see *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28, [2010] 2 AC 269. [↑](#footnote-ref-980)
981. For explicit statements see *ANS v ML* [2012] UKSC 30 [15] (Lord Reed); *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [60] (Lord Millett). [↑](#footnote-ref-981)
982. [2002] UKHL 10, [2002] 2 AC 291. [↑](#footnote-ref-982)
983. *ibid*., [41]. [↑](#footnote-ref-983)
984. Aileen Kavanagh defends the courts’ approach, however: ‘Strasbourg, the House of Lords or Elected Politicians: Who Decides About Rights After Re P? (2009) 72 MLR 828. [↑](#footnote-ref-984)
985. See e.g. Roger Masterman, ‘Section 2(1) of the Human Rights Act: Binding Domestic Courts to Strasbourg?’ [2004] PL 725; Jonathan Lewis, ‘The European Ceiling on Human Rights’ [2007] PL 720. [↑](#footnote-ref-985)
986. [2001] UKHL 23, [2003] 2 AC 295 [26]. [↑](#footnote-ref-986)
987. [2004] UKHL 26, [2004] 2 AC 323 [20]. [↑](#footnote-ref-987)
988. See especially Masterman (fn ) 727-730. [↑](#footnote-ref-988)
989. E.g. Ed Bates, ‘British Sovereignty and the European Court of Human Rights’ (2012) 128 LQR 382, 410; Brenda Hale, ‘Argentoratum Locutum: is Strasbourg or the Supreme Court supreme? [2012] HRL Rev 65, 71-77. [↑](#footnote-ref-989)
990. (2009) 49 EHRR 1. [↑](#footnote-ref-990)
991. *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373 [11] (Lord Phillips PSC). *Horncastle* is said to be a ‘portent new approach’: Lord Kerr, ‘The Conversation Between Strasbourg and National Courts – Dialogue or Dictation?’ (2009) 44 *Irish Jurist* 1, 12. [↑](#footnote-ref-991)
992. Masterman (fn ) 727-730. [↑](#footnote-ref-992)
993. *ibid*., 727. [↑](#footnote-ref-993)
994. See further Roger Masterman, ‘Taking the Strasbourg Jurisprudence into Account: Developing a “Municipal Law of Human Rights” Under the Human Rights Act’ (2005) ICLQ 907, 908; Elizabeth Wicks, ‘Taking Account of Strasbourg? The British Judiciary’s Approach to Interpreting Convention Rights’ (2005) 11 EPL 405. [↑](#footnote-ref-994)
995. Masterman (fn ) 727. See also Lewis (fn ) 731-732. [↑](#footnote-ref-995)
996. As Masterman said of the courts’ approach (*ibid*.), ‘it comes close to domestic courts being bound to follow the Convention case law’. [↑](#footnote-ref-996)
997. See also Kavanagh (fn ) 832. [↑](#footnote-ref-997)
998. [1944] KB 718 (CA). [↑](#footnote-ref-998)
999. This is Kavanagh’s interpretation of the law: fn , 832. See also Aileen Kavanagh, *Constitutional Review Under the UK Human Rights Act* (CUP 2009) 147-148. [↑](#footnote-ref-999)
1000. Philip Sales, ‘Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine’ [2012] PL 253, 256. [↑](#footnote-ref-1000)
1001. For discussion see Kavanagh (*ibid*.) 150-152; Francesca Klug and Helen Wildbore, ‘Follow or Lead? The Human Rights Act and the European Court of Human Rights’ [2010] EHRLR 621; Alison Young, ‘Is Dialogue Working Under the Human Rights Act?’ [2011] PL 773, 790-793. [↑](#footnote-ref-1001)
1002. This is not an abdication of responsibility to Strasbourg, as Wicks (fn , 414) puts it, if it represents a correct interpretation of s 2. [↑](#footnote-ref-1002)
1003. Sales and Ekins (fn ) 228. [↑](#footnote-ref-1003)
1004. Kavanagh (fn ) 153. [↑](#footnote-ref-1004)
1005. [2002] UKHL 447, [2003] 1 AC 976 [46]. [↑](#footnote-ref-1005)
1006. *N v Secretary of State for the Home Department* [2005] UKHL 31, [2005] 2 AC 296 [25]. [↑](#footnote-ref-1006)
1007. The Supreme Court’s remarks in *Horncastle* could perhaps be justified on this basis: see Hale (fn ) 76-77. The approach also seems to find favour with Nicholas Bratza, ‘The Relationship Between the UK Courts and Strasbourg’ [2011] EHRLR 505, 512. [↑](#footnote-ref-1007)
1008. Baroness Hale’s terminology: *ibid.*, 69. [↑](#footnote-ref-1008)
1009. *Re P (Adoption: Unmarried Couples)* [2008] UKHL 38, [2009] 1 AC 173. [↑](#footnote-ref-1009)
1010. *Handyside v United Kingdom* (1979-80) 1 EHRR 737 [48]; *A v Ireland* (2011) 53 EHRR 13 [232]. [↑](#footnote-ref-1010)
1011. Kavanagh (fn ) 833. cf Eirik Bjorge, ‘National Supreme Courts and the Development of ECHR Rights’ (2011) 9 IJCL 5, 19. [↑](#footnote-ref-1011)
