**Reviewing**

**the Exercise of Regulatory Power**

**—**

**Supervisory Jurisdiction**

**in Public and Private Law**

*LL.M Essay*

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# Chapter 1—Introduction

1. This essay’s central question could be recast in the following pseudo-Latin tag: “quis regulat ipsos regulatores?”.[[1]](#footnote-2) Regulation takes many different forms. It may be found under—

secondary legislation;[[2]](#footnote-3)

the inherent jurisdiction of the Court;[[3]](#footnote-4)

the rules of professional bodies;[[4]](#footnote-5)

the rules for standards in advertising;[[5]](#footnote-6)

the rules of trade associations;[[6]](#footnote-7)

the rules of sporting bodies.[[7]](#footnote-8)

1. Those affected by the exercise of such regulatory power may look to the courts for review of resulting decisions, at least where they appear to be ultra vires or illegal; unreasonable (or irrational, arbitrary or capricious); or procedurally improper.[[8]](#footnote-9) Such classification suggests a public interest in such matters. Is the exercise by the courts of supervisory jurisdiction over such licensing bodies therefore one of public law? It will be apparent that common-law roots predating developed notions of public law make such a view altogether too narrow.
2. The common thread is a story of monopolies. It is woven around public policy as much as public law; its roots reach back into the middle ages. In the minds of some writers a connection with mediaeval monsters and mythical beasts of antiquity, are ever-present: chimaeras,[[9]](#footnote-10) hippogriffs and cameleopards[[10]](#footnote-11) vie with fairies and fig-leaves[[11]](#footnote-12) for a place in this Great Rift Valley of administrative law. A central figure is the ferryman, for he exemplifies the position of those who exercise monopolies for he—

“... stand[s] ... ‘in the very ‘gateway of commerce’ and take toll from all who pass. Their business... ‘... is become a thing of public interest and use.’”[[12]](#footnote-13)

1. A fortiori, the modern regulator who may decline toll from some who seek to pass and refuse them passage.

## Regulators and Regulation

1. The central focus of this essay is on the supervision of regulatory power, exercised to control access to the pursuit of callings of choice—and the arrogation of a consequent power to discipline and expel licensees. To exercise such power is to exercise a monopoly. It is the ferryman, emerging out of the river-mist of the common law, who provides the means of passage from the public to the private shores of supervision of regulatory monopolies.
2. In the writer’s view, monopolies of regulation may be distinguished from the regulation of monopolies. In the recent past the regulation of monopolies has been typified by the creation of regulators to supervise recently-privatised utility monopolies. Monopolies of regulation exist where a body exercises licensing and disciplinary functions to control access to and conduct in callings of choice. These monopolies are supervised by the courts. *O’Reilly v. Mackman* has raised questions which are still, a decade and a half later, far from fully answered about the scope of supervision by the courts, which have declined to make available remedies under the Order 53 procedure in cases where, though there is a public interest, it cannot be shown that there is a governmental one.[[13]](#footnote-14) The consequence is uncertainty as to the nature and extent of judicial oversight of the exercise of regulatory power.

### Regulation of monopolies

1. The regulation of privatised utility monopolies,[[14]](#footnote-15) typically part of the statutory framework of privatisation, is by the relevant minister who will grant licences and appoint a regulator for enforcement (e.g. the Office of Telecommunications (OFTEL) the Office of Gas Supply (OFGAS) the Office of Water Services (OFWAT) and the Office of Electricity Regulation (OFFER)). Typically also—

“it is ministers who possess the major powers of deciding on the degree of competition which the enterprises shall meet through issuing licences ... necessary to do business.”[[15]](#footnote-16)

1. This is economic regulation: in the words of professor Littlechild, regulation as “a means of ‘holding the fort’ until competition arrives”.[[16]](#footnote-17) The regulator’s function is to control the monopoly, by enforcing the conditions of the minister’s licences.
2. The issue of a licence by a government minister in the form of an authorisation for a gas utility or appointment for a water company or franchise for a television company, to operate as a monopoly, at least geographically, may be distinguished from the issue by a regulator to a person of a permission to work in competition with others in the same field, whether as a trade union member; mobile telephone vendor; pharmacist; solicitor; or racehorse trainer.

### Regulator as monopoly

1. A monopoly in regulation is as much a monopoly as a monopoly in electricity supply. There is every bit as much public interest in monopolies in regulation as there is in monopolies in utilities. This remains so even where a ‘governmental’ interest cannot be shown: the courts will nonetheless control the exercise of monopolistic practices.

### Self-regulation: licensing (membership) and discipline

1. Where the regulator is the monopoly, he alone controls the “gateway of commerce”. This is the area of self-regulation; it covers many occupations or callings: professions, sports, the press, advertising and financial services.[[17]](#footnote-18) It also covers trade associations and trades unions.[[18]](#footnote-19)
2. The controlling bodies of sports may require persons to be members in order to participate in that sport; a variety of bodies in the sphere of trading and professional life require persons to be licensed as a condition of exercising the particular trade or calling. Trade associations may require persons to be members of the association, absent which they may not in practice be able to pursue business in that area; membership of a Self Regulating Organisation is a prerequisite of lawful trading in the areas of business subject to the Financial Services Act 1986;[[19]](#footnote-20) the approval of the Council of Lloyd’s is required in order to be a broker or underwriting agent at Lloyd’s.[[20]](#footnote-21)
3. A common feature of all of these bodies is that they seek by systems of rules to control access to the exercise of callings and the conduct of those admitted. Mechanisms may operate to extend that control to non-members.[[21]](#footnote-22)

## Public and Private Law

### Distinctions

1. It is noteworthy that the authors of the current edition of de Smith Woolf and Jowell begin a chapter on ‘Public and Private Law and their relation to Judicial Review’ with the observation that

“The previous edition of the book did not have to examine the distinction between public and private law.”[[22]](#footnote-23)

1. The distinction is however now there. Described as a divide, to this writer it is like a geological fault, a rift of uncertain direction, continuing to bring catastrophic consequences for some in its path. Its existence gives rise to three main options to someone challenging the exercise of regulatory power—

public law: the provisions of order 53;

private law: reliance of express or implied contractual terms;

public policy (private law): where there is no contractual relationship, reliance on restraint of trade.

### Definitions

1. In *O’Reilly* Lord Denning offers a succinct description of the difference between public and private law—

“Private law regulates the affairs of subjects as between themselves. Public law regulates the affairs of subjects vis-à-vis public authorities.”[[23]](#footnote-24)

1. Later in the same judgment Lord Denning asserts that s. 31 of the Supreme Court Act 1981 “comes in like a lion” to expand the description to include—

“all public authorities and public officers, and indeed anyone acting in exercise of a public duty, including a university”.[[24]](#footnote-25)

1. Eighteen months later Lord Wilberforce expressed a Diceyan wariness—

“The expressions ‘private law’ and ‘public law’ have recently been imported into the law of England from countries which, unlike our own, have separate systems concerning public law and private law. ... In this country they must be used with caution, for, typically, English law fastens not on principles but on remedies.”[[25]](#footnote-26)

1. There is a certain lack, and some circularity, of definition in this area: public authorities are subject to public law. If a body performs a public function such as should be amenable to public law remedies, then it will be subject to public law and considered a public authority if there is a governmental interest in it. If it is affected only with a public interest[[26]](#footnote-27) however then it may not look to public law to provide a remedy. The courts have developed and refined (some would say restricted) the definitions of those bodies whose decisions fall within the remit of Order 53 in widely differing situations and against a background of the privatisation of much of day-to-day government activity.
2. Any legal challenge to the exercise of a discretion must now consider how this rift affects the decision in issue. And it is the nature of the decision, not the body, that must be looked at, for it is clear that in some cases there will be both public and private law aspects to consider, the same body exercising its discretion in relation to public law duties and private law rights on the same matter.[[27]](#footnote-28) Aspects of the recourse available to the aggrieved person according to the course adopted are set out below at the table at page 30.

# Chapter 2—Supervision of Regulatory Power I: judicial Review

## Background and History

1. It is surprising that a rift between private and public law should have become a recent feature of English law. Such a formal distinction runs counter to the great reforms of procedure in the nineteenth century which

“... had swept away the ancient forms of action, with all their subtle differences and technical traps, and had brought in the modern conception of a single form of action under which any claim could be made and any remedy awarded. All the pitfalls of the old system of pleading were replaced by a unified procedure under which a case could not be lost merely by choice of the wrong formalities at the outset.... But unfortunately the prerogative remedies were left outside it.”[[28]](#footnote-29)

1. After the collapse of the Court of Star Chamber and the prerogative courts, and the achievement of the independence of the judges from the executive, there was judicial control of the executive and its officers through the ordinary courts. The prerogative remedies of certiorari mandamus and prohibition provided recourse against officialdom: by the writ of certiorari decisions of inferior tribunals could be reviewed by the Court of King’s Bench and, if necessary, quashed; a mandamus could issue to compel a public official or inferior court to perform its duty; prohibition could prevent him from executing it.[[29]](#footnote-30) These remedies—public law in that they lie only against public bodies[[30]](#footnote-31)—were subject to procedural limitations which operated in favour of the public bodies against whom they could be directed. It seems unlikely that Dicey would have approved of the extension of their special protections to the public law application of declarations and injunctions.
2. The absence of provision for discovery or interrogatories or the taking of oral evidence subject to cross-examination made the prerogative orders unsuited to cases where conflicting evidence as to the facts called for resolution by the court. Lord Denning anticipated change in the first Hamlyn lecture in 1949

“Just as the pick and the shovel is no longer suitable for the winning of coal, so also is the procedure of mandamus, certiorari, and actions on the case not suitable for the winning of freedom in the new age. They must be replaced by new and up to date machinery, by declarations, injunctions and actions for negligence ... This is not the task for Parliament ... the courts must do this.”[[31]](#footnote-32)

1. The use of private law remedies of declaration and injunction came to be encouraged in public law cases.[[32]](#footnote-33) Lord Denning’s concept of administrative law mingled public and private law, producing like treatment for statutory and domestic (or public and private) bodies.

