

**WHO – WHOM?  
UNRESOLVED ISSUES IN JUDICIAL REVIEW  
INAUGURAL LECTURE AT THE UNIVERSITY OF BUCKINGHAM  
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*Michael J Beloff QC\**

**INTRODUCTION**

It is a great pleasure for me to lecture at the University of Buckingham, of which my late father Lord Beloff was the founding father, and my son Rupert obtained first class honours in law and won the Palamountain prize for excellence. It seems that as a mere visiting Professor I take third place in my family's quest for this innovative University's honours.

This is, of course, an inaugural lecture and I express the modest hope that it will sufficiently command your attention to guarantee that it will not be a valedictory one as well. My duties as visiting Professor are to give a minimum of a single lecture over four terms – not the most testing of obligations but one more demanding than that of an Oxford Professor who, when asked what he did to earn his stipend, explained “I give an annual lecture – but not, you understand, every year”.

I have chosen as the opening words of my title that famous phrase of Lenin, the Bolshevik dictator, in which he summarised his world view “Who – Whom?” – which people have power over which other people – adapting it to judicial review of which Lenin was of course wholly ignorant and of which he would certainly have disapproved. It was not the function of Courts in Lenin's eyes to restrict public authorities' exercise of powers, but rather to ensure that any challenge to that exercise was firmly suppressed. But I want to exploit the phrase to discuss the questions of who is entitled to bring a claim for judicial review and against which bodies – questions which, three decades on from the creation of the judicial review machinery admit still of no final answer, although there is, as I shall demonstrate, far more certainty about the ‘who’ than the ‘whom.’

I should add that, to my chagrin, I discovered that the same two words introduced an essay I wrote in a book in honour of Lord Slynn,<sup>1</sup> a most

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\* The Hon Michael J Beloff, Blackstone Chambers, MA (Oxon).

<sup>1</sup> “Judicial Review in International Perspective” in M Andenas and D Fairgrieve (eds) *Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer Law International, 2000).

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distinguished advocate and judge who has close connections with this university not least through his wife Odile, who taught here. It is not, I suppose, a serious academic crime to plagiarise oneself, but I shall try as far as possible, to ensure that these words are the least original part of my lecture, and to avoid the reproach that my text is too technical for the non-lawyers while too general for the lawyers.

I have deliberately chosen as my starting point 1977, when the rules of the Supreme Court (“RSC”), were amended, so as to provide for judicial review in Order 53. The Rules reached their present incarnation in the Civil Procedure Rules of 1997 (“CPR”), not entirely helpfully renumbered 54. The order has been, I remind you, cautiously fortified by the Supreme Court Act 1981 (“SCA”) in order to avert to the possibility that some imaginative person might challenge the legality of reforming procedural law is so significant, a way by mere secondary legislation using, presumably and paradoxically, judicial review itself.

### THE WHO

Rules as to *locus standi* in public law divide persons into two categories: those who have access to the Courts to challenge decisions of public authorities and those who do not.

Prior to the 1977 reforms the interests required to bring proceedings to challenge administrative action resembled patchwork quilt, rather than a seamless robe. There was then more certainty about the “whom” than about the “who”. Different interests were required for different remedies: Declarations and injunctions could be sought against public bodies, but were only available in private law actions by way of writ or originating summons by persons whose own rights were in issue. The grant of the order prerogative remedies, in form sought on the Queen’s behalf, if in substance on behalf of the subject, was conditioned by more flexible but more variable criteria.<sup>2</sup> The complex and incoherent mélange of rules was one of the best reasons for reform of the procedures of public law.<sup>3</sup>

In *O’Reilly v Mackman*<sup>4</sup> Lord Diplock was able to say:

“Order 53 since 1977 has provided a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceeding by way of a n application for judicial review, and

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<sup>2</sup> See generally H W R Wade and C F Forsyth *Administrative Law* (Oxford: Oxford University Press, 9th edn, 2004) (“Wade”) pp 681-690.

<sup>3</sup> *Ibid* pp 697-708.

<sup>4</sup> [1983] 2 AC 237.

whichever remedy is found to be the most appropriate in the light of what has emerged upon the hearing of the application, can be granted to him.”<sup>5</sup>

Under the new system there was a single test of locus. Order 53 r 3 provided simply “The Court shall not grant leave unless it considers that the Applicant has a sufficient interest in the matter to which the application relates”.

The phrase “sufficient interest” was selected by the Rules Committee as to embrace all putative applicants but simultaneously to discriminate between them.

Although Lord Scarman suggested, in the so-called *Fleet Street Casuals*<sup>6</sup> case, that the language of the legal instrument “presents no problem of construction”, in fact neither statute nor rule gives any guidance as to what is “sufficient interest” in the matter to which the application relates”; they stipulate only that sufficiency of interest is a *sine qua non* for entitlement to a full hearing.

There were nonetheless two obvious implications of the language chosen: firstly, not everyone could engage judicial review, however meritorious the claim. Secondly, interest entitling one to do so had to be sufficient – a fluid and fact sensitive concept.

But almost immediately its content was diluted. In the same *Fleet Street Casuals* case, a group of tax payers challenged tax amnesty given to rogue printers. Despite the phraseology of the Order 53 (which expressly addresses the leave stage), the House of Lords held that, except in obvious cases, questions sufficient interest ought not to be dealt with at that stage when one side only was present but postponed until the full hearing of the application when both were.<sup>7</sup> This judicial gloss provides an important safeguard against the adoption of too restrictive an approach to standing: it brings the substance of the challenge firmly into play.

Although locus was held to go to jurisdiction ie could not be conceded,<sup>8</sup> it is now very rare to find a case in which the applicant failed on *locus* grounds.