1012. Wicks (fn ) (emphasis added). See also Lewis (fn ) 729. [↑](#footnote-ref-1012)
1013. Masterman (fn ) 931; Richard Clayton, ‘Smoke and Mirrors: The Human Rights Act and the Impact of Strasbourg Case Law’ [2012] PL 639. See also *Re McKerr* [2004] UKHL 12, [2004] 1 WLR 807 [63] (Lord Hoffmann); Wicks (*ibid*.) 415; Lewis (*ibid*.) 724-725; *Re P* (fn ) [33] (Lord Hoffmann). [↑](#footnote-ref-1013)
1014. For discussion see Wicks (*ibid*.) 419-423. [↑](#footnote-ref-1014)
1015. Lord Irvine, ‘A British Interpretation of Convention Rights’ [2012] PL 237, 241. [↑](#footnote-ref-1015)
1016. *ibid*. [↑](#footnote-ref-1016)
1017. Masterman (fn ) 729. See also Masterman (fn ) 930; Wicks (fn ) 425-426. [↑](#footnote-ref-1017)
1018. cf Irvine (fn ) 247. [↑](#footnote-ref-1018)
1019. Kavanagh (fn ) 835. [↑](#footnote-ref-1019)
1020. *R (Anderson) v Secretary of State for the Home Department* [2001] EWCA Civ 1698, [2002] 2 WLR 1143 [91]. See further *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153 [105] (Lord Brown). [↑](#footnote-ref-1020)
1021. Kavanagh (fn ) 157. [↑](#footnote-ref-1021)
1022. *ibid*., 159 (emphasis original). [↑](#footnote-ref-1022)
1023. Sales (fn ) 260. [↑](#footnote-ref-1023)
1024. *ibid*. [↑](#footnote-ref-1024)
1025. *ibid*., 261. [↑](#footnote-ref-1025)
1026. Masterman (fn ) 729. [↑](#footnote-ref-1026)
1027. They do not affect the validity of Convention-incompatible legislation: s 4(6)(a). [↑](#footnote-ref-1027)
1028. Sales (fn ) 260, 266. [↑](#footnote-ref-1028)
1029. Hansard HL vol 583 col 1271. cf Irvine (fn ). [↑](#footnote-ref-1029)
1030. *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465. [↑](#footnote-ref-1030)
1031. *ibid*., [43]-[44] (Lord Bingham). [↑](#footnote-ref-1031)
1032. *YL* (fn ) [99] (Lord Mance), [161] (Lord Neuberger). [↑](#footnote-ref-1032)
1033. Williams (fn ) 147. [↑](#footnote-ref-1033)
1034. ‘Possibly’, because Strasbourg also seems to have suggested in the alternative that the body was a governmental organisation: see text to fnn -. [↑](#footnote-ref-1034)
1035. [2003] EWCA Civ 1056, [2004] 1 WLR 233. [↑](#footnote-ref-1035)
1036. See [86], [122]. [↑](#footnote-ref-1036)
1037. Williams (fn ) 147-148. [↑](#footnote-ref-1037)
1038. I discuss the link in chapter seven. [↑](#footnote-ref-1038)
1039. For cross-jurisdictional analysis of the horizontal effect issue, see Dawn Oliver and Jörg Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study* (Routledge 2007). [↑](#footnote-ref-1039)
1040. See Phillipson (fn ) 149-150. [↑](#footnote-ref-1040)
1041. Gavin Phillipson and Alexander Williams, ‘Horizontal Effect and the Constitutional Constraint’ (2011) 74 MLR 878. [↑](#footnote-ref-1041)
1042. See notably William Wade, ‘Horizons of horizontality’ (2000) 116 LQR 217. [↑](#footnote-ref-1042)
1043. As chapter seven explains, however, there are some differences between the two schemes other than their respective scopes. [↑](#footnote-ref-1043)
1044. Stephen Gardbaum, ‘Where the (state) action is’ (2006) 4 IJCL 760, 764. [↑](#footnote-ref-1044)
1045. Phillipson and Williams (fn ) 880. [↑](#footnote-ref-1045)
1046. *ibid*. [↑](#footnote-ref-1046)
1047. Jonathan Morgan, ‘Questioning the “True Effect” of the Human Rights Act’ (2002) 22 LS 259. [↑](#footnote-ref-1047)
1048. Shaun Pattinson and Deryck Beyleveld, ‘Horizontal Applicability and Horizontal Effect’ (2002) 118 LQR 623. [↑](#footnote-ref-1048)
1049. Wade (fn ) 220. [↑](#footnote-ref-1049)
1050. Pattinson and Beyleveld (fn ) 634-635. [↑](#footnote-ref-1050)
1051. Phillipson and Williams (fn ) 891. Sections 7 and 8, of course, only concern public authorities. [↑](#footnote-ref-1051)
1052. *ibid*., 881-884. [↑](#footnote-ref-1052)
1053. Morgan (fn ) 271. [↑](#footnote-ref-1053)
1054. Phillipson and Williams (fn ). [↑](#footnote-ref-1054)
1055. *ibid*., 888-890. [↑](#footnote-ref-1055)
1056. Aileen Kavanagh, ‘The Elusive Divide Between Interpretation and Legislation Under the Human Rights Act 1998’ (2004) 24 OJLS 259, 271. [↑](#footnote-ref-1056)
1057. Phillipson and Williams (fn ) 894. Section 6(6) HRA even appears to imply that the constitutional constraint of incrementalism is preserved: *ibid*., 892-894. [↑](#footnote-ref-1057)