“It may truly now be said that we have developed a system of administrative law. These developments have been most marked in the review of decisions of statutory bodies: but they apply also to domestic bodies....”[[33]](#footnote-34)

1. But in professor Wade’s view what the courts have done is to take refuge in a new incarnation of actions on the case.

## A Seismic Event: O’Reilly v. Mackman

1. The first signs of the geological fault appeared no earlier than 1971, in a Law Commission Working Paper.[[34]](#footnote-35) The proposals for mutually exclusive remedies, separating public and private law did not in the event come to pass, and less radical proposals later became the new Order 53 in 1977, subsequently incorporated in the Supreme Court Act 1981.[[35]](#footnote-36) Wade describes the primary purpose of these reforms as

“to stop a good case being lost by choice of the wrong procedure.”[[36]](#footnote-37)

1. But the remedies of declaration and injunction as interchangeable remedies were, under Order 53, available with limitations (short time limit; leave of the court required to proceed; procedural limitations); whilst in proceedings commenced by ordinary action these restrictions were avoided. The seismic shock came in the decisions in *O*’*Reilly* and *Cox* which held this avoidance contrary to public policy. Although in subsequent decisions[[37]](#footnote-38) the application of the rule in *O*’*Reilly* has been limited, that has only modified the size of the rift, not closed it.
2. If the object of the reform was

“... not to give new privileges to public authorities but to improve the remedies available to the citizen”

it is hard to see that that has been achieved. Professor Wade’s formulation is bleak:

“For now we have a ... formulary system under which a complainant may lose his case not because it has no merits but because he has chosen the wrong form of action. This runs counter to the whole spirit of modern procedural reform... It is, to quote [Professor JA Jolowicz (in [1983] CLJ 18)] ‘a singularly unfortunate step back to the technicalities of a bygone age’”[[38]](#footnote-39)

## The Tests of Public Law

1. What is the form of the landscape through which this fault runs to create the Great Rift Valley of administrative law? What constitutes a sufficient public law element to (i) require or (ii) permit proceedings to be brought under Order 53? There is no easy one-sentence answer.

### “Source of power”

1. The prerogative remedies had lain against public authorities whose power derived from statute. This widened to include government bodies whose power was statutory but was said to be derived from the prerogative.[[39]](#footnote-40) Although the exercise of the prerogative was thus a basis for invoking the court’s public law powers, the use of the royal charter alone is not sufficient to establish the body thereby created as a public body.[[40]](#footnote-41)
2. The Supreme Court Act 1981 put the new Order 53 on a statutory footing. It did not broaden the ancient jurisdiction of the prerogative orders—

“29.—(1) The High Court shall have jurisdiction to make orders of mandamus, prohibition and certiorari in those classes of cases in which it had power to do so immediately before the commencement of this Act.

“31.—(2) A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeking that relief, has been made, and the High Court considers that, having regard to—

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

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

(c) all the circumstances of the case,

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

1. Thus the circumstances in which declarations or injunctions may be granted in applications for judicial review (as distinct from in actions begun by writ in private law) is limited to the scope of the old prerogative orders, which henceforth would dictate the use to which Lord Denning’s “new and up to date machinery” may be put in public law.

### “Public function”—*Datafin*

1. In 1987 the Courts had to consider whether judicial review lay in respect of a body

“without visible means of legal support.... It has no statutory, prerogative or common-law powers, and it is not in contractual relationship with the financial market or those who deal in that market.”[[41]](#footnote-42)

1. There were in Sir John Donaldson MR’s judgment two essential elements giving rise to jurisdiction—

a public element, which can take many different forms; and

the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction.[[42]](#footnote-43)

1. He described the Panel’s position thus:

“As an act of government it was decided that, in relation to take-overs, there should be a central self-regulatory body which would be supported and sustained by a periphery of statutory powers and penalties ...

... it operates wholly in the public domain. Its jurisdiction extends throughout the United Kingdom. Its code and rulings apply equally to all who wish to make takeover bids or promote mergers, whether or not they are members of bodies represented on the panel”[[43]](#footnote-44)

1. Of as much interest in this case as the decision itself are the omissions. On the face of the judgments the consideration of the private law alternative was limited to contractual issues. Other private law possibilities do not appear to have been canvassed. The Take-over panel is a classic self-regulatory monopoly—but that issue was not canvassed; that word does not appear in the judgments.
2. A public law element is nonetheless a requirement without precision. Craig proposes that the application of the term will

“... depend on whether one believes the task being performed by the public body when it makes the contract really partakes in some manner of ‘governing’ or ‘public regulation’ as opposed to private contracting.”[[44]](#footnote-45)

1. This description is of particular significance against the recent background of the privatisation of government control through measures such as the privatisation of state monopolies; the introduction of ‘Next Steps’ agencies, and the contracting out of processes (but not policy-making) formerly performed by government departments.
2. Self-regulatory bodies that are not obviously public authorities, but appear rather in the nature of a private body than of an emanation of the state may be within the scope of public law processes. *Datafin* established that bodies whose powers did not derive from statute, prerogative (or contract) could still be susceptible to judicial review. In that case it was clear that government saw a need for the regulation of take-overs and mergers and indeed was required by Europe to regulate this area. Secondary legislation assumed the existence of the Panel. It was clear that the existence or otherwise of such legislative inter-dependence was and is a significant factor in deciding whether particular self-regulation amounts to public regulation.
3. The connection can, it seems, be quite a tenuous one. Where regulations implementing an EC directive gave the Director General of Fair Trading powers to investigate misleading advertising and the essence of this regulatory scheme was that the Director General would act only if the matter had not been resolved by the Advertising Standards Authority, a private body, the court held that this was sufficient to render the ASA liable to judicial review.[[45]](#footnote-46)

### Defining the rift: twin-track control and government concern

1. A mere public interest in a body’s functions is not, however, enough. In *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* Simon Brown J (as he then was) said—

“To say of decisions of a given body that they are public law decisions with public law consequences means something more than that they are decisions which may be of great interest or concern to the public or, indeed, which may have consequences for the public. To attract the court’s supervisory jurisdiction there must be not merely a public but potentially a governmental interest in the decision-making power in question. And, indeed, generally speaking the exercise of the power in question involves not merely the voluntary regulation of some important area of public life but also what Mr Beloff calls a ‘twin-track system of control’. In other words, where non-governmental bodies have hitherto been held reviewable, they have generally been operating as an integral part of a regulatory system which, although itself non-statutory, is nevertheless supported by statutory powers and penalties clearly indicative of government concern.”

1. The introduction of a ‘governmental interest’ test is however considerably to narrow the “public element ... which can take many forms” in *Datafin*. This narrower test is one which has appealed to judges in subsequent cases, not least for reasons which have little if anything to do with the application of principles for determining a sufficiency of public nexus to qualify for Order 53 proceedings. In the *Football League* case, Rose J appeared to further confine the broad sweep of the Datafin test (an approach approved by the Court of Appeal in *Aga Khan)* when, recognising the Football Association as the governing body of football, he declined to apply to it:

“... principles honed for the control of the abuse of power by government and its creatures ...”[[46]](#footnote-47)

1. This was a restatement of the pre-*Datafin* ‘source of power’ test. The private companies in the financial services sector which operate as self-regulating organisations would fall within this narrow definition of public regulation. The Financial Services Act 1986 regulates the carrying on of investment business, and makes related provisions concerning insurance business; listing and dealing in securities; and takeovers.[[47]](#footnote-48) At the time of writing the Secretary of State’s powers to recognise a body (whether a body corporate or an unincorporated association) and other related powers are exercised by the Financial Services Authority (formerly The Securities and Investments Board ).[[48]](#footnote-49) There are presently three self-regulating organisations, the Securities and Futures Authority, the Personal Investment Authority, and the Investment Management Regulatory Organisation. Although not created by legislation, and although under their rules their members are in contractual relations with them, they are not excluded from the public law jurisdiction of judicial review as the source of their power is not solely contractual but is interwoven with the statutory requirements of the Financial Services Act regime. These arrangements are to be replaced by legislation to be published during the Summer of 1998.[[49]](#footnote-50)
2. Membership of such a body is a prerequisite for trading in the area of financial services which it regulates, given that it is an offence to conduct business in that area without the relevant authorisation.[[50]](#footnote-51) Thus each SRO is responsible for the exercise of a public monopoly.
3. Despite the “privatisation of the business of government”[[51]](#footnote-52) private self-regulatory bodies—domestic bodies in Lord Denning’s words[[52]](#footnote-53)—will nonetheless be liable to judicial review under Order 53 provided that one of the following tests succeeds—

Source of power (statutory, prerogative)

Within the scope of the prerogative orders[[53]](#footnote-54)

The performance of a function by a body the source of whose power is not solely a consensual submission to its jurisdiction and in which function governmental concern is apparent through some form of statutory nexus.

1. But self-regulatory bodies merely exercising monopoly control over a trade calling or profession do not, it seems, fall within the boundaries of Order 53. To define and explain the rift it must also be viewed from the private side.

# Chapter 3—Supervision of Regulatory Power II: Private Law—Contract

## Private Contract

### Mere contract

1. A decision by a body which, by exercising a monopoly power can limit or prevent a person’s pursuit of his calling should be subject to review by the courts under Order 53. Such has been the argument in a number of cases concerning legal persons as well as natural persons.[[54]](#footnote-55) But these cases illustrate that those criteria alone are not enough to bring such bodies within the bounds of Order 53's public law judicial review powers.
2. In *Law v. National Greyhound Racing Club Ltd* it was argued by the defendant that the case should have been brought under Order 53. The court rejected the argument: the Club’s powers—

derived from contract; and

were of concern only to those who took part in the sport.

1. There was neither statutory underpinning nor exercise of the prerogative, and the trainer whose licence was suspended was already in a contractual relationship with the National Greyhound Racing Club, thereby facilitating a contract-based remedy as an easy alternative solution in private law.

### Prerogative power—royal charter

1. In *R. v. Jockey Club ex p Massingberd-Mundy*, counsel for the applicant steward invited the Court to distinguish the position of the Jockey Club after 1970, when it had been incorporated by Royal Charter, from its earlier position prior to 1970, and from the position of the National Greyhound Racing Club Ltd., and to decide that it was subject to Order 53. Neill LJ, having first expressed the view that, absent authority, he might have concluded some decisions of the Jockey Club were capable of judicial review, [[55]](#footnote-56) did not feel able to distinguish *Law* and thus considered he was bound to follow the decision of the Court of Appeal in that case. The highest persuasive authority in support was found in the Privy Council case of *Calvin v. Carr* which concerned proceedings before the Australian Jockey Club.

