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*Datafin* to Virgin Killer: self-regulation and public law  
by  
Daithí Mac Síthigh\*

**Abstract:** In this paper, the treatment of self-regulatory and other private bodies for the purposes of English public law is reviewed. Starting with the expansion of the scope of judicial review of administrative action in *Datafin*, the question is explored alongside other key aspects of public law, with an argument being advanced that there are in fact multiple definitions of public authorities and public function currently used for a range of purposes. *Datafin* is compared with the case law under section 6 of the Human Rights Act, including *YL*. Particular attention is paid to the less familiar areas of the law where specific statutes require public authorities to carry out duties, such as legislation pertaining to freedom of information and equality rights. It is argued that, while the definitions and lists used in the case of these statutes draw upon the experiences of the courts in applying *Datafin* and section 6, there are significant gaps in accountability and scrutiny that should be addressed. Finally, the question of new forms of self- and co-regulation in relation to new media are summarised, and it is concluded that further clarity on the scope of public law, including statutory schemes, is required, and that actions taken thus far in Parliament have not addressed this problem in an adequate fashion.

**Contact Details:** Daithí Mac Síthigh, Norwich Law School, University of East Anglia, NR4 7TJ; [d.mac-sithigh@uea.ac.uk](mailto:d.mac-sithigh@uea.ac.uk)

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I

## Introduction

### *Datafin*

In 1986, the Court of Appeal found that an application for judicial review could be brought in respect of a decision of the City Panel on Takeovers and Mergers, a non-governmental or private body purportedly engaged in the 'self-regulation' of certain financial activities in the City of London. As is often the situation in such cases, the applicants (*Datafin*, a vehicle formed by managers of a printing company trying to buy it in competition with another company seeking to merge with it) failed on the substantive question (and the company they failed to buy went through a series of subsequent mergers and demergers), but remain famous - at least in the minds of lawyers and scholars, not to mention the revision notebooks of administrative law students.

The *Datafin* case<sup>1</sup> has been followed by a series of further cases where the question of amenability (primarily a matter for the common law) has arisen, though in general they can be said to be applications of *Datafin* principles rather than any significant reconsideration of its findings. In the absence of statutory control, *Datafin* and its children (and the bare reference in CPR Part 54 to judicial review being a claim regarding "a decision, action or failure to act in relation to the exercise of a public function")<sup>2</sup> determine whether a particular body, or a particular function of a body, is subject to judicial review. Thus, it is possible (on the authority of the first flurry of post-*Datafin* cases) to seek judicial review of a decision of the Advertising Standards Authority,<sup>3</sup> but not of the Jockey Club (the *Aga Khan* case)<sup>4</sup> (where the contractual relationship between the Jockey Club and the owners affected by its decisions was important) or the Football Association.<sup>5</sup> Indeed, the relatively clear decision in the *Aga Khan* case did not dissuade an applicant from seeking a review of the decision of the Appeal Board of the Jockey Club, unsuccessfully advancing various innovative grounds such as the absence of a direct contract between himself and the Appeal Board.<sup>6</sup>

<sup>1</sup> *R v Panel on Takeovers and Mergers ex parte Datafin* [1987] QB 815.

<sup>2</sup> Note that the current Rules are written to include the HRA action discussed below; the former provision (RSC Order 53) was essentially silent on the matter.

<sup>3</sup> *R v Advertising Standards Authority ex parte The Insurance Service* (1990) 2 Admin LR 77. Examples of subsequent cases include *R v Advertising Standards Authority ex parte Charles Robertson (Developments)* [2000] EMLR 463 and *R (Debt Free Direct) v Advertising Standards Authority* [2007] EWHC 1337 (Admin), both applications being unsuccessful.

<sup>4</sup> Though note that it is possible to challenge Jockey Club decisions through the indirect routes of claims based on contract and restraint of trade: *Williams v Jockey Club* [2004] EWHC 2164 (QB).

<sup>5</sup> *R v Football Association ex parte Football League* [1993] 2 All ER 833.

<sup>6</sup> *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC 2197 (Admin).

## Legacy and relevance of *Datafin*

Other recent cases have dealt with the British Council's 'purely voluntary' registration scheme for EFL schools<sup>7</sup> and a series of issues pertaining to Lloyd's of London,<sup>8</sup> and it has been made clear again and again that there are limits to judicial review of the private law actions of public authorities.<sup>9</sup> Not all issues have been resolved, though: for example, it is still unclear whether the Press Complaints Commission is subject to judicial review, with the point being sidelined in a number of cases due to the Commission's reservation of its position on this point and the Court's acceptance of such.<sup>10</sup>

*Datafin* is broadly accepted in other common-law jurisdictions, although there have been some isolated attempts to expand its scope. In a 2005 New Zealand decision, it was found that a private (but free-to-air) television network was amenable to judicial review in respect of its decision to bar a party from a pre-election debate.<sup>11</sup>

*Datafin* is of continuing interest for a number of reasons. For its time, it was a useful expansion of the scope of administrative law, allowing a limited set of powerful bodies outside the traditional public law paradigm to be held to account before independent judges where the circumstances demanded, despite being in many regards characterised as private bodies. The decision in *Datafin* was reached during a decade when customers of nationalised industries were told to 'See Sid' if they wanted to become shareholders in privatized industries instead and when former Prime Minister Thatcher suggested that there is such thing as society, but there have been further examples in subsequent years of the blurring of the line between purely public and purely private, continuing (and in some sectors intensifying) despite a change of government when the Conservatives were replaced in government by Labour after the 1997 election.

Today, there is renewed interest in financial regulation, and the idea of the Chancellor of the Exchequer paying tribute to light-touch regulation<sup>12</sup> is, after the events of the past year, quite preposterous. On the other hand, self-regulation retains its allure in some sectors (particularly media and communications), as it neatly side-steps complaints of State interference and keeps the costs of regulation off the public books, and although there have been a number of situations where public-private partnerships have been scaled back, the pursuit of private-sector and third-sector delivery has not yet slowed down in any significant way.

<sup>7</sup> *R (Oxford Study Centre) v British Council* [2001] All ER (D) 213 (Mar).

<sup>8</sup> *R (West) v Lloyd's of London* [2004] EWCA Civ 506.

<sup>9</sup> E.g. *R (Evans) v University of Cambridge* [2002] All ER (D) 86 (Jul).

<sup>10</sup> *R (Ford) v Press Complaints Commission* [2001] EWHC Admin 683; *R v Press Complaints Commission ex parte Stewart-Brady* (1996) 9 Admin LR 274, [1997] EMLR 185.

<sup>11</sup> *Dunne v Canwest* [2005] NZAR 577; see further J Wilson, 'Judicial Review and Editorial Freedom' (2006) 12 Auckland U L Rev 199.