1058. *ibid*., 886. [↑](#footnote-ref-1058)
1059. This is the model I advance with Gavin Phillipson (*ibid*.). [↑](#footnote-ref-1059)
1060. *ibid*., 884-885. [↑](#footnote-ref-1060)
1061. Although for discussion, see Phillipson and Williams (*ibid*.) 903-907. [↑](#footnote-ref-1061)
1062. For discussion see Phillipson (fn ). [↑](#footnote-ref-1062)
1063. See notably Gavin Phillipson, ‘Privacy: The Development of Breach of Confidence – The Clearest Case of Horizontal Effect?’, in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011). [↑](#footnote-ref-1063)
1064. They have therefore eschewed Sir Richard Buxton’s extreme extra-judicial view that any obligation to give horizontal effect would ‘beat the air.’: ‘The Human Rights Act and Private Law’ (2000) 116 LQR 48, 56. [↑](#footnote-ref-1064)
1065. See especially *Douglas v Hello! Ltd* [2001] QB 967 (CA) , in which the transformation began. [↑](#footnote-ref-1065)
1066. [2004] UKHL 22, [2004] 2 AC 457 [132]. [↑](#footnote-ref-1066)
1067. Thomas Bennett, ‘Horizontality’s New Horizons – Re-Examining Horizontal Effect: Privacy, Defamation and the Human Rights Act: Part 1’ [2010] Ent LR 96; Part 2 [2010] Ent LR 145. [↑](#footnote-ref-1067)
1068. Nicole Moreham, ‘Privacy and Horizontality: Relegating the Common Law’ (2007) 123 LQR 373. [↑](#footnote-ref-1068)
1069. *Campbell* (fn ) [14]. [↑](#footnote-ref-1069)
1070. Phillipson (fn ) 150-158. [↑](#footnote-ref-1070)
1071. *ibid*. [↑](#footnote-ref-1071)
1072. For discussion see Phillipson (fn ). [↑](#footnote-ref-1072)
1073. *Campbell* (fn ) [17]. This would resemble the ‘weak’ indirect horizontal effect model, on which see Gavin Phillipson, ‘The Human Rights Act, ‘Horizontal Effect’ and the Common Law: A Bang or a Whimper?’ (1999) 62 MLR 824. [↑](#footnote-ref-1073)
1074. *ibid*., [20]-[21]. [↑](#footnote-ref-1074)
1075. This may be termed the ‘radical distortion’ model. It is commonly thought to have the same effect as the ‘strong’ indirect horizontal effect model advanced by Murray Hunt, ‘The “Horizontal Effect” of the Human Rights Act’ [1998] PL 423, but a closer reading of Hunt’s work shows that his position may actually have been more akin to the constitutional constraint model than many have thought: see Phillipson and Williams (fn ) 884-885. [↑](#footnote-ref-1075)
1076. [2008] EWCA Civ 446, [2009] Ch 481 [27]. See also *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB). [↑](#footnote-ref-1076)
1077. See especially Paul Craig, ‘Contracting Out, the Human Rights Act and the Scope of Judicial Review’ (2002) 118 LQR 551. [↑](#footnote-ref-1077)
1078. In *R (Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587, [2010] 1 WLR 363. [↑](#footnote-ref-1078)
1079. [2007] UKHL 27, [2008] 1 AC 95. [↑](#footnote-ref-1079)
1080. Alexander Williams, ‘What is a Hybrid Public Authority Under the HRA?’, in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011) 52. [↑](#footnote-ref-1080)
1081. See Alexander Williams, ‘A Fresh Perspective on Hybrid Public Authorities Under the Human Rights Act: Private Contractors, Rights-Stripping and “Chameleonic” Horizontal Effect’ [2011] PL 139. [↑](#footnote-ref-1081)
1082. In *Poplar Housing and Regeneration Community Association v Donoghue* [2001] EWCA Civ 595, [2002] QB 48; *R (Beer) v Hampshire Farmers’ Markets Ltd* [2003] EWCA Civ 1056, [2004] 1 WLR 233. [↑](#footnote-ref-1082)
1083. This is criticised even by Dawn Oliver, who advocates a relatively narrow reading of s 6(3)(b): ‘Functions of a Public Nature Under the Human Rights Act’ [2004] PL 329, 332. Her thesis is examined below. [↑](#footnote-ref-1083)
1084. *Poplar Housing* (fn ). [↑](#footnote-ref-1084)
1085. [2002] EWCA Civ 366, [2002] HRLR 30 [20]-[21], [35] (Lord Woolf CJ). [↑](#footnote-ref-1085)
1086. Buxton LJ attempted a brief and rather unconvincing defence of the *Leonard Cheshire* approach in *YL*, however: [2007] EWCA Civ 26, [2007] 2 WLR 1097 [45]-[52]. [↑](#footnote-ref-1086)
1087. *Leonard Cheshire* (fn ) [15]. [↑](#footnote-ref-1087)
