The Outer Limits of English Judicial Review

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I. *Introduction*

If two individuals, *A* and *B*, have a dispute over some purely private matter, and an English civil court finds that *A* has wronged *B*, the court is likely to award *B* a remedy. But *B* cannot, instead of seeking a remedy, ask the court to review *A*'s alleged wrongfulness to determine if *A*'s action (or inaction) shows him to have not understood, or to have disregarded, the extent of his legal powers.[1] But then why would *B* ever want a court to take this path? *B* is claiming that *A* failed to conform to an obligation he had to her, and so she wants the court to rule on liability for that failure. A court which understood its function to be to ascertain if *A* had somehow misinterpreted or exceeded his legal powers would be ignoring the simple fact that *B* litigated in the hope of getting a right enforced. If a court were to presume that *B* wanted nothing more than a determination as to whether *A* exercised his powers lawfully, it would be treating a private law action as if it were a judicial review application.

No English court would presume anything of the sort, because wholly private disputes are the domain of private law and judicial review belongs to public law.[2]

* Law Department, London School of Economics. I am grateful to Mark Aronson, Julia Black, Carol Harlow, Michael Lobban, Martin Loughlin, Thomas Poole, Grégoire Webber, and the journal's reviewers for comments on drafts.

[1] There will, of course, be instances where *B* challenges *A*'s exercise of (or failure to exercise) a power – as when beneficiary *B* objects to how trustee *A* has exercised a power of appointment under a trust – and a court might even use language similar to that used in the context of judicial review when ruling on that challenge (see, e.g., *Re Manisty's Settlement* [1974] Ch 17, 26 (Templeman J)). But these are not procedural challenges of the kind that a complainant makes when she objects that a public body has exercised its powers unlawfully.

[2] Public lawyers sometimes see parallels between some of the higher decision-making standards imposed in private law contexts (such as the fiduciary's obligation to act in good faith and in the interests of the beneficiaries) and the decision-making standards imposed on bodies governed by public law – the core argument being that the standards of considerate decision-making in public and private contexts correspond to such a degree that it makes little if any sense to speak of judicial review as if it were based on distinctively public law principles: see, e.g., Dawn Oliver, "Review of (Non-Statutory) Discretions", in *Judicial Review and the Constitution*, ed. C. Forsyth (Oxford: Hart, 2000), 307-325. The argument is tangential to this article and it is impossible to do it justice in a note. I would only suggest

The public-private distinction, however, is notoriously fuzzy. Reviewable decisions need not stay reviewable: some old cases in which *mandamus* lay to individuals removed from office, for example, were, by the twentieth century, being treated as employment contract disputes.[3] And certainly the domain of reviewability expands. Perhaps the most obvious modern illustration of expansion is the judicial shift of focus from the source to the nature of a decision-making body's power when determining reviewability, so that decisions made by private bodies whose powers are in some way woven into the fabric of government regulation (for example, where bodies carry out work which would otherwise have to be undertaken by a government department) can be amenable to judicial review.[4] Some public lawyers would have the courts broaden the scope of judicial review by developing yet more accommodating conceptions of public decision-making.[5] There have even been recommendations that the High Court's powers of judicial review should sometimes extend to the decisions of private operators performing non-public functions.[6]

But would anyone say that judicial review should be available to *B* when her grievance is confined to the allegation that *A*'s action (or inaction) contravenes his obligations under private law? The argument for extending the supervisory

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that it might not withstand careful scrutiny. The fact that trustees "[g]enerally … must not profit from the trust" (ibid 309), for example, seems not to support the conclusion that trustees are under the same "duties of selflessness and altruism" (ibid 310) as are public decision-makers (the word "generally" is presumably being used to capture the fact that, while fiduciaries will be stripped of secret profits, they will be entitled to profit from their position if authorized to do so by either the settlor or the beneficiaries). The argument might best be contested, in any event, on its conclusion rather than its detail. To conclude that public law and private law are conceptually alike seems but a precursor to the more intriguing question: yet we know that there *are* differences (that judicial review features in English public law, for example, but not in English private law) – how are we to account for these differences?

[3] See Stuart Anderson, "Judicial Review", in *The Oxford History of the Laws of England. Volume XI: 1820-1914 English Legal System*, ed. W. Cornish, S. Anderson, R. Cocks, M. Lobban, P. Polden & K. Smith (Oxford: OUP, 2010), 486-522 at 507; Stephen Sedley, *Freedom, Law and Justice* (London: Sweet & Maxwell, 1999), 36-7; and cf. *Middleton's case* (1662) 1 Sid. 169, where the King's Bench held that a *mandamus* should be granted to restore Middleton to his post as treasurer of a water company, even though the company "was only a thing of private concernment … not touching the public".

[4] *R. v Panel on Take-overs and Mergers, ex parte Datafin* [1987] QB 815 (CA). The test described in parenthesis of a private body performing a public function – that the body has undertaken an initiative which, had it not undertaken it, would have had to come within the remit of a government department – has regularly been criticized by administrative lawyers. It is sometimes difficult if not impossible to say with certainty that a task would have been undertaken by the government but for a private body's initiative. Even if a court could be sure that the government would not have undertaken a task performed by a private body, furthermore, it is not clear why it should follow that the private body's decisions cannot be reviewed, given that on some matters governments might endorse private bodies performing certain functions while not being prepared to take responsibility for carrying out those functions themselves.