“The issue of judicial review was not raised. Nevertheless it seems clear from the opinion of the Privy Council that it was there considered that the Australian Jockey Club was not a body within the domain of public law and that the proceedings before the stewards of that club were domestic proceedings where the source of power was a consensual submission to the jurisdiction.”

1. By such dicta, the issues both unargued and inaccurate, may the course of the common law be set. For the Australian Jockey Club, though not incorporated by charter, is underpinned by statute (the Australian Jockey Club Act of 1873). The statutory underpinning was not referred to in the *Massingberd-Mundy* judgment; yet it had been a basis for the application of public law to the Panel in the *Datafin* case two years earlier.

### Legitimate expectations

1. Another assault on the private territory still occupied by the Jockey Club took place the following year.[[56]](#footnote-57) This time the argument that Order 53 should apply was put on the public law ground of the legitimate expectation[[57]](#footnote-58) of a prospective new racecourse owner.[[58]](#footnote-59) The applicant did not succeed in establishing legitimate expectation. The Court went on to consider the question of jurisdiction *obiter*. Stuart-Smith LJ cited Roch J’s judgment in *Law v National Greyhound Racing Club Ltd.* (at 224)—

“In Law’s case the authority of the stewards to suspend the plaintiff’s licence was derived wholly from contract. There may be cases where the authority of the stewards of the Jockey Club will not be derived from a contract between them and the person aggrieved by their act or decision or alternatively may not be derived wholly from a contract. It seems to me that, if such a case were to arise, then the question is such an act or decision of the Jockey Club susceptible to judicial review? may receive an answer different from that given by the court in Law’s case.”

he continued

“It seems possible that the learned judge had in mind such a case as the present which is plainly unconnected with contract.”

1. Stuart-Smith LJ felt unable to depart from the decision in *Massingberd-Mundy*. But for the authority cited in it (*Law*), he would have held the Jockey club amenable to judicial review. Simon Brown J considered that the nature of the power being exercised by the Jockey Club in discharging its functions of regulating racecourses and allocating fixtures was strikingly akin to the exercise of a statutory licensing power, and had

“no difficulty in regarding this function as one of a public law body, giving rise to public law consequences.”[[59]](#footnote-60)

1. He regarded the Jockey Club as subject to review in respect of such functions. He judged it

“preferable to develop these principles in future in a public law context than by further distorting private law principles.”[[60]](#footnote-61)

### Government creatures and quantum leaps

1. No doubt this was encouraging to the Aga Khan who, following the disqualification of one of his horses from a race, sought once more to test the amenability of the Jockey Club to the broader test for judicial review developed in *Datafin*.[[61]](#footnote-62) But despite recognition by the Court of Appeal that the Club regulated a national activity and that in its absence government would regulate the sport in its stead, the court found the club not susceptible to judicial review. It found no government connection, and the applicant would have a remedy in private law. It left open the possibility that in another case, absent a contractual relationship, public law remedies might be available.
2. Similarly the Football Association. It had a monopoly control over the way the game of association football was played; its rules, though contractual in form, were in effect a legislative code for the game and it regulated an important aspect of life (and in its absence the state would have to create a public body to perform its functions). But Rose J. held that

“to apply to the governing body of football, on the basis that it is a public body, principles honed for the control of the abuse of power by government and its creatures would involve what, in today’s fashionable parlance, would be called a quantum leap.”[[62]](#footnote-63)

## Doubting the Contractual Basis

1. There was some judicial doubt that those cases which had been put firmly on a contractual footing, and thus firmly into the realm of private law, were simply contractual. The thesis was developed by Denning LJ, as he then was, in the early 1950s, although drawing on earlier authority. The cases concern the right not to be arbitrarily or capriciously dismissed from work. The starting point is the assertion of the Court’s authority to construe the contract.

“Outside the regular courts of this country, no set of men can sit in judgment on their fellows, except so far as parliament authorizes it or the parties agree to it. The jurisdiction of the committee of the Showmen’s guild is contained in a written set of rules to which all the members subscribe. This set of rules contains the contract between the members and is just as much subject to the jurisdiction of these courts as any other contract.”[[63]](#footnote-64)

1. First, two themes are apparent—

The implication of terms into the contract on the grounds of public policy

A narrow construction (*contra proferentem*)

“... in these days the principle to be applied is that where there is a right there should be a remedy. ... In the case of domestic tribunals which depend for their jurisdiction on a contract, express or implied, it is an actionable breach of contract for them to usurp more than the contract gives them.”[[64]](#footnote-65)

“Although the jurisdiction of a domestic tribunal is founded on contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy. The tribunal must, for instance, observe the principles of natural justice. They must give the man notice of the charge and a reasonable opportunity of meeting it. Any stipulation to the contrary would be invalid.. They cannot stipulate for the power to condemn a man unheard.”[[65]](#footnote-66)

1. Then, as the argument is developed, the inequality of bargaining power between the contracting parties (and in particular the great power of the body whose rules are the terms of the contract) acquires ever greater emphasis—

“It is very different with domestic tribunals which sit in judgment on the members of a trade or profession. They wield powers as great as, if not greater than, any exercised by the courts of law. They can deprive a man of his livelihood. They can ban him from the trade in which he has spent his life and which is the only trade he knows. They are usually empowered to do this for any breach of their rules, which, be it noted, are *rules which they impose and which he has no real opportunity of accepting or rejecting. In theory their powers are based on contract. The man is supposed to have contracted to give them these great powers; but in practice he has no choice in the matter.* If he is to engage in the trade he has to submit to the rules promulgated by the committee.... A man’s right to work is just as important to him as, if not more important than, his rights of property. ”[[66]](#footnote-67) (my emphasis)

1. Finally, the emphasis shifts: the analogy is no longer mere inequality of bargaining power; rather, these bodies are private legislators—

“The rules of a trade union must be lawful. They are not a mere contract into which the union can insert any provision it likes without question by the courts. They are *more like by-laws than a contract*.”[[67]](#footnote-68)

“*The rules of the union read* more *like a legislative code than anything else.*”[[68]](#footnote-69)

“[The trade union’s] rules are said to be a contract between the members and the union. So be it. If they are a contract, then it is an implied term that the discretion should be exercised fairly. But *the rules are in reality more than a contract. They are a legislative code laid down by the council of the union to be obeyed by its members. This code should be subject to control by the courts just as much as a code laid down by Parliament*.”[[69]](#footnote-70) (my emphasis throughout)

1. The theme of the private legislator is not limited to trade unions. Lord Denning took the same line with sporting bodies:

“... the truth is that the rules are nothing more nor less than a legislative code - a set of regulations laid down by the governing body to be observed by all who are, or become, members of the association.”[[70]](#footnote-71).

1. Judicial intervention to control the rules of domestic bodies can be used equally where the applicant is not a party to the contract-become-legislative-code.

## A Non-Contractual Remedy?

1. Lord Denning's assertion of jurisdiction to find decisions ultra vires,[[71]](#footnote-72) to imply terms of natural justice, and to regard provisions more like by-laws or a legislative code,[[72]](#footnote-73) was to apply to private contract principles whose home is in public law. His approach to construction of the contracts was a purposive one with a substantial public policy element. This was not, it is suggested, an approach plucked out of the air but reflected public policy and public interest notions with a long history in another area of private law of relevance to the control of self-regulatory bodies in which Lord Denning took a similar approach.[[73]](#footnote-74)
2. The reasoning in some of the "contract cases"[[74]](#footnote-75) viewed the absence of a contract as a factor leading to the application of public law principles. Such reasoning could result in the use of judicial review at the stages prior to the acceptance of an application (i.e. before a person became a member of the regulatory body) whilst upon creation of contractual relations between member and regulator by the acceptance of an application, public law would no longer apply, being displaced by the terms of the contract so created.
3. Such extraordinary logic borders on the perverse. Given that the courts have taken an alternative (private law) approach in some such cases in the absence of a contract, the courts may well have some reluctance to widen the application of public law principles if the absence of a contract will not necessarily mean the absence of a private law remedy. Alongside the seemingly simple public law (prerogative order-based)/private law (contract-based) dichotomy was a third option—that of private law remedies where no contract existed. Such remedies are based on notions of public interest and public policy. In order to consider their scope and their relationship with the public law remedy of judicial review it is instructive first to consider their origins.

# Chapter 4—Public Interest in Private Rights: Public Policy

## Regulating Private Rights—Private Law but not Juris Privati

1. The roots of a man’s right to practice his calling or trade free of restraint go deep into the middle ages, in the law concerning monopolies and common callings. Some of the lines of authority have been described as lost to English law,[[75]](#footnote-76) though living on in a vibrant line of authority in the United States.[[76]](#footnote-77) Whether and to what extent businesses could be affected by a public interest became a constitutional issue under the Fourteenth Amendment over the permissible extent of price regulation, and, in parallel, the use of mandamus extended to compel private corporations to perform duties where there was a public interest. The mechanisms by which this occurred are rooted in English jurisprudence of the middle ages, a jurisprudence in which the public interest had, to use again the terminology of *Wachmann*, developed out of a ‘governmental’ interest.
2. It is perhaps fairer to say that these ancient lines of authority are weak rather than lost. For strands appeared in the 1960s: *Nagle v. Feilden*, and *The Pharmaceutical Society v Dickson.* It is a reflection on the different routes taken by branches of the common law that a convenient starting point from which to consider early cases and writings is in USA in the nineteenth century.
3. In the last century the US supreme court fastened on the authority of Sir Matthew Hale. In a decision illustrative of a policy the reverse of one seeking to limit the use of judicial review under Order 53 to cases of governmental interest, it sought to use themes of the public obligations of (private) business. It found them in two of Hale’s works: *De Jure Maris* and *De Portibus Maris*. The case was *Munn v. Illinois*, and it concerned price regulation of grain elevators in Chicago. Hale's two works consider common callings and monopolies. The exercise of a common calling does not depend on the monopolistic exercise of the calling. But the requirement is the “exercise of a trade to all who will come”.