<sup>12</sup> See for example 'Chancellor launches Better Regulation action plan' (24 May 2005) [http://www.hm-treasury.gov.uk/better\\_regulation\\_action\\_plan.htm](http://www.hm-treasury.gov.uk/better_regulation_action_plan.htm).

Perhaps most notably, though, the position after *Datafin* looks very different to that of today when the purposes of defining a body as exercising a public function are considered. In 1986, the possibility of applying for judicial review was the primary purpose for seeking such a designation. Since 1998, though, there is the additional element of the remedy provided by the Human Rights Act, which prohibits 'public authorities' from acting in a way that violates the Convention rights of a 'victim'. Simultaneously, a range of statutes have extended broad duties to bodies of various sorts, under headings such as freedom of information and equality. It is therefore thought necessary, and is the purpose of this paper, to consider these matters alongside *Datafin*, in order to ascertain the true state of the law on public authorities and public functions, and therefore assess what constraints, if any, apply to self-regulatory and co-regulatory bodies in public law.

## ***The Human Rights Act***

### **Section 6: functions of a public nature**

By the time that the Human Rights Bill was introduced in Parliament, the legacy of *Datafin* was still unclear, and there was some anxiety, including on the part of the legislators introducing the Bill, that greater clarity on the application of human rights law was necessary.<sup>13</sup> Therefore, it was necessary to set out – in the text of the legislation – against which parties the new domestic remedy for breach of Convention rights would be available. This is achieved through section 6 of the Act:

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
- (2) Subsection (1) does not apply to an act if—
  - (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
  - (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
- (3) In this section "public authority" includes—
  - (a) a court or tribunal, and
  - (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
- (4) In subsection (3) "Parliament" does not include the House of Lords in its judicial capacity.
- (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.
- (6) "An act" includes a failure to act but does not include a failure to—
  - (a) introduce in, or lay before, Parliament a proposal for legislation; or

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<sup>13</sup> See for example the debate on clause 6 in the House of Commons: Hansard HC vol 314 cols 404-418 (17 June 1998).

(b) make any primary legislation or remedial order.

The Act does not define what is a public authority. Instead, it includes the persons certain of whose functions are of a public nature within the group of authorities that are public authorities, but restricts the application of that definition through subsection (5). The Lord Chancellor explained in debate in the House of Lords that a body which has "any functions of a public nature ... qualifies as a public authority", though not all acts of such a body would be subject to the Act, and that it would not be appropriate to list all such bodies in the Act.<sup>14</sup> It was surely inevitable, though, that in a climate of contracting out, deregulation, diverse provision, privatisation and other similar developments, this definition would not be the subject of further discussion and elaboration. At a relatively early stage, the courts were able to develop an appropriate nomenclature (as in *Aston Cantlow*),<sup>15</sup> distinct from the *Datafin* doctrines but interesting in that it set up a division not clearly expressed in the statute. This is the divide between 'core' and 'hybrid' public authorities: core public authorities (not defined, but including courts and tribunals) are public authorities with respect to all of their functions, while hybrid public authorities (i.e. those captured by s 6(3)(b) but exempted in part by s 5(5)) see some acts (or functions?) subject to the HRA and others (i.e. private acts) not so subject.

*YL*<sup>16</sup> is the definitive decision of the House of Lords decision (for now) on this point. The local authority had a duty under the National Assistance Act 1948 to make arrangements for the care of elderly residents, which in this case was provided by a private company (Southern Cross) which ran nursing homes catering for both 'public' and 'private' residents. A 'public' resident wished to challenge her removal from the nursing home on Article 8 grounds. In the House of Lords, the Government intervened, on the side of the resident. It was found that the actions of the private company are not captured by section 6; it had earlier been found (pre-HRA) that similar bodies would not be amenable to judicial review.<sup>17</sup> Generally, the case limits the ability of affected individuals to challenge decisions of bodies acting under contract with local authorities.<sup>18</sup>

### Responding to *YL*: general approach

One feature of the debate on public authorities and the Human Rights Act is the consistent and determined advocacy of the broad approach taken by the

<sup>14</sup> Hansard HL vol 583 col 796 (24 November 1997).

<sup>15</sup> *Parochial Church Council of Aston Cantlow and Wilmcote with Billesley v Wallbank* [2003] UKHL 37.

<sup>16</sup> *YL v Birmingham City Council* [2007] UKHL 27.

<sup>17</sup> *R v Servite Houses ex parte Goldsmith* (2000) LGLR 997, 2000 WL 571362 (QBD).

<sup>18</sup> It has been suggested (perhaps with tongue in cheek) that a future resident wishing to bring an Article 8 claim should instead remain until physically evicted, and then advance a horizontal effect claim under the common law on battery: A Williams, '*YL v Birmingham City Council*: contracting out and "functions of a public nature"' [2008] EHRLR 524.

Joint Committee on Human Rights (JCHR), causing it to depart quite significantly from Government policy on a number of occasions. In the time between the *YL* decisions at the Court of Appeal and House of Lords, the JCHR put forward a proposal (based on its earlier, detailed report on the subject)<sup>19</sup> to intervene (through a standalone Act), as follows:

For the purposes of section 6(3)(b) of the Human Rights Act 1998 (c. 42), a function of a public nature includes a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform that function.

However, this Bill, introduced in Private Members' Time in the 06-07 session by the chair of the committee (Andrew Dismore MP), was not proceeded with, on the grounds that it was more appropriate to await the decision of the House of Lords in *YL*.

A second attempt (with a revised text) was introduced in the following parliamentary session (07-08), but did not receive parliamentary time and fell at the end of the session. This Bill would have set out mandatory factors to be taken into account when assessing a function

- (a) the extent to which the state has assumed responsibility for the function in question;
- (b) the role and responsibility of the state in relation to the subject matter in question;
- (c) the nature and extent of the public interest in the function in question;
- (d) the nature and extent of any statutory power or duty in relation to the function in question;
- (e) the extent to which the state, directly or indirectly, regulates, supervises or inspects the performance of the function in question;
- (f) the extent to which the state makes payment for the function in question;
- (g) whether the function involves or may involve the use of statutory coercive powers;
- (h) the extent of the risk that improper performance of the function might violate an individual's Convention right.

It would also provide that a function of a public nature would include functions required or enabled to be performed wholly or partially at public expense, without regard to the legal status of the person performing the function or whether there was a contract in place. At first glance, this does seem to be rather broad, potentially capturing any activities carried out with assistance from public funds (through 'functions ... enabled ... partially at public expense'), and would seem to contradict the more purposive approach of the seven mandatory factors.

