PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

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ture of the legal regime established by the English Human Rights Act 1998. In fact, we seem to be caught between wanting to reaffirm that government is different, and ought to be treated by the law differently, from civil society, while at the same time needing to make sense of the array of phenomena that seem to challenge distinctions between governor and governed, the public and the private. Another initially tempting explanation of the paradox might be to say that unease about the public/private distinction is a preoccupation of academics not shared by judges and legislators. But this suggestion will not stand up to closer scrutiny. For instance, the wisdom of the regime of judicial review procedure has been the cause of debate amongst policy-makers as much as academics; and use of the public/private distinction in the HRA was the subject of considerable public and parliamentary as well as academic debate.

The aim of this chapter is to analyse and better understand the nature of the paradox that I have identified and its implications for broad themes of this volume—the distribution and regulation of power. The first step will be to discuss in some detail certain of the legal regimes in which the public/private distinction plays a significant role. Next comes an analysis of some prominent recent attacks on the public/private distinction. Finally, I will suggest that the paradox can be resolved by distinguishing between two quite different versions of the public/private distinction—one institutional/functional, and the other values-based.

THE PUBLIC/PRIVATE DISTINCTION IN OPERATION

The first part of this section deals with the concept of a functional public/private distinction by focusing on the HRA, and the second with the concept of an institutional public/private distinction, referring to judicial review of executive action and several other legal regimes.

Human Rights and the Concept of Public Functions

'Fundamental human rights' as traditionally conceived are rights against the government or the state, not against other citizens. This is as true of the rights guaranteed under the amendments to the US Constitution as it is of rights enshrined in more recent international and national human rights documents. According to this conception, human rights law rests on a fundamental distinction between the governors and the governed, the state and 'civil society' (ie the non-state), the 'public' and the 'private.' In the amendments to the US Constitution, some of the rights are expressly drafted as rights against the government. The first amendment (freedom of speech) and the fourteenth amendment (equal protection) are the best-known examples. Certain amendments, by reason of their subject matter, only apply to state action. The seventh amendment (trial by jury) is an example.[7]

[7] Although, of course, there is nothing intrinsic to the practice of 'judgment by one's peers' that marks it as public. Limitation of trial by jury to public legal proceedings is a political choice.

But even those amendments that are not limited to state action by their terms or content have been interpreted as applying basically only to 'state action.'[8]

Some of the rights contained in the European Convention on Human Rights (ECHR) (by which the United Kingdom was bound under international law for many years before the enactment of the HRA in 1998, and by which it remains bound) are, by virtue of their content, rights against the state. But there is nothing in the express terms of the provisions of the Convention that would prevent them applying to citizens as well as to government. Being an international treaty, the ECHR imposes obligations only on nation states and not on individuals; but those obligations (for instance, to bring domestic law into conformity with the Convention) may relate not only to dealings between citizens and government but also to relations between citizen and citizen.

It was against this background that the question of the scope of application of the HRA arose. The Act deals separately with 'primary and subordinate legislation' on the one hand and 'acts' (of 'public authorities') on the other. Under section 3, primary and subordinate legislation must, as far as possible, be 'read and given effect in a way that is compatible with Convention rights.' Section 4 confers jurisdiction to make a declaration that primary or subordinate legislation is incompatible with a Convention right. Acts of public authorities are dealt with in section 6, which renders unlawful acts that are incompatible with Convention rights. Whereas incompatibility of primary legislation with a Convention right is expressly stated not to affect its legal validity, the making of incompatible subordinate legislation would constitute an (unlawful) act under section 6.[9] There is no statutory definition of the concept of 'an act' beyond the provision that it includes 'failure to act' (except failure to introduce in or lay before Parliament a proposal for legislation, and failure to make any primary legislation or remedial order).

A provision of primary or subordinate legislation that requires or authorises breach of a Convention right will be incompatible with the Convention regardless of whether the breach constitutes 'state action'.[10] So, for instance, legislation regulating defamatory speech would be incompatible with Article 10 of the ECHR (on freedom of expression) if it permitted one citizen to infringe another citizen's Convention right of free expression. In other words, the regime under sections 3 and 4 provides protection against breaches of Convention rights that are 'legally regulated'—in the sense of required or authorised by primary or subordinate legislation—by whomever they are committed.[11] Nevertheless, the subject matter of the regime established by sections 3 and 4 of the HRA is legislation, not the conduct that it requires or authorises. Unlike primary legislation, subordinate legisla-

[8] For a useful brief discussion see R Clayton and H Tomlinson, *The Law of Human Rights* (Oxford University Press, 2000), 208–17.

[9] Primary legislation and remedial orders made under the Act do not constitute 'acts' for the purposes of s 6: HRA s 6(6)(b).

[10] N Bamforth, 'The True 'Horizontal Effect' of the Human Rights Act 1998' (2001) 117 *LQR* 34.