1088. *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [41]. [↑](#footnote-ref-1088)
1089. *YL* (fn ) [61] (Baroness Hale), [105] (Lord Mance). [↑](#footnote-ref-1089)
1090. *Weaver* (fn ). [↑](#footnote-ref-1090)
1091. *ibid*., [97]. [↑](#footnote-ref-1091)
1092. *ibid*., [38]. [↑](#footnote-ref-1092)
1093. *ibid*., [126]. [↑](#footnote-ref-1093)
1094. *ibid*. [↑](#footnote-ref-1094)
1095. *Beer* (fn ) [25] (Dyson LJ), [47] (Longmore LJ). [↑](#footnote-ref-1095)
1096. *YL* (fn ) [116] (Lord Mance). See also [26] (Lord Scott). [↑](#footnote-ref-1096)
1097. *Weaver* (fn ) [153]. [↑](#footnote-ref-1097)
1098. Jonny Landau, ‘Functional Public Authorities After *YL’* [2007] PL 630, 636. [↑](#footnote-ref-1098)
1099. See also Stephanie Palmer, ‘Public Functions and Private Services: A Gap in Human Rights Protection’ (2008) 6 IJCL 585, 601. [↑](#footnote-ref-1099)
1100. As chapter six explained. [↑](#footnote-ref-1100)
1101. [2002] EWHC 529 (Admin), [2002] 1 WLR 2610. [↑](#footnote-ref-1101)
1102. *Weaver* (fn ) [71] (Elias LJ), [101] (Lord Collins MR). [↑](#footnote-ref-1102)
1103. *ibid*., [70]. [↑](#footnote-ref-1103)
1104. As explained in chapter one. See also Rix LJ (*ibid*.) [155]. [↑](#footnote-ref-1104)
1105. *Beer* (fn ) [40] (Dyson LJ). [↑](#footnote-ref-1105)
1106. *Poplar Housing* (fn ) 69. [↑](#footnote-ref-1106)
1107. *West Kent Housing Association Ltd v Haycraft* [2012] EWCA Civ 276 continues the trend. Here, the Court of Appeal straightforwardly considered an Art-8 based claim against a registered social landlord without even considering whether it was a public authority. [↑](#footnote-ref-1107)
1108. *Weaver* (fn ) [58]. [↑](#footnote-ref-1108)
1109. E.g. *Goldsmith*, discussed at text to fn . [↑](#footnote-ref-1109)
1110. *Weaver* (fn ) [71]. [↑](#footnote-ref-1110)
1111. *ibid*., [119]. [↑](#footnote-ref-1111)
1112. *Aston Cantlow* (fn ) [12] (Lord Nicholls). [↑](#footnote-ref-1112)
1113. *YL* (fn ) [65]. [↑](#footnote-ref-1113)
1114. See also *YL* (*ibid*.) [5]-[13] (Lord Bingham). [↑](#footnote-ref-1114)
1115. *Weaver* (fn ) [148]-[159]. [↑](#footnote-ref-1115)
1116. *ibid*., [72]. [↑](#footnote-ref-1116)
1117. See *Aston Cantlow* (fn ) [12] (Lord Nicholls). [↑](#footnote-ref-1117)
1118. David Feldman, ‘Changes in Human Rights’, in Michael Adler (ed), *Administrative Justice in Context* (Hart 2010) 113. [↑](#footnote-ref-1118)
1119. *Weaver* (fn ) [72]. [↑](#footnote-ref-1119)
1120. Paul Craig, ‘Public Law Control Over Private Power’, in Michael Taggart (ed), *The Province of Administrative Law* (Hart 1997) 196. [↑](#footnote-ref-1120)
1121. The analysis in this part derives from my work at fnn and . [↑](#footnote-ref-1121)
1122. See HRA, ss 7(1) and 7(7). [↑](#footnote-ref-1122)
1123. It is clear however that companies, being legal persons, would be unable to rely on certain rights such as Art 3. [↑](#footnote-ref-1123)
1124. These are given by s 7(1). [↑](#footnote-ref-1124)
1125. These were the facts of *Jain v Trent Strategic Health Authority* [2009] UKHL 4, [2009] 1 AC 853. The claimants were unable to make the Convention argument because the facts pre-dated the HRA’s entry into force. [↑](#footnote-ref-1125)
1126. Williams (fn ) 58. [↑](#footnote-ref-1126)
1127. So termed in *Boddington v British Transport Police* [1999] 2 AC 143 (HL). [↑](#footnote-ref-1127)
1128. [2001] EWHC Admin 429, [2001] ACD 75 [71]. See also Richard Buxton, ‘Private Life and the English Judges’ (2009) 29 OJLS 413, 416. [↑](#footnote-ref-1128)
1129. Catherine Donnelly, Delegation of Governmental Power to Private Parties: A Comparative Perspective (OUP 2007) 261. [↑](#footnote-ref-1129)
1130. See also *YL* (fn ) [75]-[77] (Buxton LJ). [↑](#footnote-ref-1130)
1131. [2001] QB 967 (CA). [↑](#footnote-ref-1131)
1132. Section 6(3)(a), of course, renders it a public authority. [↑](#footnote-ref-1132)
1133. *Leonard Cheshire* (fn ) [73]. [↑](#footnote-ref-1133)
1134. Buxton (fn ) 416-417. [↑](#footnote-ref-1134)
1135. See text to fnn -. [↑](#footnote-ref-1135)
1136. Gavin Phillipson, ‘Privacy: The Development of Breach of Confidence – The Clearest Case of Horizontal Effect?’, in Hoffman (fn ). [↑](#footnote-ref-1136)