The Government initially approached the situation through publishing guidance for local authorities on 'contracting in the light of the Human Rights Act.' Proponents of the new Bill, though, argue that this approach was a failure, being poorly written, lacking in practical examples and failing to be

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<sup>19</sup> Joint Committee of Human Rights, 'The Meaning of Public Authority under the Human Rights Act' HC (2006-7) 410 / HL (2006-7) 77.

properly communicated to local authorities.<sup>20</sup> It has also been suggested that the matter would be addressed in the forthcoming consultation process on the British Bill of Rights and Duties. A Bill with this title has been presented as a Private Member's Bill in the current session.<sup>21</sup>

## Responses to YL

If the JCHR proposal is not to pass, is there then a case-by-case solution? The recently-enacted Health and Social Care Act 2008 provides at s 145(1):

A person ("P") who provides accommodation, together with nursing or personal care, in a care home for an individual under arrangements made with P under the relevant statutory provisions [various, including ss.21(1)(a) and 26 of the NA Act] is to be taken for the purposes of [6(3)(b)] to be exercising a function of a public nature in doing so.

According to the explanatory note, this is consistent with what is said to be the Government's original intention in the HRA: to include private care homes providing services to an individual pursuant to a contract with a local authority. In effect, then, it reverses the result of YL, but not the legal reasoning or the impact on other bodies potentially performing a public function (but on behalf of or pursuant to an agreement with, say, a council) and those who would seek to enforce Convention rights against them. Groups concerned with the rights of the elderly (e.g. Age Concern, Help the Aged) as well as civil liberties groups (Justice, Liberty) campaigned in favour of this clause,<sup>22</sup> and introducing the clause in the House of Lords, Baroness Thornton restated the Government's objection to the result in YL but agreed that a sector-by-sector approach would not be appropriate.<sup>23</sup> It is interesting to review the debate on this clause, where the only objections came from peers arguing that the Human Rights Act should also protect private customers of the affected care homes. The enactment of the provision would seem to put the issue of HRA compliance by private facilities with respect to publicly-funded residents relatively beyond doubt for the time being, although the financial and practical impact is still being assessed by the private sector providers.<sup>24</sup>

It is contended that this approach itself is problematic, in that it makes situations that would be on the boundary more susceptible to being defined as not engaging the HRA, due to the lack of an affirmative statement. Depending on how the legislative drafters see it, unless Baroness Thornton's words persuade all parties not to pursue this approach (which does depend

<sup>20</sup> Hansard HC vol 469 col 740 (18 December 2007) (Andrew Dismore).

<sup>21</sup> Human Rights Act 1998 (Meaning Of Public Authority) Bill 2008-09.

<sup>22</sup> Press release (20 May 2008), <http://www.justice.org.uk/images/pdfs/joint%20press%20release%20hsc%20amendment%2020.5.08.pdf>.

<sup>23</sup> Hansard HL vol 701 col GC631Lords (22 May 2008).

<sup>24</sup> L James, 'Taking responsibility for human rights: a gap in the law?' (2008) 3(1) J of Care Services Management 83, 94-5.

on a general resolution of the question), providing a textual guarantee of HRA enforcement will either become a *pro forma* statement added to a range of Bills, or the source of tension and negotiation each time. It also does not solve the question of existing legislation, of which there is an awful lot: bear in mind that the general legislation conferring power on local authorities in respect of housing and social assistance may in fact be from the first years of the modern welfare state, despite modern reforms. Courts could well point to an express inclusion of the clause in one Act (or its rejection in debate in another) as creating a strong presumption against finding that a function was captured by section 6. On the other hand, in a US context, even an explicit statutory statement that seemed to define a body (Amtrak) as private ("will not be an agency or establishment of the United States Government") was disregarded by the Supreme Court for the purposes of an ultimately unsuccessful First Amendment challenge.<sup>25</sup>

Unsurprisingly, we did not have to wait for long before there was a demand for another specific clause, and it came in an area that had already been the subject of legal proceedings. During the parliamentary debates on what became the Housing and Regeneration Act 2008, an amendment was introduced that would not only have made (private) residential social landlords (RSLs) public authorities for the purposes of section 6, but also 'amenable to judicial review by the Administrative Court'. This amendment – not particularly carefully drafted – would have gone much further than was required to address the criticised elements of the caselaw. For example, it would probably have defined the relevant bodies as what the courts consider core public authorities. It was therefore not extremely difficult for the Government to oppose the clause,<sup>26</sup> although the Government's own reasoning is also open to criticism. It was put to Parliament that that 'social housing is not a public service which has been recently privatised, it is a regulated voluntary activity which local authorities become involved in'<sup>27</sup> (which, if true, should surely apply to nursing homes on the same basis), that compliance would be expensive (a reasonable, although philosophically controversial one), and that the provision would prevent RSLs from borrowing money, as they would be considered to be public bodies for Treasury monitoring purposes. The JCHR rightly criticized the last of these points as wholly unproven, pointing to the lack of any examples of such a ruling, and pointing to a written confirmation from the then Secretary of State for Constitutional Affairs that status as a hybrid public authority did not affect the classification of borrowing as public or private.<sup>28</sup>

<sup>25</sup> *Lebron v National Railroad Passenger Corporation* (1995) 513 US 374; substantive claim unsuccessful (1995) 69 F 3d 650 (2<sup>nd</sup> Circuit CA).

<sup>26</sup> Hansard HL vol 702 col GC228 (11 June 2008).

<sup>27</sup> Hansard HL vol 702 col GC230 (11 June 2008).

<sup>28</sup> Written Evidence 3 (Memorandum from the Secretary of State for Constitutional Affairs and Lord Chancellor) in Joint Committee on Human Rights, 'The Meaning of Public Authority under the Human Rights Act' HC (2003-4) 382 / HL (2003-4) 39.

Despite these great efforts, which led to the defeat of the various amendments, the High Court subsequently found in *R (Weaver) v London & Quadrant Housing Trust*<sup>29</sup> that, for the purposes of the Human Rights Act, a RSL was a hybrid public authority. The claim against the RSL, brought with the support of legal aid (as it is a test case on public functions!) was based on legitimate expectation (i.e. a non-HRA public law claim requiring a *Datafin*-style determination) as well as the Article 8 issues. Richards LJ (with Swift J) found that *YL* did not overrule the earlier *Poplar* decision;<sup>30</sup> that the RSL was a non-profit charity, lacking the private and commercial features of Southern Cross in *YL*; that the sector (social rented housing) is not just regulated but 'permeated by state control and influence with a view to meeting the Government's aims for affordable housing' and 'in a very real sense [can] be said to take the place of, local authorities'<sup>31</sup> that the sector is heavily subsidised; and that it has a duty to co-operate with local authorities.