[11] It has also been argued that although only a 'victim' may challenge an act under s 6, anyone may invoke ss 3 and 4: M Elliott, 'The Human Rights Act 1998 and the Standard of Substantive Review' [2001] *CLJ* 301.

tion also falls within the regime established by section 6 of the HRA, provided it can be attributed to an 'act of a public authority.' Furthermore, because courts and tribunals are public authorities for the purposes of section 6, they are under a duty not to act incompatibly with Convention rights in making and developing the common law.[12] The result of all this is that while the HRA only imposes obligations to respect Convention rights on Parliament and public authorities, it will also have profound indirect effects on the legal position of 'private' individuals and bodies by reason of its direct impact on law-making activities. In the result, the public/private distinction is most important to the operation of human rights law in relation to activities other than law-making.

The statutory concept of a 'public authority' is complex. It has both institutional and functional elements. On the institutional side, 'the House of Lords in its judicial capacity' is a public authority (s 6(4)). But the House of Lords in any other capacity is not; nor is the House of Commons (proviso to s (3)). On the functional side, 'any person certain of whose functions are functions of a public nature' is a public authority (6 (3)(b)), except in relation to 'acts of a private nature' (s 6 (5)). The juxtaposition of 'function' and 'act' is slightly puzzling. An act may or may not involve the performance of a function. For instance, engaging in a recreational pursuit seems to be the very antithesis of performing a function. On this basis, the phrase 'act of a private nature' could embrace both acts done in performance of private functions and 'private acts'. So the word 'act' in the phrase 'act of a public authority' should be understood to refer to an act or a failure to act regardless of whether it was referable to the performance of a function. The obligation not to act incompatibly with Convention rights attaches to acts, not functions.

The term 'public authority' is also defined to include 'a court or tribunal' (s 6 (3)(a)). This seems to be a mixed institutional/functional criterion of public authority status. For instance, the High Court—a paradigmatic court—would qualify as a court 'institutionally' as it were; and a Social Security Appeal Tribunal—a paradigmatic tribunal—would qualify as a tribunal institutionally. But it is well established that a body may, by reason of its functional characteristics, be a 'court' (for certain purposes at least) even though it is not called a court.[13] By parity of reasoning, the same should be true of tribunals.[14] So in principle at least, a body could be a court or tribunal, and hence a public authority, solely by virtue of (certain of) its functions. Beyond this, the HRA gives no guidance as to what the

[12] There is a large literature on the nature and content of this obligation examined in terms of the nature of the HRA's 'horizontal effect.' See, eg, M Hunt 'The "Horizontal Effect" of the Human Rights Act' [1998] *PL* 423; G Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?' (1999) 62 *MLR* 824; N Bamforth, 'The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies' [1999] *CLJ* 159; R Buxton, 'The Human Rights Act and Private Law' (2000) 116 *LQR* 48; HWR Wade, 'Horizons of Horizontality' (2000) 116 *LQR* 217; J Morgan, 'Questioning the "True Effect" of the Human Rights Act' (2002) 22 *LS* 259.

[13] *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1990] 1 All ER 355 (CA); [1991] 2 AC 370 (HL).

[14] HRA, s 21(1) defines 'tribunal' in terms of 'legal proceedings.' Clayton and Tomlinson (above n 8 at 207–8) suggest that 'legal proceedings' should be understood in terms of the exercise of judicial power, ie functionally.

term 'public authority' means. This is troubling because section 6 is understood to set up a contrast between what are called 'core' and 'hybrid' public authorities. According to this reading, hybrid public authorities are persons 'certain of whose functions are of a public nature'. But except in relation to the House of Lords in its judicial capacity and 'paradigmatic' courts and tribunals, the HRA says nothing about what a core public authority is.[15]

In *Aston Cantlow and Wilmcote with Billesly PCC v Wallbank*[16] the entity in question was a parochial church council, that is, a statutory corporation and part of the (established) Church of England. The council served a statutory notice on the defendants requiring them to repair a church building. The defendants disputed their liability, arguing that the (common) law that established the liability was incompatible with Article 1 of the First Protocol to the ECHR. The House of Lords held, unanimously, that the council was not a core public authority; and, by a 4–1 majority (Lord Scott dissenting), that it was not a hybrid public authority. There is an unfortunate lack of uniformity in the reasons variously given for these conclusions. Lord Nicholls (at [8] and [14]) and Lord Hope (at [47]) took an institutional approach to the concept 'core public authority'. Noting that under Article 34 of the ECHR, only 'persons', 'groups of individuals' and 'non-governmental bodies' can qualify as 'victims' entitled to complain of breaches of s 6 of the HRA, they concluded that core public authorities are 'governmental bodies', and that the council was not a core public authority because it was a 'religious', not a governmental body.[17] By contrast, Lord Rodger understood the concept 'core public authority' functionally, concluding that the council's 'general function' was religious, not governmental (at [144], [159], [166]). Lord Hobhouse hedged his bets, saying that a core public authority 'has a governmental character and discharges governmental functions' (at [87]); although the tone of his discussion is more functional than institutional.[18]

On the other hand, all of the Law Lords adopted a functional approach to the concept 'hybrid public authority'. Lord Nicholls (at [16]) and Lord Hope (at [41],

[15] One might think that since a hybrid public authority is an entity certain of whose functions are public, a pure public authority would be an entity all of whose functions are public: *Aston Cantlow and Wilmcote with Billesley PCC* v *Wallbank* [2003] UKHL 37 at [85] (Lord Hobhouse); [143] (Lord Rodger). Such an exhaustive definition would be extremely difficult to apply in practice, even assuming it to be desirable in principle. Clayton and Tomlinson, above n 8, at 191–92 suggest as the criterion of a pure public body that its functions are 'largely or predominantly of a public nature.'