### Common callings

1. Cases on common callings begin with the ferryman’s, the year the Black Death broke out, 1348.[[77]](#footnote-78) The following year there was legislation to regulate the charges of labourers and tradesmen: none could refuse to practice his calling to whomever applied, and all must work for a reasonable rate.[[78]](#footnote-79) This was an early attempt to regulate the operation of a free market: 80% to 90% of the population had perished by the Black Death, labour had become a scarce commodity, and prices had risen accordingly. Though there was not a monopoly, the consequences of scarcity affected the public interest. Statutory intervention ensued, and the underlying principles, viz. a holding out to work for whomever applied (i.e. without discrimination), and charging reasonable prices, came to be seen as a part of the common law. Three centuries later Hale restates these principles using the example of the common ferryman—

“[a man] may make a ferry for his own use or the use of his family, but not for the common use of all the King’s subjects passing that way; because it doth in consequence tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge and every ferry ought to be under a public regulation, viz: that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these he is finable.”[[79]](#footnote-80)

1. *\*\** That the application of the non-discrimination principle of common callings is still good law is shown by *Constantine*, in which a common innkeeper failed without lawful excuse to provide to a traveller accommodation which was available. The requirements of reasonable pricing and non-discriminatory behaviour apply *a fortiori* to monopolies.

### Monopolies and the public interest

1. By letters patent of the King the Tailors of Ipswich were given power to make rules for good order and government and power to fine for breach of those rules. Such fines could be enforced by levying distress or by action of debt. The common law of the Seventeenth Century seemed as capable as any Twentieth Century English court of taking points of construction on the scope of the rules: it did not tolerate rules of regulatory bodies which sought by the exercise of some form of oppressive admissions procedure to exclude persons from the practice of a lawful trade—

“... at the common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness, ... and especially in young men, who ought in their youth, ... to learn lawful sciences and trades ... therefore the common law abhors all monopolies, which prohibit any from working in any lawful trade;...”[[80]](#footnote-81)

“... it appears that without an Act of Parliament, none can be in any manner restrained from working in any lawful trade. ... forasmuch as the statute has not restrained him ... the said ordinance cannot prohibit him from exercising his trade ... for these are against the liberty and freedom of the subject and are a means of extortion ... or of oppression ...: but ordinances for the good order and government of men of trades and mysteries are good, but not to restrain any one in his lawful mystery.”[[81]](#footnote-82)

1. In effect the Tailors were acting ultra vires their rule-making powers. In any event the court went on to distinguish the “public use and exercise of a trade to all who will come” i.e. trade as a common tailor, from “him who is a private ... tailor ... in the house of any for the use of a family”.[[82]](#footnote-83) Even if the Tailors’ rule had been upheld, it would not have applied to such private arrangements, which were outside the scope of the Tailors’ public monopoly.[[83]](#footnote-84)
2. Hale's second work considered monopolies: where the circumstances create a monopoly in the provision of a public service, then there is a public interest which creates a corresponding public duty, the nature of which is to act reasonably—

“A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, houselage, pesage, for he doth no more than is lawful for any man to do, viz: makes most of his own.... If the King or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the Queen,... or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the King’s license or charter. For now the wharf, and crane and other conveniences are effected with a public interest, and they cease to be *juris privati* only; ...”[[84]](#footnote-85)

1. The passage above from Hale is the basis for Lord Ellenborough CJ’s statement of the rule that

“If, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms.”[[85]](#footnote-86)

1. Thus once there is a monopoly, as Le Blanc J put it, “private property [is] clothed with a public right”[[86]](#footnote-87)
2. A public interest may be said to arise therefore where private property or services are available for common use, and there is a monopoly (or a virtual monopoly, perhaps even limited choice of supply). The Ipswich Tailors case makes it clear that monopolies in the nature of self-regulating bodies are subject to the common law's supervision as a matter of private law. As has been seen the language used in that case is "restrained ... in any ... trade". It is an authority relied upon in two modern authorities in which the doctrine of restraint of trade was used as a basis for invoking the court's supervision of the actions of a self-regulatory body.

# Chapter 5—Supervision of Regulatory Power III: Private Law—Restraint of Trade

## The Professions

1. The doctrine of restraint of trade is not limited to contractual arrangements and has been applied to rules of conduct for a profession. In *Pharmaceutical Society v Dickson* in 1968 the House of Lords was clear that the doctrine of restraint of trade applied to professions—

I am entirely unable to accept the argument that professional bodies are outside the general doctrine of restraint of trade. ... an examination of the great case of *Mitchel v Reynolds* in 1711, where Lord Macclesfield delivered the judgment of the court, shows that the dislike of the common law for all restraints was general and applied equally to restraints voluntary and involuntary, to grants and charters by the Crown, to bye-laws and of course to contractual restraints, unless in particular circumstances they could be justified. [[87]](#footnote-88)

and provided a proper basis for the challenge of the society’s rules—

“He is entitled to come to the courts and to ask for a decision that the rule (for such it amounts to) of which he complains was not one which it was within the powers of the society to impose. ...”

1. The case straddles the boundary of trade and professions. The Pharmaceutical Society of Great Britain was originally a voluntary association of chemists and druggists which became incorporated by Royal Charter. This original charter was confirmed by Act of Parliament (Pharmacy Act, 1852, s 1), and there are other statutory connections.[[88]](#footnote-89) Post Order 53 the Pharmaceutical Society must be subject to public law.[[89]](#footnote-90) It would thus be treated in the same way as other professional bodies such as The Bar Council;[[90]](#footnote-91) the Law Society and the Institute of Chartered Accountants.[[91]](#footnote-92)

## Sporting Bodies

1. The Jockey Club refused Mrs Nagle a trainer’s licence.[[92]](#footnote-93) She sued in private law for a declaration. Her case was that

the refusal was because she was a woman;

it was the practice of the stewards to refuse licences to women trainers; and

such a practice was void as against public policy.

1. Despite the difficulty in showing a contract, the case was nonetheless advanced on notions of contract, arguing that there was a ‘contractual nexus’. (In its breadth it anticipated, though less successfully, the broad-based argument as to functions in *Datafin*.) Struck out on appeal from the Master, on further appeal to the Court of appeal the contractual argument was dismissed as "absurd" and "untenable". The case was also put on the basis that—

“The Stewards of the Jockey Club hold themselves out as exercising, and exercise, a monopoly in the control of horseracing on the flat in Great Britain … and that the practice (to refuse a licence to a woman trainer) was “unlawful and in restraint of trade and contrary to public policy.”[[93]](#footnote-94)

1. Distinguishing trading or professional associations from mere social clubs, and likening the Jockey Club to the former categories, the argument was put on the basis that a man or woman had a right not to be unjustly excluded from his or her chosen occupation—

The common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having the governance of it. If they make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad. It is against public policy. The courts will not give effect to it...[[94]](#footnote-95)

“We live in days when many trading or professional associations operate “closed shops”. No person can work at his trade or profession except by their permission. They can deprive him of his livelihood. When a man is wrongly rejected or ousted by one of these associations, has he no remedy? I think that he may well have, even though he can show no contract. The courts have power to grant him a declaration that his rejection and ouster was invalid and an injunction requiring the association to rectify their error. ”[[95]](#footnote-96)

1. The Court of Appeal was receptive to arguments based on public policy; if necessary, changing public policy, in order

“to protect the right of a person to work when it is being prevented by the dictatorial exercise of powers by a body which holds a monopoly. This principle is not novel.”[[96]](#footnote-97)

1. The test to be applied appears in the following passage—

“...the question arises as to a man’s right to work or, more precisely, his right not to be capriciously and unreasonably prevented from earning his living as he wills. ... If ... it can be shown ... that a candidate has been capriciously and unreasonably refused admission, it is certainly arguable that the law will intervene to protect him...”[[97]](#footnote-98)

1. Restraint of trade arguments have succeeded in other sporting cases: the rules of sporting bodies which prevented players transferring from one club to another or playing of Test and County cricket have been held void.[[98]](#footnote-99)
2. More recently, in May 1996 Stevenage Borough Football Club had finished top of the GM Vauxhall Football Conference, the league of semi-professional football clubs immediately below the three divisions forming the Football League. In principle that would entitle them to be promoted to the third division. Under the rules of the League, promotion depended on them satisfying certain admission criteria. Stevenage did not satisfy the criteria. It could not therefore become a member of the League. Here was a modern ‘application’ case challenging rules on the basis of unreasonable restraint of trade.
3. The case has four points of particular interest:

It suggests that applicants (whether the area of self-regulation is football or financial services) have a legitimate expectation that the relevant application criteria would be applied to them fairly and in accordance with the rules of justice.[[99]](#footnote-100)

It debunks the resource argument put *inter alios* by Rose J.[[100]](#footnote-101)

It argues for an extension to judicial review by adopting the approach in Simon Brown J’s judgment in *RAM Racecourses* in which he asserted the view that the natural home for cases such as *Nagle* and *Breen* was in judicial review (i.e. Order 53) proceedings. Carnwath J. goes on to cite with apparent approval Forsyth's article[[101]](#footnote-102) in which he suggests that the extension of judicial review to non-statutory bodies (as in Datafin) has a “common law root” in cases (*Alnutt v. Inglis; Nagle v. Feilden*) dealing with the exercise of monopoly powers. He concludes that if that is right, there are clear parallels with the earlier cases on restraint of trade.[[102]](#footnote-103)

It deals with the issue of interlocutory injunctions in cases brought in restraint of trade seeking a declaration. This aspect of the case is dealt with below at page 26 *et seq*. in the section on remedies.

1. Carnwath J. emphasised the importance of the public interest element of the area of the law concerned with application cases whether in proceedings by writ or judicial review.[[103]](#footnote-104) He did not find it easy to justify either the dividing line between governmental and non-governmental functions or the procedural distinctions.[[104]](#footnote-105) The broad approach he takes emphasises the similarities between the public and the private law approaches to judicial supervision of self-regulatory bodies.
2. Are those similarities such that the courts provide equivalent supervision of self-regulatory bodies in private law, not only for those in contractual relationships but also for applicants outside any contract? For if there is equivalent supervision, why the interest in the nature of the rift? There are two reasons. First, if the remedies available are not co-extensive; second, because as long as it is not possible to chart the fault with certainty, the plaintiff/applicant is still at risk of commencing the wrong proceedings. The first of these questions is dealt with below; the second is considered in the concluding chapter.

# Chapter 6—Remedies

1. This chapter will consider four aspects of remedies.

First, the extent to which the early precursors of the modern restraint of trade cases, the monopolies and common callings cases, sought the "public law" remedies of the prerogative writs.

Second, and in the light of the extent to which the US public interest cases represent a development of English authority, an illustration of how US law has developed the use of the English prerogative remedy of mandamus.