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<sup>5</sup> Ibid, at 283.

<sup>6</sup> *R v Inland Revenue Commissioner, ex p Federation of the Self-Employed* [1982] AC 617. Commented on by P Cane “Standing Legality and the Unity of Public Law” [1981] PL 322.

<sup>7</sup> *R v MMC, ex p Argyll Group* [1986] 1 WLR 763, Lord Donaldson MR said at 773 “the first stage test which applies on an application for leave will lead to refusal if the applicant has no interest whatsoever and the applicant’s interest is one of the facts to be weighed in the balance.”

<sup>8</sup> *R v Secretary of State for Social Services, ex p Child Poverty Action Group* (1990) 2 QB 540 at 556 D-G. Woolf LJ said: “the question of locus standi goes to the

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In the *Rose Theatre* case<sup>9</sup> Schiemann J held that an ad hoc group had no *locus* to challenge the Secretary of State's refusal to schedule the theatre as an ancient monument.<sup>10</sup> He dismissed the argument that persons who combine together for a particular cause have more claim on the court's time than solitary crusaders, but in my submission, counter-intuitively since the very aggregation underscores the genuineness of the interest.

Schiemann J was the King Canute of judicial review, battling against an irreversible tide – although he defended himself against his critics in an academic journal – an unusual; weapon of last resort for a serving judge.<sup>11</sup>

In judicial review, the factors which the court now takes into account in deciding whether an applicant has standing are:

- (i) the merits of the application;
- (ii) the importance of maintaining the rule of law;
- (iii) the importance of the issue raised;
- (iv) the likely absence of any other responsible challenger;
- (v) the nature of the breach of duty against which relief is sought; and
- (vi) the expertise and experience of the applicant body.

In *Greenpeace No 2*<sup>12</sup> where the environmental pressure group challenged authorisations given for the discharge of radioactive waste, Otton J said:<sup>13</sup>

“It seems to me that if I were to deny standing to Greenpeace, those it represents might not have an effective way to bring the issues before the court. There would have to be an application either by an individual employee of BNFL or a near neighbour. In this case it is unlikely that either would be able to command the expertise which is at the disposal of Greenpeace. Consequently, a less well-informed challenge might be mounted which would stretch unnecessarily the court's resources and which would not afford the court the assistance it requires in order to do justice between the parties. Further, if the unsuccessful Applicant had the benefit of legal aid it might leave the

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jurisdiction of the Court and therefore ... the parties are not entitled to confer jurisdiction, which the court does not have, on the court by consent.”

<sup>9</sup> *R v Secretary of State for the Environment, ex p Rose Theatre Trust Co* [1990] QB 504.

<sup>10</sup> P Cane “Statutes, Standing and Representation” [1990] PL 307, especially at 310-311.

<sup>11</sup> Sir Konrad Schiemann “Locus Standi” [1990] PL 342.

<sup>12</sup> *R v Inspectorate of Pollution and another, ex p Greenpeace Ltd (No2)* [1994] 4 All ER 329.

<sup>13</sup> *Ibid*, at 350.

respondents and BNFL without an effective remedy in costs. Alternatively, the individual (or Greenpeace) might see, to persuade Her Majesty's Attorney General to commence a relator action which (as a matter of policy or practice) he may be reluctant to undertake against a government department. Neither of these courses of action would have the advantage of an application by Greenpeace, who, with its particular experience in environmental matters, its access to experts in the relevant realms of science and technology (not to mention the law), is able to mount a carefully selected, focused, relevant and well-argued challenge."<sup>14</sup>

In accordance with this generous approach, the courts have entertained applications brought by bodies such as the Joint Council for the Welfare of Immigrants,<sup>15</sup> the Child Poverty Action Group,<sup>16</sup> the World Development Movement,<sup>17</sup> the Equal Opportunities Commission<sup>18</sup> and Shelter.<sup>19</sup>

This migration of pressure groups from the political to the legal arena has been assisted by the development of protective cost orders to assist those with virtuous motives but without adequate funds to immunise themselves against a potential liability to meet the other side's costs in accordance with the underlying principle of English law that loser pays.

In *R (Corner House) v Trade and Industry Secretary (CA)*,<sup>20</sup> where a pressure group sought to challenge ECGD's anti-corruption guidelines, the Court of Appeal said:

“(1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the Applicant has no private interest in the outcome of

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<sup>14</sup> I (boastfully) declare an interest in the penultimate observation since I was Greenpeace's advocate.

<sup>15</sup> *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275.

<sup>16</sup> *R v Secretary of State for Social Services, ex p Child Poverty Action Group* [1990] 2 QB 540.

<sup>17</sup> *R v Secretary of State for Foreign and Commonwealth Affairs, ex p The World Development Movement* [1995] 1 WLR 586.

<sup>18</sup> *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] AC 1.

<sup>19</sup> *R v Secretary of State for the Environment, ex p Shelter* [1997] COD 49.

<sup>20</sup> *Regina (Corner House Research) v Secretary of State for Trade and Industry, CA*, [2005] EWCA Civ 192 [2005] 1 WLR 2600.

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the case; (iv) having regard to the financial resources of the Applicant and the Respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the Applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

(2) If those acting for the Applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.

(3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.”<sup>21</sup>

The principled explanation for this relaxed judicial attitude lies in the very nature of public law. Sedley J has famously stated:

“Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power, and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of power.”<sup>22</sup>

So if locus is denied at all it is only usually denied when a claim is brought by someone whose interest is remote in tandem with someone with a more direct interest: The NUM but not the TUC could represent one of its members on a welfare issue.<sup>23</sup> The British Herpetological Society but not the World Wildlife Fund on an environmental one.<sup>24</sup> It is no doubt rightly suspected by the Court that the party denied *locus* was more concerned with publicity than with remedy. On the other hand, despite the doubts of Forbes J at first instance both a local reporter and the NUJ had standing to challenge a Magistrate’s Court decision to hold in private the committal hearing of persons charged with gun running.<sup>25</sup>

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<sup>21</sup> At para 74.