[16] [2003] UKHL 37.

[17] Both judges refer to an article by Dawn Oliver, 'The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act' [2000] *PL* 476. Oliver argues that 'public authority' should be understood narrowly rather than broadly because public authorities 'may' not be entitled to complain of breaches of the ECHR: it would be undesirable, she argues, that 'fringe bodies' should not be entitled to rely on the Convention. She does not discuss ECHR Article 34, and seems to assume that neither hybrid nor core public authorities can assert Convention rights. By contrast, Lord Nicholls and Lord Hope seem to equate 'core public authority' with 'governmental body' and 'hybrid public authority' with 'non-governmental body'. On that basis they apparently believe that while core public authorities cannot rely on the Convention, hybrid public authorities can—at least in relation to their private acts/functions: Lord Nicholls at [11].

[18] Unfortunately, the judgments do not always distinguish clearly between 'governmental' and 'public', or between 'non-governmental' and 'private', either in their application to bodies or to functions, even though s 6 of the HRA does not use the term 'governmental'. Similarly, only Lord Hobhouse (at [88]) distinguishes between (private) functions and (private) acts.

[63]) could be interpreted as going further and arguing that unless the defendant is a core public authority, the application of s 6 of the HRA depends entirely on whether it was performing a public function (or a public act). According to this approach, a hybrid public authority is not a person or body 'certain of whose functions are functions of a public nature' (s 6(3)(b)), but rather a person or body performing a public function (or act). This would mean that an entity, other than a core public authority, could be a public authority only in relation to a particular (public) act. The effect of this approach is to collapse the distinction between public authorities and public functions (/acts) in relation to persons or bodies other than core public authorities. For these judges, then, s 6 applies to all acts of governmental entities, and to all public acts/functions by whomever performed.

Underlying this discussion is a point of fundamental importance. In the modern period, the public/private distinction seems to have developed, in political and legal thinking anyway, in the eighteenth and nineteenth centuries as a result, on the one hand, of the centralisation and expansion of government and, on the other, of the growth of ideas about the importance of the individual (as distinct from the community) associated with the Enlightenment. In this context, the distinction was conceived institutionally in terms of a contrast between government and non-government. Using French law as his model, John Allison has argued that there is an important link between a political conception of the state as a separate entity and the distinction between public law and private law.[19] In the French system, the public/private distinction has institutional roots, and it has also borne institutional fruit in the shape of the Conseil d'Etat. AV Dicey who, in his *Introduction to the Study of the Law of the Constitution*, first published in 1885, argued for the principle of equality before the law, understood that principle in institutional terms, with government on one side of the equation and citizens on the other. On that basis, he rejected both a substantive distinction between public and private law and an institutional arrangement under which the two bodies of law would be administered by different agencies.

Ironically, the first edition of Dicey's work was published only about 12 years after the French Tribunal des Conflits, in the case of *Blanco* (1873), adopted the essentially functional criterion of *service publique*[20] to define the boundary between the respective jurisdictions of the Conseil d'Etat and the ordinary courts.[21] More importantly for present purposes, political and legal developments of the last 25 years have seriously undermined the institutional understanding of

[19] J Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford, Clarendon Press, 1996); also T Daintith, 'State Power' in *The New Palgrave Dictionary of Economics and the Law* (London, Macmillan, 1998), 524. On the history of the public/private distinction more generally see MJ Horwitz, 'The History of the Public/Private Distinction' (1982) 130 *U of Penn LR* 1423.

[20] This was originally conceived as a mixed functional/institutional criterion; but as it developed it became more and more functional: LN Brown and JS Bell, *French Administrative Law* (5th edn, Oxford University Press, 1998), 129–32.

[21] Brown and Bell, above n 19, at 5, 129. On the infiltration of this concept into English law see T Prosser, 'Public Service Law: Privatization's Unexpected Offspring' (2000) 63 *Law and Contemporary Problems* 63.

the public/private distinction. We now see clearly that non-government institutions are implicated in various ways in governmental tasks ('governance') and, conversely, that government participates in various ways alongside its citizens in social and economic life.[22] One result has been a shift from conceiving the public/private distinction in institutional terms to thinking about it in functional terms. Partly, no doubt, because the ECHR was conceived and drafted at a time when the public/private distinction was understood primarily in institutional terms (and because it is a treaty), the conceptual structure of section 6 of the HRA is ambivalent as between institutional and functional understandings of the province of public law in general, and of human rights law in particular. Understood in institutional terms, human rights are rights against government. Understood in functional terms, human rights are designed to impose constraints upon the performance of governmental tasks, activities or functions.

