

JUDICIAL REVIEW AND PUBLIC LAW: CHALLENGING THE PRECONCEPTIONS OF A TROUBLED TAXONOMY

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Much has been written on whether public/private distinctions should be made by judicial review. Little explored is the related but distinct question of whether judicial review should itself be classed as a branch of public law. This important issue of taxonomy affects the limits, contours and methodology of review, yet is often taken for granted. This article argues that the law and scholarship on judicial review is infused with preconceptions that often prove inconsistent or incoherent, and which may even hinder the potential of judicial review to protect individual rights by taxonomically binding it to public law in a way that is neither an epistemological nor functional imperative. It argues that by loosening its association with public law, judicial review can begin to be liberated from these preconceptions, with renewed focus on deeper questions of principle and purpose.

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I INTRODUCTION

The so-called public/private divide features throughout the law and scholarship on judicial review, cleaving public and private bodies, functions, interests, remedies and law.¹ It has been asked whether there is or should be a public/private distinction made *by* judicial review,² but there has scarcely been focus on whether judicial review should itself be classed as a branch or component of public law.³ These questions are related but distinct, the issue of classification having largely been taken for granted. This article examines the incongruences of, and the difficulties caused by, the categorisation of judicial review as a branch of public law. It argues that its classification as such is neither epistemologically nor functionally necessary, and that by loosening its association with public law, judicial review can begin to be liberated from a number of preconceptions, with renewed focus on deeper questions of principle and purpose.

The classification, organisation and treatment of judicial review as a branch of public law is interconnected with the way in which review is conceived, along with its limits, contours and methodology. If judicial review is regarded as a branch of public law, it might seem doctrinally awkward for a reviewing court to supervise private bodies, regulate private interests or award private law remedies. Conversely, if review is not classed as a branch of public law, its methodology may be at least partly liberated from the perceived need to draw public/private distinctions, with judicial review regulating only, or principally, the 'public' side of those divides.

Public/private distinctions have famously caused difficulties in judicial review: courts have struggled with when to characterise a body as a public

¹ Whilst this article contests substantial aspects of the concept and implications of the public/private distinction, and the contrasts the distinction is supposed to elucidate, it is difficult to offer a meaningful discussion of the distinction and supposed characteristics of the 'public' and the 'private' without using those terms. They are used without adopting wholesale the concept and implications of the public and private labels and the public/private distinction: the article uses the terms to analyse, not make or endorse, the distinction.

² See, eg, Lord Woolf, 'Droit Public: English Style' [1995] *Public Law* 57; Andrew Edgar, 'Public and Private Interests in Australian Administrative Law' (2013) 36 *University of New South Wales Law Journal* 202.

³ This is a question of doctrinal classification. It is different from searching for the 'constitutional foundations' of judicial review, the debate on which has in England and Wales been polarised into so-called *ultra vires* and common law schools of thought: see, eg, Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing, 2000). Consider, as an example of an analysis of the public/private interface which is dependent on the distinction being made, Paul Craig, 'Public Law and Control over Private Power' in Michael Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997) 196.

body, a function as a public function, and so on, in order to measure susceptibility to review.⁴ The source of a body's powers as statutory or contractual, and the character of a body as public or private, has been relevant for the determination of reviewability in Australia.⁵ The courts in New Zealand have also been more reluctant to permit judicial review on the full range of grounds when contractual powers are at issue.⁶ Even in Scotland, where the competency of an application for review 'does not depend upon any distinction between public law and private law',⁷ and where 'the supervisory jurisdiction has always been capable of being invoked to review decisions of purely private as well as public bodies',⁸ contractual rights and obligations have been held 'not as such amenable to judicial review'.⁹ In apparent defiance of its

⁴ See generally Paul Craig, *Administrative Law* (Sweet & Maxwell, 8th ed, 2016) ch 27. Notable cases include *R v Panel on Take-Over and Mergers; Ex parte Datafin plc* [1987] 1 QB 815 ('Datafin') and *R v Disciplinary Committee of the Jockey Club; Ex parte Aga Khan* [1993] 1 WLR 909 ('Aga Khan'), among others. Carol Harlow described it as a 'hard truth' that the public/private classification is 'irrelevant and devoid of intrinsic merit', and that it is 'wholly irrelevant to the organisation of modern society'; the introduction of such a distinction as a basis for classification would be 'foolish': Carol Harlow, "'Public" and "Private" Law: Definition without Distinction' (1980) 43 *Modern Law Review* 241, 250, 256–8. Arguably the interpenetration of public and private institutions and capital, which she identified in her article, has increased since its being written, strengthening her view.

⁵ *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture [No 2]* (2009) 26 VR 172, 186–94 [54]–[81]. Mark Aronson stated that Australian law has generally 'yet to resolve the issue of a government contractor's susceptibility to the processes of judicial review': Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1, 42.

⁶ See Mark Elliott, 'Judicial Review's Scope, Foundations and Purposes: Joining the Dots' [2012] *New Zealand Law Review* 75, 85.

⁷ *West v Secretary of State for Scotland* 1992 SC 385, 413.

⁸ *Ashley v Scottish Football Association Ltd* [2016] CSOH 78, [19].

⁹ *West* (n 7) 413. This is notwithstanding that there has been said to be 'no difference' between English and Scots law on the substantive grounds of review: *Brown v Hamilton District Council* 1983 SC (HL) 1, 42; *West* (n 7) 402, 413; *Ashley* (n 8) [19]. See also *Watt v Strathclyde Regional Council* 1992 SLT 324. A recent glimpse of hesitancy in using judicial review in contractual scenarios is seen in *Shearer v Betvictor Ltd* [2016] CSOH 62. On the relationship between contract and judicial review, see also *Crocket v Tantallon Golf Club* 2005 SLT 663, 672–3 [37]–[41]. One might note a potential distinction drawn in Scotland between review of decisions made by a decision-maker whose powers have been conferred by contract, and review of contractual obligations — contrast *West* (n 7) 413 with *Ashley* (n 8) [20]. It is clear that difficult questions remain on the relationship between contract and judicial review. In relation to England and Wales, see Lord Woolf et al, *De Smith's Judicial Review* (Sweet & Maxwell, 7th ed, 2013) 145–50.

doctrinal foundations,¹⁰ there remains in Scotland a tendency to characterise judicial review as a branch of public law.¹¹

There is often an awkwardness in fastening these distinctions to consistent principles, and a resultant lack of certainty in knowing exactly who and what is reviewable, when and (perhaps more crucially) why. The distinctions can also become self-reinforcing: precedents are invoked by judges to show that this is a public body, or that is a public function, and so an apparent consistency builds up in the law. However, as this does not always reflect the original principles on which processes or remedies were once built, such an appearance of consistency is perhaps misleading: for example, the remedies of certiorari, mandamus and prohibition (now, in England and Wales, quashing orders, mandatory orders and prohibiting orders)¹² are regarded as ‘public law remedies’,¹³ though, as Dawn Oliver has shown, they have not always been conceived as such and, historically, they to some extent traversed the putative public/private divide.¹⁴ Perhaps part of the difficulty is that the classification and conceptualisation of the prerogative orders or constitutional writs¹⁵ as public law remedies has distracted from deeper questions of principle in judicial review.¹⁶

The classification of judicial review as a branch of public law is often used as a basis on which other distinctions are made, and, potentially, unnecessarily made. For example, though there is common law authority that one should

¹⁰ See Stephen Thomson, ‘The Doctrinal Core of the Supervisory Jurisdiction of the Court of Session’ [2016] *Public Law* 670. This article contains answers and provides comparative context to some of Neil Duxbury’s points in Neil Duxbury, ‘The Outer Limits of English Judicial Review’ [2017] *Public Law* 235, 237–9, acknowledging that Duxbury was writing in the specific context of England and Wales. Duxbury’s point about judicial review of arbitration (at 238–9), for example, causes significantly less difficulty in the law of judicial review in Scotland, with its significant history of review of arbitral processes and decisions: see Thomson, ‘The Doctrinal Core of the Supervisory Jurisdiction of the Court of Session’ (n 10) 680–3.

¹¹ See, eg, *AXA General Insurance Ltd v Lord Advocate* [2012] 1 AC 868, 952 [171]. Some aspects of judicial review procedure are being shifted into a more public law-oriented conception of review, as with the law on leave, standing and time limits, which have recently been more closely aligned with their counterparts in England and Wales: *Courts Reform (Scotland) Act 2014* (Scot) s 89.

¹² *Civil Procedure Rules 1998* (UK) SI 1998/3132, r 54.2 (‘CPR’), inserted by *Civil Procedure (Amendment No 4) Rules 2000* (UK) SI 2000/2092, r 22.

¹³ See, eg, Peter Cane, *Administrative Law* (Oxford University Press, 5th ed, 2011) 299–303.

¹⁴ Dawn Oliver, ‘Public Law Procedures and Remedies: Do We Need Them?’ [2002] *Public Law* 91, 100–3. See also Woolf et al, *De Smith’s Judicial Review* (n 9) 855–85.

¹⁵ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 93 [21].

¹⁶ See nn 156–63 and accompanying text.

generally have resort to other remedies (including private law remedies) where these are available, prior to or instead of applying for judicial review,¹⁷ this does not necessarily require a public/private distinction to be drawn. Rather than identifying a relationship as private law in nature, and on that basis excluding or deprioritising remedies in judicial review, it is possible to justify a prioritisation of other remedies, such as those in contract or tort, on alternative principles. One could be that, as a matter of policy, it is preferable to require contractual or other 'private law' rights to be exercised in order to mitigate the effects of review on public administration, as the resulting judicial decision is typically not catholic, but directed specifically at the legal relationship between the parties in dispute. This might generate fewer rights for a larger class of persons in the 'public' domain. Alternatively, contractual obligations owed by a public body might, as a matter of policy, be thought best enforced through contractual remedies from a rule of law and economic perspective: by treating a public contractor like any private contractor, private persons are not disincentivised from contracting with public bodies on the basis that they might be treated differently by the courts.¹⁸ The landscape of judicial review need not be cast on public/private contours.

The reluctance to admit of judicial review of contractual obligations implies the segregation of a class of private law cases apparently considered inappropriate for judicial review. Institutional factors may, as Mark Elliott has argued, feature in the determination of amenability to review¹⁹ — it might, for example, be regarded as inappropriate that non-statutory trustees, or company directors, or sports referees, be subject to judicial review, whereas it might be thought appropriate for emanations of the Crown acting in a prerogative capacity to be subject to review. As Elliot rightly stated, institutional factors would be indicative rather than determinative of amenability to review²⁰ — it

¹⁷ See The Law Society of Scotland, *The Laws of Scotland: Stair Memorial Encyclopaedia* (Butterworths, 2000) 134–7; Woolf et al, *De Smith's Judicial Review* (n 9) 902–7; Sir William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 11th ed, 2014) 600–8; Craig, *Administrative Law* (n 4) 869–71. See also *Watt* (n 9); *R v Chief Constable of the Merseyside Police; Ex parte Calveley* [1986] 1 QB 424; *Diamond v PJW Enterprises Ltd* 2004 SC 430. Cf *R (Corporation of London) v Secretary of State for the Environment, Food and Rural Affairs* [2005] 1 WLR 1286, 1292–3 [15]–[16].

¹⁸ Though consider *Crédit Suisse v Allerdale Borough Council* [1997] QB 306, and comment on the case at first instance in Peter Cane, 'Do Banks Dare Lend to Local Authorities?' (1994) 110 *Law Quarterly Review* 514. See also *Supportways Community Services Ltd v Hampshire County Council* [2006] LGR 836, 852 [61]; *Charles Terence Estates Ltd v Cornwall Council* [2013] 1 WLR 466.

¹⁹ Elliott (n 6) 87.