This case, although the most recent word on the subject, does appear to stand relatively alone, and must be approached with some care.<sup>32</sup> Elsewhere, aside from the various cases that culminated with the decision in *YL*, various Human Rights Act claims against bodies have been dismissed for lack of a public function under section 6: against a parochial council (*Aston Cantlow*), against Network Rail on the grounds that it 'was not, and therefore was not acting as, a public authority', although it may have been so (albeit a hybrid one) before amendments to the system of rail regulation in the UK,<sup>33</sup> and against Lloyd's of London.<sup>34</sup>

### Judicial review and section 6 claims: the same test?

In some cases, great care is taken to deal with the administrative law and human rights claims separately (e.g in the most recent *Lloyd's* case).<sup>35</sup> In the Northern Irish case of *Wylie*,<sup>36</sup> the difference was restated: "The public law concept in judicial review is not identical to the public authority concept under the 1998 Act but they occupy some common ground". In *YL*, they were again not equated, although it is argued by Palmer that a point of departure between the majority and minority of the Court was the reliance by the

<sup>29</sup> [2008] EWHC 1377 (Admin).

<sup>30</sup> In *Poplar Housing and Regeneration Community Association v Donoghue* [2001] EWCA 595 (Civ), an RSL was found to be subject to the Human Rights Act; the question in *Weaver* was whether this was disturbed by *YL*.

<sup>31</sup> *Weaver* [55].

<sup>32</sup> For discussion of the decision in *Weaver*, see R Latham & S Reeder, 'An old chestnut' (2008) 158 NLJ 1484; A Arden, 'A swing of the pendulum' (2008) 11 J of Housing L 75.

<sup>33</sup> *Cameron v Network Rail Infrastructure Ltd* [2006] EWHC 1133 (QB) [37].

<sup>34</sup> *R (West) v Lloyd's of London* [39].

<sup>35</sup> *R (West) v Lloyd's of London*.

<sup>36</sup> *Re Wylie* [2005] NIQB 2.

majority on *Datafin* and subsequent cases to give a narrow reading to section 6.<sup>37</sup>

On one hand, an argument based on section 6 of the HRA was the subject of some criticism in the (non-HRA) case of *R v Association of British Travel Agents ex parte Sunspell*,<sup>38</sup> rejected by Keene J (setting aside a grant of permission to apply for review) as "a classic one of trying to haul oneself uphill by one's bootstraps", and it was suggested (but not determined) in the same case that there would be situations where a body would come within the scope of the HRA but not conventional public law actions. In *Aston Cantlow*, the House of Lords was sceptical of the value of the authorities on public authority based on judicial review.<sup>39</sup> On the other hand, an equally forceful case is made by Burnton J in *Mullins* for a merging of the two approaches, at least on the basis of the new procedures:

For the reasons I have given, in relation to hybrid authorities, I believe that [CPR Part 54.1] as introduced on that date was intended to apply to the same acts as those that are treated as those of a public authority by virtue of section 6(3)(b) and (5) [HRA]. This interpretation avoids different meanings be given to similar phrases in the same context. It means that the question whether a particular act of a hybrid authority was done in the exercise of a public function will receive the same answer under section 6 and under Part 54.1. It means that Part 54.1, like section 6, falls to be interpreted by taking into account the jurisprudence of the European Court of Human Rights. I think that these results are sensible and desirable.<sup>40</sup>

In *Weaver* it was put to the court that defining bodies as subject to HRA obligations is based on amenability to judicial review; the point was not addressed, but Richards LJ commented that "it would be strange if a function had a public character sufficient to engage the application of the 1998 Act yet insufficient to engage the court's normal public law jurisdiction".<sup>41</sup> It can be said that there is a significant division of opinion on this point.

There are a number of reasons why this matters, not least the value to the potential applicant of knowing with some certainty whether their claim is going to be dismissed on what is essentially, from the court's point of view, a preliminary matter. Indeed, there are clearly a number of crucial differences between the two procedures in other preliminary matters. The state of the law on standing is one: "sufficient interest" in the case of judicial review, following section 31 of the Supreme Court Act 1981 and a number of cases in the past 20 years that are commonly understood as giving a generous interpretation to the Rules as opposed to "is (or would be) a victim of the unlawful act", according to section 7 HRA and Article 34 of the Convention. On the other hand, it is established that the types of acts that a core public authority must perform in accordance with the Convention are broader than

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<sup>37</sup> S Palmer, 'Public, Private and the Human Rights Act 1998: An Ideological Divide' (2007) 66 CLJ 559, 567-8.

<sup>38</sup> [2001] ACD 16, 2000 WL 1480083 (QBD) [25].

<sup>39</sup> *Aston Cantlow*, per Lord Nicholls [52]; Lord Hobhouse [87].

<sup>40</sup> *Mullins* [42].

<sup>41</sup> *Weaver* [64].

the public law functions required for a conventional matter of judicial review. As I will argue below, the use of the HRA definitions in other legislation may also be of some importance.

### **European approaches**

The approach of the European Court of Human Rights is, as previously stated, based on the idea of State responsibility for particular actions.<sup>42</sup> It is reaffirmed in *Storck v Germany*,<sup>43</sup> where it is clear that there is a relatively undeveloped definition of the concept of public authorities. This can be understood, though, in the light of the Court's approach to the duties on courts to vindicate the Convention rights of parties and the State's positive obligations, and so there has historically been only a limited need to decide conclusively the ambit of state bodies. Similarly, in *Costello-Roberts v UK*,<sup>44</sup> the UK was found to be violating the applicant's Article 3 rights by failing to protect him from a particular severity of corporal punishment. The legislation then in force applied to publicly-funded schools but not to the independent sector in respect of pupils not funded through 'assisted places' – perhaps broader than even the pre-*YL* understanding of the scope of the Human Rights Act favoured by the JCHR. This approach of course varies from right to right, given the state of the law on positive obligations under the Convention.

Under EU law, there is a slightly different approach: for example, direct effect applies to a body "whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals".<sup>45</sup> Given the relatively few cases where the principle is directly engaged, though, this is a doctrine that has not developed in any great detail. Some UK opinions on public authorities have touched on aspects of EU law but not found them to be of particular use.<sup>46</sup>

### ***Public authorities and specialised statutes***

#### **Importance of other provisions**

Despite the litres of ink spilled and bits consumed by the literature on *Datafin* and then on the HRA cases, there is a third, less familiar 'category' of legal

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<sup>42</sup> See further Williams (n 18) 526; H Quane, 'The Strasbourg jurisprudence and the meaning of a "public authority" under the Human Rights Act' [2006] PL 106.

<sup>43</sup> (2005) 43 EHRR 96.

<sup>44</sup> (1993) 19 EHRR 112.

<sup>45</sup> *Foster v British Gas* [1990] ECR I-3313 [20].

<sup>46</sup> *Aston Cantlow* [53]-[55], *Weaver* [47].

material on public authorities, that of specific statutes requiring public authorities to act in a particular way. Examples include legislation on equality and discrimination, on the use of Welsh and Gaelic in their respective hinterlands, and the main example discussed here, the Freedom of Information Act 2000. While the availability of remedies under judicial review and the HRA are likely to be of value to the individual in many situations, it is clear that Parliament recognises the importance of other approaches to regulating the behaviour of public authorities. Therefore, a particular body's status in terms of possible causes of action in the courts is certainly not the only game in town. In the same way, though, as the affected citizen has a genuine interest in whether a particular body can be held to account through judicial review or human rights law, the same person should pay attention to whether the same body is included within the scope of these statutes. It is contended in this section that the answer to such a question is not much clearer than it was for the established issues of review and rights, and that significant gaps in the protection of the individual may be emerging.