An important contrast between the institutional and functional understandings of the concept of publicness is that whereas institutional approaches are commonly based on reasonably hard-edged factual criteria, the idea of a public function is widely acknowledged to rest on value judgements about the interest that society can legitimately claim in regulating the lives of individual citizens. Under the functional approach the public/private divide is not between government and non-government but between society, or community, and the individual. Because of its evaluative nature, the functional approach is context-specific. Judgements about which activities are public and which are private will depend on the purposes for which the distinction is being drawn. For instance, the fact that an activity is classified as public for the purposes of human rights law does not mean that it will be classified as public in other legal contexts.

Andrew Clapham takes a rather different functional approach to the scope of human rights law.[23] His starting point is that the distinction between the state (public) and non-state (private) actors should not mark the line between application and non-application of human rights law. At the same time, the focus of his approach is not on identifying those activities in the conduct of which human rights must be respected. Rather he starts with the functions of human rights. In broad terms (but with particular reference to the ECHR), he says that these are to protect and promote democracy on the one hand, and individual dignity on the other.[24] In his view, it is only conduct that has 'a public element' that attracts the protection of 'democracy-enhancing' human rights. By contrast, 'dignity-enhancing'[25] human rights protect conduct regardless of whether it has a public element. This can be put in terms of duties: people have a duty to respect dignity-enhancing rights in all situations, whereas democracy-enhancing rights need only be respected in public situations. And, whilst the functional public/private distinction embodied in section 6 of the HRA relates to the scope of the obligation to protect

[22] For a recent general statutory encouragement of such participation see Local Government Act 2000, especially ss 2 and 4.

[23] *Human Rights in the Private Sphere* (Oxford University Press, 1993).

[24] *Ibid*, especially at ch 5.

[25] These descriptions of rights are mine, not Clapham's.

human rights, Clapham's use of the distinction relates to the conduct protected by human rights.

At first sight this is an attractive approach because it relates the scope of application of human rights to their underlying purpose. Democracy and dignity may be interfered with by non-state actors as well as by the state, and by those engaged in private activities as well as by public functionaries. On reflection, however, Clapham's account seems less satisfactory. One problem arises out of the fact, expressly acknowledged by Clapham, that at least some human rights protect both democracy and dignity. More importantly, it seems at least arguable that although only some human rights protect democracy, they all protect dignity by virtue of the fact that they belong to individuals as human beings. If all rights protect dignity, they should, according to Clapham's reasoning, all apply to private as well as public activities because people's dignity ought to be respected at all times. If this is so, the distinction between public and private activities does no work. Rather the scope of applicability of any particular right would depend solely on its content. Rights will be applicable to some situations but not to others merely by virtue of their terms and substance. But because people's dignity ought to be respected in all situations, the distinction between democracy (public) and dignity (private) is irrelevant to deciding the scope of application of any particular right because all rights protect dignity.

It is clear that there is something amiss with Clapham's analysis when one considers the examples he gives of how the democracy/dignity distinction affects the application of rights. Suppose (he says) that the members of a small Christian community refuse to allow a coven of witches to address them; and, by contrast, that witches are banned from holding meetings.[26] In the latter situation (says Clapham) democracy is threatened, but not in the former. However, it is hard to see how anything follows from this about the scope of freedom of speech. In the latter situation (it seems) both democracy and dignity are threatened; and so the right to speak is (doubly) engaged. In the former situation—so Clapham's discussion implies—the witches' freedom of speech is not infringed. This seems to be because their dignity is not threatened. But it is by no means clear that the concept of 'dignity' could be elaborated to produce this conclusion independently of some reference to the lack of a public element in the activity of the Christian group.

Clapham's position is further complicated by his insistence that he is not recommending abolition of the public/private distinction.[27] So, he says, whereas 'private individuals' have a right to privacy that can be set against another's 'right to information,' 'the State' has no such right to privacy but only a 'claim to *secrecy*.'[28] This example takes us right back to an institutional public/private distinction. In the end, I would argue, the logic of Clapham's position precisely requires abandonment of the public/private distinction and determination of the scope of human rights solely by reference to their substantive terms and without reference,

[26] Clapham, above n 23 above, at 146.
[27] *Ibid* at 134.
[28] *Ibid* (original emphasis).

in terms of a public/private distinction, *either* to the characteristics of those bound to respect them or of the functions and activities they engage in, *or* to the characteristics of activities protected by human rights.

Judicial Review and the Institutional Public/Private Divide

If the HRA reflects a shift to a functional understanding of the public/private distinction, there are other areas in which institutional understandings are still dominant or at least very important. The Freedom of Information Act 2000, for instance, applies to information held by a 'public authority'; and Schedule 1 contains a very long list of bodies that qualify as such for the purposes of the Act.