<sup>22</sup> In *R v Somerset County Council and ARC Southern Ltd, ex p Dixon* (1992) COD 323.

<sup>23</sup> *R v CAO ex p Bland* Times 6 February 1985.

<sup>24</sup> *R v Poole BC ex p Beebie* [1991] COD 264.

<sup>25</sup> *R v Horsham JJ, ex p Farquarson* [1982] QB 762. I was instructed for the NUJ by Harriet Harman. Tempora Mutantur ...

The individual busybody denied standing is an almost extinct beast: one such was the Church of England priest who sought to challenge the ordination of women priests – but (unwisely) in Wales!<sup>26</sup>

A curious (and it may be temporary) difference between English and Scottish approach in this area was illustrated when former world heavyweight champion, Mike Tyson, despite a conviction for rape, was permitted to come to Glasgow to wreak violence on some unfortunate British pugilist whose chances of success were accurately measured by the business man who brought advertising space on the soles of the boxer's boots.

Two feminist groups, Justice for Women, south of the border, and The Rape Crisis Centre north of it, sought unavailingly to quash the Home Secretary's decision. In London no *locus* point was taken.<sup>27</sup> In Scotland it was.<sup>28</sup>

Lord Clarke said:

“Some legislation and its related measures will, no doubt, confer a right of challenge on individual members of the public as a whole, but it is a fallacy to suppose that because of the public interest in ministers acting lawfully and fairly that public interest by itself confer on every member of the public a right to challenge the minister's act or decision. Matters must go further, in my judgment, and the individual or body seeking to challenge the minister's act or decision must show that, having regard to the scope or purpose of the legislation or measures under which the act is performed or the decision is made, he or they have had such a right conferred on them by law, either expressly or impliedly.”<sup>29</sup>

Of this viewpoint Lord Hope said in a lecture:

“ an approach to standing which applies a private law test to issues of public law is at risk of being out of touch with the public interest in

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<sup>26</sup> *R v Dean and Chapter of St Paul's Cathedral* (1998 COD 130). In *R v Legal Aid Board, ex p Bateman* [1992] 1 WLR 711, a client who sought further legal aid in order to pay her solicitor has held not to have sufficient interest to challenge the decision of the Board for refusing it – a not altogether obvious conclusion.

<sup>27</sup> *R v Secretary of State for the Home Department, ex p Bindel* [2001] Imm AR 1 (QBD).

<sup>28</sup> *Rape Crisis Centre Co v Secretary of State for the Home Department* 2001 SLT 389 (OH).

<sup>29</sup> *Ibid*, at 391.

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having matters of that kind, about which a section of the public has a genuine grievance, litigated in the courts.”<sup>30</sup>

A new problem has been introduced in consequence of the standing test under the Human Rights Act 1998 (“HRA”) entirely distinct from the sufficient interest test of the SCA. Section 7(3) of the HRA provides that an applicant for judicial review is to be taken to have a sufficient interest in relation to the alleged unlawful act only if he is, or would be, a “victim of that act”. Section 7(6) imports into English law that test, as it is applied by the European Court of Human Rights.

The basic principle which has emerged in Strasbourg jurisprudence is that a petitioner may claim to be a victim only if he is *personally affected* by the act or omission which is at issue. Although the Court has given an elastic meaning to that concept including within it potential victims.<sup>31</sup> Indirect victims<sup>32</sup> representatives of victims<sup>33</sup> and even possible victims ie persons who cannot know whether they have been the victim of a breach or not because their complaint relates to secret measures.<sup>34</sup> And even future victims,<sup>35</sup> there remains a perceptible gulf between the two tests.

The consequence of this precise translation of the Strasbourg test into domestic law is that some claims may not be brought under the HRA which might be brought under the common law of human rights. A pressure group might well want to test the validity of certain regulations laid before Parliament, but not yet in effect, and *ex hypothesi* incapable at the time of the proposed challenge of having created a class of victims, even though the same benefits to the Court as were recognised by Otton J in *Greenpeace No.2* would be present here as well.<sup>36</sup> The solution would be to amalgamate the HRA with the SCA test albeit with the consequence of disturbing the symmetry of the tests applied in Strasbourg and the Strand.

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<sup>30</sup> Lord Hope of Craighead “Mike Tyson comes to Glasgow” [2001] PL 294.

<sup>31</sup> *Campbell and Cosans* 4 EHRR 293.

<sup>32</sup> *Open Door Counselling Ltd v Ireland* (A/246) (Application Nos.14234/88, 14253/88) European Court of Human Rights, October 29<sup>th</sup> 1992, (1993) 15 EHRR 244.

<sup>33</sup> *Abdulaziz, Cabales, and Balkandali v UK* 1985 7 EHRR 471, where I appeared for the Applicants against Peter Rawlinson QC former Attorney-General.

<sup>34</sup> *Klass v Germany* (A/28) European Court of Human Rights, 6 September 1978, (1979-80) 2 EHRR 214.

<sup>35</sup> *Vilvarajah v United Kingdom* (A/215) European Court of Human Rights October 30<sup>th</sup> 1991 (1992) 14 EHRR 248.

<sup>36</sup> See too Carnwath J in *R v Secretary of State for the Environment ex p Shelter* [1997] COD 49.