²⁰ *Ibid.*

might be felt that when a government department is in breach of contract, it should be contract law, and not judicial review, that determines liability. This underlies the thrust of the *Datafin* principle that the nature of the power exercised, rather than its source, is determinative of susceptibility to review.

However, the nature of the power is still assessed through the lens of a particular worldview: one premised on traditional conceptions of the public/private divide. When the nature of the power is contractual, the instinct of the courts is to recoil from judicial review. Why, after all, should public law deal with private law obligations? Why should public law standards be imposed on bodies acting in an ostensibly private law capacity? However, when the precariousness of some of the underlying concepts is exposed, it is evident that the existing approach to judicial review is infused with predispositions and premises which do not always prove consistent or coherent. The multifaceted realities of power, and the complex nature of governance, reveal the fragility and inadequacy of traditional public/private distinctions — and the classification of judicial review as a branch of public law arguably perpetuates the clumsiness of review methodology in attempting to grapple with these realities.

II THE INDETERMINACY OF ‘PUBLICNESS’

Judicial review’s uncomfortable encounters with public/private distinctions are well publicised. This has famously been seen in relation to the categorisation of bodies as public or private, with a shift in judicial methodology to whether the body’s functions are public or private in nature, an approach broadly followed in Australia.²¹ This is essentially in recognition of the fact that public bodies can have private law obligations (such as in contract or tort), and that private bodies can have public law obligations (such as when a private body exercises *de facto* regulatory functions). It has also been seen in relation to standing, and whether the applicant is required to have a private

²¹ *Datafin* (n 4), affirmed in *R (Holmcroft Properties Ltd) v KPMG LLP* [2017] Bus LR 932 (*Holmcroft*). See also *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864. The importance of the nature of the power under review was also confirmed in *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374. It has been noted that *Datafin*’s formal status remains uncertain in Australia (see Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 153–6), but reliance on public/private distinctions is found in Australia as elsewhere. See also Chris Finn, ‘The Public/Private Distinction and the Reach of Administrative Law’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 49, 53–6.

interest in the matter to which the application relates, or whether an applicant can make an application in the public interest.²² The trend is one in which the courts adapt the law as the boundary between the public and the private is tested, developed and refashioned, but not always with confidence in the principles and concepts that this involves.

The notion of what is public — ‘publicness’ — is neither fixed nor incontrovertible.²³ As Elliott has pointed out, it is not enough to state that judicial review is about controlling public power when the very notion of publicness is deeply contestable.²⁴ Not only are there numerous situations in which ostensibly public relationships are privatised, or ostensibly private relationships ‘publicised’, the scholarship (and jurisprudence) sometimes operates on the basis of oversimplified or superficial conceptualisations of public law and publicness.²⁵

One of the conceptualisations of public law and private law is that the former is concerned with vertical relationships between the state and private entities, whereas the latter is concerned with horizontal relationships between private entities.²⁶ Whilst there is an attractive simplicity and perhaps pedagogical utility in this conceptualisation, it comes under strain when the interplay between the public and the private is opened up to scrutiny.

Consider, in this regard, the complexities of publicly owned companies. In the UK, there are examples of publicly owned companies at each level of government, including national (eg The Royal Bank of Scotland Group plc),

²² The technicalities of remedies were partly to blame, a situation liberalised by *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

²³ Perhaps the notion of ‘privateness’ is also neither fixed nor incontrovertible, though the focus of the present argument is on ‘publicness’, as it is tests of a sufficient ‘public’ element or nature that are used to define judicial review or susceptibility to review. See also Neil Walker, ‘On the Necessarily Public Character of Law’ in Claudio Michelon et al (eds), *The Public in Law: Representations of the Political in Legal Discourse* (Ashgate, 2012) 9, 12–14.

²⁴ Elliott (n 6) 76–7.

²⁵ Brennan J stated that the chief aims of public law are the ‘declaration and enforcing of the law which determines the limits and governs the exercise of [a] repository’s power’, though this is quite a technical definition: *A-G (NSW) v Quin* (1990) 170 CLR 1, 36. Neil Walker argued that ‘public law’ is a broadly descriptive organising category, and ‘one that tends to take for granted the validity of the underlying framework within which that description takes place’: Walker, ‘On the Necessarily Public Character of Law’ (n 23) 14.

²⁶ Including ‘horizontal’ relationships between private entities and state entities acting in the capacity of private entities — such as a contracting government department: see Michel Rosenfeld, ‘Rethinking the Boundaries between Public Law and Private Law for the Twenty First Century: An Introduction’ (2013) 11 *International Journal of Constitutional Law* 125, 125–6.

devolved (eg David MacBrayne Ltd)²⁷ and local (eg Manchester Airports Group plc).²⁸ An illuminating example is The Royal Bank of Scotland Group plc ('RBS'), which is majority owned by HM Treasury²⁹ through a management structure including intermediaries UK Financial Investments Ltd ('UKFI') and UK Government Investments Ltd ('UKGI').³⁰ As provided in the *UKFI Framework Document*, HM Treasury has a prominent role in the corporate governance of UKFI and its investee companies, including RBS. UKFI is stated to be 'directly accountable to HM Treasury' for the achievement of UKFI's objectives,³¹ and responsibilities are owed by UKFI to both HM Treasury and Parliament.³² Meanwhile, the Chancellor of the Exchequer bears shared responsibility for ensuring the intentions of the *UKFI Framework Document* are implemented.³³

These introduce significant public sector involvement into the corporate governance of RBS. Accordingly, the corporate governance of RBS is open to direct influence by public sector actors and values. Moreover, it enables HM Treasury to pursue policy objectives through its effective ownership of RBS — objectives which, considering the prominence of RBS in the banking, financial and insurance industries and the potential magnitude of the consequences of its actions, may be tantamount to objectives pursued through orthodox regulatory channels, such as primary or secondary legislation. If public law is

²⁷ David MacBrayne Ltd is a wholly owned subsidiary of the Scottish Ministers. Ferry operators CalMac Ferries Ltd and Argyll Ferries Ltd are wholly owned subsidiaries of David MacBrayne Ltd. Both ferry operators receive large financial subsidies from the Scottish Ministers: see David MacBrayne Limited, *Group Annual Report and Consolidated Financial Statements for the Year Ended 31 March 2017* (Report).

²⁸ Manchester Airports Group plc is currently 35.5% owned by Manchester City Council and 29% owned by a consortium of the other nine local authorities in Greater Manchester: Manchester Airports Holdings Limited, *Interim Report and Accounts for the Six Months Ended 30 September 2017* (Report) 33.

²⁹ The shares are held by the Treasury Solicitor as nominee for HM Treasury. This constitutes a majority of the voting share capital of RBS: RBS, *Annual Report and Accounts 2016: Creating a Simple, Safe, Customer-Focused Bank* (Annual Report, 23 February 2017) 121.

³⁰ The UKGI Framework Document states that UKFI and UKGI would 'merge over time': UKGI, *UK Government Investments: Framework Document* (Policy Document, April 2016) 2 [2.1]. For now, UKFI appears to have a more direct role in the corporate governance of RBS than UKGI, so the focus in this discussion is on UKFI rather than UKGI. UKFI was also the vehicle by which the UK Government managed its interests in Lloyds Banking Group plc, Northern Rock plc and Bradford & Bingley plc: UKFI, *UK Financial Investments Limited Annual Report and Accounts 2016/17* (Annual Report, July 2017) 5.

³¹ UKFI, *UKFI Framework Document* (Policy Document, 5 May 2016) 8 [10.1].

³² See generally *ibid.*

³³ *Ibid* 9 [10.3].

essentially directed at the act of government,³⁴ the corporate governance relationship between HM Treasury and RBS (whether or not via UKFI/UKGI) appears predominantly vertical in nature considering the policy objectives motivating the government's acquisition of RBS. This is significant because the relationship between corporate owners and the corporate entity is principally one of private law — putatively horizontal in nature. In addition, private law instruments are used to pursue policy or public law objectives; in other words, putatively horizontal obligations are used to execute vertical objectives.

A similar phenomenon is encountered in the concept of 'government by contract',³⁵ in which government uses outsourcing or procurement contracts as a medium for pursuing or implementing policy objectives.³⁶ Likewise, 'government by financing' allows government to pursue policy objectives through the award and control of commercial tenders and franchises. These ostensibly private law (horizontal) relationships become vehicles for the exercise of what might otherwise have been public law (vertical) powers. Indeed, an English local authority has even used a private company to effectively bypass borrowing restrictions for an infrastructure project, only to have the Court of Appeal confirm the unenforceability of the authority's guarantee over the company's liabilities.³⁷ In other words, a public body purported to use private law devices to circumvent public law obligations, and whilst this was held to be *ultra vires*, the financial damage to the lender had already been inflicted by this attempt to use horizontal obligations to execute vertical objectives.³⁸ There is similar capacity for this type of outcome to arise

³⁴ See Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2003) 153.

³⁵ Contract and regulation have been described as 'twin pillars of the new architecture of governance': Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 3rd ed, 2009) 339. A good overview is given by Harlow and Rawlings: at ch 8. See also Cheryl Saunders and Kevin KF Yam, 'Government Regulation by Contract: Implications for the Rule of Law' (2004) 15 *Public Law Review* 51; ACL Davies, *The Public Law of Government Contracts* (Oxford University Press, 2008).

³⁶ See generally Terence Daintith, 'Regulation by Contract: The New Prerogative' (1979) 32 *Current Legal Problems* 41. Though this has to some extent been curtailed in the UK at the level of local government by the *Local Government Act 1988* (UK) s 17. See also *Local Government Act 1999* (UK) s 19.

³⁷ *Crédit Suisse* (n 18).

³⁸ Consider also *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1. A possible remedy could in such a scenario lie in unjust enrichment — consider, for example, *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, on which see Greg Weeks, 'The Public Law of Restitution' (2014) 38 *Melbourne University Law Review* 198. However, if the remedy is pursued against the local authority, it would presuma-

under Private Finance Initiatives ('PFIs'). Horizontal commitments can also potentially frustrate vertical obligations, such as the danger of a public body fettering or unlawfully delegating its discretion in the context of procurement, outsourcing and performance measurement.³⁹ For example, a public body which agrees by contract to pay a sizeable penalty should it breach a contractual obligation, such as annual payments over a number of years to subsidise the operation of a hospital, may find itself having effectively limited its scope of action should it seek to reduce subsidies in later years as part of a programme for reduction in public expenditure.⁴⁰ The capacity for public bodies to funnel public law obligations into private law apparatus or, to put it crudely, contract out of or diminish public law liability, incentivises further creative attempts to abuse the public/private distinction. The potential for public law accountability to be diluted by the use of private law mechanisms, perhaps even putting some acts or decisions beyond the reach of judicial review, is surely a setback for the rule of law. The range of potential challengers may be reduced to those who can establish a private law relationship; note the view that even though '[p]rivate power may affect the public interest and the livelihoods of many individuals ... that does not subject it to the rules of public law'.⁴¹

There are other relationships, putatively private law in nature, that are subject to dimensions of verticality redolent of public law powers or obligations. For example, are the contractual obligations of a private company with exclusive responsibility for processing visa and residence applications on behalf of a public immigration agency unequivocally private law in nature? Or, as private law obligations become a conduit for the exercise of public (law) power, do they assume a character of verticality? The same might be asked of debt collection by a private company on behalf of court officers, or obligations owed in tort by a private security company to prisoners in its custody.

The tension runs not only in the direction of 'horizontal' relationships with characteristics of verticality, but also 'vertical' relationships with characteristics of horizontality. For example, the relationship between a public tax authority and private taxpayer is presumably vertical, but elements of horizontality are introduced when authority and taxpayer negotiate tax settle-

bly have to be shown that the authority — not just the asset-starved company — was unjustly enriched.