Third, the issue of availability of interlocutory injunctions considered in the *Welsh Football* and the *Stevenage* cases calls for comment as an important area of possible limitation on private law remedies.

Fourth and finally, there is a table to illustrate broadly the distinctions and also the similarities that Carnwath J sought to emphasise between proceedings begun by writ and by judicial review.

## Public Interest, Private Remedy

1. The public interest in regulatory monopolies and in the public interest in common callings seems to have been applied by the courts, certainly between the seventeenth and the nineteenth centuries, without recourse to what we now think of as public law remedies. One case, *the Company de Horners in London*, illustrates the use by the Court of King's Bench of certiorari to "call for the file". But it was not a file on monopolies or common callings. Those cases followed the path of private law:
2. The Tailors of Ipswich, having found one William Sheninge in breach of a rule, fined him £3.13s.4d., and brought an action of debt to recover the sum. The court's decision that their monopoly was bad was thus in the context of a defence to an action in debt. At about the same time in *Darcy v. Allen*, an (unsuccessful) attempt to enforce a monopoly granted by letters patent, was made, not by prerogative remedy, but by an action on the case.
3. Two centuries later, Alnutt did not seek a mandamus to require a monopoly to comply with the public duty applicable to common callings and monopolies.[[105]](#footnote-106) Rather it seems he claimed for damage to the unwarehoused goods, lost interest and profits. And in *Bolt v. Stennett* in which the crane at Smart’s Quay was held affected by a public interest, a similar point was taken in (successful) defence to an action for trespass.
4. None of the proceedings considered sought relief by what has now come to be seen as a public law remedy of a prerogative writ. The remedies of private law served to underpin the public interest which affected the private property or business, whether as plaintiff or defendant.

## Public Interest, Public Remedy (USA)

1. It seems that many of the functions which in the developing industrialisation of the nineteenth century were in England performed by public officials or bodies[[106]](#footnote-107) were in the USA performed by private corporations. The element of public interest is common to both. And as public bodies performing such functions were subject to the prerogative orders in England, so were private corporations in the USA. The nexus thus appears to be public function and public interest, a broader principle than the limited scope of the *Wachmann* test: it is not necessary to have a governmental interest. In the USA mandamus is not confined to an action directed to public officials and inferior tribunals but also lies against corporations and utilities affected with a public interest.[[107]](#footnote-108) It will thus lie against gas and electricity suppliers to compel supply without unjust discrimination as to rates or charges,[[108]](#footnote-109) against railroad companies to compel performance of their duties as a common carrier in the receipt transportation and delivery of freight and passengers without unlawful discrimination.[[109]](#footnote-110) Here the public interest in the duty to serve all who apply[[110]](#footnote-111) and without discrimination invokes a public law remedy.
2. Mandamus may be used to deal with a refusal by a union to admit to membership an employee who had all lawful and reasonable requirements for membership.[[111]](#footnote-112) In some States it may similarly be used to compel a corporation to reinstate a member who has been illegally expelled or suspended; and to restore to him all the rights and privileges of membership.[[112]](#footnote-113) In equivalent cases in English law the injunction was the remedy even before the appearance of the public-private rift.[[113]](#footnote-114) American law can thus control private bodies with functions akin to those of private self-regulatory bodies in England by an application of a public law remedy with its origins in English law. It appears from this limited examination that the test applied in the USA is essentially one of public interest, not government interest. It will be suggested below that the government interest test is an unsatisfactory exercise in pragmatism which fails to serve the litigant.

## Interlocutory Injunctions

1. Mrs Nagle's case was an appeal on an interlocutory application, not a trial of her action. Application cases which are outside the scope of Order 53 may in practice fall to be determined on interlocutory applications, simply because a refusal to deal with the application until a final order is made after trial may in practice determine the issue against the applicant, as where without the approval of a self-regulating body an applicant cannot get employment or conduct his business; by the time of trial the employment opportunity is lost or the business is insolvent. Thus interlocutory injunctive relief (as referred to by Lord Denning in *Nagle*) is of great significance in considering whether private law offers effective relief in "application" i.e. non-contractual cases.
2. Could an interlocutory injunction be obtained in a case brought in restraint of trade? Hoffman LJ in *ex parte Aga Khan* had doubted the possibility of an injunction in *Nagle* had survived *The Siskina**.* The issue was whether that an arrangement in restraint of trade was merely void or unenforceable: it created no wrong and therefore gave rise to no cause of action. In the *Welsh Football* case Jacob J considered that it was well-settled law that “a person who is not a party to an arrangement said to be void may apply for a declaration if he is sufficiently affected by it”. Jacob J drew support from the Australian case of *Buckley v Tutty*[[114]](#footnote-115)in distinguishing *The Siskina*—

A right to a declaration was a cause of action;[[115]](#footnote-116)

For a party to have such a cause of action it was enough that he had a sufficient interest. It was not necessary to have a contractual relationship;[[116]](#footnote-117)

1. Thus an interlocutory injunction could be granted in an action in restraint of trade for a declaration.
2. In *Stevenage FC* Carnwath J. adopted Jacob J’s reasoning. He considered in the alternative that restraint of trade may be another class of case where the courts as an exception to the ordinary rule would grant injunctions to parties with a special interest but no legal right. *Welsh Football* and *Stevenage FC* were both decisions at first instance and the issues may be subject to the scrutiny of higher judicial authority. This question cannot be regarded as finally settled, but it is to be hoped that the argument that applicants with sufficient interest seeking interlocutory injunctions in proceedings for restraint of trade (the *Welsh Football, Stevenage FC* and *Buckley v. Tutty* position) will prevail over the Hoffman-*Siskina* view.

. . . / . . .

## Table of comparisons[[117]](#footnote-118)

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Order 53** | **Contract** | **Restraint of Trade** |
| **Standing** | person aggrieved or sufficient interest | privity | sufficient interest[[118]](#footnote-119) |
| **Leave required** | Yes | No | No |
| **Intervention standards** | illegality | outside the express or implied terms of the contract[[119]](#footnote-120) | outside the express or implied terms of the contract or ultra vires the rule [[120]](#footnote-121) |
|  | irrationality (or ‘Wednesbury’ unreasonableness) | implied term of reasonableness | arbitrary or capricious; capricious or unreasonable[[121]](#footnote-122) |
|  | procedural impropriety[[122]](#footnote-123) | implied term of natural justice[[123]](#footnote-124) | implied term of natural justice |
| **Limitation** | promptly (< 3 months)[[124]](#footnote-125) | Limitation Acts: 6 years | Limitation Acts: 6 years |
| **Procedure:** application | Notice of motion: Form 86A | writ | writ |
| pleadings | no | yes | yes |
| discovery | no | yes | yes |
| oral evidence | no: affidavit evidence | yes: can cross-examine | yes: can cross-examine |
| **Remedies** | Certiorari; Prohibition; Mandamus;[[125]](#footnote-126) Injunction (final and interlocutory); Declaration; damages | Injunction (final and interlocutory); declaration; damages | Injunction (final and interlocutory[[126]](#footnote-127)); declaration; damages[[127]](#footnote-128) |

1. Within the relatively narrow compass of self-regulation—licensing or membership; conduct; discipline; and expulsion—does the unavailability of Order 53 result in the lack of a remedy? Subject to the limited reservations in the previous section it would seem not. And damages apart, remedies are discretionary in any event.[[128]](#footnote-129) The vice would seem rather to lie in the uncertainty: the risk that whatever course selected might fail.

# Chapter 7—Criticisms and Conclusions

## Special Protection and Resources

1. In *O*’*Reilly*, Lord Diplock’s concern was that to allow proceedings by action was to circumvent—

the requirement for the leave of the court before being able to proceed;

the requirement that proceedings be brought “promptly and in any event within three months” and instead to launch proceedings months if not years after the decision to be challenged was taken;

the requirement for leave for discovery;

the requirement for leave to cross-examine witnesses;

and amounted to an abuse of the process of the court.[[129]](#footnote-130)

1. Considerable judicial energy has been spent on this concern to protect public authorities from the attempted depredations of litigants. Rose J followed in Lord Diplock’s footsteps in the *Football League* case: leaping into new fields was not an option, quantum or otherwise; that aside,

“It would ... be a misapplication of increasingly scarce judicial resources. It will become impossible to provide a swift remedy, which is one of the conspicuous hallmarks of judicial review, if the courts become even more swamped with such applications than they are already. This is not, of course, a jurisprudential reason for refusing judicial review, but ...”[[130]](#footnote-131)

1. These scarce resources were simply deployed elsewhere in the High Court: Carnwath J was at pains in *Stevenage FC* to point out how much more convenient the procedure of judicial review would have been—

“Furthermore, the procedural distinctions are not obviously justifiable. Rose J’s concern that extension of judicial review to such bodies as the Football Association, would result in excessive pressure on judicial time, is not borne out by the evidence of the present case. In spite of the efforts of the parties, and the economy of presentation, the writ procedure, with pleadings, discovery, and oral evidence, inevitably is more elaborate, time consuming and expensive than judicial review. Most of the facts in the present case were uncontentious, and little emerged in the process of oral evidence which could not have been adequately dealt with by affidavit and examination of documents. Under the judicial review procedure, if properly conducted, the case for each party can generally be set out in one main affidavit on each side, supported only by relevant documents; rather than, as in this case, in some sixteen witness statements, fifteen files of documents, and transcripts of five days of oral evidence.” [[131]](#footnote-132)

1. This view, far from supporting "floodgates" arguments rather suggests the greater threat to judicial resources is the narrow application of Order 53.

## The Pantomime Game

1. There has also been a substantial body of academic criticism. Wade was critical of the need to protect government institutions in a way that private bodies are not protected—

“The object of the reforms was not to give new privileges to public authorities but to improve the legal remedies available to the citizen.”[[132]](#footnote-133)

1. Criticising the courts’ approach to limiting judicial review by rejecting the exercise of monopoly power as the basis for judicial review, Black goes on to observe that the ‘government interest’ test is based on judicial speculation rather than evidence—

“The main weakness of the test is that it depends on proving a counter-factual, requiring the court to second-guess the legislature on the basis of little or no evidence as to the legislature’ s intention. As the *Aga Khan* judgements illustrate, it thus has the potential to collapse into an unseemly pantomime game with judges replying to the hypothetical question, ‘but for this body would the government regulate?’ with cries of ‘oh yes they would, oh no they wouldn’t’.”[[133]](#footnote-134)

1. The judiciary’s reluctance to extend judicial review is said to be technical and pragmatic, as evidenced by Rose J.’s remarks[[134]](#footnote-135) which also lend support to the view that the public private classification is no more than an attempt to shield political issues and some highly executive minded decisions from public criticism.[[135]](#footnote-136) It is difficult to disagree with such views when looking back over a decade and a half of decisions which seems likely to continue on a “case to case basis”[[136]](#footnote-137) and thus continue to offer little certainty to litigants who are subject to the decisions of self-regulatory bodies: in the future they are less likely to be viewed as performing public functions. In the concluding section to this essay attempts to divine some trends for the future and offer some conclusions for litigants at risk of falling between the public and private cliffs of the Great Rift Valley.