One mitigating factor of more general importance is the capacity of third Parties to intervene in judicial review proceedings. Judicial review is essentially multilateral, not bilateral because of its public interest dimension. Under the 1977 rules [053 9r (1)] potentially interested persons had to be served once leave was given: and there was provision for others to apply to be joined to oppose the application. Under the CPR 57.17 that provision is extended to potential supporters as well.

Interventions by third parties have increased dramatically in England and Wales over the last five years, especially at the level of the House of Lords.<sup>37</sup>

Of equal note has been the shift in the character of interveners: from invitees of the court, to applicants to the court; from official or statutory authorities (like the EOC), to pressure groups (like Liberty on Justice), commercial organisations or professional bodies.

In *Matthews v Ministry of Defence*<sup>38</sup> Hale L J identified three categories of case potentially engaging such intervention; cases which raises wider policy issues on which the court needs a fuller range of information: cases in which a third party has a direct interest in the outcome; cases in which a third party has an indirect interest in the outcome of a decision on a point of law, as that decision may be determinative of their own case.

Not all commentators regard this development of third party intervention with unalloyed enthusiasm. Some question the extent to which the pressure groups are representative of their members.<sup>39</sup> Others detect a lack of consistent principle in the basis for permitting interventions: and question the value to the Courts of an avowedly partisan approach in contrast to the neutral assistance provided by the old style *amicus curia* or, in one of the clumsy neologians consequent upon Lord Woolf's expulsion of Latin from the language of the law, an advocate of the Court.<sup>40</sup>

But the judiciary are even more involved in issues with a political dimension – appointments of junior doctors, restrictions on casino gambling, the scope of the inquests into the death of Diana Princess of Wales and Dodi Al Fayed, the propriety of ceasing the investigation into alleged corruption in

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<sup>37</sup> See the House of Lords Practice Directions and Standing Orders Applicable to Civil Appeals, House of Lords (January 1996) Direction 34 1 See also *Khan (Sultan)* [1997] AC 558; *R v Secretary of State for the Home Department, ex p Venables*, *R v Secretary of State for the Home Department, ex p Thompson* [1998] AC 407; *R v Bow Street Stipendiary Magistrate, ex p Pinochet Ugarte* [2000] AC 61; *R v Immigration Appeal Tribunal, ex p Shah* [1999] 2 AC 629. See generally Louis Blom-Cooper QC “Third Party Intervention and Judicial Discretion” [2002] PL 602 (“Blom-Cooper”) Sarah Hannett “Third Party Intervention in the Public Interest” [2003] PL 128.

<sup>38</sup> CA April 10<sup>th</sup> 2000.

<sup>39</sup> C Harlow “Public Law and Popular Justice” (2002) *Modern Law Review* 1.

<sup>40</sup> Blom-Cooper, above n 37.

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the sale of arms to Saudi Arabia.<sup>41</sup> In this venture they are part volunteer – for the ever expanding reach of common law judicial review is their own responsibility – part conscript in as much as the HRA compels them to assess in areas such as freedom of expression or right to respect for private life what “is necessary in a democratic society” to achieve such identified public interest aims as national security. In my view, to put it colloquially, they need all the help they can get.

We may not yet be accustomed to so-called Brandeis briefs in this country,<sup>42</sup> in which the social and economic impact of a decision one way or another is placed before the Supreme Court, but if as Alexander Pope said: “A little knowledge is a dangerous thing”, an absence of knowledge is simply worse. Judges can sift the chaff from the wheat. That after all is what they are paid for.

The rules as to standing represent a balance between two aspects of the public interest – the desirability of encouraging individual citizens to participate actively in enforcing the law on the one hand, but on the other hand the undesirability of allowing the meddlesome interloper to invoke the jurisdiction of the courts in matters in which he is not concerned with all the concomitant waste of time and money.

In my view, the scales tilt firmly in the favour of the first of those interest Lord Diplock stated more than a quarter of a century ago in the *Fleet Street Casuals* case:

“It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the Federation, or even a simple public spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to indicate the rule of law and get the unlawful action stopped.”<sup>43</sup>

With all the reservations I have not infrequently expressed about the danger of the Courts rushing into areas where they should sensibly fear to tread, I consider the rules as to standing are obsolete. Public law, like private law, has other mechanisms to prevent abuse of its process including but not limited to costs sanctions.

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<sup>41</sup> To take a random selection from Blackstone Chambers’ recent caseload.

<sup>42</sup> Andrew Henderson “Brandeis Briefs and Proof of Legislative, Facts in Proceedings under the Human Rights Act 1998” [1998] PL 563.

<sup>43</sup> Above n 6, at 644 E.

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I turn to the other part of the Who Whom? formula. Prior to the 1977 reforms the test for the whom was one of source. If the power under challenge was the product of statute or secondary legislation the old orders ran. Powers under the prerogative were embraced within the fold in a case concerning the extra statutory Criminal Injuries Compensation Scheme where Lord Parker CJ said “the exact limits of the ancient remedy by way of certiorari have never been and ought not to be specifically defined.”<sup>44</sup> And blessed in the so-called GCHQ case.<sup>45</sup> This started a switch in emphasis from source to function, which was confirmed in the famous case involving the Take-Over Panel.<sup>46</sup> But whatever the virtues of the new test, certainty is not one of them. That there are boundaries is clear: where they start and when they end is not.

Bodies whose only source of power is contractual are beyond the pale: some public ingredient is critical. The various cases show only that the Courts deploy a series of open textured phrases to describe that ingredient. In *Datafin*, “public element,”<sup>47</sup> as well as “public law functions”,<sup>48</sup> in *R v Chief Rabbi ex p Wachman*<sup>49</sup> “public law consequences”,<sup>50</sup> in *Poplar Housing Association v Donoghue*,<sup>51</sup> “public stamp or character”, in *RC Heather v Leonard Cheshire Foundation*,<sup>52</sup> “public flavour.”<sup>53</sup>

This variety of phrases, focussing on the epithet public, conceals a variety of criteria: What is the source of the body’s power? What are the body’s functions? What is the nature of those functions? If the body not exist, would Parliament be obliged to create something similar? Has it a requisite degree of statutory recognition or underpinning to stamp it as a public body?