1137. As discussed in Williams (fn ) 62-63. [↑](#footnote-ref-1137)
1138. As explained in chapter six. [↑](#footnote-ref-1138)
1139. *YL* (fn ) [116]. [↑](#footnote-ref-1139)
1140. *Klass v Germany* (1979-80) 2 EHRR 214 [42]. [↑](#footnote-ref-1140)
1141. *Golder v United Kingdom* (1979-80) 1 EHRR 524 [44]. However, Strasbourg has previously allowed states to rely on the ‘rights and freedoms of others’ limitation without specifically stating what those rights and freedoms are: see e.g. *Steel v United Kingdom* (1999) 28 EHRR 603. See also Helen Fenwick and Gavin Phillipson, ‘Public Protest, the Human Rights Act and Judicial Responses to Political Expression’ [2000] PL 627, 643. [↑](#footnote-ref-1141)
1142. *Campbell v MGN* [2004] UKHL 22, [2004] 2 AC 457 [132] (Baroness Hale). [↑](#footnote-ref-1142)
1143. cf *YL* (fn ) [60]-[61] (Baroness Hale). [↑](#footnote-ref-1143)
1144. As argued above: text to fnn -. [↑](#footnote-ref-1144)
1145. *YL* (fn ) [128]. [↑](#footnote-ref-1145)
1146. Text to fnn -. [↑](#footnote-ref-1146)
1147. *ANS v ML* [2012] UKSC 30 [16]. [↑](#footnote-ref-1147)
1148. ‘Typically’ because Parliament may supply these principles itself, as under s 1 of the Constitutional Reform Act 2005: ‘This Act does not adversely affect… the existing constitutional principle of the rule of law.’ [↑](#footnote-ref-1148)
1149. Randal Graham, ‘A Unified Theory of Statutory Interpretation’ (2002) 23 Stat LR 91, 121. [↑](#footnote-ref-1149)
1150. *ibid*. [↑](#footnote-ref-1150)
1151. *ibid*., 116. [↑](#footnote-ref-1151)
1152. *ibid*., 119. [↑](#footnote-ref-1152)
1153. *ibid*., 132. [↑](#footnote-ref-1153)
1154. *ibid*., 116. [↑](#footnote-ref-1154)
1155. Reed Dickerson, ‘The Diseases of Legislative Language’ 1 *Harvard Journal on Legislation* (1964) 5, 9. [↑](#footnote-ref-1155)
1156. See Graham’s examples (fn ) 120-121. [↑](#footnote-ref-1156)
1157. Francis Bennion, *Statute Law* (Oyez Publishing 1980) 120. [↑](#footnote-ref-1157)
1158. Graham (fn ) 123. [↑](#footnote-ref-1158)
1159. As explained also in chapter one. [↑](#footnote-ref-1159)
1160. As it did in the Sexual Offences Act 2003, for example, by prescribing evidential presumptions as to the victim’s consent: see ss 75 and 76. [↑](#footnote-ref-1160)
1161. *YL* (fn ) [82]. [↑](#footnote-ref-1161)
1162. For the avoidance of doubt, this is not the attribution to Parliament of a ‘personal’, conscious attitude of the kind Elliott was criticised for attributing in chapter two (text to fnn -). It is simply the use of context and principle to determine the meaning of a vague statutory term. [↑](#footnote-ref-1162)
1163. See chapter five. [↑](#footnote-ref-1163)
1164. cf *Leonard Cheshire* (fn ) [65] (Stanley Burnton J). [↑](#footnote-ref-1164)
1165. Graham (fn ) 124. [↑](#footnote-ref-1165)
1166. *ibid*. [↑](#footnote-ref-1166)
1167. [1982] QB 1053 (CA). [↑](#footnote-ref-1167)
1168. E.g. *R v Hinks* [2001] 2 AC 241 (HL). [↑](#footnote-ref-1168)
1169. [2011] EWCA Crim 1305. [↑](#footnote-ref-1169)
1170. Hansard HL vol 673 col 1424 (19 July 2005) (Lord Goldsmith A-G). See further David Ormerod, ‘The Fraud Act 2006 – Criminalising Lying?’ [2007] Crim LR 193, 200. [↑](#footnote-ref-1170)
1171. *Poplar Housing* (fn ) 69. [↑](#footnote-ref-1171)
1172. *Leonard Cheshire* (fn ) [65]. [↑](#footnote-ref-1172)
1173. *Leonard Cheshire* (fn ) [35]-[36] (Lord Woolf CJ); *Partnerships in Care* (fn ) [9] (Keith J). [↑](#footnote-ref-1173)
1174. *Aston Cantlow* (fn ) [52]. See also [87] (Lord Hobhouse). [↑](#footnote-ref-1174)
1175. E.g. *R (West) v Lloyd’s of London*[2004] EWCA 506 (Civ) [34]-[35] (Brooke LJ); *R (Mullins) v The Appeal Board of the Jockey Club*[2005] EWHC 2197 (Admin) [42] (Stanley Burnton J). [↑](#footnote-ref-1175)
1176. *YL* (fn ) [51]. [↑](#footnote-ref-1176)
1177. *Beer* (fn ) [29]. [↑](#footnote-ref-1177)
1178. *YL* (fn ) [12] (Lord Bingham), [156] (Lord Neuberger). [↑](#footnote-ref-1178)
1179. *ibid*., [101]. [↑](#footnote-ref-1179)
1180. [2008] EWHC 1377 (Admin) [60]. [↑](#footnote-ref-1180)
1181. *ibid*., [64]. [↑](#footnote-ref-1181)