[5] See, e.g., Mark Elliott, "Judicial Review's Scope, Foundations and Purposes: Joining the Dots" [2012] NZ L Rev 75; Julia Black, "Constitutionalising Self-Regulation" (1996) 59 MLR 24.

[6] See, e.g., Gordon Borrie, "The Regulation of Public and Private Power" [1989] PL 552, 558; Sedley, *Freedom, Law and Justice*, 28-30; also William A. Robson, *Justice and Administrative Law: A Study of the British Constitution*, 2nd edn (London: Stevens & Sons, 1947), 507.

jurisdiction of the Administrative Court has never been that the exercise of all private decision-making powers should, in principle, be amenable to judicial review. Rather, it has been that the decisions of some bodies (usually large corporate entities) currently categorized as private ought to be made reviewable, and that the key to making those decisions reviewable is either to redefine the decisions as "public" or to show them to be somehow on a par with the decisions of bodies performing public functions.[7] No one, so far as I can tell, has ever argued that there should be no limits to the reach of judicial review; it appears to be commonly accepted that a line must be drawn somewhere (which does not mean that the line stays put or that nobody would have it moved).

Although the outer limits of English judicial review have not remained fixed, it is simple enough to state where the border currently lies. In English law, only decisions made by public bodies, or bodies understood to be performing public functions, are amenable to judicial review.[8] Purely private decisions cannot be reviewed. But making sense of why this should be so can be difficult. A decision by a private body could have consequences similar to a decision by a public one, the substantive principles of judicial review do not apply exclusively to cases concerning the exercise of public power, and the reasons for categorizing a body as public can sometimes seem strained. In this article, I shall try to identify and assess the reasons which can be adduced to explain why the High Court's judicial review powers are exclusive to public law. My basic argument is that particular explanations for the confinement of judicial review do not always do the work that they are supposed to do and that the most convincing explanations are perhaps some of the more prosaic ones, mainly concerning remedies, procedure, and the simple fact that, in some contexts, judicial review of decisions made by private bodies is legally prohibited. I should emphasize at the outset that my objective is certainly not to stack up these explanations so as to knock them all down, as if the confinement of judicial review to public law is somehow foolhardy. That there are inherent limits to the range of rights capable of being vindicated by way application for judicial review seems obvious. I do, however, hope that my necessarily schematic and sometimes tentative account of

[7] See, e.g., Black, "Constitutionalising Self-Regulation", 51-5.

[8] I will normally use shorthand and refer simply to the decisions of *public bodies* (with the intention that this be read to include private bodies which operate as *de facto* public bodies by exercising public functions). I will refer to non-public bodies as "private", "domestic", and "self-regulating", varying the terms to cut down on monotony. My references to bodies' *decisions* should be understood to include the exercise of powers more generally (including failure to exercise powers).

the explanations for the confinement of judicial review casts some light (or at least prompts reflection) on why it is difficult and probably impossible to say what the absolute outer limits of the Administrative Court's supervisory jurisdiction could ever be.

II. *Jurisdiction*

Jurisdiction – understood broadly – is one of the standard explanations for the confinement of judicial review to public law.[9] Jurisdiction is *conferred* on a public body: its powers are derived from statute, the royal prerogative, or the common law; they are not derived from the fact of consent between parties. The point of judicial review will, more often than not, be to determine if a public body, in reaching a decision, has somehow either acted outside its jurisdiction or made an error of law within its jurisdiction.[10] A purely private body, by contrast, is not conferred jurisdiction but rather derives its decision-making competence from its own regulations. Imagine that a self-governing organization's regulations stipulate that acceptance of those regulations is a condition of membership, and that any dispute between the organization and its members (or prospective members) must be settled by a panel set up by the organization itself. A decision by this panel could not be challenged on the basis that it had no jurisdiction to deal with the dispute, because its jurisdiction is established by the organization's internal arrangements. Following this line of argument, judicial review is inappropriate to arbitration arrangements agreed between, say, an individual and a private body because the fact of both parties having accepted these arrangements means that the private body's jurisdiction can be taken for granted.

The reason for seeking judicial review, however, might be that a body's

[9] In the context of English judicial review, the concept of jurisdiction has traditionally been used to refer specifically to statutory jurisdiction (with a distinction drawn between jurisdictional and non-jurisdictional error), thereby confining public powers to powers underpinned by statute. Nowadays, the concept is considered unduly narrow and is generally eschewed by the courts. An account of how "jurisdiction" has been superseded by "public source" and "public authority" would detract from my general argument, and so I have retained the concept. But it should be noted that I am employing the concept broadly to cover all publicly sourced power rather than just jurisdiction as traditionally understood within *ultra vires* doctrine.