³⁹ See Davies (n 35) 169–96, 248–58; Harlow and Rawlings (n 35) 217–22, 419.

⁴⁰ See KM Hayne, 'Government Contracts and Public Law' (2017) 41 *Melbourne University Law Review* 155, 164.

⁴¹ *Aga Khan* (n 4) 932.

ments. Similarly, agreements between a prosecuting authority or the police and a criminal accused or suspect to drop or reduce charges in return for cooperation or the provision of information might not be unequivocally vertical. Freedom of information obligations appear vertical in nature, yet confidentiality clauses in public outsourcing or procurement contracts (supposedly horizontal) might constrain freedom of information compliance by the contracting public body.⁴²

In fact, the binary conceptualisation of acts as horizontal or vertical can be fraught with difficulty. Is the contractual outsourcing of public law powers from a public body to a private company best considered a vertical or horizontal act? Or does it have features of both verticality and horizontality? The Australian government outsources ‘garrison and welfare services’ at the Nauru Regional Processing Centre to Canstruct International Pty Ltd.⁴³ As the relationship between the Australian government and Canstruct is contractual and putatively horizontal, does (and should) this shift characteristics and obligations of verticality to the relationship between Canstruct and a person being held at a Regional Processing Centre? Likewise, in the UK, the Department for Work and Pensions (‘DWP’) outsources Work Capability Assessments to the Centre for Health and Disability Assessments Ltd (‘CHDA’), a subsidiary of Maximus Inc.⁴⁴ Does (and should) this also shift characteristics and obligations of verticality to the relationship between CHDA and a person subject to a Work Capability Assessment?⁴⁵ An example at the level of local government is the outsourcing by a local authority of the operation of sports and leisure facilities to a private company — a practice of which there are several examples in Australia⁴⁶ — which could ultimately be a vehicle for

⁴² See Peter Vincent-Jones, *The New Public Contracting: Regulation, Responsiveness, Relationality* (Oxford University Press, 2006) 317–20. Consider in the Australian context, however, amendments to the *Freedom of Information Act 1982* (Cth) (see, eg, s 47G) and, at the state level, the example of the *Government Information (Public Access) Act 2009* (NSW) s 32(1).

⁴³ Until recently the services at both the Manus and Nauru Regional Processing Centres were outsourced to Broadspectrum (formerly Transfield Services Ltd): Department of Immigration and Border Protection, *Offshore Processing Centres in Nauru and Papua New Guinea: Procurement of Garrison Support and Welfare Services* (ANAO Report No 16 of 2016–17, 13 September 2016).

⁴⁴ DWP, *Employment and Support Allowance* (Ministerial Statement, 30 October 2014).

⁴⁵ See *Holmcroft* (n 21) 945 [44]; *Davies* (n 35) ch 8.

⁴⁶ For example, the outsourcing by several local authorities in Queensland (Isaac Regional Council, Mount Isa City Council, Rockhampton Regional Council, North Burnett Regional Council and Whitsunday Regional Council) and New South Wales (Newcastle City Council) of the operation of public swimming pools to Lane 4 Aquatics: see ‘Local Government Aquatic Centre Management’, *Lane 4 Aquatics* (Web Page) <www.lane4aquatics.com.au/

reducing private law liability.⁴⁷ The company could even be wholly or partly owned by the local authority. These examples, and those of publicly owned companies, place considerable strain on the contention that

public law is concerned with public institutions and their relations with private citizens, and with the performance of public functions, while private law is concerned with private activities and relations between private citizens (both individuals and corporations).⁴⁸

In short, orthodox vertical and horizontal conceptions of public (law) and private (law) powers may insufficiently encapsulate the complexities inherent in the mixing of public law and private law characteristics.⁴⁹ This poses a serious challenge for distinguishing between public law and private law powers in terms of, specifically, the determination of susceptibility to review, and, more broadly, the doctrinal classification of judicial review. It also shows that government outsourcing is not necessarily just about cost savings, but can additionally or alternatively be about obfuscating transparency and accountability. It is not only capable of being motivated by a reduction in financial liability, but also a reduction in accountability, and potentially effecting a shift from legal accountability to the fallback of political accountability.⁵⁰ Further-

company/aquatic-management/local-government-aquatic-centre-management.php>, archived at <<https://perma.cc/H36A-G65F>>. Many other examples exist around Australia, including in such diverse areas as the outsourcing of building maintenance, land valuation, beach cleaning, information technology services, and waste collection and disposal services.

⁴⁷ Whether that is the intention or, as in *Crédit Suisse* (n 18), the effect.

⁴⁸ Cane, *Administrative Law* (n 13) 4.

⁴⁹ See Harlow and Rawlings (n 35) 375.

⁵⁰ Though in the political arena, officials who have outsourced functions may claim that the arm's-length relationship between the outsourcing body and the entity to which the function is outsourced requires that the latter is given the time and space to fulfil its obligations; or they may claim that they will express dissatisfaction to, or seek answers from, the head of that entity. Each of these is a poor substitute for the outsourcing body itself taking responsibility and addressing problems which have arisen. There are also additional costs which may be incurred by the public purse, such as where the outsourcing body must litigate with the contracting entity to enforce obligations. A public body can apparently have its cake and eat it: though a publicly owned company like RBS can be used by the government to pursue or implement policy objectives, without full 'public law' scrutiny (notably by way of judicial review), the government can also claim that public consequences arising from the company's operations are not public or governmental matters. For example, in a question recently posed in the UK Parliament by the Rt Hon Ian Blackford MP about the closure of a large number of RBS branches, resulting in 13 towns in Scotland losing their only remaining bank, the Prime Minister, the Rt Hon Theresa May MP, replied that this was a 'commercial decision' of the bank: United Kingdom, *Parliamentary Debates*, House of Commons, 24 January 2018, vol 635, cols 258–9. She repeated that claim when charged by Mr Blackford in his follow-up

more, if a private entity is not subject to judicial review either at all or to the same extent as a public body, outsourcing may result in a gap between the more stringent public law standards to which a public body is held accountable and the often lower private law standards to which a private contracting party is held accountable. It may also put the individual in a weaker legal position where he or she deals with a private contracting entity instead of a public body. To take just one example, a private contracting party may not be treated as a public officer for the purposes of the tort of misfeasance in public office,⁵¹ even if it is performing a public function.

There are not only challenges faced by the conceptualisation of public powers and obligations on the planes of verticality and horizontality but also with the determination of those powers on the axes of voluntariness and non-voluntariness, or axes of consensual and coercive power. Neil MacCormick, for example, cleaved public law from private law on the basis that powers under the former are essentially unilateral and non-voluntary, whereas those under the latter are essentially bilateral (or multilateral) and voluntary.⁵²

First, the claim that public law powers are essentially unilateral and non-voluntary is again questioned by negotiated tax settlements, agreements for the abandonment or reduction of criminal charges, the effects of confidentiality clauses in government contracts on freedom of information compliance, and so on. These introduce elements of bilaterality and voluntariness — said to characterise private law obligations — into ostensibly public law obligations and relationships.

Furthermore, the characterisation of private law powers as essentially bilateral (or multilateral) and voluntary risks understating the extent to which individuals are constrained by economic realities. For example, a person ineligible for public housing benefits enters into a purchase or rental agreement for residential property on a 'voluntary' basis, but the alternative to doing so — residing with another individual or being homeless — might not be a viable alternative. Similarly, a person enters into a supply agreement with a utilities provider, but the alternative — living without an electricity or gas supply — might not be viable. A person may travel to work using transport which operates on a local or national government franchise, and it may be overpriced in market terms, but the alternative to using that transport —

question that RBS appeared to be in breach of its legal obligations under the *Equality Act 2010* (UK).

⁵¹ Aronson, 'Misfeasance in Public Office' (n 5) 43.

⁵² Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, 2007) 172–6.

walking to work or travelling by car — might not be viable. The proposition or implication that private contracting parties are legal equals⁵³ inadequately accounts for the fact that there may be substantial economic inequalities between them which erode the voluntary basis on which the weaker party contracts with the stronger party.⁵⁴ It also seems to assume a well-functioning marketplace in which there is an adequate degree of consumer choice: one may be able to choose between only two or three service providers, all of which offer bad value, in a market which has so few competitors precisely because of stringent regulatory requirements — those ultimately imposed by the government or legislature.

The ‘legal equals’ argument is at best an oversimplification and at worst compounds the economic vulnerability of contracting parties. The courts are now recognising employment contracts to be distinguishable from ‘commercial contracts’, with the former imposing additional duties on the employer and attracting more intense judicial scrutiny.⁵⁵ Yet commercial contracts can also be one-sided and can reflect or be the result of deep power imbalances.⁵⁶

⁵³ Ibid 175.

⁵⁴ This may be understood as a difference between ‘legal equality and material inequality’, and between ‘legal freedom and economic necessity’: Martin Krygier, ‘Marxism and the Rule of Law: Reflections after the Collapse of Communism’ (1990) 15 *Law and Social Inquiry* 633, 651. See also Hugh Collins, *Marxism and Law* (Clarendon Press, 1982) ch 6. The public/private distinction which is routinely drawn may simply be removed from many individuals’ experience of ordinary life. The reality is that the individual might experience a hegemony on the part of the seller, landlord, utilities provider or transport operator — or in having to transact with such entities — that is practically tantamount to that experienced when dealing with a public body; but judicial review will in most cases not lie against such entities and most commentators would not argue that it should. They will typically invoke, however, the troubled public/private distinction to defend their position.

⁵⁵ *Johnson v Unisys Ltd* [2003] 1 AC 518, 532 [20]; *Keen v Commerzbank AG* [2007] ICR 623, 630 [43]; *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661, 1673 [32] (Baroness Hale DP), 1677–8 [54]–[57] (Lord Hodge SC)).

⁵⁶ Jason Varuhas rightly urged caution in the categorisation of contracts, and acknowledged that ‘different sub-classes of commercial contract may routinely be categorised by significant power imbalances between the parties’: Jason Varuhas, ‘Judicial Review beyond Administrative Law: *Braganza v BP Shipping Ltd* and Review of Contractual Discretions’, *UK Constitutional Law Association* (Blog Post, 31 May 2017) <<https://ukconstitutionallaw.org/2017/05/31/jason-varuhas-judicial-review-beyond-administrative-law-braganza-v-bp-shipping-ltd-and-review-of-contractual-discretions/>>, archived at <<https://perma.cc/3785-Y98U>>. However, as Varuhas recognised (pointing to *Braganza* (n 55) 1675 [39] (Baroness Hale DP), 1678 [57] (Lord Hodge SC)), even within the more specific categories he proposed (employment, charter party, tenancy, insurance and loan agreements) there can also exist large power imbalances. The power and economic imbalances between a large multinational corporation and one of its employees would in many cases be greater than that between a small business and one of its employees. Likewise, a consumer contract between an individual and a large

Economic factors may affect the characterisation of related powers and obligations as public ('non-voluntary') or private ('voluntary'), and may even question that distinction. In the case of transport operated on an exclusive government franchise,⁵⁷ a passenger contracts with the transport operator on a supposedly bilateral and voluntary basis. However, if this highly regulated marketplace, uncompetitive at the point of consumption, offers bad value for passengers,⁵⁸ it is a public (law) restriction which results in an erosion of consumer choice implicit in the concept of a private (law) marketplace in which obligations are concluded bilaterally and voluntarily. The state creates an uncompetitive environment at the point of consumption, yet the customer who must 'take it or leave it' is relegated to remedies that sound only in private law. As Michel Rosenfeld pointed out, if government administers what are traditionally conceived to be horizontal, private law frameworks — such as contract law — in a way which becomes increasingly heavily regulated or paternalistic, this may 'appear to confound or cross the line between private and public law'.⁵⁹

Martin Loughlin placed government at the centre of his definition of public law as 'the law relating to the activity of governing the state'.⁶⁰ Its basic tasks are 'those concerning the constitution, maintenance and regulation of governmental authority'.⁶¹ If judicial review is classed as a branch of public law, it would under Loughlin's definition exclusively or principally relate to government activity. It should apparently do likewise for Elliott, who argued

utilities or telecommunications provider would likely reflect greater power and economic imbalances than that between an individual and a local cafe.