The SCA section [31[2]] was, for its part, opaque speaking only of the need for “having regard to the nature of the matter in respect of which rule of many be granted” by the prerogative orders and the nature of the person “bodies against who such relief might be granted.” The duality of test at least confirmed that amenability to judicial review depends not only on the character of the body against when such relief is sought, but on the powers

<sup>44</sup> *R v Criminal Injuries Compensation Board, ex p Lain* [1987] 2 QB 864 at 882.

<sup>45</sup> *Council of the Civil Service Unions v Minster for the Civil Service* [1985] AC 374.

<sup>46</sup> *R v Takeover Panel, ex p Datafin* [1987] QB 815.

<sup>47</sup> *Ibid*, per Sir John Donaldson MR at 838.

<sup>48</sup> *Ibid*, per Lloyd LJ at 847.

<sup>49</sup> [1992] 1 WLR 1036.

<sup>50</sup> *Ibid*, per Simon Brown at 1042c.

<sup>51</sup> [2002] QB 48 (“Poplar”).

<sup>52</sup> [2002] 2 All ER 934 (“LCF”).

<sup>53</sup> *Ibid*, per Lord Woolf MR at para 14.

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being exercised by it. This is emphasised in CPR Part 54(1) (2) which provides, in material part, that a claim for judicial review means a claim to review the lawfulness of “(ii) a decision, action or failure to act in relation to the exercise of a public function.”

The fact that a body has been created by exercise of prerogative power or those powers and purposes are provided for by statute is no longer dispositive. The Jockey Club shared the first feature, but was held not to be amenable to judicial review.<sup>54</sup> Limited liability companies shares the second feature but are considered as private bodies. As Wade states “Statutory status without the public element is not by itself conclusive. Statutory powers and duties are possessed by many bodies, for example, commercial companies and trustees, which having no public element are quite outside the range of judicial review.”<sup>55</sup>

It is, in consequence. It is unsurprising that the law reports are littered with cases essentially about classification.<sup>56</sup>

Judicial review has been applied to the decisions of the Advertising Standard Authority,<sup>57</sup> the Code of Practice Committee of the British Pharmaceutical Society;<sup>58</sup> the GMC<sup>59</sup> and the Institute of Chartered Accountants,<sup>60</sup> but not the FA<sup>61</sup> or ABTA;<sup>62</sup> the Local Government Ombudsman,<sup>63</sup> but not the Insurance Ombudsman;<sup>64</sup> to the LME,<sup>65</sup> but not Lloyds of London;<sup>66</sup> to maintained schools,<sup>67</sup> but not public schools<sup>68</sup> – (the public element is rightly regarded as linguistic camouflage). There is still no definitive ruling on whether the BBC is judicially reviewable – maybe

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<sup>54</sup> *R v Jockey Club, ex p Aga Khan* [1993] 1 WLR 909.

<sup>55</sup> D Pannick QC “Who is Subject to Judicial Review and In Respect of What” [1992] PL 1.

<sup>56</sup> *R v London Metal Exchange Ltd, ex p Albatros Warehousing BV*, QBD, March 30<sup>th</sup> 2000, Case No: CO/2470/98; *R v The London Metal Exchange ex parte Hoogewerff Reserve Ltd Partnership* (Proceedings), November 11<sup>th</sup> 1999, Case No: CO/3538/98.

<sup>57</sup> See; *R v NCB, ex p NUM* (1986) ICR 791 compare; *R v British Coal Corpn, ex p Vardy* 1993 ICR 720).

<sup>58</sup> *R v AJA, ex p Insurance Service Plc* [1990] 2 Admin LR 77.

<sup>59</sup> *R v Code of Practice Committee of the British Pharmaceutical Society* 1991 COD 228.

<sup>60</sup> *R v General Medical Council, ex p Gee* 1986 1 WLR 237.

<sup>61</sup> *R v Institute of Chartered Accountants, ex p Brindle* [1994] BCLC 297.

<sup>62</sup> *R v Football Association Ltd, ex p Football League Ltd* 1993 2 All ER 833.

<sup>63</sup> *R v Association of British Travel Agents, ex p Sunspell Ltd* [2001] ACD 16.

<sup>64</sup> *R v Local Commissioner for Administration, ex p Eastleigh BC* [1988] QB 855.

<sup>65</sup> *R v Insurance Ombudsman, ex p Aegon Life Insurance Ltd* [1994] COD 426.

<sup>66</sup> *R v Corporation of Lloyds, ex p Briggs* [1983] 1 Lloyds Rep 176.

<sup>67</sup> *R v London Borough of Newham, ex p X* [1995] ELR 303.

<sup>68</sup> *R v Fernhill Manor School, ex p Brown* [1982] S Admin LR 159.

because of an instructive dislike of the concept of a state broadcasting body,<sup>69</sup> and even where charities, whose very status is impregnated with concepts of public interest stand is still unclear.<sup>70</sup> The University of Buckingham is, I would suggest, immune from judicial review, but the University of Thames Valley established under the Further and Higher Education Act 1992 is not,<sup>71</sup> and as for the Universities of Oxford and Cambridge who knows? Not even Sir William Wade who adorned both Universities.<sup>72</sup>

There are yet further complications: There is a distinctive Eurotest for bodies against which community directives are directly effective in the sense of being enforceable at the suit of individuals. It is whether the body is an “Emanation of State”. This was shown by the *Marshall* case<sup>73</sup> where the ECJ upheld the complaint of discrimination of a woman employed by the Health Authority, who was compulsorily retired at 60, whereas her male colleagues could soldier on until 65. I argued the case for Mrs Marshall, but, having now reached the age of 65 myself, wonder which sex was actually the victim of discrimination.