[10] Judicial review proceedings will sometimes raise questions of fact – e.g., when the finding upon which an impugned action depends is unsupported by evidence. But questions of fact arise far less frequently in judicial review as compared with private law cases because the reason for judicial review is to determine if an action was lawful. See Harry Woolf, "Public Law – Private Law: Why the Divide?" [1986] PL 220, 225.

decision is challenged as unlawful rather than beyond its jurisdiction. Private bodies can make decisions which exceed or run contrary to the powers which they have established for themselves (as well as powers conferred on them by statute and the common law), and, when these decisions are challenged, courts are able to decide on their lawfulness. Courts, when they make these decisions, are not engaging in judicial review. Nevertheless, the standards of procedural fairness and reasonableness that courts apply when considering an appeal challenging the decision of a domestic tribunal are essentially the same as the ones they apply when reviewing the decisions of bodies performing public functions. That a tribunal "is not subject to judicial review because it is not a public body", according to Lord Woolf,

> does not mean that it escapes the supervision of the High Court…. The [tribunal]'s jurisdiction over the plaintiff arises out of a contract. That contract has an implied requirement that the procedure provided for … be conducted fairly…. [I]f the [tribunal] does not act fairly or if it misdirects itself in law and fails to take into account relevant considerations or takes into account irrelevant considerations, the High Court can intervene.[11]

"[T]he language of judicial review", Richards J observed in 2004, is "just as applicable" in cases concerning the decisions of tribunals which derive their authority from the agreement between the relevant parties as it is in relation to the decisions of public bodies.[12] For in cases concerning private bodies' decisions,

> [t]he function of the court … is to ensure that the primary decision-maker operated within lawful limits. It is a review function, very similar to that of the court on judicial review. Indeed, given the difficulties that sometimes arise in drawing the precise boundary between the two, I would consider it surprising and unsatisfactory if a private law claim in relation to the decision of a domestic body required the court to adopt a materially different approach from a judicial review claim in relation to the decision of a public body. In each case the essential concern should be with the lawfulness of the decision taken: whether the procedure was fair, whether there was any error of law, whether any exercise of judgment or discretion fell within the limits open to the decision-maker, and so forth.[13]

Whether the body being challenged is public or private, in other words, the

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[11] *Wilander v Tobin* [1997] 2 Ll Rep. 293, 299-300. See also *Nagle v Fielden* [1966] 2 QB 633, 644-5 (Lord Denning, MR), 653 (Salmon LJ) ("Once … a man is elected to a club, he acquires contractual rights and cannot be expelled save in accordance with its rules and by processes which do not offend against natural justice").

[12] *Bradley v Jockey Club* [2004] EWHC 2164 at [40].

[13] Ibid at [37]. See also *Fallon v Horseracing Regulatory Authority* [2006] EWHC 2030 at [12] (Davis J).

court's supervisory function is to consider if its acts and decisions amounted to a lawful exercise of power. The approach taken in private law proceedings, under Part 8 of the Civil Procedure Rules, is much the same as that which the Administrative Court would take had the exercise of the power raised a public law issue.[14] Judges assess the decisions of private tribunals according to essentially the same criteria that they apply when reviewing the decisions of public ones.

Whereas parliament has never been inclined to pass laws intended to remove the jurisdiction of the courts over disputes between private citizens, it has been known to pass laws intended to stop citizens from going to court to challenge the lawfulness of decisions which public bodies have made against them. So might judicial review be confined to public law because parliament sometimes legislates with the aim of ousting or restricting the courts' jurisdiction to scrutinize a body's decisions? For three reasons, ouster of jurisdiction cannot be an explanation – and is probably not even part of a broader explanation – for the confinement of judicial review to public law. First, ouster of jurisdiction is rarely the reason for judicial review. Granted, one of the landmark cases in English judicial review concerned an ouster clause.[15] But since 1969, when that case was decided, there are not many instances in which governments have succeeded in getting ouster clauses passed into law.[16] Secondly, English judicial review did not come about after parliament first legislated to remove the courts' jurisdiction over the decisions of an inferior tribunal. English judges developed principles of judicial review primarily so that they could decide on the lawfulness of public decisions when those decisions were challenged, rather than so that they could determine whether parliament had been successful in

[14] Note that this is a point about the approach taken rather than the remedies available. The claim is not that the remedies would be much the same irrespective of whether the decision being challenged issued from a public or a private body.

[15] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

[16] Governments are likely often dissuaded from trying because the principles of judicial review militate against provisions exempting public bodies' decisions from judicial scrutiny. Wherever courts can infer that parliament might not have intended a public body to be the final arbiter of its own powers, they will draw that inference – on the basis that the judiciary is under a general duty to decide on the lawfulness of a body's decisions when citizens make a *prima facie* case that a decision unfairly interferes with their rights. When, in 2003, the then government introduced a Bill containing an ouster clause which stated unequivocally that the decisions of the Asylum and Immigration Tribunal were to be completely immune to judicial review – were to stand, that is, irrespective of whether the tribunal had erred in law of contravened principles of natural justice – senior lawyers, jurists, and judges kicked up such a fuss that the clause was withdrawn from the Bill at its second reading in the lords: see Lord Woolf, "The Rule of Law and a Change in the Constitution" (2004) 63 CLJ 317, 327-9; Andrew Le Sueur, "Three Strikes and It's Out? The UK Government's Strategy to Oust Judicial Review from Immigration and Asylum Decision Making" [2004] PL 225, 233; Richard Rawlings, "Review, Revenge and Retreat" (2005) 68 MLR 378, 401-06.

ousting the courts' jurisdiction to review the decisions of any particular public body. Thirdly, it would not be entirely correct to think of ouster of the courts' jurisdiction as a purely public law issue. Self-regulatory bodies can include, in their contracts with their members, statutorily enforceable provisions obliging claimants to try arbitration before they can pursue a right of action in a court.[17] Under the terms of these contracts, furthermore, parties will quite often relinquish their ECHR article 6 rights to a determination by an independent and impartial tribunal established by law.[18] It is perfectly conceivable, in other words, for private bodies to include *de facto* ouster clauses in contracts with their members.