⁵⁷ Examples of which include the operation of the Melbourne suburban rail network by Metro Trains Melbourne, the operation of the Melbourne tram network by Yarra Trams, the operation of the Melbourne Metropolitan Bus Franchise by Transdev Melbourne, and the operation of Sydney Ferries by Harbour City Ferries: see *Franchise Agreement — Train* (Contract between Public Transport Development Authority and Metro Trains Melbourne Pty Ltd, 2 April 2012); *Franchise Agreement — Tram* (Contract between Public Transport Development Authority and KDR Victoria Pty Ltd, 2 April 2012); Public Transport Victoria, 'Transdev Begins Operating the Melbourne Metropolitan Bus Franchise' (Press Release, 2 August 2013); Transdev, 'Transdev Australasia Acquires 100% of Harbour City Ferries' (Media Release, 8 December 2016).

⁵⁸ The potential for this is increased by the fact that an incumbent franchisee has advantages over rival tenderers in refranchising rounds, thus distorting the competitiveness of the tendering process itself: Oliver E Williamson, 'Franchise Bidding for Natural Monopolies: In General and with Respect to CATV' (1976) 7 *Bell Journal of Economics* 73. See also Hayne (n 40) 166–7, on 'unsolicited proposals' or 'market-led proposals'.

⁵⁹ Rosenfeld (n 26) 126.

⁶⁰ Loughlin (n 34) 153; see also at 154–5.

⁶¹ *Ibid* 1.

that one aspect of the foundations of judicial review 'is necessitated by the uniqueness of government's position.'⁶² Peter Cane also seemed to equate public functions with 'governance.'⁶³ In fact, the courts have even stated that what may truly render a decision susceptible to review is not merely that it is public in nature, but that it is governmental in nature.⁶⁴

The majority of judicial review in common law jurisdictions generally relates to government activity in some form, whether of national government, devolved government, local government or bodies carrying out a function which is governmental or relates to acts of government. However, this classification of review comes under strain, or at least 'governance' must be considered in a very broad sense, in the several contexts in which governance seems increasingly unconventional and either bound up with or conveyed through private law mechanisms. That reality could also be problematic for Oliver's assertion that the separation of powers has a relevance in public law cases that might not be replicated in private law cases.⁶⁵ Whilst that may be true if one contrasts the case of a local authority acting beyond its statutory powers, with a contractual dispute between two limited companies under unequivocally private ownership, there is a sufficient range of scenarios occupying the middle ground which raise difficult questions about the form and application of the separation of powers. In addition, as the distinction between public and private law is not an inevitable fault line of judicial review, the separation of powers may have as fluid a relevance as the elusive public/private law divide.

Furthermore, not all cases of judicial review relate to government activity. The existence of cases which are not essentially about government or public activity questions whether it is doctrinally appropriate to categorise judicial review as a branch of public law. In other words, does the fact that most judicial review cases concern public or government activity mean that judicial review must be regarded as in the domain of public law? Or does this confuse empirical observation with normative justification?⁶⁶

⁶² Elliott (n 6) 79 (emphasis omitted).

⁶³ Cane, *Administrative Law* (n 13) 4.

⁶⁴ *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth; Ex parte Wachmann* [1992] 1 WLR 1036, 1041; *Aga Khan* (n 4) 923 (Bingham MR), 930 (Farquharson LJ). Contrast the position in South Africa: see Woolf et al, *De Smith's Judicial Review* (n 9) 194–7.

⁶⁵ Oliver, 'Public Law Procedures and Remedies' (n 14) 97.

⁶⁶ See Elliott (n 6) 79.

III THE FLUIDITY OF 'JUDICIAL REVIEW'

If the indeterminacy of publicness and its implications for judicial review are sometimes acknowledged, then less frequently recognised is the fluidity of judicial review as a conceptual and practical framework.⁶⁷ Of course, a definition of judicial review as the process invoked under s 75(v) of the *Australian Constitution*, or the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act'), or s 39B of the *Judiciary Act 1903* (Cth), or statutory provisions for review in the states,⁶⁸ or pt 54 of the *Civil Procedure Rules* in England and Wales,⁶⁹ is unhelpfully formalistic for the purpose of this discussion. Rather, a closer look reveals that the idea of judicial review is not categorically encapsulated by these procedures.

The point may be implied in the work of Oliver.⁷⁰ First, she identified commonality in values imposed in public law duties and private law duties, such as those in relation to common callings and restraint of trade. In particular, she identified examples of the willingness of the common law to impose duties of fairness and rationality in these areas. Even if a body fell on the 'wrong' side of the public/private divide as framed by Oliver, it might still be captured by duties of legality, fairness and rationality imposed at common law.

Moreover, Oliver argued that the courts in England and Wales have exercised a supervisory jurisdiction outside the realm of judicial review, identifying 'a private law supervisory jurisdiction based on grounds very similar to those that are available in judicial review'.⁷¹ The common law was moving towards the imposition of substantive duties of good administration or legality, fairness and rationality on decision-makers of either a public or private character.⁷² She pointed out that

there is a degree of judicial supervision of private contracting powers, and public contractors are in principle subject to at least the same degree of judi-

⁶⁷ It was, however, acknowledged by Mark Aronson, Matthew Groves and Greg Weeks that judicial review 'can mean different things according to context': Aronson, Groves and Weeks (n 21) 156.

⁶⁸ See *ibid* 32–8.

⁶⁹ *CPR* (n 12).

⁷⁰ Dawn Oliver, 'Common Values in Public and Private Law and the Public/Private Divide' [1997] *Public Law* 630; Dawn Oliver, *Common Values and the Public-Private Divide* (Cambridge University Press, 1999); Dawn Oliver, 'Review of (Non-Statutory) Discretions' in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing, 2000) 307.

⁷¹ Oliver, 'Common Values in Public and Private Law and the Public/Private Divide' (n 70) 636.

⁷² *Ibid*.

cial supervision as private contractors. There is, in other words, a private law supervisory jurisdiction over certain aspects of contractual, quasi-contractual and property relations; and public bodies may be equally subject to that supervision.⁷³

Despite these perceptive observations, there are problems with Oliver's analysis. First, her challenge to orthodox conceptions of the public/private divide is undermined by her invocation of that very divide on the basis that the procedural privileges under what was then ord 53 of the *Rules of the Supreme Court 1965* (UK) should be 'restricted to genuinely public bodies which are directly or indirectly democratically accountable'.⁷⁴ It is also unclear to what extent she sought to exclude politically non-accountable bodies from judicial review or merely from enjoying ord 53 protections.⁷⁵ Not only are these distinctions precisely what have proved so problematic to the courts, Oliver appears to have resiled from her position as she later advocated for the abolition of the prerogative orders and rejected the need for special public law remedies and procedures:

[A] number of wrong turns have been taken by the courts in recent decades, influenced by a once-fashionable view that we need a public/private divide, a special court, special procedures, special remedies. These assumptions are quite inconsistent with the history of the common law, with what to those from civil law jurisdictions has in the past been seen as the unity of the common law, and with the almost worldwide trend to the privatisation of former state functions, contracting out and other techniques which make the public/private divide artificial and difficult to operate.⁷⁶

Nevertheless, this is a valuable and interesting line of enquiry; it is evocative of a supervisory jurisdiction which traverses the public/private divide: one available in 'public law' under the procedure for judicial review, and one in 'private law' under ordinary procedure.⁷⁷ Judicial review is foundationally premised on a supervisory jurisdiction, but the contours and parameters of that jurisdiction are imprecise. Aside from being a supervisory jurisdiction as

⁷³ Dawn Oliver, 'Is the Ultra Vires Rule the Basis of Judicial Review?' in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing, 2000) 3, 12.

⁷⁴ Oliver, 'Common Values in Public and Private Law and the Public/Private Divide' (n 70) 633.

⁷⁵ See *ibid* 644. Sedley LJ stated in *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988, 1993–4 [17] that in his view 'the single important difference between judicial review and civil suit' is the difference in time limits.

⁷⁶ Oliver, 'Public Law Procedures and Remedies' (n 14) 109.

⁷⁷ See *Bird v Campbelltown Anglican Schools Council* [2007] NSWSC 1419.

it is commonly understood in a public law context, it can be closely associated with broader equitable jurisdiction and the inherent jurisdiction of a court to regulate process for the administration of justice.⁷⁸ It could also be argued that the supervisory jurisdiction might feature in a private law context, such as in the supply of implied terms in contracts and the imposition of common law restrictions on non-statutory trustees.⁷⁹ The public/private law divide seems in modern times to be, if not fully, then at least principally, responsible for this type of judicial activity being considered as categorically distinct from judicial review. As noted, however, the public/private divide — whether of law, bodies, functions, interests or remedies — is itself contentious, so this type of activity is neither categorically other than in exercise of the supervisory jurisdiction nor categorically other than judicial review. Whilst the public/private law divide was not completely rejected, it was recently implied that in Scotland the supervisory jurisdiction traverses that divide:

[W]hile it is true that different considerations are in play, there is the lack of any obvious good reason why there should be any difference as between the grounds for exercise of the supervisory jurisdiction in the public law sphere, to use [counsel for the respondent's] expression, and the grounds for its exercise in the private law sphere.⁸⁰

The fluidity of the concept of judicial review has several aspects. First, it is temporally fluid, having come into being over time and continuing to develop on an indefinite trajectory. There are cases which historically were not labelled as instances of judicial review that would now, given the same factual matrix, be classed as such.⁸¹ The law and concept of review has been one of accretion as developed by the common law.

⁷⁸ See Stephen Thomson, *The Nobile Officium: The Extraordinary Equitable Jurisdiction of the Supreme Courts of Scotland* (Avizandum Publishing, 2015) ch 1; Thomson, 'The Doctrinal Core of the Supervisory Jurisdiction of the Court of Session' (n 10) 674–6.

⁷⁹ There are signs of judicial open-mindedness to the sharing of values or principles across the putative divide. For example, Baroness Hale DP stated in her leading judgment in the UK Supreme Court that 'the contractual implied term is drawing closer and closer to the principles applicable in judicial review': *Braganza* (n 55) 1672 [28].

⁸⁰ *Ashley* (n 8) [24]. It has also been written in the Australian context that '[t]he fact that some (and sometimes all) of judicial review's principles operate in fields beyond those where judicial review's remedies might be sought can have effects in both fields ... the sharing of principles sometimes leads to a degree of confusion as to the appropriateness of terminology or procedure': Aronson, Groves and Weeks (n 21) 158.

⁸¹ And vice versa: see *Duxbury* (n 10) 235–6.

Second, judicial review is differently conceived across jurisdictions, cautioning against a universal conception thereof. In some jurisdictions, such as Australia, Canada and the United States, it includes review of legislation inconsistent with fundamental constitutional texts.⁸² In the UK, it includes review of legislation only to the extent prescribed or implied by other legislation, notably that relating to devolution, human rights and (for the time being) European Union law.⁸³ In Scotland, one can competently seek judicial review of a private entity acting in a private law capacity which has little, if anything, to do with public functions.⁸⁴ An individual can in several contexts seek judicial review in one jurisdiction in a way that would be incompetent or unavailable in another.