At the opposite extreme—in terms of conceptual complexity, anyway—are the common law rules governing the scope of 'judicial review' in the sense of proceedings brought in accordance with Civil Procedure Rules (CPR) Part 54. CPR Part 54 is the successor to the version of Order 53 of the Rules of the Supreme Court (RSC) that came into operation in 1977. The previous version of Order 53 dealt only with applications for the 'prerogative writs' of certiorari, prohibition and mandamus.[29] The procedural restrictions that surrounded applications for these remedies were so adverse to applicants that declarations and injunctions (the procedures for which were laid down in other Orders of the RSC and were less restrictive) came to be used as alternatives to the prerogative writs. The 1977 amendments to Order 53 regularised this situation by providing that prerogative orders (formerly 'prerogative writs') could be claimed only in accordance with the Order 53 procedure, but that declarations and injunctions could be applied for either under Order 53 or in accordance with the procedures for seeking these remedies laid down in other Orders of the RSC. A perhaps unanticipated result of making injunctions and declarations available 'either way' was the enunciation by the House of Lords in *O'Reilly v Mackman*[30] of the so-called 'exclusivity principle' to the effect that declarations and injunctions could be sought under Order 53 only in 'public law matters.' The exclusivity principle proved to be extremely controversial, and various exceptions to it were quickly developed.[31] However, the basic idea that judicial review under RSC Order 53, and now under CPR Part 54, is the appropriate procedure for 'public law claims' has become entrenched in the law, thus creating a procedural public/private divide.

The case law concerning the meaning of 'public law claim' and, hence, the scope of CPR Part 54, is extremely complex and has several strands. One strand rests on a distinction between public law rights and private law rights. This distinction provided the basis of the exclusivity principle laid down in *O'Reilly v Mackman*, but it has now

[29] Now known as a quashing order, a prohibiting order and a mandatory order respectively.

[30] [1983] 2 AC 237.

[31] See particularly *Wandsworth BC v Winder* [1985] AC 461; *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] AC 624; *Chief Adjudication Officer v Foster* [1993] AC 754; P Cane, *An Introduction to Administrative Law* (3rd edn, Oxford University Press, 1996), 99–104.

all but disappeared from view under the weight of exceptions to that principle enunciated in later cases.[32] A second strand in the cases defining the scope of judicial review rests on the contrast between governmental and non-governmental functions. This approach was first adopted in the *Takeover Panel* case[33] in which it was held that decisions of the Panel (a non-governmental, self-regulatory body) could be challenged under Order 53 because it was exercising a public function or a power with a public element. In later cases, this test has been elaborated in two ways.[34] One is to ask hypothetically whether the government would make provision for the exercise of the function if it was not being performed by the body in question.[35] The other is to ask whether the activities of the non-governmental body in question are an integral part of a governmental scheme of regulation.[36]

Yet a third strand in the case law on the meaning of 'public law claim' utilises an institutional distinction based on the source of a decision-maker's powers. In the *Takeover Panel* case the Panel's power was based neither on statute nor on contract but merely on the consent of those who submitted to its jurisdiction. Two of the judges indicated that if the Panel's power had been contractual (and in this sense 'private'), its decisions would not have been subject to judicial review. In other words, if the source of a body's power is contractual, the fact that it performs a public function will not render it amenable to judicial review.[37] This approach is of particular significance for cases involving the privatisation of government enterprises and contracting out of the provision of services by government. One typical result of privatisation is to transform the relationship between the provider and the consumer of a service from one based on statute to one based on contract; and a typical result of contracting out is to disrupt the statutory relationship connecting the consumer and the government entity by creating a contractual relationship between the consumer, or the government entity responsible for arranging for the provision of the service, or both, and the provider of the service. The issue then becomes whether the consumer can challenge (contractual) conduct of the service provider by way of judicial review.

A single judge of the High Court has held in this context that the *Takeover Panel* and *Aga Khan* cases[38] 'stand as authorities for the proposition that the courts cannot impose public law standards upon a body the source of whose power is con-

[32] An analogous distinction is used to determine the scope of application of the right to a fair trial under Article 6 of the ECHR. Article 6 applies to 'the determination of civil rights and obligations.' The case law on the meaning of 'civil' is complex, but on balance seems to draw the line between 'civil' and 'non-civil' in terms of entitlement-based 'rights' (the paradigm of which are 'private law rights' such as arise under property law and contract law) and discretion-based benefits (such as ex gratia payments and purely discretionary social welfare benefits). See Clayton and Tomlinson, above n 8, at 625–31. The appropriate domestic analogy is, of course, with rules governing the applicability of the requirements of (procedural) natural justice.

[33] *R v Panel on Takeovers and Mergers, ex parte Datafin* [1990] 1 QB 146.

[34] J Black, 'Constitutionalising Self Regulation' (1996) 59 *MLR* 24.

[35] Eg *R v Chief Rabbi of the United Hebrew Congregations, ex parte Wachmann* [1992] 1 WLR 1036.

[36] See eg *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909 per Hoffmann LJ.

[37] Eg *Law v National Greyhound Racing Club* [1983] 1 WLR 1302.

[38] See above nn 33 and 36 respectively.

tractual and absent sufficient statutory penetration.'[39] The *Servite Houses* case involved a challenge to a decision of a housing association to close a residential nursing home in which a local authority, in discharge of statutory functions, had arranged for the applicants to live. The ground of challenge was that the applicants had been promised that they would be able to live there for the rest of their lives. The judge held that the decision was not amenable to judicial review on public law grounds because the respondent was entitled, under its contract with the local authority, to close the home.