III. *Public interest*

Since public bodies, unlike private agents, have powers to determine how citizens should act, it is important to try to prevent those bodies from abusing their powers. Prevention would be impossible if public bodies were allowed to use those powers however they wished. So it is a basic administrative law principle that public bodies cannot have absolute discretion. "The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good."[19] Another possible explanation for judicial review being limited to public law, then, is that discretion is conferred on public bodies on the understanding that they exercise it exclusively for the public good, and the courts ought therefore to be able to police the exercise of this discretion more carefully than they would attend to the exercise of discretion by parties under the terms of a private agreement or arrangement.[20] It would, of course, be incorrect to say that public bodies bear the unique constraint of being unable to choose their actions with their own interests in mind, given that private actors are sometimes constrained in the much same way (as when, for example, they act as fiduciaries). But the distinct fetter on the discretion of public bodies is that they have an obligation to take only public interest considerations, and often especially serious

[17] See Arbitration Act 1996, s. 9; also UNCITRAL Model Arbitration Law (1994), art. 8.
[18] See, e.g., *Placito v Slater & Ors* [2002] EWCA Civ 1863 at [50]-[51] (Potter LJ); *Edwards v UK* (1992) 15 EHRR 417; *Stretford v Football Association Ltd* [2007] EWCA Civ 238 at [45] (Sir Anthony Clarke, MR). A court will only uphold such a provision so long as it is satisfied that the aggrieved party's decision to relinquish this right was truly voluntary: see *Stretford v FA*, at [52].
[19] H. W. R Wade & C. F. Forsyth, *Administrative Law*, 11th edn (Oxford: OUP, 2014), 296.
[20] See Jack Beatson, "'Public' and 'Private' in English Administrative Law" (1987) 103 LQR 34, 36-7.

public interest considerations, into account.[21] Purely private bodies – though they obviously have to comply with the law, and though they may have to act with the best interests of other parties in mind – are never under the precise same obligation.

Let us grant that the decisions which many public bodies make about citizens can have consequences the likes of which do not attach to decisions by private bodies. Is it nevertheless not an overstatement to say that public bodies alone are capable of making decisions contrary to the public interest? Where "Parliament has given a tribunal power to deprive a man of his livelihood for a particular cause, … the courts will intervene if there is a real substantial miscarriage of justice", Denning LJ observed in 1952, continuing: "I see no reason why the powers of the court to intervene should be any less in the case of domestic tribunals."[22] His point was not that judicial review should be available whether the body is statutory or domestic; rather, it was that the absence of statutory underpinning should not be a bar to judicial intervention (in the case of domestic bodies, Denning noted, the court can intervene by granting declarations and injunctions). In other words, a court should intervene when private bodies make decisions with public interest implications similar to those which can arise in public decision-making contexts – except that intervening should never, in the case of purely private bodies, take the form of judicial review.

But therein rests the puzzle: why should it not take this form? Decisions of public bodies can be amenable to judicial review even when they affect hardly anyone. By contrast, a self-regulatory body may be capable of, for example, granting and withholding valuable licences and opportunities coveted by large numbers of people; a considerable segment of the public may be interested, or potentially interested, in the body's decisions, and yet this – certainly this by itself – will not suffice to make those decisions reviewable. One possible answer to the puzzle is that whereas it makes sense to make amenable to review decisions which always go to the public interest, to make reviewable a category of decisions which only sometimes have a public interest dimension, and which will in any event be controllable through private law doctrine, is to risk drawing arbitrary and unnecessary distinctions in the realm of private decision-making. Another, perhaps stronger answer is that a private decision which is likely to affect large numbers of people, or

[21] *Aston Cantlow PCC v Wallbank* [2003] UKHL 37 at [7] (Lord Nicholls).
[22] *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329, 345-6.

which is subject to a duty to act only with regard for others, is not necessarily a decision with a public interest dimension – indeed, might be said not to have any such dimension if what is understood by public interest is the interest which citizens have in being able to challenge decisions which they consider to be based on an improper exercise of *public* power. It is not enough, on this line of reasoning, simply to claim that judicial review is confined to public law because public decision-making has a public interest dimension. One has to be more precise: the confinement of judicial review to public law has to do with the fact that a primary function of judicial review is to secure "the public interest in good governance."[23]

IV. *Monopoly*

Where there is a marked disparity in negotiating power between a self-regulating body and any private actor seeking to benefit from its decisions, that body will probably be able to exercise a significant degree of leverage over the parties' negotiations; indeed, even the matter of whether negotiations take place could be within its control.[24] Might the public have an interest in seeing judicial review lie against a body which is able to wield immense power over those dependent on its decisions, even if the activities of that body are neither authorized by positive law nor supported by the government?