1182. *Weaver* (fn ) [83]. [↑](#footnote-ref-1182)
1183. Oliver (fn ) 346. [↑](#footnote-ref-1183)
1184. As their Lordships realised in *Aston Cantlow* (fn ). [↑](#footnote-ref-1184)
1185. Such as the universities cases (discussed in chapter three). [↑](#footnote-ref-1185)
1186. Oliver (fn ) 330. In reply, see Maurice Sunkin, ‘Pushing Forward the Frontiers of Human Rights Protection: The Meaning of Public Authority Under the Human Rights Act’ [2004] PL 643, 649-653. It should be clear that I disagree with Sunkin’s view that Parliament intends a focus on the issue of the individual’s consent *in fact* to the power wielded over them by the defendant. [↑](#footnote-ref-1186)
1187. *ibid*., 340. [↑](#footnote-ref-1187)
1188. *ibid*. [↑](#footnote-ref-1188)
1189. *ibid.,* 342-346. [↑](#footnote-ref-1189)
1190. *ibid*., 350. [↑](#footnote-ref-1190)
1191. *ibid*., 340. [↑](#footnote-ref-1191)
1192. *ibid*., 343-344. [↑](#footnote-ref-1192)
1193. *ibid*., 337. [↑](#footnote-ref-1193)
1194. See chapter three. [↑](#footnote-ref-1194)
1195. As with *Datafin*, discussed in chapter four. [↑](#footnote-ref-1195)
1196. Including by Bennett J: [2006] EWHC 2681 (Fam). [↑](#footnote-ref-1196)
1197. *YL* (fn ) [66] (Buxton LJ). [↑](#footnote-ref-1197)
1198. *ibid*., [67]-[78]. [↑](#footnote-ref-1198)
1199. *ibid*., [69]. [↑](#footnote-ref-1199)
1200. *ibid*., [76]. [↑](#footnote-ref-1200)
1201. *YL* (fn ) [95]. [↑](#footnote-ref-1201)
1202. Joint Committee on Human Rights, *The Meaning of Public Authority Under the Human Rights Act* (2003-04, HL 39, HC 382) [140]. [↑](#footnote-ref-1202)
1203. *ibid*., [144]. [↑](#footnote-ref-1203)
1204. *ibid*., [141]. [↑](#footnote-ref-1204)
1205. *YL* (fn ) [8]-[9]. He also said he ‘fully agreed’ with Baroness Hale: [2]. [↑](#footnote-ref-1205)
1206. *ibid*., [8]. [↑](#footnote-ref-1206)
1207. *ibid*., [65]. [↑](#footnote-ref-1207)
1208. See especially John Allison, *A Continental Distinction in the Common Law* (OUP 2000). Baroness Hale gave a list of factors relevant to the issue, however, such as the extent of public funding and whether the body exercises any statutory coercive powers: *ibid*., [67]-[72]. [↑](#footnote-ref-1208)
1209. *ibid*., [68]. [↑](#footnote-ref-1209)
1210. As Baroness Hale herself recognised (*ibid*.). [↑](#footnote-ref-1210)
1211. Kate Markus, ‘*Leonard Cheshire Foundation*: What is a Public Function?’ [2003] EHRLR 92, 99. [↑](#footnote-ref-1211)
1212. *ibid*. [↑](#footnote-ref-1212)
1213. Joint Committee on Human Rights, *The Meaning of Public Authority Under the Human Rights Act* (2006-07, HL 77, HC 410) [150]. [↑](#footnote-ref-1213)
1214. Human Rights Act 1998 (Meaning of Public Authority) HC Bill (2006-2007) [43], cl 1. For brief analysis see Alexander Williams, ‘*YL v Birmingham City Council:* Contracting Out and “Functions of a Public Nature”’ [2008] EHRLR 524, 529. [↑](#footnote-ref-1214)
1215. Human Rights Act 1998 (Meaning of Public Function) HC Bill (2007-2008) [45]. [↑](#footnote-ref-1215)
1216. Human Rights Act 1998 (Meaning of Public Authority) HC Bill (2008-2009) [42]; Human Rights Act 1998 (Meaning of Public Authority) HC Bill (2009-2010) [39]. [↑](#footnote-ref-1216)
1217. *ibid*., cl 2. [↑](#footnote-ref-1217)
1218. *ibid*., cl 1. [↑](#footnote-ref-1218)
1219. *Poplar Housing* (fn ) 69. [↑](#footnote-ref-1219)
1220. *Aston Cantlow* (fn ) [16]. [↑](#footnote-ref-1220)
1221. *YL* (fn ) [62]. [↑](#footnote-ref-1221)
1222. *Weaver* (fn ) [147]. [↑](#footnote-ref-1222)
1223. *Aston Cantlow* (fn ) [88]. [↑](#footnote-ref-1223)
1224. *YL* (fn ) [130]. [↑](#footnote-ref-1224)
1225. *ibid.,* [34]. [↑](#footnote-ref-1225)
1226. *Weaver* (fn ) [76]. [↑](#footnote-ref-1226)
1227. *ibid*., [102]. [↑](#footnote-ref-1227)
1228. See also Jack Beatson and others, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell 2008) 341. [↑](#footnote-ref-1228)
1229. A similar concern was also expressed in Parliament – albeit in relation to core public authorities, on the mistaken assumption that s 6(5) would also apply to them: Hansard HL vol 583 col 810 (24 November 1997) (Lord Meston). *Procedurally*, the courts may still decide, however, that there are more appropriate mechanisms for pursuing a HRA-based claim for assault than through judicial review: *R (Ruddy) v Chief Constable of Strathclyde* [2012] UKSC 57. [↑](#footnote-ref-1229)