## New Self-Regulators

1. It seems unlikely that the trend of privatisation of government will reverse.[[137]](#footnote-138) More sectors of business if regulated will fall to be regulated under the self-regulatory mechanisms of trade associations. The point is reinforced by a recent Treasury consultation document[[138]](#footnote-139) which invites observation on the possibility of replacing the statutory regime for the regulation of insurance brokers with a self-regulatory body operated by the industry (perhaps under a Royal Charter, but then that would not be enough to bring it within Order 53). Another example is to be found in the recent case of *R. v. The Panel of the Federation of Communication Services Ltd* (‘FCS’) *& Anor ex parte Kubis.*
2. FCS is a trade association providing services to its members: mobile telephone network operator service providers and dealers in mobile telephones. FCS instituted a Crime Prevention Scheme with rules requiring members of FCS not to trade with members or non-members who are declared to be ‘not in good standing’ under the scheme. The Scheme had the support of the Home Office and of the DTI. All members had to incorporate the Scheme rules into their transactions with others, and that thus incorporated the scheme into further transactions with others by a cascade of contracts across the industry.
3. The applicant Mr Kubis, who was not a member and had been declared not of good standing, contended that his livelihood had been seriously affected because no-one would trade with him. He further asserted that the fact that the Scheme is supported by the Government, that the Home Office backed the FCS, and the Government welcomed the recommendations, brought it within the scope of Order 53. However Tucker J was not persuaded. Neither FCS not its disciplinary panel was woven into the fabric of public regulation. FCS was not a statutory body. There was no governmental underpinning and FCS did not exercise governmental powers.[[139]](#footnote-140) It is easy to say that Mr Kubis might have fared better had he argued restraint of trade.

## Conclusions

1. Self-regulation may well be amongst the most difficult areas in which to be certain of choosing the right procedure. The Law Commission's decision to recommend maintenance of the status quo[[140]](#footnote-141) retains the residual uncertainty of interlocutory injunctions in restraint of trade proceedings.[[141]](#footnote-142) Broader distinctions reflect perceptions or prejudices of national life: government, the traditional professions and financial regulation are serious and important parts of national public life. Sport, although as much ‘big business’ as the business of the Takeover Panel, is only leisure, the ‘bread and circuses’ of our national private life. For all the analysis the sense remains that development on a “case to case basis” enables a degree of judicial flexibility which lands harshly on litigants probably perceived as undeserving: the geological fault facilitates arbitrary distinctions, disguises decisions on the merits: in some cases litigants have been left without a remedy: too public law for a writ, too late to apply for a remedy.
2. Choose private law where the court finds the body to be a public body and, even were the High Court to apply what the Law Commission described as the ‘broad’ approach to *Roy v. Kensington & Chelsea*[[142]](#footnote-143) under which Order 53 would only be insisted on if private rights were not in issue, it remains doubtful that a challenge to licensing or disciplinary decisions could safely be made by way of contract or restraint of trade instead of Order 53. Choose public law and fail, and pay the costs of a case involving three silks and three juniors,[[143]](#footnote-144) and if you can afford it you still have time to issue a writ.
3. Private law can offer a solution on the other side of the rift from Order 53 so that the litigant is not left without a remedy. But neither public nor private law alone can have a solution for the wrong choice of procedure in this landscape of procedural exclusivity. Surely the greatest “misapplication of increasingly scarce judicial resources”[[144]](#footnote-145) is to require the same matter to be litigated twice. The effect on extra-judicial resources, specifically the litigant’s, of administrative law’s Great Rift Valley does not appear to get consideration it should have.
4. To end where I began, if the answer to "who regulates the regulators?" is the courts, who is going to regulate the judges? We live in a time where customer service is emphasised. Much of what this essay is about is how an applicant can obtain just service from a self-regulatory body. It is difficult for him to do that without a level of service from the courts which he continues not always to get.

# Case references

|  |  |  |
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| ***Abbreviation*** | ***Casename*** | ***Reference*** |
| Abbott v. Sullivan | Abbott v. Sullivan | [1952] 1 All ER 226 |
| Aga Khan | R. v. Jockey Club ex parte Aga Khan, | [1993] 2 All ER 853, 874 |
| Allnutt v. Inglis | Allnutt and Anor. v. Inglis | (1810) 12 East 527 |
| Andreou v. ICA | Andreou v Institute of Chartered Accountants in England and Wales | [1997] All ER |
| ASA: Insurance Service | R v. Advertising Standards Authority ex p the Insurance Service | [1990] COD 42; (1990) 2 Admin LR 77 |
| ASA: Vernons | R v Advertising Standards Authority Ltd, ex parte Vernons Organisation Ltd | (1992) |
| Bonsor | Bonsor v. Musicians Union | [1954] 1 Ch 479 |
| Boulting | Boulting v. Association of Cinematograph Television and Allied Technicians | [1963] 2 QB 606 |
| Breen v. AEU | Breen v. Amalgamated Engineering Union | [1971] 2 QB 175 |
| Buckley v. Tutty | Buckley v. Tutty | (1971) 125 CLR 353 (High Court of Australia) |
| Calder | R v Visitors to the Inns of Court, ex parte Calder, R v Visitors to the Inns of Court, ex parte Persaud | [1993] 2 All ER 876 |
| Caparo | Caparo v. Dickman | [1990] AC 605 |
| CCSU | CCSU v. Minister for the Civil Service | [1985] AC 74 |
| Company de Horners | The Company de Horners in London | 2 Rolle, 471 |
| Constantine | Constantine v. Imperial Hotels Ltd | [1944] K.B. 693 |
| Darcy v. Allen | Darcy v. Allen | (1602) 11 Co. Rep 84 |
| Datafin | R. v. Panel on Takeovers and Mergers ex parte Datafin | [1987] QB 815 at 824, 825 |
| Davy v. Spelthorne | Davy v. Spelthorne BC | [1984] AC 262 |
| Eastham | Eastham v Newcastle United Football Club Ltd | [1963] 3 All ER 139 |
| Enderby Town FC | Enderby Town Football Club v Football Association | [1971] Ch 591 |
| Faramus | Faramus v Film Artistes’ Association | [1964] 1 All ER at p 32 |
| Football League | R v Football Association Ltd ex parte Football League; Football Association Ltd v. Football League | [1993] 2 All ER 833 |
| Greig v. Insole | Greig v. Insole | [1978] 1 WLR 302 |
| Hutchinson | Director of Public Prosecutions v Hutchinson and another | 1990 2 All ER 836 |
| Ipswich Tailors | The Case of the Tailors, &c. of Ipswich | (1614), 11 Co Rep 53a, 77 ER 1218, 45 Digest (Repl) 391, 86 |
| Kubis | R. v. The Panel of the Federation of Communication Services Ltd & Anor ex parte Kubis | Unrep, QBD Crown Office List, Tuckey J, 3-Sep-1997 |
| Lain | R. v. Criminal Injuries Compensation Board ex parte Lain | [1967] 2 QB 864 |
| Lavelle | R v BBC, ex p Lavelle | [1983] 1 All ER 241, [1983] 1 WLR 23 |
| Law | Law v. National Greyhound Racing Club Ltd | [1983] 1 WLR 1302 |
| Lee v. Showmen's Guild | Lee v. The Showmen's Guild of Great Britain | [1952] 2 QB 329 |
| Letang v Cooper | Letang v Cooper | [1964] 2 All ER 929 |
| London Electricity | R v Electricity Comrs, Ex p London Electricity Joint Committee Co | [1923] All ER 150; [1924] 1 KB 171 |
| Massingberd-Mundy | R v Disciplinary Committee of the Jockey Club, ex parte Massingberd-Mundy | [1993] 3 Al ER 207 |
| Mercury | Mercury Communications Ltd v Director General of Telecommunications and another | [1996] 1 ALL ER 575 |
| Munn v. Illinois | Ira Y Munn v. The People of the State of Illinois | (1876) 94 US 77 |
| Nagle | Nagle v. Feilden | [1966] 1 All ER 689 |
| O'Reilly | O’Reilly v Mackman and others | [1982] 3 All ER 680 |
| Percival | R v General Council of the Bar, ex parte Percival | [1990] 3 All ER 137 |
| Pharmaceutical Soc. v. Dickson | The Pharmaceutical Society of Great Britain and Another v Dickson | [1968] 2 All ER 686 |
| R. v Royal Pharmaceutical Society | R v Royal Pharmaceutical Society of GB, ex parte Association of Pharmaceutical Importers and others | [1989] 2 All ER 758 |
| RAM Racecourses | R. v. Jockey Club ex p RAM Racecourses Ltd | [1993] 2 All ER 225, CA |
| Rank | R. V. Independent Broadcasting Authority, ex p. Rank | 26 March 1986 cited in McHarg |
| Re a Solicitor (1987) | Re a Solicitor | (1987) 131 SJ 1063 |
| Roy | Roy v Kensington and Chelsea and Westminster Family Practitioner Committee | [1992] 1 AC 624 |
| Stevenage | Stevenage Borough Football Club v. The Football League | Unrep, Ch D, Carnwath J, 23-Jul-1996 |
| Tee | R. v. LAUTRO Ltd, ex parte Tee | Unreported, Lexis Transcript, 6-May-1994, CA Dillon, Hirst, Roch LJJ |
| The Siskina | Owners of cargo lately laden on board the vessel Siskina and others v Distos Compania Naviera SA "The Siskina" | [1977] 3 All ER 803 |
| Vine | Vine v. National Dock Labour Board | [1957] AC 488 |
| Wachmann | R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann | [1993] 2 All ER 249 |
| Walsh | R v East Berkshire Health Authority, ex p Walsh | [1984] 3 All ER 425, [1985] QB 152 |
| Weinberger | Weinberger v. Inglis | [1919] AC |
| Welsh Football case | Newport Association Football Club Ltd and others v Football Association of Wales Ltd | [1995] 2 All ER 87 |