There are *obiter dicta* to the effect that a self-regulating body's decisions should be reviewable when its powers are such that those subject to its decisions have no real choice but to submit to the exclusivity of the body's authority,[25] and at least one academic has argued that the proper test for amenability to review is whether the decision-maker exercises monopoly power.[26] But the courts have rejected monopoly power as the appropriate test, primarily because private bodies

[23] Elliott, "Judicial Review's Scope, Foundations and Purposes", 80.
[24] See Robert L. Hale, "Force and the State: A Comparison of 'Political' and 'Economic' Compulsion" (1935) 35 *Columb. L. Rev.* 149; also H. W. Arthurs, *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985), 192.
[25] See *ex parte Datafin*, at 845-6 (Lloyd LJ); also *R. v Disciplinary Committee of the Jockey Club, ex parte Massingberd-Mundy* [1993] 2 All ER 207, 219 (Neill LJ observing that, had he not been constrained by authority, he would have ruled that some decisions of the Jockey Club were judicially reviewable given its position of public importance and its near monopolistic powers in an area in which the general public has an interest and in which many people earn their livelihoods); *R. v Jockey Club, ex parte RAM Racecourses Ltd* [1993] 2 All ER 225 (Stuart-Smith LJ similarly observing that, had the matter been free of authority, he would have held the Jockey Club to be amenable to judicial review).
[26] Colin D. Campbell, "Monopoly Power as Public Power for the Purposes of Judicial Review" (2009) 125 LQR 491.

performing entirely private functions can operate monopolistically, meaning that the test has the potential to extend judicial review to decisions which have no public law element.[27] Even if the test were embraced, furthermore, it would explain only some instances of amenability, for there would still be cases where the courts assume supervisory jurisdiction notwithstanding that aggrieved parties are able to choose not to submit to the decisions which they are challenging.[28] The monopoly powers test certainly illustrates how the limits of English judicial review are not fixed – how the outer limits of review could be expanded so that some decisions currently controlled through private law are redefined as decisions containing a public law element. But there is an obvious distinction to be drawn between making a prescriptive argument about where judicial review should reach and describing where it actually does reach. While the monopoly powers test points towards an interesting normative enquiry, it seems to fare less well as an explanation of why judicial review is confined to public law, and so, for the purposes of this article, there is no need to dwell on it.

V. *The rule of law*

Perhaps judicial review is confined to public law because the principles of judicial review affirm the basic features of the rule of law, and public bodies have a special obligation to make decisions which accord with the rule of law. Judicial review is premised on the idea that there should be *government* according to law: *ultra vires* doctrine is basically the principle that parliament confers statutory powers on a body on the understanding that it will uphold legality. The story of the growth of judicial review in the twentieth century is one of citizens' increasing reliance on the State as a service provider, and of how the agencies and authorities made responsible for providing services had to be under the supervision of the courts if they were to be

[27] See, e.g., *R. v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909 (CA), 932-3 (Hoffmann LJ); *R. v Football Association Ltd, ex parte Football League Ltd* [1993] 2 All ER 833, 848 (Rose J) ("[T]he FA is not a body susceptible to judicial review either in general or, more particularly, at the instigation of the League, with whom it is contractually bound. Despite its virtually monopolistic powers and the importance of its decisions to many members of the public who are not contractually bound to it, it is … a domestic body whose powers arise from and duties exist in private law only"); *R. (on the application of Mullins) v Jockey Club Appeal Board (No. 1)* [2005] EWHC 2197 (Admin) at [31] (Stanley Burnton J).

[28] See Elliott, "Judicial Review's Scope, Foundations and Purposes", 77-8. Although Campbell claims that the test explains most instances of amenability, he concedes that it cannot explain all instances: Campbell, "Monopoly Power as Public Power", 495-6, 510-11.

brought to account whenever they misused powers entrusted to them by parliament.[29] So it is that public bodies nowadays have a duty to make decisions which give citizens subject to those decisions access to justice, a right to be heard, confidence that rules will be applied consistently, and the ability to discover the rules that apply to them before they are applied – that they have a duty to make decisions in accordance with what is now statutorily recognized as "the constitutional principle of the rule of law".[30]

But is the obligation to abide by rule of law principles relevant only to public law? The proposition that the rule of law is a private as well as a public law concept is difficult to assess, because defenders of it tend to rely on their own distinctive claims about what "the rule of law" means. Whether or not particular defences seem plausible depends on whether one accepts how the concept is being configured. If the rule of law protects against the arbitrary exercise of power then a private body might be challenged for acting contrary to the rule of law when it controls the allocation of a valuable resource and a claimant has had her application for that resource summarily denied. The basis of the challenge would be that the private body was abusing its immense power in a manner comparable with abuses of power by the State.[31] But the challenge would be trading on the idea that the rule of law protects against the misuse of power generally as opposed to what it is commonly understood to protect against: abuses of the powers to make and apply laws to which citizens want reliable recourse and upon which they must be able to depend if they are to plan their affairs confident that their choices will not incur unwelcome liabilities.

Private law, according to one eminent public lawyer, "constitutes the major substance of the rule of law"[32] because "efforts to bring governmental action within the limits of the rule of law presuppose that the relations between private citizens (and private groups or organizations) are already effectively regulated by law."[33]

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[29] See Alfred Denning, *Freedom under the Law* (London: Stevens & Sons, 1949), 67-126.
[30] Constitutional Reform Act 2005, s. 1.
[31] See William Lucy, "The Rule of Law and Private Law", in *Private Law and the Rule of Law*, ed. L. M. Austin & D. Klimchuk (Oxford: OUP, 2014), 41-66 at 63 ("[For] those gripped particularly tightly by the public law perspective … the only worrisome sources of potentially arbitrary power in the world are law-makers and their executive functionaries…. But … the world contains *other* worrisome sources of arbitrary power. One such source is surely one's fellow citizens, as well as other legal (non-governmental or non-executive) persons").
[32] T. R. S. Allan, "The Rule of Law as the Rule of Private Law", in *Private Law and the Rule of Law*, pp. 67-91 at 68.
[33] Ibid 71.