1230. cf Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (2nd edn, OUP 2009) 246, who argue that the distinction between reviewable and non-reviewable activities in judicial review might guide the courts here. [↑](#footnote-ref-1230)
1231. Emphasis added. [↑](#footnote-ref-1231)
1232. Landau (fn ) 632. [↑](#footnote-ref-1232)
1233. *ibid*. [↑](#footnote-ref-1233)
1234. *Aston Cantlow* (fn ) [16]. [↑](#footnote-ref-1234)
1235. *Weaver* (fn ) [95]. [↑](#footnote-ref-1235)
1236. *ibid*., [125] (emphasis original). [↑](#footnote-ref-1236)
1237. *ibid*., [28]. [↑](#footnote-ref-1237)
1238. *ibid*., [53]. [↑](#footnote-ref-1238)
1239. This may have been an error, as Rix LJ observed: *ibid*., [114]. [↑](#footnote-ref-1239)
1240. *ibid*., [101]. [↑](#footnote-ref-1240)
1241. Space precludes a useful analysis of the position of the Press Complaints Commission, which was presumed to be a public authority for both judicial review and HRA purposes in *R (Anna Ford) v Press Complaints Commission* [2001] EWHC Admin 683. [↑](#footnote-ref-1241)
1242. *Partnerships in Care* (fn ). [↑](#footnote-ref-1242)
1243. Section 942(2). [↑](#footnote-ref-1243)
1244. The position of charities was discussed in chapter one. [↑](#footnote-ref-1244)
1245. *Mullins* (fn ). [↑](#footnote-ref-1245)
1246. See discussion at text to fnn -. [↑](#footnote-ref-1246)
1247. *YL* (fn ) [141]. [↑](#footnote-ref-1247)
1248. Williams (fn ) 529 [↑](#footnote-ref-1248)
1249. cf Oliver (fn ) 340. [↑](#footnote-ref-1249)
1250. It is unlikely that the function would additionally be public under strand one. As discussed in chapter six, the *Costello-Roberts* principle is relatively narrow and would not seem to stretch this far. [↑](#footnote-ref-1250)
1251. *Weaver* (fn ) [80] (Elias LJ). [↑](#footnote-ref-1251)
1252. (2006) 43 EHRR 53. [↑](#footnote-ref-1252)
1253. *Weaver* (fn ) [119]. [↑](#footnote-ref-1253)
1254. cf *Buckland v United Kingdom* App no 40060/08 (ECtHR, 18 September 2012) [65], where Strasbourg appeared to suggest that all landlords – private and state – must act proportionately under Art 8 ECHR when evicting people from their homes. The case itself involved a local authority, however, and there was no specific mention of the private indirect responsibility principle. [↑](#footnote-ref-1254)
1255. Housing Act 1996, s 170. [↑](#footnote-ref-1255)
1256. See further *Peabody Housing Association v Green* (1979) 38 P & CR 644 (CA). [↑](#footnote-ref-1256)
1257. Helen Fenwick and Gavin Phillipson, *Media Freedom Under the Human Rights Act* (OUP 2006) 114. The Commission had previously left the BBC’s Art 34 status open: *BBC Scotland, McDonald, Rodgers and Donald v United Kingdom* (1998) 25 EHRR CD179; *BBC v United Kingdom* (1996) 21 EHRR CD93. [↑](#footnote-ref-1257)
1258. Department for Culture, Media and Sport, ‘An Agreement Between Her Majesty’s Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation’ (Cm 6872, 2006) Part 75(1). [↑](#footnote-ref-1258)
1259. Art 3(1), HM Privy Council, ‘Charter of Incorporation of the British Broadcasting Corporation 2006’ <http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory\_framework/charter\_agreement/royalchartersealed\_sept06.pdf> accessed 4 September 2012 (emphasis added). [↑](#footnote-ref-1259)
1260. *ibid*., Art 9(2). [↑](#footnote-ref-1260)
1261. *ibid*., Art 7(1). [↑](#footnote-ref-1261)
1262. BBC, ‘A Brief History Of The BBC’ <http://www.bbc.co.uk/dna/h2g2/A30044459> accessed 24 January 2013. [↑](#footnote-ref-1262)
1263. Charter (fn ) Art 17. [↑](#footnote-ref-1263)
1264. *ibid*., Art 53. [↑](#footnote-ref-1264)
1265. *ibid*., 115. [↑](#footnote-ref-1265)
1266. *R (ProLife Alliance) v BBC* [2004] 1 AC 185 (HL). [↑](#footnote-ref-1266)
1267. ‘An Agreement…’ (fn ). [↑](#footnote-ref-1267)
1268. Fenwick and Phillipson (fn ) 120 (emphasis original). [↑](#footnote-ref-1268)
1269. *ibid*., 121-122. [↑](#footnote-ref-1269)