Third, review activity does not exist solely within the dedicated procedure for judicial review. It is not married to any specific procedure. In England and Wales, it was established in *Wandsworth London Borough Council v Winder* that it was permissible to raise as a defence in an ordinary action the averment that a public body had acted unlawfully — so-called collateral challenge — without having to resort to judicial review procedure under ord 53.⁸⁵ In *Wandsworth* the collateral challenge was defensive,⁸⁶ but in *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* it was effectively permitted offensively.⁸⁷ This was formal judicial recognition that the ord 53 procedure was not the exclusive domain of what may functionally be regarded as judicial review, even where ord 53 was the principal procedural route for transacting review. Moreover, collateral challenge was even permissible as a defence in criminal proceedings.⁸⁸ Forms of collateral challenge have to

⁸² On judicial review of legislation in Australia, see Kathleen E Foley, 'Australian Judicial Review' (2007) 6 *Washington University Global Studies Law Review* 281.

⁸³ The determination of what is a 'public authority' for the purposes of the *European Convention on Human Rights* is beyond the scope of this article.

⁸⁴ See nn 94–100 and accompanying text.

⁸⁵ [1985] 1 AC 61, distinguishing: *O'Reilly v Mackman* [1983] 2 AC 237; *Cocks v Thanet District Council* [1983] 2 AC 286.

⁸⁶ In *Crédit Suisse* (n 18), the defensive collateral challenge was mounted by the public body itself — in other words, it invoked its own ultra vires conduct as a defence to liability in private law.

⁸⁷ [1992] 1 AC 624. See also *Shears Court (West Mersea) Management Co Ltd v Essex County Council* (1986) 85 LGR 479; *McClaren v Home Office* [1990] ICR 824; Carl Emery, 'Collateral Attack: Attacking Ultra Vires Action Indirectly in Courts and Tribunals' (1993) 56 *Modern Law Review* 643.

⁸⁸ *Boddington v British Transport Police* [1999] 2 AC 143. But see *R v Wicks* [1998] AC 92.

varying extents also been recognised in Australia,⁸⁹ Canada,⁹⁰ New Zealand⁹¹ and Scotland.⁹² Furthermore, the High Court of Australia noted that questions regarding the ultra vires activities of public bodies can arise in cases which are not technically judicial review cases. These included ‘actions for recovery of moneys exacted *colore officii* or paid by mistake, and those for trespass, detinue and conversion where the plaintiff challenges the validity of the authority relied upon by the defendant as an answer to the allegedly tortious acts.’⁹³

Fourth, there are cases which are not labelled as instances of judicial review, but which are capable of characterisation as such — further alluding to the fragility of existing taxonomies. An example from Scotland involved reduction of an ultra vires nomination for the honorary secretary of the Scottish Women’s Amateur Athletic Association.⁹⁴ Instructively, this took place entirely outside the prescribed procedure for judicial review. There was existing authority for the court to interfere in this way with proceedings of a sporting association,⁹⁵ however that authority preceded the introduction of the new dedicated procedure for judicial review. Nevertheless, the case at hand existed contemporaneously with the dedicated procedure for review, but did not use it — and was not required by the courts to use it.⁹⁶ It is illuminat-

⁸⁹ See *Federal Airports Corporation v Aerolineas Argentinas* (1997) 76 FCR 582; *Ousley v The Queen* (1997) 192 CLR 69; *A-G (Cth) v Breckler* (1999) 197 CLR 83; *Jacobs v OneSteel Manufacturing Pty Ltd* (2006) 93 SASR 568; *Gedeon v Crime Commissioner (NSW)* (2008) 236 CLR 120.

⁹⁰ See *Consolidated Maybrun Mines Ltd v The Queen* [1998] 1 SCR 706; *R v Al Klippert Ltd* [1998] 1 SCR 737; *AG (Canada) v TeleZone Inc* [2010] 3 SCR 585.

⁹¹ *McCarthy v Madden* (1914) 33 NZLR 1251 (SC); *R v Broad* [1915] AC 1110 (PC); *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA).

⁹² *Ferrier v Scottish Milk Marketing Board* [1937] AC 126.

⁹³ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 144 [17] (citations omitted).

⁹⁴ *Gunstone v Scottish Women’s Amateur Athletic Association* 1987 SLT 611.

⁹⁵ *St Johnstone Football Club Ltd v Scottish Football Association Ltd* 1965 SLT 171.

⁹⁶ *Graham v Ladeside of Kilbirnie Bowling Club* 1990 SC 365 — also existing contemporaneously with the new procedure for judicial review — saw ordinary procedure used to reduce a bowling club’s decision to suspend a member, notwithstanding an objection by the defender to the competency of the action which, they averred, should have been brought by petition for judicial review. Another example involved an award of damages in reparation by a private company’s disciplinary committee acting in breach of natural justice, a case that was successful on appeal to the Inner House of the Court of Session, despite being conducted outside the prescribed procedure for judicial review: *Tait v Central Radio Taxis (Tollcross) Ltd* 1989 SC 4. This followed a line of authority on procedural fairness which applied similarly to contractual

ing not only that the course of the Scottish jurisprudence has failed to be driven by a distinction between public and private decision-makers,⁹⁷ but that, of those cases that existed contemporaneously with the new judicial review procedure introduced in 1985,⁹⁸ some were transacted within that procedure and others outside it. This division of cases has not occurred on the basis of any salient principle, reinforcing the idea of the supervisory jurisdiction transcending the formal boundaries of review. Furthermore, the High Court of Justiciary has suspended criminal convictions and sentences due to transgressions of fairness and natural justice,⁹⁹ though, as a criminal court, it is not typically regarded as conducting judicial review. As in England and Wales, the collateral challenge can be used in Scots criminal law proceedings.¹⁰⁰

All of this serves to caution against any sense of inevitability about how judicial review is conceived or constructed. What is essentially judicial review activity simultaneously exists within and without the dedicated procedure for review. This does not always appear to be cleaved on any obvious principle. The fault lines emerge at different places and different times, they are subject to shifting and none of this fully predictably. In short, the concept of judicial review is fluid, and that fluidity, added to the indeterminacy of public law, results in a doctrinally unsettled and somewhat tentative relationship between judicial review and public law.

IV IS THE CLASSIFICATION OF JUDICIAL REVIEW AS A BRANCH OF PUBLIC LAW AN EPISTEMOLOGICAL IMPERATIVE?

In light of these observations about indeterminacy and fluidity, and the calling into question of some of the fundamental assumptions about judicial review,

arbiters: *Barrs v British Wool Marketing Board* 1957 SC 72, 82. See Thomson, 'The Doctrinal Core of the Supervisory Jurisdiction of the Court of Session' (n 10) 680–3.

⁹⁷ As an example of judicial review of private decision-makers, there was a flurry of competent petitions for judicial review against private golf clubs in the 2000s: see *Irvine v The Royal Burgess Golfing Society of Edinburgh* 2004 SCLR 386 (petition granted); *Crocket* (n 9) (petition competent but refused on the merits); *Wiles v Bothwell Castle Golf Club* 2005 SLT 785 (petition granted); *Smith v Nairn Golf Club* 2007 SLT 909 (petition competent but refused on the merits). But see *Fraser v Professional Golfers Association Ltd* 1999 SCLR 1032.

⁹⁸ Following the report of the Working Party on Procedure for Judicial Review of Administrative Action, set up in 1983 under the chairmanship of Lord Dunpark. See now *Act of Sederunt (Rules of the Court of Session 1994)* 1994 (Scot) ch 58.

⁹⁹ *Bradford v McLeod* 1986 SLT 244; *Doherty v McGlennan* 1997 SLT 444.

¹⁰⁰ *Shepherd v Howman* 1918 JC 78; *David Lawson Ltd v Torrance* 1929 JC 119.

it is now asked whether we must ‘know’ judicial review through the lens of public law, or whether we require public law to know judicial review. Essentially, this is a matter of legal doctrine.

The first point to note is an apparent shift in emphasis from common law to statutory review. In the UK, for example, this is generally seen through the proliferation of statutory (grounds of) review,¹⁰¹ but also in the specific context of review associated with devolution, the *European Convention on Human Rights* and EU law, each of which (domestically) is principally a statutory framework, and the latter two of which have entered the UK domestic legal space exclusively due to statutory provision.¹⁰² In Australia, judicial review was in general given a more palpably statutory footing with the enactment of the *ADJR Act* and legislation at the state level.¹⁰³ A consequence of the increasing association of judicial review with statutory foundations is that statutes are often conceived in terms of public authority and public law.¹⁰⁴ Statute even continues to play a role in determining susceptibility to review at common law.¹⁰⁵

There is of course the deeper question of when public law came into existence as a concept, and whether it is ‘native’ to any given jurisdiction. It has been argued that the distinction between public and private law was imported to England from continental Europe.¹⁰⁶ The concept of judicial review as a distinct category of law is a more recent innovation, though to take the example of Scotland, judicial activity capable of characterisation as judicial

¹⁰¹ Consider, for example, the caseload involving review of immigration, asylum, housing and welfare decisions: see Robert Thomas, ‘Immigration Judicial Reviews: Resources, Caseload, and “System-Manageability Efficiency”’ (2016) 21 *Judicial Review* 209.

¹⁰² See *European Communities Act 1972* (UK); *Human Rights Act 1998* (UK).

¹⁰³ See, eg, *Administrative Law Act 1978* (Vic). Of course, judicial review is also effectively provided for by s 75(v) of the *Australian Constitution*, giving a more constitutionally codified basis than in the UK.

¹⁰⁴ See Elliott (n 6) 78, 84.

¹⁰⁵ Post-*Datafin*, the relevance of a power being statutory in nature (ie the source of the power) has not disappeared: see, eg, *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, 69 [65]; *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936, 946 [35]; *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, 555 [12]. The source of the power — that is to say in statute — apparently ‘clearly provides the answer’: see *R (Beer) v Hampshire Farmers’ Markets Ltd* [2004] 1 WLR 233, 240 [16].

¹⁰⁶ JWF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford University Press, rev paperback ed, 2000). See also Cane, *Administrative Law* (n 13) 4–5. The importation claim was also made by Lord Wilberforce in *Davy v Spelthorne Borough Council* [1984] 1 AC 262, 276.

review is evident from at least the 15th century.¹⁰⁷ Not only did Scots law require no specific characterisation of judicial review as a discrete category of activity in order to carry out its basic function (checking excess of jurisdiction), it apparently did not require any concept of public law in order to do so.¹⁰⁸

Care must be taken not to regard public law as an epistemological imperative for judicial review simply to satisfy a definition of public law or to fill it with content. The concept of public law is apparently unnecessary to a working law of judicial review — of course, reasonable arguments can be made about how a conception of public law might enhance or facilitate judicial review,¹⁰⁹ but it is not a vital component of every feasible conceptualisation of review. The question might nevertheless be asked: what does public law comprise if judicial review is removed as a sub-category of public law? Would it not be eviscerated? What would be left of public law?

First, as Lord Woolf remarked, the assimilation of public law and judicial review is a mistake.¹¹⁰ If one thought it necessary or desirable to have such a category as public law,¹¹¹ it could still have content without judicial review, such as constitutional law, public order law, counterterrorism law, data privacy law and so on. These may interface with judicial review, particularly in the case of constitutional law, but they remain distinguishable. Second and more importantly, however, it is neither a purpose nor *raison d'être* of judicial review to fill 'public law' with content. If judicial review need not be conceived or characterised as an aspect of public law, perhaps other areas of law

¹⁰⁷ Thomson, 'The Doctrinal Core of the Supervisory Jurisdiction of the Court of Session' (n 10) 673. In relation to England and Wales, see Woolf et al, *De Smith's Judicial Review* (n 9) 348–53; Gavin Drewry, 'Judicial Review: The Historical Background' in Sir Michael Supperstone, James Goudie and Sir Paul Walker (eds), *Judicial Review* (LexisNexis, 5th ed, 2014) 9; Michael Beloff and Rupert Beloff, 'Natural Justice and Fairness: The Audi Alteram Partem Rule' in Sir Michael Supperstone, James Goudie and Sir Paul Walker (eds), *Judicial Review* (LexisNexis, 5th ed, 2014) 353, 353–61; Wade and Forsyth (n 17) 373–9.