When public officials exceed or abuse their jurisdiction they are, apart from in exceptional instances, subject "to the same rules of private and criminal law … in the same manner as private citizens".[34] The argument, note, is pointedly not that public and private law controversies over the rule of law are all of a piece. Rule of law considerations are indeed relevant to private law, but – the crux of the argument – they differ from rule of law considerations relevant to public law.

> While the enforcement of the rule of law consists, in private law, in the defence of the rights and duties that compose the established scheme of civil liability, in public law it means chiefly the prevention or correction of abuse of power by official state agencies…. [T]he rights protected by judicial review are … abstract and inchoate – rights not to be the victim of an abuse of power, which can take any of the various forms of unreasonableness or illegality…. [I]n public law the court must intervene only to remedy excesses or abuses of jurisdiction by a public authority, which is normally entitled (and required) to pursue a policy agenda in furtherance of its own view of the public interest.[35]

Perhaps the most straightforward reason for concluding that public and private decision-making bodies cannot be subject to the same rule of law obligations is that some of these obligations are either specific to law-making or concern congruence between enacted laws and the exercise of powers by bodies acting on the authority of those laws. If a body neither makes law nor has its decision-making authority conferred upon it by law – if it is a self-regulating body, making decisions in accordance with its own rules – it cannot be subject to the rule of law in the same way as can a body exercising public power. Part of the explanation for judicial review belonging to public law might be that it upholds not the rule of law but a particular facet of it: the requirement that those on whom powers over citizens are conferred should not be allowed to exceed those powers.[36]

The difficulty with this proposition is that it runs up against two basic objections. First, some forms of governmental power (for example, the power to award pensions to widowers[37]) have been subject to review even though the power was not legally conferred. Secondly, some legally conferred powers (for example,

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[34] Ibid 82.

[35] T. R. S. Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford: OUP, 2013), 232.

[36] See Elliott, "Judicial Review's Scope, Foundations and Purposes", 78-9. (Note that Elliot's argument is not that this specific facet of the rule of law serves on its own as a criterion for determining amenability to judicial review: see ibid 83-4.)

[37] See *R. (on the application of Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29. For other examples, see B. V. Harris, "The 'Third Source' of Authority for Government Action Revisited" (2007) 123 LQR 225, 226-7.

trustees' statutory powers of investment[38]) are not subject to judicial review. The existence of a legally conferred power is not a prerequisite to, nor does misuse of such a power guarantee, the availability of judicial review; and so it is not clear how the association of judicial review with this one facet of rule of law might form part of the explanation as to why judicial review is exclusive to public law.

Ultimately, any attempt to make the rule of law part of the explanation for the confinement of judicial review looks likely to founder, because most if not all rule of law obligations must be relevant to the decisions of private bodies in one way or another. These bodies will sometimes contravene rule of law principles by unfairly granting and withholding privileges, for example, or by failing to give a category of prospective applicants fair notice of their right to seek a decision from the body, or by making an applicant's eligibility for a licence dependent on her meeting a criterion which it is impossible to satisfy. As was observed in section II, the standards of reasonableness and legality which the High Court applies in private law proceedings (under CPR Pt 8) are basically the same as those applied in public law proceedings. "[T]he constitutional principle requiring the rule of law to be observed", according to Lord Steyn, "requires that a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected."[39] This is a right which individuals ought to be accorded regardless of whether the body making the decision is public or private – likewise a person's right to have decision makers respect various other principles of legality, such as the rights to present her case and to see like cases treated alike. Rule of law considerations always feature, if only implicitly, in cases concerning claims that public power has been exercised unlawfully. But it would be wrong to think that these considerations only ever arise in public law, for public bodies are not, when making decisions, under a unique obligation to respect the rule of law. And so one cannot successfully invoke the rule of law as an explanation as to why judicial review is confined to these bodies.

VI. *Procedure and remedies*

There would only be a point to the courts expanding judicial review into the realm of

[38] See Trustee Act 2000, s. 3(1).

[39] *R. (on the application of Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36 at [28].

private law if there was something judicial review could bring to the table that was not already part of the stock of private lawyers. Perhaps judicial review is confined to public law because there is no need for things to be otherwise. With the demise of *O'Reilly v Mackman*[40] and the weakening of the principle of procedural exclusivity, the mode of commencement of proceedings – whether a claim was initiated in private or public law – is unlikely to be of any consequence;[41] some claims initiated as private law claims could proceed via judicial review, and in the course of civil proceedings the decisions of public bodies might be impugned. In most instances, furthermore, whatever judicial review could bring to private law litigation will already be supplied by private law remedies. Success in seeking judicial review does not automatically entitle an applicant to a private law remedy – there has to be something about the unlawfulness of the public body's decision (e.g., misfeasance in public office, breach of a statutory duty) to which the claimant can point as establishing civil liability.[42] But a private law remedy can usually extend to the same places as can judicial review: claimants challenging the decisions of domestic bodies can quite often, by seeking a declaration of right combined with an injunction, obtain much the same remedy as would have been granted if judicial review had been available. Could having judicial review lie against the decision of a domestic body achieve anything that could not already be achieved within the domain of private law?