# Bibliographic References

|  |  |
| --- | --- |
| ***Author*** | ***Publication*** |
| John Alder | Hunting the Chimaera 13 Legal Studies 1993 |
| John Alder | Obsolescence and Renewal: Judicial Review in the Private Sector, in Administrative law Facing the Future: Old Constraints and New Horizons, Leyland and Woods |
| Norman Arterburn | The Origin and First Test of Public Callings 75 Univ of Penn LR 411-421 (1926-7) |
| Peter Cane | Introduction to Administrative Law, Clarendon, 3rd Edn |
| Nicholas Bamforth | The Scope of Judicial Review: still uncertain [1993] PL 239 |
| Michael Beloff | Judicial Review - 2001: A Prophetic Odyssey (1995) 58 MLR 143 |
| Michael Beloff | Pitch, Pool, Rink, ... Court? Judicial Review in the Sporting world [1989] PL, 95 |
| Black, Julia | Constitutionalising Self-Regulation 1996) 59 MLR 24 |
| Sir Gordon Borrie | The Regulation of Public and Private Power [1989] PL 552 |
| Sas, Blanche | Regulation and the Privatised Electricity Supply Industry, (1992) 53 MLR 485 |
| Peter Cane | Introduction to Administrative Law, 3rd Edn, Clarendon |
| Chitty | Chitty on Contracts, 26th Edn. |
| West Group | Corpus Juris Secundum |
| Paul Craig | Administrative Law, 3rd Edn. |
| Paul Craig | Constitution Property and Regulation [1991] PL 538 |
| De Smith (Ed Evans) | Judicial Review of Administrative Action, Ed Evans, 4th Edn 1980 |
| De Smith Woolf and Jowell | de Smith Woolf and Jowell on Judicial Review |
| Michael Fordham | Judicial Review Handbook 1994 Wiley Chancery Law |
| Christopher Forsyth | Of Fig Leaves and Fairy Tales: the Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review [1996] CLJ 122 |
| Mark Friend | Judicial Review, Private Rights and Community Law [1985] PL, 21-6 |
| Carol Harlow | Public and Private Law: Definition without Distinction: 43 MLR 241 |
| Law Commission | Administrative Law: Judicial Review and Statutory Appeals. Law Commission Paper No 226 |
| Andrew Le Sueur & Maurice Sunkin | Public Law |
| Norman Lewis | Choice and the Legal Order 1996 |
| McAllister | Lord Hale and business affected with a public interest: Harv LR 759 (1929-30) |
| Aileen McHarg | Regulation as a Private Law Function? |
| Dawn Oliver | Common Values in Public and Private Law and the Public/Private Divide [1997] PL 630 |
| Dawn Oliver | Judicial review and the shorthandwriters [1993] PL 214-218 |
| Dawn Oliver | Is the Ultra Vires Rule the basis of Judicial Review? [1987] PL 543 |
| David Pannick | Who is Subject to Judicial Review and in Respect of What? [1992] PL 1 |
| Prosser, Tony | Regulation Markets and Legitimacy, in The Changing Constitution, Ed Jowell and Oliver, 3rd Edn |
| HWR Wade | Procedure and Prerogative in Public Law, 5th Child & Co Oxford Lecture, (1985) 101 LQR 180 |
| Harry Woolf | Protection of the Public-a New Challenge (Hamlyn Lectures, 1990) |
| Harry Woolf | Public Law-Private Law: Why the Divide? [1986] PL 220-38 |
| Lord Woolf | Droit Public-English Style [1995] Public Law 57 |