Several points deserve notice. One is the reference by the judge to 'public law standards.' Although the public/private distinction was introduced in *O'Reilly v Mackman* on the back of a reform of court procedure, and although judicial review procedure has distinctive features, the procedural public/private distinction has brought a substantive public/private distinction in its wake. In other words, judicial review is to be understood not merely as a distinctive procedural regime, but also as the gateway to a distinctive set of substantive public law principles which provide grounds for challenging decisions that are amenable to judicial review, but not for challenging decisions that are not so amenable. This coupling of procedure and substance was not inevitable, and I will have more to say about it later. The second point to note is that the judge combined the institutional and the functional tests by holding that contractual power may be amenable to judicial review if it is an integral part of a statutory regime of service provision. In this respect, the fact that the relevant regime is statutory does not mean that this criterion is an institutional one based on the source of the power. Rather, the fact that a contractual function is embedded in a statutory regime indicates that the function is 'public' in the relevant sense.

Thirdly, it is instructive to compare the approach in *Servite Houses* with that in the later case of *Poplar Housing and Regeneration Community Association Ltd* v *Donoghue* in the Court of Appeal.[40] Poplar was a housing association created by Tower Hamlets LBC so that the council could transfer to it a substantial proportion of the council's (public) housing stock. Tower Hamlets had arranged for the applicant to be accommodated temporarily in one of Poplar's houses pending a decision as to whether it had a statutory duty to house her permanently. In due course the council decided that the applicant was not entitled to permanent housing; and as a result, Poplar sought a possession order against the applicant, who argued that in seeking the order Poplar was acting in breach of Article 8 of the ECHR. This argument raised the issue of whether Poplar was a public authority for the purposes of section 6 of the HRA. It was accepted by all parties that Poplar was not a pure public authority; and so the relevant questions were whether it was a hybrid public authority and whether the act of seeking a possession order was public or private. The Court of Appeal held that Poplar was bound by the HRA, effectively because it was an integral part of the arrangement by which the council fulfilled its statutory housing functions.

[39] *R v Servite Houses, ex parte Goldsmith* [2001] LGR 55.
[40] [2001] 3 WLR 183.

The fact patterns in these two cases are essentially similar. In particular, the challenged action in both cases was done in exercise of a contractual, or at least a contract-like, power. An explanation for the difference in outcome may lie in the fact that whereas the source of the power was directly relevant to the scope of judicial review in *Servite Houses*, it was only indirectly relevant to the scope of the HRA in *Poplar*. According to the rule that the judge in *Servite Houses* extracted from the *Takeover Panel* and *Aga Khan* cases, an exercise of contractual power will be subject to judicial review only if it is an integral part of a governmental activity. By contrast, a body can be a public authority under the HRA provided only that certain of its functions are public; and the fact that a decision was made under a contract is only one factor to be taken into account in determining whether it was a private or a public act.

In *R (Heather) v Leonard Cheshire Foundation*[41] (the facts of which were very like those of *Servite Houses*) the Court of Appeal, in holding that the Foundation was not a hybrid public authority for the purposes of the HRA, distinguished *Poplar* on the ground that the activities of the Foundation were not an integral part of the activities of the local authority in the way that the activities of Poplar were. Whereas Poplar was a statutory housing association formed to take over the council's housing stock, the Foundation is a long-established non-statutory charitable organisation specialising in the provision of residential care. However, the fact that the relationship between the Foundation and the council was essentially contractual did not figure (expressly at least) in the court's justification for its decision that the Foundation was not a public authority. This is not to say that the legal underpinning of an entity's activities may not be relevant to its status. In *R (A) v Partnerships in Care Ltd*[42] a non-governmental psychiatric hospital was held to be a public authority because statute imposed certain obligations in relation to the running of the hospital directly on its owners. The point would seem to be that contract does not weigh so heavily against a finding of publicness under the HRA as it does in the context of CPR Part 54.[43]

An institutional public/private divide is a much more prominent feature of EC law. Of most general significance, perhaps, is the law concerning the effect of directives in the domestic law of the Member States. Unlike EC regulations, directives are designed to be implemented by Member States rather than to affect the legal rights and obligations of citizens by their own force. However, in order to overcome problems caused by non-implementation or incorrect implementation, the European Court of Justice (ECJ) developed the doctrine of 'direct effect' of directives. According to this doctrine, once the date for implementation of a directive has passed, the directive is treated, as against *organs of the state* but not against citizens, as having

[41] [2002] EWCA Civ 366.

[42] [2002] EWHC 529; [2002] 1 WLR 2610.