1270. *ibid*., 122 (emphasis original). [↑](#footnote-ref-1270)
1271. (2005) 40 EHRR 29. [↑](#footnote-ref-1271)
1272. This is in spite of the fact that Strasbourg has not yet clearly ruled to that effect: see the cases at fn . [↑](#footnote-ref-1272)
1273. See chapter four, text to fnn -. [↑](#footnote-ref-1273)
1274. *ProLife* (fn ) [1]. [↑](#footnote-ref-1274)
1275. BA, Sch 3, para 1(3). [↑](#footnote-ref-1275)
1276. See Channel Four Corporation, ‘About Channel 4’<http://www.channel4.com/info/corporate/legal/about-channel-4> accessed 4 September 2012. [↑](#footnote-ref-1276)
1277. E.g. ensuring a ‘significant contribution’ to ‘programmes of educative value’ (s 265(3)), which does not apply to Channels 3 and 5. [↑](#footnote-ref-1277)
1278. See Communications Act 2003, s 23 and Sch 3, para 4(1). [↑](#footnote-ref-1278)
1279. Section 6(1)(a) was repealed and the ITC’s role transferred to OFCOM by the Communications Act 2003. [↑](#footnote-ref-1279)
1280. Similarly with the BBC, although the regulator here would have been the Broadcasting Standards Commission rather than the ITC. [↑](#footnote-ref-1280)
1281. The *Radio France* exception would also apply to Channel 4, as an otherwise governmental organisation. [↑](#footnote-ref-1281)
1282. Emily Laidlaw, ‘The Responsibilities of Free Speech Regulators: An Analysis of the Internet Watch Foundation’ (2012) 20 *IJLIT* 1. [↑](#footnote-ref-1282)
1283. *ibid*., 15. [↑](#footnote-ref-1283)
1284. *ibid*., 14. [↑](#footnote-ref-1284)
1285. *ibid*., 5-6. [↑](#footnote-ref-1285)
1286. *ibid*., 4. [↑](#footnote-ref-1286)
1287. *ibid*., 6. [↑](#footnote-ref-1287)
1288. *ibid*., 24-26. [↑](#footnote-ref-1288)
1289. Laidlaw (fn ) 24-26. [↑](#footnote-ref-1289)
1290. *Sychev v Ukraine* App no 4773/02 (ECtHR, 11 October 2005) [↑](#footnote-ref-1290)
1291. See Directive 2011/93/EU, and discussion by Laidlaw (fn ) 24-25. [↑](#footnote-ref-1291)
1292. *West* (fn ). [↑](#footnote-ref-1292)
1293. *ibid*., [8]. [↑](#footnote-ref-1293)
1294. [1993] 1 Lloyd's Rep 176, 185. [↑](#footnote-ref-1294)
1295. *West* (fn ) [26]. [↑](#footnote-ref-1295)
1296. The Financial Services Act 2000 created the FSA. [↑](#footnote-ref-1296)
1297. *Aston Cantlow* (fn ). [↑](#footnote-ref-1297)
1298. *ibid*., [2]. [↑](#footnote-ref-1298)
1299. *ibid*., [58] (Lord Hope). [↑](#footnote-ref-1299)
1300. As discussed in chapter six. [↑](#footnote-ref-1300)
1301. See ss 2(1) and (2). [↑](#footnote-ref-1301)
1302. *Aston Cantlow* (fn ) [64] (Lord Hope). [↑](#footnote-ref-1302)
1303. For discussion see Legal Advisory Commission of the General Synod, ‘Registration and Enforcement of Chancel Repair Liability by Parochial Church Councils’ <www.churchofengland.org/media/51405/chancelrepairliability.rtf> accessed 5 September 2012. [↑](#footnote-ref-1303)
1304. See s 52. [↑](#footnote-ref-1304)
1305. [2006] EWHC 1133 (QB). [↑](#footnote-ref-1305)
1306. *ibid*., [35]. [↑](#footnote-ref-1306)
1307. *ibid*. [↑](#footnote-ref-1307)
1308. *ibid*. (emphasis removed.) [↑](#footnote-ref-1308)
1309. See Regulation 4. [↑](#footnote-ref-1309)
1310. CPR, Pt 54.3(2). [↑](#footnote-ref-1310)
1311. HRA, s 8(3). [↑](#footnote-ref-1311)
1312. *Lonrho v Shell Petroleum (No. 2)* [1982] AC 173 (HL); *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 (HL). [↑](#footnote-ref-1312)
1313. *Three Rivers DC v Bank of England (No. 3)* [2003] 2 AC 1 (HL). [↑](#footnote-ref-1313)
1314. Although, if bad faith is present, the improper purpose doctrine will apply in judicial review. [↑](#footnote-ref-1314)
1315. Murray Hunt, ‘Constitutionalism and the Contractualisation of Government in the United Kingdom’, in Michael Taggart (ed), *The Province of Administrative Law* (Hart 1997) 26 sees the law as in a state of transition from one to the other. [↑](#footnote-ref-1315)
1316. Paul Craig, ‘Public Law and Control Over Private Power’, in Taggart (*ibid*.) 198. [↑](#footnote-ref-1316)
1317. *ibid*., 200. [↑](#footnote-ref-1317)
1318. John Allison, ‘Theoretical and Institutional Underpinnings of a Separate Administrative Law’, in Taggart (fn ) 85. [↑](#footnote-ref-1318)
1319. *ibid*., 87-88. [↑](#footnote-ref-1319)