¹⁰⁸ Indeed, it has been said that Scots lawyers did not think in terms of a category of 'public law' until quite recently, perhaps in the mid–late-20th century: see JDB Mitchell, 'Why European Institutions?' in LJ Brinkhorst and JDB Mitchell (eds), *European Law and Institutions* (Edinburgh University Press, 1969) 30, 42–4; Lord Reed, 'The Development of Judicial Review in Scotland' [2015] *Juridical Review* 325. See generally JDB Mitchell, *Constitutional Law* (W Green & Son, 2nd ed, 1968).

¹⁰⁹ See Part VI.

¹¹⁰ Woolf, 'Droit Public' (n 2) 60. Chief Justice French did not assimilate public law and judicial review, but appeared to place judicial review at the heart of public law: see Chief Justice Robert French, 'Public Law: An Australian Perspective' (Conference Paper, Scottish Public Law Group, 6 July 2012).

¹¹¹ See generally Loughlin (n 34); Cane, *Administrative Law* (n 13) 4–9.

might neither require to be so conceived or characterised. Essentially, however, the question of ‘what else would we class as public law?’ is not strictly relevant to a conceptualisation of judicial review, as (i) there is no prior requirement to have a category of law designated as public law, and (ii) the very notions of public law and publicness are, as noted, greatly contestable.

There is another red herring which might be put forward: if judicial review is not classed as a branch of public law, how else should it be categorised? First, it is quite possible for judicial review to be conceived outside the straight public/private law divide. Criminal law is, under an orthodox conception, more public law than private law in nature, but is frequently conceived and treated as a distinct category in its own right. To some extent the same might be said of taxation law and procedural law. Judicial review might also seem to be more public law than private law in nature, but be conceived as a distinct category in its own right. Of course, if the public/private law divide evaporated altogether, then judicial review would be liberated from the perceived imperative to characterise it as falling on any particular side of that divide.

Second, it is evident from the foregoing arguments that it is not an epistemological imperative that judicial review be classed as a branch of public law. It does not need the concept of public law to be capable of functioning as an area of judicial activity. It might do if one adopts a remedy-led approach, such that one might argue that judicial review relies on a concept of public law because its invocation leads to the award of ‘public law remedies’ (though, as noted, the prerogative writs were not always unequivocally ‘public law’ in nature).¹¹² However, this is a rather formalistic argument,¹¹³ and remedies surely exist to serve or facilitate particular functional expectations of law. More pointedly, judicial review does not and should not exist to serve some doctrinal conception of remedies. A remedy-led approach arguably puts the proverbial cart before the horse.

Third, the evidence in Scotland, where the adherence of judicial review to a public law conception seems weakest, does not suggest that judicial review is necessarily doctrinally dependent on, nor strongly doctrinally associated with, the concept of public law. Recent reforms may signal modifications to this

¹¹² See nn 13–14 and accompanying text.

¹¹³ Lord Woolf argued that a ‘fundamental difference between the public law system and the private law system is as to the procedure by which relief is obtained from the courts’: Sir Harry Woolf, ‘Public Law–Private Law: Why the Divide?’ [1986] *Public Law* 220, 227. However, is that difference really so fundamental?

position.¹¹⁴ However, it seems that Scots judicial review is associated with public law rather more as a matter of habit or routine, taken for granted as such — perhaps because that is how review is conceived in England and Wales, which will inevitably feature as the larger neighbouring jurisdiction with a more voluminous and diverse jurisprudence. Indeed, few domestic attempts have been made to assess its doctrinal foundations, or to properly conceptualise its basic principles, and so its kinship with public law seems not so much the product of principled reasoning or functional necessity as casual association. If one jurisdiction has known a working law of judicial review without the overt doctrinal lens of public law, there is no reason in principle why other jurisdictions require that lens. The point is not necessarily to argue that it is better for judicial review to jettison all notions of public law but that the preconception that judicial review requires public law as an epistemological imperative can be jettisoned.

V IS THE CLASSIFICATION OF JUDICIAL REVIEW AS A BRANCH OF PUBLIC LAW A FUNCTIONAL IMPERATIVE?

Even if it is not an epistemological imperative that judicial review be classed as a branch of public law, is it a functional imperative? In other words, does judicial review need to be categorically associated with public law in order to fulfil its function? This question is necessarily conditioned by what is considered to be the essential function of judicial review, and this is itself contentious.

The function of judicial review does not have to be about, or solely about, controlling public, governmental or regulatory power, as is often supposed. It can also, or instead, be about preventing abuse of power,¹¹⁵ constraining the exercise of authority where it causes material prejudice,¹¹⁶ controlling monopoly power,¹¹⁷ confining bodies to their jurisdiction,¹¹⁸ protecting

¹¹⁴ See n 11.

¹¹⁵ Sir John Laws, 'Public Law and Employment Law: Abuse of Power' [1997] *Public Law* 455, 464.

¹¹⁶ Sir Harry Woolf, 'Judicial Review: A Possible Programme for Reform' [1992] *Public Law* 221, 235.

¹¹⁷ Colin D Campbell, 'Monopoly Power as Public Power for the Purposes of Judicial Review' (2009) 125 *Law Quarterly Review* 491.

¹¹⁸ *West* (n 7); *Davidson v Scottish Ministers* 2006 SC (HL) 41, 52–3 [45]; *Eba v Advocate General for Scotland* [2012] 1 AC 710, 713 [8]; *Ashley* (n 8) [22].

individuals' substantive and procedural rights or interests,¹¹⁹ ensuring natural justice or fair play in procedural interactions,¹²⁰ striving to achieve legal equality between parties (perhaps those who cannot rely on remedies in, for example, contract or tort), enforcing the rule of law,¹²¹ and so on.

The indeterminacy problem also stalks this functional question: whilst, as noted, Elliott pointed out that 'the notion of "publicness" is highly imprecise, and so any putative test based on "public impact" would be doomed to indeterminacy', he added that it would 'risk being over-broad: decisions can readily affect the *public* without engaging its interest in *good governance*'.¹²² Elliott indeed regarded one of the foundations of judicial review as 'aim[ing] to secure the public interest in good governance'.¹²³ The concept of good governance is itself hugely contestable¹²⁴ — not only because it may be impossible to secure consensus on what this means in a political or constitutional context, but also because other aspects of 'governance' are relevant, such as corporate governance. This is already seen in, and confounded by, the UK Government's corporate governance of RBS, noting that this may also be a conduit for governance in a more conventional sense, and further noting that state governance and corporate governance might not always share the

¹¹⁹ See TRS Allan, 'Dworkin and Dicey: The Rule of Law as Integrity' (1988) 8 *Oxford Journal of Legal Studies* 266, 273; Jeremy Waldron, 'A Rights-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18; Alon Harel, 'Rights-Based Judicial Review: A Democratic Justification' (2003) 22 *Law and Philosophy* 247; Thomas Poole, 'Legitimacy, Rights and Judicial Review' (2005) 25 *Oxford Journal of Legal Studies* 697; Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346.

¹²⁰ There may potentially be a doctrinal bridge in this regard between 'public law' cases on the one hand and 'private law' cases on the other; that is, a bridge which invokes the courts' supervisory jurisdiction: see nn 71–3 and accompanying text. However, this would probably be conceptually narrower than the confinement of bodies to jurisdiction.

¹²¹ See *R (Jackson) v AG* [2006] 1 AC 262, 304 [107] (Lord Hope), 318 [159] (Baroness Hale); *Eba* (n 118) 713 [8]; *AXA General Insurance* (n 11) 910–14 [42]–[52] (Lord Hope DP), 927 [97] (Lord Mance JSC), 940–6 [135]–[154], 951–2 [169]–[170] (Lord Reed). The rule of law perspective is not just relevant to, or grounded in, notions of publicness. It can have as much relevance and grounding in the 'private sphere': see Lisa M Austin and Dennis Klimchuk (eds), *Private Law and the Rule of Law* (Oxford University Press, 2014). See also *Duxbury* (n 10) 242–4.

¹²² *Elliot* (n 6) 91–2 (emphasis in original).

¹²³ *Ibid* 80 (emphasis omitted). This view was repeated by *Duxbury*: *Duxbury* (n 10) 241. Whilst *Duxbury* was right to state that judicial review cannot be claimed to be 'confined to public law [merely] because public decision-making has a public interest dimension', the invocation of the concept of 'good governance' is problematic.

¹²⁴ See Judith Resnik, 'Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century' (2013) 11 *International Journal of Constitutional Law* 162.

same values or promote the same objectives.¹²⁵ Furthermore, in an era of privatisation and commodification, ideas of corporate social responsibility, environmental responsibility and commitment to so-called ethical investment (including in the context of sovereign wealth funds) and ethical procurement could arguably be folded into the concept of good governance; though, equally, others may insist on libertarian values, laissez-faire markets, economic efficiency and individualism. The idea of a central notion of ‘good governance’ in this maelstrom of ideologies is somewhat presumptive.

Furthermore, the very nature of governance may be changing as private sector standards, management methods and performance measures are applied to the public sector. This is seen in numerous contexts, such as performance criteria (including ‘benchmarking’) applied to public service provision,¹²⁶ a shift towards ‘customer service’ culture in the public sector,¹²⁷ the creation and role of the Office for Budget Responsibility in the UK, and, in the EU, the automatic trigger of a correction mechanism in the event of significant observed deviations in relation to the balancing of national budgets.¹²⁸ In this context of the ‘instrumentalisation’ and ‘privatisation’ of law in which public/private relations may be becoming inverted, as powerfully articulated by Alain Supiot,¹²⁹ core ideas of governance itself are called into question. Though ideology can never be disclaimed, the emphasis seems to be

¹²⁵ See Mark Aronson, ‘A Public Lawyer’s Responses to Privatisation and Outsourcing’ in Michael Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997) 40, 50–1.

¹²⁶ See, eg, Theodoros Papaioannou, Howard Rush and John Bessant, ‘Benchmarking as a Policy-Making Tool: From the Private Sector to the Public Sector’ (2006) 33 *Science and Public Policy* 91. See also HM Treasury, *Value for Money Assessment Guidance* (Report, November 2006) on ‘Value for Money Assessment’ in PFI procurement.

¹²⁷ See, eg, UK Visas and Immigration, ‘UK Visas and Immigration: Customer Commitments’, GOV.UK (Web Page, 3 June 2014) <www.gov.uk/government/publications/customer-service-commitments-uk-visas-and-immigration/uk-visas-and-immigration-customer-commitments>, archived at <<https://perma.cc/RQX7-N66P>>; HM Revenue & Customs, *HMRC Customer Views on the Revised Customer Charter* (HMRC Research Report No 405, 19 February 2016) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/496796/HMRC_customer_views_on_the_revised_customer_charter.pdf>, archived at <<https://perma.cc/9SFT-NJ4N>>; Environment Agency, ‘Environment Agency Customer Service Commitment: What You Can Expect’, GOV.UK (Web Page, 13 September 2016) <www.gov.uk/government/publications/environment-agency-customer-service-commitment-2/environment-agency-customer-service-commitment>, archived at <<https://perma.cc/32YW-YMFU>>.

¹²⁸ *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union*, opened for signature 2 March 2012 (entered into force 1 January 2013) art 3; also known as the ‘Fiscal Compact’.