### **Freedom of information**

Under the Freedom of Information Act, records can be requested from particular bodies. There are three categories:

- Bodies listed or described in Schedule 1 (as amended)
- Bodies wholly owned by a public authority (automatically covered)
- Bodies designed pursuant to section 5 of the Act (to the extent so designated), that exercise functions of a public nature or are carrying out the functions of a public authority under contract

The list of bodies and types of bodies in Schedule 1 is lengthy, and has been already been amended by 91 separate Acts (so far),<sup>47</sup> usually by other legislation. Typically, a new body is created and the same legislation inserts it into Schedule 1 of the Act; under the Act, the Schedule can also be amended by statutory instrument, and there have been eight such orders to date. Such bodies must be established and appointed by Crown, legislative or executive action. In the case of companies wholly owned by a public authority, no action is necessary, although a problem has arisen in that the form of words used in the statute, referring to a company 'wholly owned by any public authority' having 'no members except that public authority' means that companies jointly owned by two or more public bodies are (inexplicably and probably unintentionally) not included.<sup>48</sup> There has also been one case of a removal of a body wholly owned by a public authority – the unfortunate Northern Rock – where the order providing for the transfer of the bank to public ownership 'deemed' it not to be subject to the Act.<sup>49</sup>

<sup>47</sup> Best estimate of the author, based on Lexis, Westlaw and other searches.

<sup>48</sup> Freedom of Information Act 2000, s 6. See further Written Evidence 10 (Memorandum of the Information Commissioner's Office) in Joint Committee of Human Rights (n 19).

<sup>49</sup> Banking (Special Provisions) Act 2008; Northern Rock plc Transfer Order 2008 SI 2008/432 art 18.

In the case of section 5, though, no action has been taken to date. In late 2007, the Ministry for Justice published a consultation paper setting out its provisional view with regard to the use of the section and inviting comments.<sup>50</sup> Although the consultation closed in February 2008, the Government's response has not yet been published. The consultation paper did indicate some openness to action, suggesting that there are obvious disparities between similar functions (the example given was publicly-run prisons v privately-run prisons) and that there are issues associated with transparency arising from the significant sums of public money being spent through bodies not subject to the Act. However, the paper also highlighted considerations of cost and burden, particularly in the case of charitable organisations.

Five options were presented: take no action, encourage good behaviour through a code of practice, build FOI requirements into public contracts, issue a section 5 order, or issue a series of section 5 orders. The final option was the preferred option of the public watchdog, the Information Commissioner. Broadly speaking (and hampered by the fact that the submissions will not be published until after the Government's response is published), extension was opposed by business groups<sup>51</sup> and the charitable sector,<sup>52</sup> and favoured by freedom of information campaigners.

If action were to be taken, though, such would still be constrained by the requirement that prescribed bodies be exercising functions of a public nature. Any listing of a body not exercising such functions could (and would) be challenged as *ultra vires* the Freedom of Information Act. In the consultation paper, it is suggested that a court dealing with such a challenge would 'be likely to have regard to broadly similar factors in relation to section 5 of the Act as they would when determining the scope of judicial review and the Human Rights Act 1998'.<sup>53</sup> Section 5 itself was the subject of some internal discussion at the time of the Act's passing, drawing upon the *Datafin* jurisprudence, as can be seen from documents (perhaps ironically) subsequently disclosed under FOI.<sup>54</sup>

### FOI and its discontents

There are dangers to this approach too, particularly given the pace of modern legislation. For example, the controversial school 'academies' are not subject

<sup>50</sup> Consultation Paper CP 27/07 <http://www.justice.gov.uk/docs/cp2707.pdf>.

<sup>51</sup> 'CBI Response to Ministry of Justice Consultation' (January 2008) [http://www.cbi.org.uk/ndbs/positiondoc.nsf/1f08ec61711f29768025672a0055f7a8/FBF89CF6CFF38DB9802573FC006223B4/\\$file/psdfoi0208resp.pdf](http://www.cbi.org.uk/ndbs/positiondoc.nsf/1f08ec61711f29768025672a0055f7a8/FBF89CF6CFF38DB9802573FC006223B4/$file/psdfoi0208resp.pdf)

<sup>52</sup> [http://www.charitycomms.org.uk/news/sector\\_news/20080207/sector\\_opposes\\_extension\\_of\\_freedom\\_of\\_information\\_act](http://www.charitycomms.org.uk/news/sector_news/20080207/sector_opposes_extension_of_freedom_of_information_act).

<sup>53</sup> CP 27/07 (n 50) [19].

<sup>54</sup> [http://www.culture.gov.uk/images/freedom\\_of\\_information/Responseletterforcase12092.pdf](http://www.culture.gov.uk/images/freedom_of_information/Responseletterforcase12092.pdf).

to FOI as Schedule 1 includes 'maintained schools within the meaning of the School Standards and Framework Act 1988' and academies are not so categorised. However, there is no suggestion that academies should be exempt for policy reasons from FOI, and this appears to have been an oversight.<sup>55</sup> This illustrates one of the problems with the approach based on an exclusive list.

The determination of what is and what is not a public authority is also a difficult one. The BBC is in the relatively rare position of being defined as subject to the Act in respect of particular functions (or to be more precise, subject to the Act except in respect of particular functions). In *BBC v Sugar*<sup>56</sup> the House of Lords, in its first decision on the Freedom of Information Act, held that the question of the BBC's refusal to release information on the grounds that it was not subject to the Act can be appealed under the Act's rules (i.e. to the Information Tribunal); the Court of Appeal below had held that such a decision could only be challenged through judicial review.<sup>57</sup> It is worth noting in this context that the *Sugar* case relates to one of the few issues likely to lead to legal proceedings without difficulty, in that, which clearly is more likely to require judicial intervention than where a body is included or excluded without further elaboration. Given that the method under section 5 will normally mean that information is subject to FOI in respect of particular functions, this case will certainly have an impact on the process of designation.

It is interesting to note the types of bodies cited as suitable for bringing within the scope of the Act: the Information Commissioner noted that he had received complaints from the public about the non-inclusion of the Press Complaints Commission, Financial Ombudsman Service, Royal Institute of Chartered Surveyors, ICSTIS/PhonepayPlus and the Financial Reporting Council (of the five, two relate to media and communications and two to finance).<sup>58</sup> The Campaign for Freedom of Information recommended the inclusion of the PCC, ASA, Solicitors Regulation Authority "and other bodies carrying out self-regulatory functions which the government itself would otherwise undertake, should also be designated". On the other hand, it has been argued (by the then-Secretary of State for Culture, Media & Sport, Estelle Morris) that designation of the PCC would not be compatible with the Government's policy on press freedom through self-regulation,<sup>59</sup> despite the Government's outright refusal to exempt the same body from the Human Rights Act.<sup>60</sup>

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<sup>55</sup> CP 27/07 (n 50) 17.