It would be wrong to think that it could achieve absolutely nothing. The availability of judicial review against a domestic body's decision could extend the rights currently enjoyed by aggrieved parties, and might even accord to them some rights which presently they do not have. There are limited opportunities for would-be claimants to sue domestic bodies when the allegation is simply that the body in question has acted unreasonably or unfairly, but claims on such grounds would presumably be easier to bring if the decisions of these bodies were made reviewable.

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[40] [1983] 2 AC 237 (HL).

[41] It would be wrong to say that it will never be of consequence. If an impugned decision is straightforwardly a matter of public law, for example, a court might consider it inappropriate to assume an open choice of procedure: see, e.g., Carnwath LJ's judgment in *Trim v North Dorset DC* [2010] EWCA Civ 1446, esp. at [26].

[42] Judicial review will not normally be available if the claimant's dispute with a public body concerns a contract or some other matter governed by private law, though courts do sometimes consider judicial review to be appropriate notwithstanding the possibility of a private law claim: see, e.g., *R. (on the application of London Corp) v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 1765 at [15]-[16] (Pill LJ); *R. (on the application of Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587 at [70] (Elias LJ), [102] (Lord Collins).

Extending supervisory jurisdiction to the decisions of a domestic body might expand the range of expectation-based claims available to a claimant, since certain types of legitimate expectation which do not form the basis for estoppel claims (such as the right to be consulted) can sustain applications for judicial review.[43] Since judicial review is a supervisory rather than an appellate process, a reviewing court does not replace a successfully challenged decision with a decision of its own but rather retrospectively nullifies it. So if a claimant were successfully to apply for judicial review of, say, a domestic body's decision to expel her from its ranks, the consequence would be not that the claimant would be restored to the body or awarded damages for having been expelled, but rather would be presumed never to have been – and so would have the right to be treated as never having been – expelled in the first place. Furthermore, the determination that a domestic body's decisions are amenable to judicial review might supply aggrieved parties with an action unavailable in private law owing to the fact that the pursuit of any appropriate private law remedy, unlike the availability of judicial review, depends on their having a legal relationship with the decision-making body.[44] Whereas claimants in private law actions normally have to be able to show that their own legal rights are somehow threatened or infringed, judicial review never confines standing to rights-holders: interest groups and publicly-minded citizens can initiate proceedings, even though their own rights might not be directly affected.[45] Rendering amenable to review the decisions of bodies currently categorized as private would, wherever there is a prima facie case of illegality, open up those bodies to the possibility of challenge by parties to whom they have no direct obligation. Extending judicial review to decisions of domestic bodies would not, in short, be without legal consequences.

But would the consequences be welcome overall? Any answer to this question must be pure guesswork. Given that judicial review can protect rights in a

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[43] See, e.g., *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 401 (Lord Fraser) ("[E]ven where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law").

[44] See Colin D. Campbell, "The Nature of Power as Public in English Judicial Review" (2009) 68 CLJ 90, 91; Martyn Hopper, "Financial Services Regulation and Judicial Review: The Fault Lines", in *Commercial Regulation and Judicial Review*, ed. J. Black et al. (Oxford: Hart, 1998), 63-95 at 77 (the characterization of the regulatory functions of self-regulating financial bodies as confined to private law "place[s] severe limitations on the ability of investors … to challenge the decisions of regulators with whom they have no contractual relationship").

[45] See Jason N. E. Varuhas, "The Reformation of English Administrative Law? 'Rights', Rhetoric and Reality" (2013) 72 CLJ 369, 380-3.

number of ways that private law remedies cannot, perhaps – we are deep in the realms of speculation – making the decisions of a private body subject to judicial review options as well as to private law doctrines could put a claimant in a better position than that which she occupies when a court determines that the decision which she challenges only concerns the body's private law obligations. That there would be a net advantage to making the decisions of a private body reviewable seems, however, highly improbable. To make a body categorized as private subject to the comparably relaxed standing requirements which operate in judicial review applications would only seem to make sense were a court to rule that there is, in fact, a public law element to the body's decisions. For the point of according standing to parties with no direct rights against a decision-maker is to recognize that the decision-maker has failed to comply with a duty to the public at large rather than one owed only to citizens who have suffered as a consequence of the failure.[46] Considering that judicial review applications tend to be dealt with quickly and are subject to very short time limits, moreover, and that undue delay in making an application can result in a refusal to grant relief, the speed of the process alone might make it unsuited to dealing with some instances of civil litigation[47] (and where the process is suited to the litigation, it will be otiose anyway if the civil claimant can expedite by applying for summary judgment and/or strike-out[48]). Even if the decisions of a currently private body were to be made reviewable, a judge would still have to give permission before a petition for review could proceed. If a private law action were instead to be treated as a judicial review application, the process might significantly constrain the claimant, because strategies which would be available as of right (and on which claimants invariably depend) at a full trial – such as introducing oral evidence, undertaking cross-examination, and exchanging affidavits – would either not be available or would be available only at the discretion of the court.