The notion of “an emanation of state” has been criticised as “inappropriate and undefined.”<sup>74</sup> The concept of an “emanation” has an almost spectral penumbra; and, as Wade says “drawing a line around the state in this way produces obvious anomalies, for example, as between employees of government agencies and employees of private companies.”<sup>75</sup>

A yet third test has been provided by the Section 6 of the HRA 1998 states (so far as material):

“(1)It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(3)In this section 'public authority' includes -

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<sup>69</sup> *R (on the application of ProLife Alliance) v BBC* [2003] UKHL 23; [2004] 1 AC 185: the point may have been conceded by silence.

<sup>70</sup> See the contradictory views of eminent chancery judges in cases concerned with the *Royal Society for the Prevention of Cruelty to Animals v (1) HM Attorney-General (2) Richard Hannay Meade (3) Nigel Baron Vinson of Roddam Dene (4) Gillian Rosemary Atkinson* (2001) Ch D 26/1/2001 [2002] 1 WLR 448: Times February 13<sup>th</sup> 2001 (Lightman J) and the National Trust. (*Scott v National Trust*: [1998] 1 WLR 226 (Robert Walker J).

<sup>71</sup> And see discussion in Hyams: Law of Education p 590.

<sup>72</sup> Wade p 636.

<sup>73</sup> [1986] QB 401.

<sup>74</sup> *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 (“Aston Cantlow”), (“Aston Cantlow”), per Lord Hope at para 55.

<sup>75</sup> Wade p 203.

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- (a) a court or tribunal, and
- (b) any person certain of whose functions are functions of a public nature,

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3) (b) if the nature of the act is private.”

The HRA distinguishes between ‘core’ public authorities (section 6(1)) and ‘hybrid public’ authorities (Section 6(3) (b) and Section 6(5)). In relation to the former all their acts engage the HRA; in relation to the latter not if the nature of the acts is private. There is a structural affinity between the HRA to the CPR test in focussing attention on both the nature of the body and the nature of the act, but not an identity, since the nature of the act will always be the key test in ordinary judicial review whereas, for core public authorities under the HRA it will not be. Unfortunately the first case to reach the House of Lords on the meaning of public authority, *Aston Cantlow*,<sup>76</sup> concerned a peculiar relic of Canon law – the liability to repair the channel of the parish church owed to the Parochial Church council by owners of former glebe land in their capacity lay rectors of a parish.

It is a legal cliché that hard cases make bad law, but it is equally true that odd cases make uneven law. The Court of Appeal held that the PCC was a public authority enforcing a tax to which infringed property rights protected by Article 1 of the First Protocol in the Convention. Bought in to defend that decision in the House of Lords, I had my doubts – which proved in the event to be well founded. The House of Lords held that the PCC was neither a core nor a hybrid public authority.

A core public authority was defined as “essentially a body whose nature is governmental in the broad sense of that expression”. It is in respect of organisations of this nature that the government is answerable under the European Convention on Human Rights,<sup>77</sup> classic example of a “core” public authority being a government department.<sup>78</sup>

Ordinarily ‘Crown’ can be equated with Government. In *Mersey Docks and Harbour Board v Cameron*<sup>79</sup> the Crown was held to extend to, inter alios, persons who were carrying out public purposes required and created by the Government for the purposes of government. Included in the catalogue of Crown Bodies have been a county territorial association.<sup>80</sup> The Wartime

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<sup>76</sup> Above n 74, per Lord Hope at para 55.

<sup>77</sup> Lord Nicholls of Birkenhead para 7, per Lord Hope para 47.

<sup>78</sup> Ibid per Lord Nicholls.

<sup>79</sup> 1865 II HLC 4432.

<sup>80</sup> *Territorial and Auxiliary Forces Association v Nicholls* [1949] 1 KB 35.

Custodian of Enemy Property,<sup>81</sup> a Hospital Management Committee.<sup>82</sup> In *Town Investments*<sup>83</sup> Lord Diplock said “in exercising the functions of Government the civil servants of the Crown are all engaged in carrying on a single business on behalf of the Crown ie Her Majesty’s Government is the United Kingdom”,<sup>84</sup> something repeated by Lord Walker describing the Crown “the executive government in its various emanations.”<sup>85</sup> A body which is the Crown qua government is certainly a public authority; although bodies which are not part of the Crown may be.

A hybrid public authority defied precise definition Lord Nicholls said “Factors to be taken into account include the extent to which in carrying out the relevant functions, the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.”<sup>86</sup> But as Lord Hope noted; “It is the function that the person is performing that is determinative of the question whether it is, for the purposes of that (ie each) case a “hybrid public authority.”<sup>87</sup>

The question as to whether a body engages human rights obligations is one of fact and degree “sensitive to the facts of each case.”<sup>88</sup>

So diffuse is the case law that the Joint Committee on Human Rights<sup>89</sup> announced an enquiry into the meaning of “public authority” under the HRA because of the “uncertainty” created by judicial decisions.

I should now confess that in preparing my lecture I confronted every finalist’s nightmare i.e. the prospect of an imminent potential change in the law by the highest judicial body in the land, the House of Lords.<sup>90</sup>

Then pending before the House of Lords was the case of *YL v Birmingham City Council and Southern Cross Healthcare Ltd*<sup>91</sup> about whether a private care

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<sup>81</sup> *Bank voor Handel en Scheepvaart v Administrator of Hungarian Property* [1954] AC 584.