¹²⁹ Alain Supiot, ‘The Public–Private Relation in the Context of Today’s Refeudalization’ (2013) 11 *International Journal of Constitutional Law* 129.

shifting from a competition of ideologies to the profession of a mathematically ‘correct’ model of governance. As Supiot explained:

Its goal is to subject the whole of society to a single science of organization, based on criteria of efficiency alone ... a world in which everything could be calculated and managed, in which governance by numbers would replace government by laws ...¹³⁰

First, if the nature of governance may be changing, it is problematic to invoke a singular and unelaborated notion of ‘good governance’. Furthermore, if good governance becomes increasingly determined by or perceived in terms of these more private sector-oriented conceptions of performance measurement, the divide between public (law) and private (law) values and methodologies is even further tested.¹³¹

The invocation of indeterminate concepts is also seen in Elliott’s argument that

a core purpose of judicial review is the control of governmental authority, given the uniquely powerful position of government and the fact that, having no legitimate self-interests, it may properly act only in the public interest. These factors create a powerful case for judicial review of decisions taken by governmental bodies ...¹³²

Similarly, Oliver argued that a difference between public bodies and private bodies was that private bodies are generally ‘entitled — within the law — to pursue their own self-regarding interests, whereas public bodies are not: they are supposed to act, within the law, in the general public interest as they see it.’¹³³ It is, however, unclear when a self-interest is ‘legitimate’ and who decides this, and what is the ‘public interest’ and how this is established,¹³⁴ in addition

¹³⁰ Ibid 134.

¹³¹ Consider, in this regard, Neil MacCormick’s claim that ‘just as law interacts especially closely with politics when public law is in focus, so it interacts especially closely with economics when private law is in focus’: MacCormick (n 52) 223; see also at 223–40. This adopts a particular, narrow, understanding of both ‘politics’ and ‘economics’.

¹³² Elliott (n 6) 86.

¹³³ Oliver, ‘Common Values in Public and Private Law and the Public/Private Divide’ (n 70) 641.

¹³⁴ A body’s having to consider the public interest can, however, affect reviewability: *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 1 WLR 521; *MBA Land Holdings Pty Ltd v Gungahlin Development Authority* (2000) 206 FLR 120.

to the indeterminacy of the very concepts of publicness and government. It is also debatable whether the government is in a 'uniquely' powerful position.¹³⁵

In addition to the varied doctrinal explanations for judicial review, there are functions capable of attribution to review which are extrinsic to doctrinal legal explanations. An economic analysis of judicial review might use game theory to explain and functionalise review by reference to rational decision-making to maximise payoffs.¹³⁶ Perhaps it serves a more structural political function, acting as a counterweight to the hegemony of the elected, or the unelected. A Marxist interpretation might argue that judicial review represents a constrained form of challenge, shaped ultimately by a minority elite (prominently including judges), for containing grievances within a highly technical and esoteric framework of resolution. It might be a formal dispute resolution mechanism ultimately serving to legitimise a structural, political aspect of class struggle, where normative claims to power by the ruling elite are legitimised against the oppressed (governed) majority.¹³⁷ Access to justice difficulties might be no accident in this context, noting the view that judicial review was in 'bourgeois countries' a mechanism used by capitalist exploiters to invalidate legal norms contrary to their private interests.¹³⁸

More generally than the Marxist concern, judicial review might be a state contrivance designed to give individuals the impression that they have procedurally legitimate forms of challenging public or governmental action. Perhaps it serves the function of political settlement between the judicial elite

¹³⁵ This can be understood in relation to other actors, some of which transcend national boundaries: see nn 152–4 and accompanying text. It can also be understood in relation to globalisation and transnational or international constitutionalism: see Neil Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 *International Journal of Constitutional Law* 373; Neil Walker, 'Taking Constitutionalism beyond the State' (2008) 56 *Political Studies* 519; Neil Walker, Jo Shaw and Stephen Tierney (eds), *Europe's Constitutional Mosaic* (Hart Publishing, 2011); Neil Walker, *Intimations of Global Law* (Cambridge University Press, 2015).

¹³⁶ See, eg, William N Eskridge Jr, 'The Judicial Review Game' (1993) 88 *Northwestern University Law Review* 382; Robert Lowry Clinton, 'Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of *Marbury v Madison*' (1994) 38 *American Journal of Political Science* 285.

¹³⁷ See Karl Marx, 'Critique of the Gotha Programme' in Karl Marx and Frederick Engels, *Selected Works* (International Publishers, 1968) 315; Collins (n 54) ch 6; Karl Marx and Friedrich Engels, *The Communist Manifesto*, tr Samuel Moore (Penguin Books, 2002).

¹³⁸ Andrei Y Vyshinsky, *The Law of the Soviet State*, tr Hugh W Babb (Macmillan, 1948) 339–40. Vyshinsky was referring to constitutional rather than administrative review, but the same principle applies.

and public service elite¹³⁹ — a somewhat conspiratorial hypothesis, perhaps, but no less categorically a function or non-function of judicial review than any of the preceding explanations. Judicial review might simply be an extension of a general characteristic claimed of legal adjudication — that it represents a form of violence against individuals affected by it.¹⁴⁰

These are, to varying extents, unorthodox interpretations of the function(s) of judicial review, but the fact that they are almost routinely disregarded by much of the literature which claims to search for those functions in comprehensive terms shows how narrowly are those functions often conceived. In short, the claim that judicial review is exclusively or principally about controlling public or governmental power is one steeped in a particular worldview and operating within relatively narrow conceptual parameters. One must also treat with caution the claim that the rules of administrative law are 'based upon elementary concepts of legality, reasonableness and fairness which are self-evident in their own right and are even further detached from politics than are the principles of constitutional law' and references to the 'neutrality' of administrative law.¹⁴¹ More penetrating is Paul Craig's analysis that

the nature and content of constitutional and administrative law can only be properly understood against the background political theory which a society actually espouses, or against such a background which a particular commentator believes that a society ought to espouse.¹⁴²

As Craig added, '[a]gnosticism is not possible'.¹⁴³ These normative anchors are inevitably encountered in addition to the challenges presented by the shifting sands of publicness, governance and even judicial review itself.

What constructively follows from these observations? There is value in recognising the narrowness and fragility of existing conceptions (and preconceptions) of judicial review. First, and perhaps most practically, it should arguably lead to a rethink of judicial review's fundamental purposes in order to better conceptualise and formulate robust objectives, principles and rules of

¹³⁹ Note Jeremy Waldron's vision of the judge with a final 'vote' over the recognition of rights: Waldron, 'A Rights-Based Critique of Constitutional Rights' (n 119) 51.

¹⁴⁰ Robert M Cover, 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601. See also Resnik (n 124) 173.

¹⁴¹ Wade and Forsyth (n 17) 8.

¹⁴² PP Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon Press, 1990) 1; see also at 3–9.

¹⁴³ *Ibid* 8.

review. It should encourage us to search more deeply in our quest for the purposes of judicial review, noting that publicness is not an inevitable fault line or litmus test on which the concept, function or practice of judicial review must be predicated. Second, it alludes to the multitude of ways in which judicial review and its relation with publicness and privateness can be conceived. It might even be said that judicial review does not have a ‘true’ function after all: courts might use general principles to achieve what are perceived to be just outcomes for applicants and respondents on a case-by-case basis, albeit within a precedential system. Judicial review might be capable of being explained as a tradition, something we have inherited, or copied from another, or had imposed on us by another,¹⁴⁴ and come to conceive as an inalienable part of our legal order. As statements on the importance and scope of judicial review are made by judges, and are perceived to be authoritative, these claims build in credibility and — as the law develops more cohesive and coherent narratives on these claims — feasibility.¹⁴⁵ Whilst that method of accreting juridical authority is one of the defining features of common law adjudication, it evokes the relativity, circumstance and contingency of law. This should caution against over-confident truth-claims on the principles of judicial review — including any sense of inevitability about its association and fit with public law. It is incongruous for judicial review to be taken for granted as part of public law, whilst simultaneously claiming to search deeply for its functions and objectives. The extent to which the diverse functions capable of attribution to judicial review are related to, or dependent upon, concepts of publicness and public law varies significantly. The function(s) of judicial review must be established prior to the classification of review as a branch of public law, and some of those functions do not require, or may even be handicapped by, such a categorisation.

VI SHOULD THE ASSOCIATION OF JUDICIAL REVIEW WITH PUBLIC LAW BE DISCARDED?

It has been argued that it is neither epistemologically nor functionally imperative that judicial review be classed as a branch of public law. Its association with public law is neither necessary in order to conceptualise

¹⁴⁴ The common law of judicial review in Hong Kong, for example, is substantially copied from England and Wales: see generally Stephen Thomson, *Administrative Law in Hong Kong* (Cambridge University Press, forthcoming).

¹⁴⁵ See Martin Krygier, ‘Law as Tradition’ (1986) 5 *Law and Philosophy* 237; Neil Walker, ‘Out of Place and Out of Time: Law’s Fading Co-ordinates’ (2010) 14 *Edinburgh Law Review* 13.

judicial review, nor to fulfil the essential functions of judicial review — and more especially considering that those functions are deeply contestable. The relationship between judicial review and public law is also complicated by the fact that each concept is indeterminate and fluid. The remaining question which falls for consideration is therefore whether judicial review's association with public law should be discarded.

It is important to recognise that even if one accepts that characterisation as a branch of public law is neither epistemologically nor functionally imperative, this does not mean that the association of judicial review with public law is useless or without any benefit whatsoever. There may be advantages in maintaining, or establishing, that association — and perhaps there is something more intellectually honest about describing them as relative advantages, rather than framing them as truth-claims about the principles of judicial review.

First, if the association of judicial review with public law is necessary or facilitative in ensuring that particular acts of entities associated with governance (however defined) or public functions (however defined) are amenable to legal challenge — in short, to uphold some conception of the rule of law — then that is a considerable advantage.¹⁴⁶ It may even be an overriding consideration which it is felt necessitates the association of judicial review with public law. However, it would have to be demonstrated that this association is necessary to achieve those ends, and that association does not seem crucial for the functionality and utility of review.¹⁴⁷ In addition, it does not seem that a decoupling of judicial review from the category or concept of public law would necessarily result in actions that were previously subject to review being emancipated from the possibility of review. In fact, the test of reviewability in Scotland, which does not rely on overt conceptions of publicness, seems capable of more comprehensively capturing jurisdictional excesses than its counterpart in England and Wales.¹⁴⁸ Paradoxically, a dissociation of judicial review and public law dogma might actually be more effective in capturing those acts at the margins of 'public' and 'governmental' decision-making than formalistic tests of publicness. This apparent advantage is therefore not self-evident without being more carefully advocated.

¹⁴⁶ Noting the Marxist objection to the rule of law: see Collins (n 54) ch 6.

¹⁴⁷ See Thomson, 'The Doctrinal Core of the Supervisory Jurisdiction of the Court of Session' (n 10).

¹⁴⁸ Some might argue that the scope of review in Scotland goes too far, whilst others might argue that its scope in England and Wales does not go far enough.