Which court would this be? If judicial review were extended to some

[46] See Jason N. E. Varuhas, "The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications", in *Public Law Adjudication in Common Law Systems: Process and Substance*, ed J. Bell et al. (Oxford: Hart, 2016), 45-86 at 58-60, 66; also Varuhas, "The Reformation of English Administrative Law?", 410.

[47] See Harry Woolf, *Protection of the Public – A New Challenge* (London: Stevens & Sons, 1990), 15. A more serious concern runs from the opposite direction: claimants might try to sidestep the safeguards and strictures of judicial review by seeking ordinary remedies against public bodies, or (where permissible) by challenging a public body's decision in the course of civil or criminal proceedings.

[48] See Dawn Oliver, "Public Law Procedures and Remedies – Do We Need Them?" [2002] PL 91.

instances of purely private decision-making, the Administrative Court would very likely have a larger case load. But this is assuming that judicial review would remain solely within the province of the Administrative Court. If it were the lawfulness of a domestic tribunal's decision that was being challenged, there would presumably have to be some explanation as to why the judicial review application was being dealt with by a specialized court with administrative law jurisdiction. What, furthermore, could it actually mean to speak of extending judicial review to purely private decision-making? Recall the plight of *B* at the outset of this article. Judicial pronouncements entertaining the possibility of extension invariably show judges to have in mind particular examples of self-regulatory bodies. But presumably parliament or the courts would have to distinguish between private decisions which in principle are, and private decisions which are not, amenable to judicial review (as indeed is the case with public decisions). In dealing with decisions which are in principle reviewable, the courts, when determining which decisions should be reviewed, would still have to address the question that confronts them now: the question of why judicial review has been expanded this far but not further. A variety of what are essentially pragmatic considerations – including, no doubt, others besides the ones I have touched upon here – seem to form part of the explanation as to why English judicial review is exclusive to public law.

VII. *Confinement by law*

Before concluding, I should at least briefly draw attention to one other, perhaps obvious, explanation as to why some decisions will not be amenable to judicial review. In some instances, the expansion of judicial review beyond public decision-making will simply not be an option. The basic principle of proportionality, for example, is that any interference by the State with the liberty of the individual is unjustifiable if it exceeds what is required for the State to go about pursuing its legitimate aims.[49] So it is perfectly understandable that the courts have only ever resorted to proportionality – in so far as they have developed it as a separate ground

[49] See *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550 at [38] (Laws LJ) ("[E]very intrusion by the state on the freedom of the individual stands in need of justification. Accordingly, any interference which is greater than required for the state's proper purpose cannot be justified. This is at the core of proportionality; it articulates the discipline which proportionality imposes on decision-makers").

of judicial review in English law – to test the lawfulness of public authority decisions. The idea of extending judicial review to the decisions of private bodies is a straightforward non-starter wherever the law expressly forbids such an extension. Human rights law provides perhaps the most obvious illustration of this point. The European Convention on Human Rights is essentially a collection of obligations imposed on member States, and the Human Rights Act 1998, in establishing as domestic rights those which are set out in the Convention, likewise imposes obligations only on organs of the State and not on private individuals and bodies. In English law, judicial review claims based specifically on the contention that a decision unlawfully interferes with a Convention right must concern the decision of a public authority or any person whose functions are of a public nature.[50] Sometimes, it matters not whether there might be some advantage to extending judicial review to the decisions of a private body, because the law makes that extension impossible.

VIII. *Conclusion*

In this article, I have undertaken a brief analysis of possible explanations for the confinement of judicial review to public law. To say that the lay of the land turns out to be complicated is not the most riveting of conclusions. But the point of the exercise has been to draw attention to the contours of a problem rather than to try to reach a conclusion about it. The search for a magic formula the presence or absence of which brings judicial review into or takes it out of the equation seems ill-advised: a formula is likely to account for both too little and too much – to fail to explain why some decisions are reviewable even though (according to the formula) they should not be, and why some decisions are not reviewable even though (according to the formula) they should be. Various reasons, or combinations of reasons, can explain why decisions issuing from a particular body are amenable to judicial review (or, indeed, why decisions which once were not amenable to review now are). Some of the more

[50] Human Rights Act 1998, ss. 3(3)(b), 6(1). A public authority could be a core or hybrid public authority, and a court, in considering if a decision should be judicially reviewable, might find it impossible to draw the distinction between a hybrid authority's public and private activities with precision: see, e.g., *Poplar Housing & Regeneration v Donoghue*, at [66] (Lord Woolf, CJ). That the distinction has taxed the courts is especially clear from the 3-2 split in *YL v Birmingham CC* [2007] UKHL 27 over whether a health care company subject to statutory regulation was performing functions of a public nature. The crucial point for our purposes is that courts will draw the distinction, and will rule that judicial review will not be available if the hybrid authority, in making the impugned decision, was exercising part of its private as opposed to its public function.

compelling of these reasons, I hope to have shown, are not necessarily the most lauded ones; and certainly two of the standard explanations for the confinement of judicial review to public law – jurisdiction and the rule of law – are not as convincing as one might expect them to be. If we are to understand why judicial review belongs solely to public law, then we perhaps do best to focus mainly on a number of low-key, matter-of-fact considerations such as public law standing requirements, the differences between judicial review and private law remedies, the role of the Administrative Court, the question of just how far into the realm of private law judicial review could feasibly be extended, and the rules which confine judicial review to particular legal contexts.