<sup>82</sup> *Nottingham No1 Area Hospital Management Committee v Owen* [1958] 1 QB 50.

<sup>83</sup> *Town Investments v Department of the Environmental* [1978] AC 359.

<sup>84</sup> *Ibid*, at 385.

<sup>85</sup> *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* House of Lords [2006] UK HL 49.

<sup>86</sup> *Aston Cantlow*: Lord Nicholls (para 12).

<sup>87</sup> *Ibid* Lord Hope para 41.

<sup>88</sup> Lord Woolf MR Poplar, above n 51, at para 66.

<sup>89</sup> November 23<sup>rd</sup> 2006.

<sup>90</sup> Lord Denning, an honorand of this University, often recounted the story of a young student who complained to him about the frequency with which he changed the law on the eve of the examination. Being Lord Denning it was a story he recounted on more than one occasion.

<sup>91</sup> [2007] 3 All ER 957.

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home providing care and accommodation to service users under a contract with the local authority is subject to the HRA, as being:

“any person certain of whose functions are functions of a public nature.”

The function of a solicitor or barrister giving advice as to merits in the context of contested litigation is one of prophecy as much as of analysis. I therefore stated boldly in my lecture that in my view the appellant would succeed and indeed that, if the House of Lords took a more generous approach to the concept of public function, they will, as far as possible amalgamate the triple tests, that of the SCA and CPR, that of community law and that of HRA, which have hitherto been analysed, at any rate by Lord Hope of Craighead in *Aston Cantlow*<sup>92</sup> as overlapping but not coincident.

I was too bold. I console myself with the thought that the distinguished forensic and judicial careers of the majority (Lords Scott, Mance and Neuberger) were mainly in areas outwith public law, and the majority who had greater public law pedigree thought the outcome clear.<sup>93</sup> The House of Lords by 3-2 rejected the appeal.<sup>94</sup> Furthermore academic commentary on the decision has been almost uniformly critical,<sup>95</sup> but rather than repeating the arguments I advanced orally, I have deleted them from this text and direct readers' attention to the, as always, luminous speech of Lord Bingham.<sup>96</sup>

Does any of this matter other than to enthusiasts for procedural taxonomy?

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<sup>92</sup> Above n 74, at paras 34-55 see cf: through: *Burnton J R (on the application of Mullins) v Jockey Club Appeal Board (No 1)* Queen's Bench Division (Administrative Court), October 17<sup>th</sup> 2005 [2005] EWHC 2197 (Admin); [2006] ACD 2; Times October 24<sup>th</sup> 2005; *R. (on the application of Mullins) v Jockey Club Appeal Board (No.2)* Queen's Bench Division (Administrative Court), October 17<sup>th</sup> 2005 [2005] EWHC 2517.

<sup>93</sup> J Landau “Functional Public Authorities after YL” [2007] PL 630; “Law Lords Knock back Care Home Human Rights Plea. Care Homes; Human Rights; Local Authorities' Powers and Duties; Public Authorities” (2007) 157 NLJ (7279) 907; Care homes; Public Authorities; Residential care; Right to Respect for Private and Family Life; Statutory Interpretation. [2007] 151 (24) SJ 782; Alder “The Status of a Residential Care Home under the Human Rights Act 1998” [2007] 10 JLH 107; M Elliott “‘Public’ and ‘Private’: Defining the Scope of the Human Rights Act” [2007] 66 *Cambridge Law Journal* 487; and the Joint Committee on Human Rights has expressed its disappointment of the outcome.

<sup>94</sup> [2007] 3 WLR 112.

<sup>95</sup> Paul Craig “Contracting Out, the Human Rights Act and the Scope of Judicial Review” (2002) 118 *Law Quarterly Review* 551.

<sup>96</sup> Lord Bingham at para 2, Baroness Hale at para 72.

There are a number of reasons to suggest that it does not – at any rate too greatly.

Firstly, there is the demise of the so-called rule in *O'Reilly v Mackman*<sup>97</sup> This case, designed to segregate the procedures of public from those of private law normally made the judicial review normally obligatory when it was available and spawned a series of cases in which public authorities, where challenges were made to their decisions either by way of private law claims or by raising *vires* points by way of defence, would contend, even up to the House of Lords, so as to avoid any consideration of the merits that the other party was in the wrong forum. It has been slowly eroded to the extent that the exceptions have all but engulfed the rule itself.<sup>98</sup>

Secondly, whereas RSC 053 only allowed for a transfer out of an application for judicial review, which should have been made by way of ordinary action and then subject to various technicalities, the Civil Procedure rules provide more helpfully for two-way traffic.<sup>99</sup>

Thirdly and most importantly, there has been a cross pollination of private law by public law principles. Persons or bodies exercising discretionary powers which, where they were public authorities, would find themselves subject to duties to act lawfully, fairly and rationally, are increasingly held by the Courts to be subject to precisely the same obligations. It was always and necessarily the case that private bodies had to act in accordance with the law, but there has been a growing recognition that the rules of natural justice are not ring fenced under the public law sphere: and latterly the notion that the exercise of any discretionary power has to be informed by material considerations and not impaired by immaterial ones has been steadily advanced.<sup>100</sup>

One area, of growing significance in the legal world as in the world at large, where the issue has been recently resurrected is in sport.<sup>101</sup> The

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<sup>97</sup> [1983] AC 273.

<sup>98</sup> Esp *Steed v Home Secretary* [2000] 1 WLR 1169, *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988. See generally Michael Beloff QC “The Rule in *O'Reilly and Mackman*: a Cautionary Tale” in V Iyer (ed) *Essays in Honours of H M Seervai* (Delhi: Universal Law Publishing Co, 2001).