Another possible advantage is that, if one accepts that government (however defined) and entities exercising public functions (however defined) are in a privileged position of dominance, then the association of judicial review with public law may allude to some special considerations or obligations those entities are expected to discharge. Carnwath LJ, for example, opined that whilst experience subsequent to *O'Reilly v Mackman* had shown that 'a clear division between public and private law is often difficult to maintain'¹⁴⁹ and that 'the rigidity of the rule [established in *O'Reilly*] has had to be relaxed accordingly', the problems principally featured in cases in which principles of public and private law overlapped, and such cases did not 'undermine the principles that purely public acts should be challenged by judicial review'.¹⁵⁰

However, apart from the intractable issues of classification to which this article has adverted, the law of judicial review does not have to treat all reviewable bodies alike. For example, it might develop rules about the obligations of a government department, but develop variations on those rules where the body is a private limited company to which functions have been outsourced or franchised by a government department or where a private company occupies a monopoly or oligopoly position in a market. In other words, judicial review could use a paradigm for reviewability other than, or softer than, a hard-edged public/private dichotomy, not only in determining susceptibility to review, but also factors such as the form and intensity of review.¹⁵¹ Furthermore, it is not only 'government' and 'public bodies' that are in a privileged position of dominance, but also multinational corporations, powerful lobbying interests, the mainstream media and social media with mass user bases (Facebook and Twitter are the obvious examples). As these are typically non-reviewable, despite their immense impact on society,¹⁵² they undermine the claim that 'government' and 'public bodies' should be reviewable on the basis that they occupy a special position of dominance. Does an association with public law enhance or hinder the potential utility of judicial

¹⁴⁹ *Trim v North Dorset District Council* [2011] 1 WLR 1901, 1907 [21]. It was stated in *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159, 179 that 'in the New Zealand context, a sharp boundary between public and private law cannot realistically be drawn'.

¹⁵⁰ *Trim* (n 149) 1907–8 [23].

¹⁵¹ Aronson suggested a trichotomy of 'public', 'private' and 'mixed': Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing' (n 125) 52–3. Openness to such an approach may serve as an initial step in the right direction away from a hard-edged public/private dichotomy.

¹⁵² Duxbury made the useful, corresponding, observation that the decisions of public bodies can be susceptible to judicial review 'even when they affect hardly anyone': Duxbury (n 10) 240.

review in these cases? In fact, such positions of dominance may even be occupied by entities extrinsic to the nation state¹⁵³ — consider, for example, the role of the European Commission, European Central Bank and International Monetary Fund (the so-called ‘Troika’) on economic and fiscal decision-making in Greece.¹⁵⁴

There are, however, significant advantages in, if not discarding, then at least loosening, the association between judicial review and public law. First, judicial review will be to some extent liberated from its clumsy relationship with public/private distinctions. The law is currently in a position where judges are gauging publicness by ‘as much a matter of feel, as deciding whether any particular criteria are met.’¹⁵⁵ Conundrums will not entirely disappear — difficult cases will remain; courts will still have to decide where the boundaries of reviewability lie, and on what basis. In cases of a ‘mixed’ public and private character — to maintain that distinction for the purposes of argument — such as public bodies engaged in private obligations, or private bodies engaged in public obligations, the courts may still have to decide which remedies lie, whether those are contractual remedies, tort remedies or, for example, prerogative orders or constitutional writs.

However, the problem of remedies in England and Wales is accentuated by the existence of discrete, so-called ‘public law remedies’, which inflames the doctrinal difficulties of public/private distinctions. This remedy-led approach was exported to Australia.¹⁵⁶ By contrast, it is possible for the same common law remedies to be used in judicial review and ordinary actions.¹⁵⁷ The generalisation of common law remedies can already begin to liberate judicial

¹⁵³ See Walker, ‘Beyond Boundary Disputes and Basic Grids’ (n 135); Walker, ‘Taking Constitutionalism beyond the State’ (n 135); Walker, Shaw and Tierney (n 135); Walker, *Intimations of Global Law* (n 135).

¹⁵⁴ See Kevin Featherstone, ‘External Conditionality and the Debt Crisis: The “Troika” and Public Administration Reform in Greece’ (2015) 22 *Journal of European Public Policy* 295.

¹⁵⁵ *R (Tucker) v Director General of the National Crime Squad* [2003] ICR 599, 605 [13]. It has also been said to depend ‘very much on individual cases’, with ‘[n]o hard and fast rule’ able to be set down, it being ‘very much a matter of overall impression and ... degree’: *Anderson Asphalt Ltd v Secretary for Justice* [2009] 3 HKLRD 215, 236 [57]. Cane noted that the ‘classification of functions and activities as public or private is ultimately a matter of value-judgment and choice’: Cane, *Administrative Law* (n 13) 8.

¹⁵⁶ Aronson, Groves and Weeks (n 21) 43–6. See also *Australian Constitution* s 75(v); *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 9(2).

¹⁵⁷ There is in Scotland, in particular, a great degree of overlap between the common law remedies used in petitions for judicial review and those used in ordinary actions: see Thomson, ‘The Doctrinal Core of the Supervisory Jurisdiction of the Court of Session’ (n 10) 685–8.

review from formalistic straitjackets.¹⁵⁸ Some time ago, Lord Woolf called extra-judicially for additional flexibility to be built into ord 53 and for courts to ‘chip away at the grey area’ between public and private law cases,¹⁵⁹ whilst noting (judicially) that litigation on the division between public and private law proceedings continued to consume ‘a very substantial volume of the resources of the parties and the courts ... to little or no purpose’.¹⁶⁰ Meanwhile, Lord Lowry called from the Bench for the *O’Reilly* line of authority to be reconsidered.¹⁶¹ Surely there is value in going further: the abolition of a discrete class of public law remedies would appear to be a necessary precondition to a sufficient dissociation of judicial review from public law in England and Wales and in Australia.¹⁶² Lord Slynn indeed emphasised the importance of flexibility on the precise limits of public law and private law ‘[i]n the absence of a single procedure allowing all remedies’,¹⁶³ again alluding to the consequences of having specialised public law procedures and remedies. The abolition of so-called public law remedies would therefore be a step in the right direction, and it need not result in any dilution of legal protections for persons seeking legal redress. On the contrary, it could enhance those protections.

The shackles of procedural formalities are not only loosened by allowing judicial review to become a more freestanding area of law (like criminal law), conceptually and doctrinally. It can also ease some of the judicial difficulties faced by developments in society in relation to the putative public/private divide. There may be little or no need to establish whether a body is public, or performing a public function, or affecting the public interest, or acting in the

¹⁵⁸ In this vein, it has been argued that in Scotland ‘[j]ustice can ... be done in cases which lie beyond the reach of the rigid English system with its misguided public and private law dichotomy, and procedural obstacles and dilemmas are avoided’: Wade and Forsyth (n 17) 545. The Scottish system has its own problems, of course: see Thomson, ‘The Doctrinal Core of the Supervisory Jurisdiction of the Court of Session’ (n 10) 670 nn 2–4. Note again that aspects of judicial review procedure in Scotland have recently been more closely aligned with those in England and Wales (see n 11 and accompanying text), suggesting that there is at least some perception that the Scots law of judicial review can draw lessons from its English and Welsh counterpart.

¹⁵⁹ Woolf, ‘Judicial Review’ (n 116) 231.

¹⁶⁰ *Trustees of the Dennis Rye Pension Fund v Sheffield City Council* [1998] 1 WLR 840, 842.

¹⁶¹ *R v Secretary of State for Employment: Ex parte Equal Opportunities Commission* [1995] 1 AC 1, 34.

¹⁶² It is also questionable whether there ought to be a discrete leave stage and whether the protections such as those afforded by CPR (n 12) pt 54 should continue to exist, either at all or in their current form. However, that is an argument for another day.

¹⁶³ *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 WLR 48, 57.

domain of public law, in every case. It need not be the determiner of reviewability.¹⁶⁴ Importantly, cases at the margins of review should not succumb to procedural formalities, and there are benefits to be had from relaxing the taxonomical binding of review to concepts of publicness. The floodgates need not open, bearing particularly in mind the principle that judicial review is a process of last resort and that other remedies must instead be pursued where available.¹⁶⁵ Many cases in the realm of contract, tort and property, for example, would, under this principle, not come for judicial review even with a relaxation of the association of judicial review with concepts of publicness.

What is required is a change in mindset, or at least openness to such a change.¹⁶⁶ Even Lord Woolf, who acknowledged the difficulty in deciding whether a case is a public law case, defended *O'Reilly* and capitulated to the perceived inevitability of the distinction between public and private law.¹⁶⁷ To cling on to that distinction in the context of judicial review is arguably harmful both to the development of coherent and consistent principles of review, and to potential litigants who seek to rely on those principles. The dissociation of judicial review from public law, even if a partial dissociation, would better enable judges, practitioners and commentators¹⁶⁸ to assess the proper principles, purposes and objectives of judicial review: to determine what it is for, what should be its place in society and how it could best deal with the realities of power and governance in the modern age. If judicial review need not be classed as a branch of public law, neither epistemologically nor functionally, then the question is one of choice: do we, or do we not,

¹⁶⁴ Duxbury may have been right to say that no one is arguing that judicial review should have no limits, and that it appears commonly accepted that a line must be drawn somewhere: Duxbury (n 10) 236. The point, however, is that the line need not be drawn along fault lines of publicness, nor must it inevitably invoke notions of publicness. Thus, when Duxbury considered whether susceptibility to review might be determined by whether the decision-maker exercises monopoly power, and was right to recognise that this could form a basis on which the scope of judicial review might be expanded, his response was again to draw the analysis (and feasibility or otherwise of the monopoly power test) back to one of publicness, even though he acknowledged the public/private distinction to be 'notoriously fuzzy': at 235, 241–2.

¹⁶⁵ See n 17 and accompanying text.

¹⁶⁶ Varuhas referred to the 'belief in a general divide between public law and private law' as having 'too often constrained the legal imagination, distorted our understanding of the law, and artificially cut-off insights that might be gained from looking across the putative division': Varuhas, 'Judicial Review beyond Administrative Law' (n 56). See also Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing, 2016) ch 4.

¹⁶⁷ See Woolf, 'Judicial Review' (n 116) 231–2. See generally Woolf, 'Droit Public' (n 2) 60–2.

¹⁶⁸ Also charities, non-governmental organisations, policymakers, journalists, businesspeople and even ordinary members of the public.

regard it as *preferable* for it to be associated with public law in this way? For this to be framed as a choice, with a weighing of competing considerations, may allow for a more pragmatic than dogmatic approach to prevail.

VII CONCLUSION

The classification of judicial review as a branch of public law is deeply ingrained in the conception and methodology of review. It has caused, and continues to cause, significant difficulties for the theory and practice of judicial review — at least partly because there remain unsettled questions on its fundamental purposes. Those purposes must be established in the context of a broad analysis of the location and role of judicial review in the law and wider society. They will inevitably be based on a political outlook, in furtherance of particular principles of societal life and political order. Overt politicisation of judicial review would be undesirable, but doctrinal coherence and transparency would be greatly beneficial.

The importance of recognising that judicial review does not have to be classed as a branch of public law, neither epistemologically nor functionally, is that presumptions that review or reviewability must inevitably be conceived in notions of publicness can be jettisoned. Time and resources need not be committed (perhaps wasted), either at all or to the same extent, litigating issues of publicness to satisfy judicial tests and remedies that are increasingly out of step with the reality of an ever-porous public/private divide. The private contractor with a monopoly on a government franchise, the oligopolist in a tightly state-regulated sector, the multinational corporation whose products and services we can barely avoid — these would no longer be *automatically* beyond the realms of judicial review because they or their activities are not sufficiently ‘public’ in nature. Judicial review is a powerful tool for securing accountability, but it must keep up with the times.

If judicial review is to be classed as a branch of public law, and is to focus its attention on bodies, functions, interests etc on the basis of their publicness, then this doctrine must be consciously chosen and explicitly recognised and defended as such. However, it must be chosen with full recognition that it is neither the only way of conceptualising nor framing judicial review, and that there are viable alternatives if one is prepared to abandon familiar, but foundering, conceptions of review. The stakes are high: this is not just about doctrinal soul-searching, but about whether judicial review offers sufficient protection for individuals in a society where the interface between the public and the private is increasingly elusive.