<sup>56</sup> [2009] UKHL 9

<sup>57</sup> [2008] EWCA Civ 191. See also H Johnson, 'Freedom of information - confidence and journalism exemptions from disclosure' (2008) 13 Communications L 174.

<sup>58</sup> Response of the Information Commissioner to CP 27/07 (1 February 2008)

[http://www.ico.gov.uk/upload/documents/library/corporate/notices/cp2707-questions\\_ico\\_response.pdf](http://www.ico.gov.uk/upload/documents/library/corporate/notices/cp2707-questions_ico_response.pdf) 3.

<sup>59</sup> Hansard HC vol 430 col 45W (24 January 2005).

<sup>60</sup> Hansard HC vol 315 col 541 (2 July 1998).

## Cases on designation as a public authority

There does appear to be some scope for challenging the status of a body as subject to (or not subject to) a particular statute, i.e. by challenging the inclusion or removal of such a body. This issue became more than a theoretical one in the lengthy case of *R (Brown) v Secretary of State for Work & Pensions*,<sup>61</sup> where a plethora of administrative law issues arose from a decision to close a post office in Sussex. For present purposes, we are concerned with the decision to remove Royal Mail from the list of bodies required to establish a disability equality scheme under the Disability Discrimination Acts 1995-2005 and associated regulations. The Secretary of State has the power to make regulations requiring public authorities to carry out specific duties. Public authority is defined in section 49B in similar language to the Human Rights Act. The relevant legal entity, the Royal Mail Group, was included as a public authority in the original Regulations, but removed by subsequent statutory instrument, following a number of requests from the Group. Assertions that the regulation was made for an impermissible purpose and that it was irrational were rejected by the Administrative Court. However, there was a strong case made that the purpose of the regulation was to promote competition (backed up by a number of Ministerial statements and the explanatory memorandum). If this is not an improper purpose, it is still certainly of interest to us if interested in the role of public authority duties, as it serves as a timely reminder that the decision to exclude or include a body from a particular list of public authorities is open to challenge, perhaps awaiting more compelling facts.<sup>62</sup>

It would be most interesting to see how a body included as a public authority would fare if challenging a designation of itself by way of statutory instrument (as opposed to Southern Cross's argument in *YL* which was against a judicial understanding of its activities as subject to the HRA). The Irish case of *Central Applications Office v Minister for Community, Rural and Gaeltacht Affairs*, where a decision to list a private body created by universities and other higher education institutions to process student applications as a public body for the purposes of the Official Languages Act was unsuccessful, is perhaps such an example.<sup>63</sup>

<sup>61</sup> [2008] EWHC 3158 (Admin).

<sup>62</sup> With regard to this particular legislation, there was in fact no express provision for regulations defining public bodies – it was the decision of the Secretary of State to provide in the relevant regulations that they would apply to specified bodies that made the difference. Indeed, the more general (but less significant) requirements of section 49A would seem to apply to all public authorities without the need for further intervention.

<sup>63</sup> [2008] IEHC 309. There were two objections to the designation of the CAO, based on specific aspects of the Minister's (limited) power to prescribe. The High Court found that the CAO was not a 'body, organisation or group performing functions which previously stood vested in a body, organisation or group under public ownership or control' (finding indeed that its functions were new, were not vested by law, and that the universities were not under public ownership or control), but that it was a 'body, organisation or group on which functions in relation to the general public or a class of the general public stand conferred or permitted by any enactment or by any licence or authority given under any enactment', as the exercise of its functions was permitted by authority under the university legislation. However caution is

Another case of note is the status of Network Rail (which as we saw earlier is not subject to the Human Rights Act) for the purposes of the Environmental Information Regulations. The Regulations, similar in some regards to freedom of information provisions, and supervised by the same Information Commissioner, are also quite important to the citizen who would scrutinise the actions of powerful bodies. The regulations implement a European directive (2003/4/EC), which in turn implements within the EU the Aarhus Convention.<sup>64</sup> Under section 2(2) of the Regulations, public functions include any body that is covered by the Freedom of Information Act, but also 'any other body or other person, that carries out functions of public administration'. The Information Commissioner found that Network Rail was covered by this provision,<sup>65</sup> but on appeal the Information Tribunal found that Network Rail did not carry out 'functions of public *administration*', or in the alternative that it did not carry out public functions (relying in part on *Cameron*).<sup>66</sup> Again, the additional flexibility granted by the ability to include bodies other than those designated by Act of Parliament or statutory instrument inevitably lends itself to litigation. It is also difficult to see what is gained from the term 'functions of public administration' (whether with the extremely narrow construction placed on it by the Tribunal or otherwise), particularly in the light of Lord Nicholl's distinction between 'governmental function' and 'public function' for the purposes of section 6 of the HRA in *Aston Cantlow*.<sup>67</sup> However, as it is relatively close to the term of art included in both international convention and European directive ('public administrative functions'), this may be a necessary distinction to make.

### Legislative borrowing

A practice has already developed of using the language of section 6 of the HRA in other statutes. The Freedom of Information Act is one, as is the Disability Discrimination Act 2005 and the Race Relations (Amendment) Act 2000. The language is used in a slightly different context (providing for things like co-operation and information sharing with and delegation to 'public authorities') in the Education and Inspections Act 2006 and the Police and Justice Act 2006. However, these statutes do not in every case provide that a

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necessary in drawing any conclusions from this summary as significant emphasis was placed by Murphy J on the Irish text which, under the Irish constitution, determines the matter when there is a conflict between it and the English text, as there was in a number of relevant places.

<sup>64</sup> 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

<sup>65</sup> Decision FER0071801, [http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_FER0071801.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_FER0071801.pdf).

<sup>66</sup> Appeal EA/2006/006, [http://www.informationtribunal.gov.uk/Documents/decisions/networkrailtdvtheinformationcommissionerandnetworkrailinfrastructureltd\(17july2007\).pdf](http://www.informationtribunal.gov.uk/Documents/decisions/networkrailtdvtheinformationcommissionerandnetworkrailinfrastructureltd(17july2007).pdf).