[43] CPR Rule 54.1(2) defines 'a claim for judicial review' to mean 'a claim to review the lawfulness of (i) an enactment; or (ii) a decision, action or failure to act in relation to the exercise of a public function.' The first limb of this definition refers to claims under s 4 of the HRA. Because the rule is procedural, the reference in the second limb to 'public functions,' while no doubt meant to summarise the law relating to the scope of judicial review, does not supersede or modify it.

been correctly implemented.[44] This means that a citizen can challenge decisions and actions of the state and its organs that are inconsistent with the directive. The institutional aspect of the criterion that imposes obligations on states under unimplemented or incorrectly implemented directives is reinforced by the principle, clearly stated by Advocate-General Slynn in *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*,[45] that the state is directly bound by directives in relation to all of its activities, whether 'public' or 'private.'

The leading case on the meaning of 'organ of the state' is *Foster v British Gas plc* in which the ECJ offered the following definition of 'organ of the state':

> a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable to relations between individuals.[46]

This definition of 'organ of the state' assumes the existence of a 'core' state that is itself left undefined; and it is concerned with entities beyond that core. The definition is narrow in various respects. It applies only to entities to which 'special powers' have been expressly delegated by the state, and only to entities that provide a 'public service under the control of the state.' As a result, it identifies as public only entities that are both institutionally and functionally public. Institutionally, the entity must be a delegate of the state and under its control; and functionally, it must be providing a public service and have special powers for this purpose. At the relevant time, British Gas was a state-owned utility company. It was a vehicle for commercial activity rather than for what Advocate-General van Gerven called the 'exercise of authority in the strict sense,'[47] which he seems to have thought to be the characteristic of the state in its core sense. In his view, British Gas was a (non-core) state organ because it had legal powers that enabled and entitled it 'to decisively influence the conduct of persons.'

Another context within EC law in which the outer boundaries of the State need to be specified is that of public procurement. The Public Supply Contracts Regulations 1995, SI 1995/201 (which give effect to an EC Directive) govern contracting by 'contracting authorities.' The definition of this term contains both named entities and a general provision in the following terms:

> a corporation established, or a group of individuals appointed to act together, for the specific purposes of meeting needs in the general interest, not having an industrial or commercial character, and (i) financed wholly or partly by another contracting authority, or (ii) subject to management supervision by another contracting authority, or (iii) more than half of the board of directors or members of which or, in the case of a group of individuals, more than half of those individuals, being appointed by another contracting authority.

[44] For more detail see TC Hartley, *The Foundations of European Community Law* (5th edn, Oxford University Press, 2003), 206–19.

[45] [1986] 1 CMLR 688.

[46] [1990] 2 CMLR 833 at 857.

[47] *Ibid* at 851.

Like the definition adopted in *Foster*, this one identifies contracting authorities by combined institutional and functional criteria: they are entities that perform the function of meeting needs 'in the general interest' and in a non-commercial way; and they are in a relationship of 'close dependency' (understood in terms of sub-paragraphs (i), (ii) and (iii) in the definition) on another contracting authority.[48]

A third institutional approach to establishing the boundaries of the state is found in case law of the European Court of Human Rights. As noted earlier, only states are bound by the ECHR. In *Costello-Roberts v United Kingdom*[49] the question was whether the United Kingdom could be held responsible for acts of corporal punishment inflicted on a student by a teacher in an independent school. In holding the United Kingdom responsible the Court seems to have adopted a principle of vicarious liability—the State could not, by delegating internal discipline to school authorities, absolve itself of responsibility for acts of discipline that were inconsistent with rights of pupils under the Convention.

This brief survey of some of the areas in which current law embodies and utilises a public/private distinction presents a complex picture of various functional and institutional criteria combined in a number of different ways in various related areas of the law. At the same time as this patchwork of provisions has been developing, so also have critiques of the public/private distinction. It is to these that we now turn.

CRITIQUES OF THE PUBLIC/PRIVATE DISTINCTION

There was much criticism of the public/private distinction in the 1980s based on two main lines of attack. One was that the categories of public and private are so indeterminate and manipulable that they are little more than political slogans. This argument was one manifestation of a thorough-going realist/critical scepticism about legal concepts which, if taken seriously, would render impossible normative legal analysis of the sort I am engaged in here. So I will not address it in detail. The other main argument (identified particularly with feminist legal theory)[50] was that the public/private distinction is typically used as a shield to mask the extent of legal regulation of people's lives. The underlying idea here was that there are very few areas of life that are not subject to legal regulation; and that if something is regulated by law it is, in an important sense, public. For present purposes, the problem with this argument is that it does not help us to understand how the public/private distinction can operate within the law and not just as a marker of law's boundary. In other words, the public/private distinctions with which I am concerned in this chapter refer to different ways in which activities can be regulated

[48] *R v HM Treasury, ex parte University of Cambridge* [2000] 1 WLR 2514.

[49] (1993) 19 EHRR 112. See further Clayton and Tomlinson, above n 8, 189–90.

[50] See, eg, N Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford, Hart, 1998), ch 3.

by law. We might say, for instance, that although insurance markets are regulated by law, they provide a 'private' mechanism of loss distribution, by contrast with the 'public mechanism' of a social security system funded by taxes.

Even so, although the criticisms of the public/private distinction that will be examined here do not rest directly on either of these sorts of argument, they contain echoes of both lines of attack.