1. Press reports quote May LJ in the High Court on 31st March 1998 as saying it is time to abandon “the Latin phrases that are the staple diet of the courts ... they tended to obscure the legal concepts to which they referred”. (The Times and The Daily Telegraph 1st April 1998). [↑](#footnote-ref-2)
2. *Roy; Hutchinson.* [↑](#footnote-ref-3)
3. *Re a Solicitor* (1987). [↑](#footnote-ref-4)
4. *Percival; Calder; Pharmaceutical Soc. v. Dickson.* [↑](#footnote-ref-5)
5. *ASA: Vernons.* [↑](#footnote-ref-6)
6. *Ipswich Tailors* case; *Kubis.* [↑](#footnote-ref-7)
7. *Aga Khan; Massingberd-Mundy.* [↑](#footnote-ref-8)
8. See *CCSU; Abbott v. Sullivan; Nagle.* [↑](#footnote-ref-9)
9. **Alder.** [↑](#footnote-ref-10)
10. **Wade.** [↑](#footnote-ref-11)
11. **Forsyth.** [↑](#footnote-ref-12)
12. *Munn v. Illinois* p.86. [↑](#footnote-ref-13)
13. *Wachmann.* [↑](#footnote-ref-14)
14. See e.g. **Prosser**; **Sas**. [↑](#footnote-ref-15)
15. **Prosser**, p.240. [↑](#footnote-ref-16)
16. S. Littlechild, Regulation of British Telecommunications Profitability (1984) and Economic Regulation of Privatised Water Authorities (1986) cited in **Prosser** pp.243 n.17, p.252. [↑](#footnote-ref-17)
17. **Black**, p.25. [↑](#footnote-ref-18)
18. See e.g. *Lee; Bonsor; Breen; Kubis.* [↑](#footnote-ref-19)
19. These arrangements are expected to change under the Financial Services Bill, publication of which is expected during Summer 1998. [↑](#footnote-ref-20)
20. See Lloyd's Act 1982, s. 6(2), Schedule 2, paragraphs 12 13 and 14 and byelaws made thereunder. [↑](#footnote-ref-21)
21. *Abbott v Sullivan; Kubis; Tee;* see paragraph 79. [↑](#footnote-ref-22)
22. **De Smith** **Woolf & Jowell**, para 3—001 . [↑](#footnote-ref-23)
23. at p.691. [↑](#footnote-ref-24)
24. at p.692. [↑](#footnote-ref-25)
25. *Spelthorne* at p.284-5. [↑](#footnote-ref-26)
26. See paragraphs 41 and **Error! Bookmark not defined.**-56 below; *Allnutt v. Inglis; Munn v. Illinois*. [↑](#footnote-ref-27)
27. Even statutory bodies are not reviewable when acting qua employers or parties to commercial contracts: see, for example, *Lavelle* and *Walsh*. And see e.g. *Winder* and *Roy.* [↑](#footnote-ref-28)
28. **Wade** at p.183. [↑](#footnote-ref-29)
29. See generally **De Smith** 4th Edn., ed Evans, Appendix on prerogative writs: historical origins. [↑](#footnote-ref-30)
30. See paragraph 21 above. And see further at page 28 for mandamus in US law. [↑](#footnote-ref-31)
31. Cited by Rt Hon Sir Harry Woolf in his Hamlyn Lectures 1990. [↑](#footnote-ref-32)
32. See e.g. *Vine.* [↑](#footnote-ref-33)
33. *Breen* at p.189. [↑](#footnote-ref-34)
34. No. 40, October 11, 1971. [↑](#footnote-ref-35)
35. See sections 29 and 31. [↑](#footnote-ref-36)
36. **Wade**, p.182. [↑](#footnote-ref-37)
37. See *Roy v. Kensington & Chelsea.* [↑](#footnote-ref-38)
38. **Wade** p.188. [↑](#footnote-ref-39)
39. *Lain*. See **Cane** at p.19: to say of such bodies they owe their existence to exercises of prerogative power amounts only to saying they were not established by statute. Professor Wade argues that the GCHQ case was not truly an exercise of the prerogative at all and that the test for a genuine prerogative power is that it (a) produced legal effect at common law and (b) was unique to the Crown.": **Wade**, p.197. [↑](#footnote-ref-40)
40. **De Smith Woolf & Jowell**, Chapter 3; and see *RAM Racecourses*. [↑](#footnote-ref-41)
41. Sir John Donaldson MR (as he then was) in *Datafin* at p.825. [↑](#footnote-ref-42)
42. P.838 at E. Counsel had argued that the facts of this case were to be distinguished from those cases where the relationship was based on contract and cited *Walsh* and *Law*. He also referred to the decision of the Garrick Club to refuse membership as an example of an instance where no duty was owed by a decision maker. [↑](#footnote-ref-43)
43. P.835. [↑](#footnote-ref-44)
44. **Craig**, p.568. [↑](#footnote-ref-45)
45. *ASA: Insurance Service*. See **Craig**, pp.569-70. [↑](#footnote-ref-46)
46. See Rose J in the *Football League* case at p.848. [↑](#footnote-ref-47)
47. Financial Services Act 1986 (c.60) preamble. [↑](#footnote-ref-48)
48. See FSA Chapter III and s.114. [↑](#footnote-ref-49)
49. It may well be that the draft bill will favour a statutory model in place of the existing arrangements. [↑](#footnote-ref-50)
50. FSA ss. 3 and 4. [↑](#footnote-ref-51)
51. *Aga Khan* at p.874. [↑](#footnote-ref-52)
52. See paragraph 24 page 8. [↑](#footnote-ref-53)
53. See SCA 1981 ss.29 and 31(2), supra. [↑](#footnote-ref-54)
54. By applicants and defendants alike. See *e.g. Law*; *Massingberd-Mundy*; *RAM Racecourses*; and *Football League.* [↑](#footnote-ref-55)
55. at p.218. [↑](#footnote-ref-56)
56. *RAM Racecourses.* [↑](#footnote-ref-57)
57. See *CCSU.* [↑](#footnote-ref-58)
58. The facts of the case concerned a report published by the Jockey Club and relied upon by the applicant, who had not been sent a copy by the Jockey Club but had obtained a copy indirectly, and had spent £100,000 developing a green field site in the expectation of being allocated some race fixtures by the Jockey Club. As by February 8th 1990, liability for economic loss due to negligent mis-statement was confined to cases where the statement or advice had been given to a known recipient for a given purpose, of which the maker was aware and upon which the recipient had relied and acted upon to his detriment, (cf. *Caparo*), one may easily speculate that a private law action did not have the hallmarks of success. No doubt such factors played a part in the applicant's decision to make a further assault in public law. [↑](#footnote-ref-59)
59. at p.246. [↑](#footnote-ref-60)
60. at p.246; and see comment on *Nagle, infra.* This view was clearly not shared by some of his judicial brethren, e.g. Rose J: see paragraph 56. [↑](#footnote-ref-61)
61. *Aga Khan.* [↑](#footnote-ref-62)
62. *Football League*, at p.848. [↑](#footnote-ref-63)
63. *Lee v. Showmen's Guild* at p.341 per Denning LJ [↑](#footnote-ref-64)
64. *Abbott v. Sullivan.* [↑](#footnote-ref-65)
65. ibid., p.342. [↑](#footnote-ref-66)
66. ibid., p.343. [↑](#footnote-ref-67)
67. *Boulting* at p.627 per Lord Denning MR. [↑](#footnote-ref-68)
68. *Bonsor* at p.511 per Denning LJ. [↑](#footnote-ref-69)
69. *Breen* at p.190. [↑](#footnote-ref-70)
70. *Enderby Town FC* at p.606. [↑](#footnote-ref-71)
71. See paragraph 58. [↑](#footnote-ref-72)
72. See paragraphs 60-61. [↑](#footnote-ref-73)
73. See *Nagle*, page 23. [↑](#footnote-ref-74)
74. E.g. *RAM racecourses; Aga Khan.* [↑](#footnote-ref-75)
75. **Craig**, Constitutions Property and Regulation. [↑](#footnote-ref-76)
76. See *Munn v Illinois*; **Arterburn**, Public Callings; **MacAllister**, Businesses affected with a public interest. [↑](#footnote-ref-77)
77. By 1300 the term common had connotations of ‘shared by all’ or ‘public’. See OED: a1300 Cursor M. 2445 (Cott.) To pastur commun Þai laght Þe land. To the extent it meant business (see **Arterburn**) it was in the sense of serving all comers. See also the Ipswich Tailors' case. [↑](#footnote-ref-78)
78. See **Arterburn**, Public Callings p.421. [↑](#footnote-ref-79)
79. **Hale**: De Jure Maris (1 Harg L Tr 6), cited in *Munn v. Illinois.* [↑](#footnote-ref-80)
80. *Ipswich Tailors* at p.54A. [↑](#footnote-ref-81)
81. *Ipswich Tailors* at p.54a. [↑](#footnote-ref-82)
82. *Ipswich Tailors* at p.54b. [↑](#footnote-ref-83)
83. See also *Darcy v. Allen*, a failed attempt at enforcement of a monopoly granted by letters patent of the King. [↑](#footnote-ref-84)
84. **Hale**: De Portibus Maris, cited in *Munn v. Illinois* p.84. [↑](#footnote-ref-85)
85. *Allnutt v. Inglis* at p.538. [↑](#footnote-ref-86)
86. *Allnutt v. Inglis* at p.542. [↑](#footnote-ref-87)
87. Lord Upjohn p.702. [↑](#footnote-ref-88)
88. Pharmacy and Poisons Act, 1933, in 1954 a statutory appeal committee was created. [↑](#footnote-ref-89)
89. The Pharmaceutical Society was judicially reviewed in *R v Royal Pharmaceutical Society of GB, ex parte Association of Pharmaceutical Importers:* its susceptibility to review was not considered*.*  [↑](#footnote-ref-90)
90. *ex p. Percival; ex p. Calder.* [↑](#footnote-ref-91)
91. *Andreou v ICA:* The Court of Appeal decided that the institute performed public functions which justified it being regarded as a public body. See its important responsibilities in the Companies Act 1989 (see ss.25, 30 and 32). [↑](#footnote-ref-92)
92. *Nagle*. Salmon LJ described the contractual argument as "absurd" and "untenable" (p.697). [↑](#footnote-ref-93)
93. at p.692. [↑](#footnote-ref-94)
94. *Nagle*, p.692 per Lord Denning, who went on to refer to the *Ipswich Tailors* case. [↑](#footnote-ref-95)
95. Ibid p.693. [↑](#footnote-ref-96)
96. per Danckwerts LJ at p.695-6. [↑](#footnote-ref-97)
97. Salmon LJ at p.698. See also *Weinberger* pp.621, 631, 644 (not "arbitrarily or capriciously"); and *Faramus*, p.32 per Lord Pearce (unreasonable"). [↑](#footnote-ref-98)
98. *Eastham*; *Greig v. Insole.* [↑](#footnote-ref-99)
99. This seems to be advancing all in the "bare applicant" category in *McInnes v. Onslow-Fane* to the intermediate category with some procedural rights. Carnwath referred (at p. 39) to an Arbitration award regarding a complaint by Enfield Town Football Club, chaired by Sir Michael Kerr with two Queen's Counsel. [↑](#footnote-ref-100)
100. See paragraph 56. [↑](#footnote-ref-101)
101. See bibliographic references. [↑](#footnote-ref-102)
102. *Stevenage FC*, Transcript pp.36-7. [↑](#footnote-ref-103)
103. The significance of this in proceedings for restraint of trade is that onus on proving the public interest element is not on party imposing the restraint (as it is to show the restraint is reasonable) but on the applicant. See pp.37, 29-30. [↑](#footnote-ref-104)
104. Transcript pp.36-7. [↑](#footnote-ref-105)
105. *Allnutt v. Inglis.* [↑](#footnote-ref-106)
106. See paragraph 22 . [↑](#footnote-ref-107)
107. Johnson v. Interstate Power Co. 187 F Supp 36. [↑](#footnote-ref-108)
108. NC—Salisbury & S Ry Co. v. Southern Power Co. 105 SE 28. [↑](#footnote-ref-109)
109. US—Missouri Pac R. Co. v Larabee Flour Mills Co. 211 US 612. [↑](#footnote-ref-110)
110. See Arterburn, p.418. [↑](#footnote-ref-111)
111. Cal—*Thorman v. International Alliance of Theatrical Stage Emp and Moving Pictures Mach Operators of US and Canada* 320 P.2d 494. [↑](#footnote-ref-112)
112. See Al—*Medical Soc. of Mobile v Walker*; NJ—*Stevenson v Atlantic City Real Estate Board* 139 A 11; NY—*Gerseta Corp v Silk Assn of America* 222 NYS 11; 220 App Div 293. [↑](#footnote-ref-113)
113. See *Abbott v. Sullivan*; *Breen.* [↑](#footnote-ref-114)
114. Not referred to in *ex parte Aga Khan*, unsurprisingly as an application for judicial review needed no authority in support of the right to an injunction in an action for restraint of trade. Also not referred to in **Wade**, Administrative Law, 7th Edn. which Carmwath LJ in *Stevenage FC* observes shares Hoffman LJ's doubt, above. [↑](#footnote-ref-115)
115. *Letang v Cooper* per Diplock LJ at p.934; *Eastham*  [1963] 3 All ER 139 per Wilberforce J at p.153. The issue in *The Siskina* was whether there can be an interlocutory injunction when there is no dispute justiciable in the English courts at all, which Jacob J said was miles from the Welsh Football case. [↑](#footnote-ref-116)
116. See *Dickson; Buckley; Nagle; Greig* *v. Insole.* [↑](#footnote-ref-117)
117. This table is a summary and so does not include variations of detail, for example that the court can give leave in a judicial review hearing for witnesses to be called. Such leave is rarely given. [↑](#footnote-ref-118)
118. *Welsh Football* case: see page 28. [↑](#footnote-ref-119)
119. *Abbott v Sullivan*: See paragraph 58 at page 17. [↑](#footnote-ref-120)
120. The doctrine of ultra vires does not apply strictly to societies incorporated by royal charter, so as to make them open to attack by third parties in general. It remains to be seen whether a non-member with sufficient interest could mount such a challenge by way of restraint of trade: *Pharmaceutical Society.* [↑](#footnote-ref-121)
121. *Nagle v Feilden.* [↑](#footnote-ref-122)
122. CCSU, per Lord Diplock at p.949. [↑](#footnote-ref-123)
123. *Abbott v Sullivan*: see paragraph 58 at page 17. [↑](#footnote-ref-124)
124. "promptly and in any event within three months from the date when grounds for the application first arose..." O.53 r4—(1) There is a discretion to refuse relief if because of delay it would be "detrimental to good administration" (See SCA s.31(6)). [↑](#footnote-ref-125)
125. See Supreme Court Act 1981 s.29. [↑](#footnote-ref-126)
126. But see page 28. [↑](#footnote-ref-127)
127. Where there is no agreement, then an action for a declaration must be commenced to provide a platform from which to launch an application for an injunction: see page 28. [↑](#footnote-ref-128)
128. Thus the view advanced in **Harlow** of the distinction between public and private law as remedial in character, between law (damages) and equity (injunction and probably declaration) must look to its origin not in Order 53, but public policy and public interest, and the economic origins of the law against monopolies and restraints of trade. [↑](#footnote-ref-129)
129. *O'Reilly*, per Lord Diplock at p.1134. [↑](#footnote-ref-130)
130. *Football League* at p.848. [↑](#footnote-ref-131)
131. Judgment 23rd July 1996, Transcript pp36-7. [↑](#footnote-ref-132)
132. **Wade**, at p.187. [↑](#footnote-ref-133)
133. **Black**, p.35. [↑](#footnote-ref-134)
134. at page 30. [↑](#footnote-ref-135)
135. **Harlow.** [↑](#footnote-ref-136)
136. *O'Reilly*, per Lord Diplock at p.1134. [↑](#footnote-ref-137)
137. See page 11. [↑](#footnote-ref-138)
138. Financial Services Regulatory Reform: Insurance Brokers and Other Intermediaries. [↑](#footnote-ref-139)
139. *ex parte Kubis*, Transcript p.27. [↑](#footnote-ref-140)
140. Law Commission Paper No. 226, para 3.15: see pages 28 *et seq*. [↑](#footnote-ref-141)
141. See paragraphs 83 and 96. [↑](#footnote-ref-142)
142. See Law Commission Paper No 226, para 3.9: in *Roy* the House of Lords whilst favouring the broad approach did not decide that it should be adopted in preference to the ‘narrow’ approach of Lord Diplock in *O*’*Reilly.* [↑](#footnote-ref-143)
143. *Kubis.* [↑](#footnote-ref-144)
144. See paragraph 102 at page 30. [↑](#footnote-ref-145)