<sup>99</sup> CPR 54 [4].

<sup>100</sup> *R v East Berkshire Health Authority, ex p Walsh* (1995) OB 882. *Equitable Life Insurance v Hyman* [2002] 1 AC 585.

<sup>101</sup> See generally E Grayson *Sport and Law* (London: Butterworths, 3rd edn, 1999); M Beloff, T Kerr and M Demetriou *Sports Law* (Oxford: Hart Publishing, 1999); M Beloff “Pitch, Pool, Rink...Court? Judicial Review in the Sporting World” [1989] PL 95; Colin Munro: “Sport in the Courts” [2005] PL 681. The University of Buckingham’s Law Faculty enjoys special expertise in this field.

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general attitude of the Courts to sporting disputes is encapsulated in the dictum of Scot Baker LJ:

“It is in my judgment of paramount importance that sporting bodies should be given as free a hand as possible, consistent with the fundamental requirements of fairness, to run their own disciplinary promises without the interference of the Courts.”<sup>102</sup>

But what if there is some blatant unfairness or manifest perversity? The Court will interfere even with reluctance applying conventional public law tests, but not yet by public law procedures. In *Bradley v Jockey Club*,<sup>103</sup> the Court of Appeal, in dismissing an appeal against a penalty as being disproportionate, commended the analysis given by Richards J who had said that the court’s supervisory role in a private law claim did not require adoption of a “materially different approach from a judicial review claim.”<sup>104</sup>

The amenability of national sports regulators to judicial review appears foreclosed short of the House of Lords by the decision of *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan*<sup>105</sup> *R v Football Association Limited, ex p Football League Ltd*,<sup>106</sup> although there have been indications pre-Aga Khan, that senior judge would have preferred, if free to do so, to follow the judicial review route.<sup>107</sup> The most recent attempt to reverse *Aga Khan, R (on the Application of Mullins) v Board of the Jockey Club*<sup>108</sup> failed (it may be predictably) before Stanley Burnton J (adopting case where a disqualification of a doped horse by an Appeal Board of a Jockey Club) even though the plaintiff had had no contractual remedy.

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<sup>102</sup> *Flaherty v National Greyhound Racing Club Ltd* (2006 S&M ISLR SLR 8) at para 79.

<sup>103</sup> *Bradley v Jockey Club Court of Appeal* (Civil Division) July 12<sup>th</sup> 2005 [2005] EWCA Civ 1056; Times, July 14<sup>th</sup> 2005.

<sup>104</sup> *Bradley v Jockey Club (Application for New Ground of Appeal) Court of Appeal (Civil Division)*, 28 June 2005 [2005] EWCA Civ 851 (at [37]), citing in support dicta from Lord Woolf MR in *Wilander v Tobin* [1997] 2 Lloyd’s Rep 293 at 300.

<sup>105</sup> [1993] 1 WLR 909.

<sup>106</sup> (1993) 2 All ER 833.

<sup>107</sup> *R v Jockey Club, ex p Massingberd Munday* [1993] 2 All ER 2002 (Neill and Roch LJ, *R v Jockey Club, ex p Ram Racecourses* [1993] 2 All ER 267 finding themselves bound by an earlier decision of *Law v National Greyhound Racing Club* [1983] 1 WLR 1302) where, in a topsy-turvy application of *O’Reilly v Mackmann*, the defendant had the plaintiff’s action dismissed for having instituted proceedings by way of judicial review, not contract.

<sup>108</sup> 2006 2 SLR, SLR 30 and n 92 above.

But there are powerful arguments the other way based on the Datafin functional approach<sup>109</sup> and derivative tests: whether, but for the existence of a non-statutory body, government would intervene to regulate, whether government has acquiesced in or encouraged the activities of the body whose decisions is under challenge; whether the body's power are monopolistic, whether the aggrieved party has consensually submitted to be bound by the decision-maker – not whether he has chosen to undertake the regulated activity at all (where he has true freedom), but whether he has actually chosen to be regulated in that activity (where he has none). Lord Denning MR in his classic dissent<sup>110</sup> emphasised by the analogy between public authorities “and domestic bodies which control the destinies of thousands” in suggesting that the same principles should apply to supervision of their decisions. That battle has, as I have already noted, been won: but the conclusion that the same procedures should apply has not at any rate south of the border – or abroad<sup>111</sup> - although, intriguingly but so far unproductively, the Court of Appeal in *Aga Khan* “left open the question whether in other circumstances where there would be no alternative remedy its decisions could be reviewable.”<sup>112</sup>

The larger question whether the courts can, or should cut through the tangle and recognise the realities of power in societies, free standing of stark connection,<sup>113</sup> so as to attract the remedies provided by judicial review, is beyond the reach of this lecture. Law is in this elsewhere a battle ground between certainty and flexibility. For my part I consider (cautiously) that procedure should be the servant of substance, not its mistress.

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<sup>109</sup> “Why *Aga Khan* is Wrong” Michael Beloff QC and Tim Kerr [1996] *Judicial Review* 3.

<sup>110</sup> *Breen v ATU* (1971) 2 QB 175 at 190.

<sup>111</sup> *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159; *Justice v South Australian Trotting Control Board* (1989) 50 SASR. 613; *Jockey Club of South Africa v Forbes* (1993) (1) SA 648.

<sup>112</sup> This may be a case for horse for courses. The Jockey Club was described by Gray J as “a public authority in every sense of that term” in *Jockey Club v Buffham* [2003] 2 WLR 178 at 195.

<sup>113</sup> Sir Gordon Borrie “The Regulation of Public and Private Power” [1989] PL 552 and Sir Harry Woolf “Judicial Review: A Possible Programme for Reform” [1992] PL 221.