Dicey's Modern Influence

As noted above, Dicey was opposed to distinguishing between public and private both as a matter of substantive law and in designing adjudicatory institutions. His view was that governors and governed alike should be judged by 'ordinary courts' according to the same set of legal rules. His prime motivation was, it seems, a fear that the distinction would in practice operate to provide the governors with legal privileges and immunities not enjoyed by the governed. That he should have felt this way is not altogether surprising. In eighteenth century France the regional royal courts (*Parlements*) 'not only interfered to a considerable degree in executive government but also impeded such reforms as the monarchy sought to introduce.'[51] In 1790 the revolutionaries passed a law (which was confirmed in 1795 and is still in force) making it a criminal offence 'for the judges of the ordinary courts to ... call administrators to account before them in the exercise of their official functions.' The Conseil d'Etat, an organ of the executive arm of government staffed by civil servants, was established in 1799 to deal with complaints by citizens against the government. But it was not until 1889 that citizens could complain to it directly rather than through a minister of the government. In 1879, 38 members of the Conseil resigned or were dismissed as the result of a purge of members thought not to be 'in total agreement with the government.'[52] The first edition of Dicey's *Introduction to the Study of the Law of the Constitution* was published in 1885.

Dicey's views influenced judicial thinking in England in the first half of the twentieth century. On the other hand, his ideas put no discernible brake in that period on the growth of government regulation, the development of the Welfare State, and increasing government participation in the economy. Nor did they restrain the development of statutory administrative tribunals, staffed in large part by non-lawyers, the sole function of which was to adjudicate disputes between citizens and government. The growth of tribunals in England was haphazard, and dissatisfaction with the resulting lack of system led to the establishment of a committee of inquiry. In its 1957 report the Franks Committee recommended that tribunals should be identified as part of the judicial arm, rather than the executive arm, of government.[53] In Diceyan spirit, the Committee rejected proposals for the

[51] Brown and Bell, above n 19, 45.

[52] *Ibid* at 5.

[53] Cmnd 218, 1957. In 1970 the US Supreme Court significantly judicialised social security administration procedures in *Goldberg v Kelly* 397 US 254, under the influence of Charles Reich's famous article 'The New Property' (1964) 73 *Yale LJ* 733.

establishment of a general administrative appeals tribunal and an administrative division of the High Court, the former on the basis that it would undermine the ultimate control of 'the superior courts' over adjudicative bodies and would introduce a dual system of law with 'all the evils attendant on this dichotomy.'[54] Not much more than a decade later in Australia, the Kerr Committee made recommendations that led to the establishment of the Administrative Appeals Tribunal (AAT).[55] For constitutional reasons, the AAT is technically part of the executive branch; but in many significant respects, in looks and behaves very much like a court.[56] It operates subject to ultimate control by superior federal courts.

At much the same time, there were some who, tapping into a deep vein of anti-Diceyan sentiment, lamented the absence in England of a separate system of public law and of a body like the Conseil d'Etat, that could, in resolving disputes between citizen and state, take proper account of the nature and modes of operation of government administration in a way that bodies staffed (entirely) by lawyers, and adopting court-like procedures and modes of thought, were unlikely to be able to do.[57] But this view has never attracted much support. The Kerr Committee in Australia rejected the French model, most fundamentally because (the Committee said) the 'political and administrative context' in which it operated was different from that in Australia.[58] In Britain, the Leggatt Review of Tribunals has recently recommended a rationalisation of appellate tribunals falling short of the establishment of an AAT-type body.[59] But it reaffirmed the Diceyan ideology of the Franks Committee: 'Tribunals are an alternative to court, not administrative, processes.'[60] More importantly, the role of Dicey's 'ordinary courts' in reviewing administrative activity has grown enormously both in volume of claims and symbolic importance in the past 25 years. While the tribunal system handles vastly more complaints against government than do the courts, it is the courts that tend to deal with those that have the broadest implications and the highest profile in political terms. Institutionally, the formal, external mechanisms for resolving complaints against government still basically conform to Diceyan principles of institutional design.

By the 1960s, however, anti-Diceyan thoughts had started to enter the judicial mind. Symptomatic of this trend were decisions of the House of Lords such as *Ridge v Baldwin*,[61] which established the principle that administrators must fashion themselves in the image of the courts by complying with the rules of natural justice; and *Conway v Rimmer*,[62] which established ultimate judicial hegemony

[54] Cmnd 218, 1957, paras 122,123.
[55] Commonwealth Administrative Review Committee Report, Parliamentary Paper No 144 of 1971.
[56] P Cane, 'Merits Review and Judicial Review: The AAT as Trojan Horse' (2000) 28 *Federal LR* 213.
[57] The most famous exposition of this view is that of JDB Mitchell, 'The Causes and Effects of the Absence of a System of Public Law in the United Kingdom' [1965] *PL* 95.
[58] See above n 55 at para 222.
[59] *Tribunals for Users: One System, One Service* (TSO, 2001), paras 6.9–11.
[60] At para 2.18.
[61] [1964] AC 40.
[62] [1968] AC 910.