<sup>67</sup> *Aston Cantlow* [10]-[12].

body subject to the HRA is similarly subject to the statute in question; instead, inclusion on a list is required to seal the deal in some situation, creating further sub-categories of public authorities. So in the case of the Freedom of Information Act, the system of designation under section 5 can be seen as having two elements to it – i.e. it is a combination of a designation approach and a functional one. Bodies must first be exercising relevant functions (with the statute using the same language as the Human Rights Act) in order to be designated; a designation of a body not captured by that definition will surely be challenged and quashed as *ultra vires*. The Disability Discrimination Act, with respect to which it is unclear whether designation is necessary or not after *Brown*, even allows bodies to be excluded by regulation from the definition (again using HRA language) of public authority. The Race Relations (Amendment) Act is slightly different again. It is surely likely, though, that if this increasingly significant group of statutes uses the HRA test rather than the *Datafin* one (if there is a difference), then modifications to the HRA test (whether through judicial development or legislation along the lines proposed by the Joint Committee) must have a knock-on effect on the status of public authorities in the 'statutory' category.

The curious phrase "person certain" may continue to be part of the problem. In *Brown*, it is noted by the Court that 'the draftsman used the expression "person certain" to emphasise the fact that the public authority must be an identifiable natural or legal person', contrasting it with the alternative word 'person' as defined in the Interpretation Act, which is perhaps at the outer limits of plausible interpretation.

It is also possible for bodies to be designated as possessing powers that would be commonly understood as pertaining in the first instance of public authorities, without defining them as such. It is difficult to understand how certain bodies, such as RSLs, should enjoy the benefits of exercising public functions (such as the power to apply for an anti-social behaviour order pursuant to the Crime and Disorder Act)<sup>68</sup> but not be subject to the obligations of such.

Even when proposals for new legislation are put forward, though, there is what can only be understood as a creative ambiguity in the words of their proposers. Most recently, when it was suggested in a White Paper that there be a new statutory duty along similar lines as the familiar equality duties to address social mobility / class questions,<sup>69</sup> the language was that consideration would be given to "a new strategic duty on central departments and key public services" to address these issues: what is a central department, let alone a 'key public service', and who will decide?

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<sup>68</sup> Crime and Disorder Act 1998, s 1A (inserted by s 61 of the Police Reform Act 2002).

<sup>69</sup> Cabinet Office, 'New Opportunities: Fair chances for the future' (Cm 7533, 2009).

## ***Recent developments in self-regulation and co-regulation***

### **Co-regulation or self-regulation?**

Having considered the various types of control placed on public authorities, it is now appropriate to look to current developments in self-regulation, in order to assess whether those affected by the decisions of such bodies are given satisfactory rights of redress. Indeed, while the various changes above were in progress, self-regulation too was being joined by a close cousin, 'co-regulation', which is a favoured solution to many contemporary problems. The approach blends the independence and non-intervention of self-regulation with limited oversight by established public authorities, and is increasingly encouraged by the European Commission and others. Typically, co-regulation includes a legal connection (possibly though not necessarily statutory) between a non-state regulatory system and state regulation, discretionary power exercised by the non-state system, and the involvement of the bodies or persons being regulated in the process of regulation. In fact, since the Companies Act 2006 (part 28), transposing provisions of the Takeovers Directive (2004/25/EC) came into force, it can be argued that *Datafirs*'s Takeover Panel itself is in the co-regulation category, as its functions now have a clear statutory basis.

However, even in co-regulation situations, where it would be thought that the issues of public functions would be a little more clear-cut, it is not always so. This issue arises in *R (Siborurema) v Office of the Independent Adjudicator*,<sup>70</sup> dealing with the regulatory system for student complaints envisaged in the Higher Education Act 2004. The OIA was created by universities as a limited company without share capital in 2003, and subsequently recognised by the Secretary of State pursuant to the Act as the 'designated operator' for a student complaints scheme with effect from January 2005. It argued that amenability to judicial review would hinder its role to 'serve students and HEI's cheaply and efficiently',<sup>71</sup> but the Court of Appeal rejected the argument, particularly in relation to whether the complaints scheme was within the terms of the authorising Act.

This is of some importance in the context of the operation of the Office, which is a typical co-regulation scenario: a Minister can recognise the non-governmental body if it is operating in accordance with a set of principles set out in the statute. It is found that a correct reading of the Act shows that the designated operator would be performing a public function, making it different to institutions such as purely private arbitrators.<sup>72</sup> The claim was rejected on the merits (with the scope for review appearing quite narrow), as

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<sup>70</sup> [2007] EWCA Civ 1365.

<sup>71</sup> [2007] EWCA Civ 1365 [41].

<sup>72</sup> [49] (Pill LJ), [69] (Moore-Bick LJ).

was a subsequent application<sup>73</sup> and the OIA reports that there have been 13 other applications where permission to apply was not granted.<sup>74</sup> This is perhaps a satisfactory situation, and it is clear that the system is not self-regulation based on contract (or something resembling contract), as students affected by its decisions are not party to any such contract, which (if relevant) is between the OIA and the subscribing universities and/or between the OIA and the state. However, it remains troubling to observe that as far back as its first annual report, the OIA was reassuring the public that one of its two forms of accountability was the way in which its decisions 'are constrained by the possibility of judicial review' (the other form was the designation under the Higher Education Act, which could be revoked),<sup>75</sup> while subsequently going to court in *Siborurema* with the argument that it should not be so constrained. The OIA is also not subject to the Freedom of Information Act, though surely should be considered for inclusion in a future section 5 order.

### **Killing Virgin Killer: the continuing power of self-regulation**

On December 5<sup>th</sup> 2008, Wikipedia disappeared.<sup>76</sup>

It turned out that the reason for the site becoming inaccessible to most UK users was a system of filtering unknown to most Internet users, steered by the private-sector Internet Watch Foundation. The most important aspect of the controversy, for our purposes, is that it promotes public discussion on the role of the IWF, which while a core issue in Internet law and policy, is still a relatively unknown one. The IWF is a private body that plays a role in the regulation of UK Internet access - not a statutory role but a self-regulatory role. For those critical of Internet censorship, this is a particularly problem, as although the State has declined to intervene, transparency and accountability are also absent.

The IWF has played a dual role in the control of alleged child pornography, sending takedown notices to hosts of UK-based content (though that task has been broadly completed with little or no such content said to remain or being newly published) and creating a blacklist of non-UK content which ISPs then proceed to block (usually by returning a page not found (404) error to a user who requests the page by entering the URL or clicking on a link) through systems such as Cleanfeed.

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<sup>73</sup> *R (Arratoon) v OIA* [2008] All ER (D) 160 (Nov).

<sup>74</sup> <http://www.oiahe.org.uk/pathwayproject/OIA-Pathway-Project.pdf> [4.22].

<sup>75</sup> OIAHE, 'Annual Report 2004' <http://www.oiahe.org.uk/docs/OIA-Annual-Report-2004.pdf> 18.

<sup>76</sup> For the background to this incident, the list of news articles and broadcast transcripts compiled by Wikipedia users ([http://en.wikipedia.org/wiki/Wikipedia:Administrators%27\\_noticeboard/Media\\_coverage\\_of\\_2008\\_IWF\\_action](http://en.wikipedia.org/wiki/Wikipedia:Administrators%27_noticeboard/Media_coverage_of_2008_IWF_action)) is of particular value.

In this case, the problem arose in relation to a photograph<sup>77</sup> of an album cover, the album being 'Virgin Killer' by The Scorpions. The image features a (partially obscured) photograph of a naked female child, although the initial listing blocked the page (i.e. text and photo) rather than the image alone. The image, a controversial one to begin with, was also available on various websites, and the album itself, including in some cases the original cover, is available on the second-hand market; an alternative version with a less objectionable cover was also issued. The situation was complicated by the interaction between the technological configuration of the ISP blocking and Wikipedia itself, which meant that, in practice, many UK users could not edit any pages on Wikipedia while the blocking continued.

The IWF issued a number of statements,<sup>78</sup> and also gave interviews to the UK media; for example, the IWF spokesperson concluded a discussion on BBC Radio 4's Today programme with "We apply the Protection of Children Act and the UK sentencing guidelines". The difficulty here is apparent, in that there is no clear line of legal authority between the Act, the Sentencing Guidelines, and the IWF. In particular, there is a limited right of appeal within the IWF,<sup>79</sup> and its discussions are broadly effective, from the point of view of domestic Internet users (i.e. an IWF decision means, in practice, that a page cannot be accessed by a user without special skill).

With that in mind, given the suggestion that the system could be rolled out for other types of content (suicide websites, promotion of terrorism), or used as a policing tool, or used in IP enforcement, it is necessary to address these issues before any extension is even considered. Already, public authorities such as the Ministry of Justice recommend that reports of images covered by the new 'extreme pornography' offence<sup>80</sup> be sent to the IWF rather than the police.<sup>81</sup>

Is an IWF decision— or an ISP action on the basis of such a decision – subject to judicial oversight of any sort? The IWF has itself asserted that it is subject to the Human Rights Act, though at the level of a Board meeting,<sup>82</sup> and not tested in court. The ISPs have made no such concession, nor would they be likely to.<sup>83</sup> There is the added dimension that testing the grounds of review through a test case is far from likely – seeking a legal remedy for the blocking of access to a non-UK webpage (which in many cases is not officially marked as blocked, but is merely unreachable through what looks like a computer error) allegedly containing material that generally condemned by society and subject to heavy legal penalties is not an everyday event. An expansion in

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<sup>77</sup> 'Virgin Killer' [http://en.wikipedia.org/wiki/Virgin\\_Killer](http://en.wikipedia.org/wiki/Virgin_Killer).

<sup>78</sup> <http://iwf.org.uk/media/news.250.htm>.

<sup>79</sup> <http://iwf.org.uk/public/page.148.341.htm>.

<sup>80</sup> Part 5 of the Criminal Justice and Immigration Act 2008.

<sup>81</sup> <http://www.justice.gov.uk/docs/extreme-pornographic-images.pdf>.

<sup>82</sup> Akdeniz, *Internet Child Pornography and the Law* (Aldershot: Ashgate, 2008) 264. Thanks to TJ McIntyre (University College Dublin) for bringing this reference to my attention.

<sup>83</sup> See e.g. L Edwards, 'From child porn to China, in one Cleanfeed' (editorial) (2008) 3(3) SCRIPTed, <http://www.law.ed.ac.uk/ahrc/SCRIPT-ed/vol3-3/editorial.asp>.

the IWF's role, particularly in the context of the extreme pornography offence (which was subject to vocal criticism from a number of corners), may in fact bring these issues to the forefront after all. There does appear to be life in self-regulatory approaches despite the lack of clarity with regard to accountability.

## Comment

The statutory designation approach brings with it the advantage of certainty and allows all parties to plan their activities (whether in relation to compliance with the law by the said body or use of the law by a citizen). The functional approach allows applicants to seek a remedy against a body even if such was not directly contemplated by Government, or indeed where a strategic decision is taken to avoid that body being held to account. It is clear that it will not be possible to gather all the remedies of traditional judicial review, the Human Rights Act and the new statutory provisions into one approach. Therefore, what may be the best solution for the time being is to pursue some measure of a joined-up approach, where (known) information on all possible remedies is easy to access, and an honest and open discussion takes place at the inception of any new body or function with regard to its legal status. Special caution is necessary in the situation where a public function is performed by a party not subject to duties such as freedom of information and equality, particularly where there is a requirement of action on the part of Parliament or a Minister, that a two-tier situation does not develop – if for example a broad definition of public authority were to be adopted by the courts and by Parliament, and it applied to both judicial review and the HRA, there would still be a division – perhaps an unsustainable one – between those bodies subject to judicial review and the HRA but not the statutory provisions and those subject to all three. This is unquestionably important in the case of self-regulatory bodies, which have come within the scrutiny of the courts under protest (or in the case of the Press Complaints Commission, continue to dodge that bullet quite elegantly), but are rarely subject to other obligations. It is disappointing to note that there is not yet a culture of examining the potential public authority/public function status of a self-regulatory or co-regulatory body as part of the process of examining the most appropriate approach.<sup>84</sup>

The approach taken by Parliament with respect to the partial abrogation of *YL* in the Health and Social Care Act has little to offer, as it leaves a controversial general principle that restricts the functional approach intact while effectively engaging in statutory designation for a limited class of functions. Greater clarity on the part of the courts is needed as to the relationship between the

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<sup>84</sup> See for example 'Identifying appropriate regulatory solutions: principles for analysing self- and co-regulation' (Ofcom, 10 December 2008), which deals with some of what we can understand as the the *objectives* of judicial review, human rights and other features of legislation, but in an apparently separate domain altogether.

various heads of review, as if discretion is to stay with us, the inconsistent findings as to the separate or merged public function tests for judicial review and HRA claims clouds the exercise of this discretion perhaps beyond redemption. There is no overwhelming requirement for the threshold requirements being the same – judicial review and HRA duties perform separate functions and there are clearly matters which would be the subject of one but not the other. There is similarly no objection in principle to a single test, and such a test would have the advantage of providing some stability for all concerned. Without some action, though, inconsistent application and evasive tactics mean that even in a supposedly litigious and over-regulated society – “this whole health and safety, Human Rights Act culture [that] has infected every part of our life”,<sup>85</sup> there may still be some Alsacias in England.<sup>86</sup>

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<sup>85</sup> Speech by David Cameron to the Conservative Party Conference, 1 October 2008, [http://www.conservatives.com/News/Speeches/2008/10/David\\_Cameron\\_Conference\\_Speech\\_2008.aspx](http://www.conservatives.com/News/Speeches/2008/10/David_Cameron_Conference_Speech_2008.aspx).

<sup>86</sup> ‘There must be no Alsacia in England where the King’s writ does not run’: *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478, 488 (Scrutton LJ), quoted by Donaldson MR in *Datafin* 827.