

THE PUBLIC/PRIVATE DIVIDE: AN OUTDATED CONCEPT OF GOVERNANCE IN ENGLISH LAW

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Abstract: Although the difference between ‘public’ and ‘private’ appears simple in theory, in English law the distinction can be uncertain. The trend towards privatisation and contracting-out to the private sector of functions once carried out by the State has blurred the line between what is public and what is private. These new forms of governance have challenged the traditional ambit of the State and given rise to the question of whether private bodies, acting on behalf of the State or exercising functions of the State, should be subject to duties to serve the public interest and higher standards of accountability in the same way as public bodies. At present, when private bodies exercise public functions, individuals are inadequately protected against the abuse of power.

This paper considers the controversy surrounding this issue, and concludes that the public/private divide is an outdated concept in English law which should be abolished in order to control abuses of power and to ensure that those exercising power are subject to the same standards of accountability.

Keywords: Public/Private divide, Judicial Review, Human Rights Act 1998, Privatisation, Contracting-out, Accountability.

1. Introduction

Legal accountability in the public law arena is achieved via claims for judicial review which examine the lawfulness of action or inaction in relation to the exercise of a public function (Part 54.1(2)(a) Civil Procedure Rules) and claims brought under the Human Rights Act 1998 (HRA). Prevailing judicial attitudes assume that it is possible to draw a strict public/private distinction within English law, yet this divide has become of less importance due to the increase of privatisation and contracting-out of public functions. This paper highlights controversial issues arising from judicial attempts to distinguish between public and private law, by examining the definition of ‘public body’ for judicial review claims and the meaning of ‘public authorities’ by virtue of the HRA 1998. It will analyse the difficulties of the public/private divide and consider whether the distinction should be abolished or maintained.

2. The public/private divide

The distinction between public and private law has followed a complex course arising from public functions and private activities. The main function of public law is to impose duties to serve the

public interests and to regulate relationships between the individual and the State (Oliver 1999, 13). Private law is concerned with private activities and relations between private citizens (Cane 2011). Thus, 'private bodies are entitled, though to greater and lesser extents, to pursue self-regarding interests' (Oliver 1999, 13). It follows that public bodies are subject to higher standards of accountability, due to the power held by public officials over citizens. Conversely, the same accountability is not available in private law remedies, as private bodies are not amenable to judicial review. For instance, the law of contract, tort and crime may impose specific ways to prevent abuse of power by private companies, but the courts have no general supervisory jurisdiction to pass judgement on whether a private company has abused its power (Endicott 2011, 605). Moreover, in most cases private law remedies are limited to enforceability of contract or damages, whereas in public law remedies, an individual is able to challenge a public body's decision through judicial review. As a result, there is reduced protection for individuals against abuses of power when private bodies have acted beyond their powers.

Although the public/private distinction appears simple in theory, the precise legal boundaries of where 'State' action ends and private activity begins are difficult to draw. Successive Governments' policies since the late 1970s, from Thatcher's 'rolling back the frontiers of the State' to the current coalition government's 'Big Society' agenda, has resulted in the privatisation of public power, contracting-out of public services to private bodies and the use of public/private partnerships (PPPs) (Endicott 2011, 580).

Now that the State discharges many public law obligations via private law arrangements, it can be argued that this demonstrates an inadequacy in protecting individuals against abuse of power, for when there is a breach of human rights, or other abuse of public power by private bodies, those responsible are not subject to the same legal constraints as a public entity exercising such power. Legal accountability (via the courts in judicial review proceedings), political accountability (via Parliamentary scrutiny) and administrative responsibility (via the public sector Ombudsmen) are missing. Given that private bodies are increasingly exercising public functions, often the only legal option when a private body has abused its power is a private law remedy. However, this is generally ineffective, as private law remedies are often inappropriate, since they often do not deal with abuse of power. For example, if a dispute arose due to misrepresentation in a care home being run by a private company, this would be resolved by enforceability of a contract without looking at the legality or lawfulness of the power exercised or damages offered to the claimant. Therefore, it would mean that the actual abuse of power would go unremedied and there would be no judicial

intervention, thus exposing an accountability gap in human rights protection within the English jurisdiction.

In order to control the abuses of power and ensure that those who exercise power are subject to the same standards of accountability, it is proposed that the public/private divide should be abolished. However, not all academic commentators agree.

2.1 Justifications for the public/private divide

Cane argues that a distinction is necessary to provide different legal regimes for the performance of public functions and private activities (Cane 2011, 5). His reasoning is based on the duties and obligations; for example, public administrators are responsible for conducting their duties in the public interests, whereas the same obligations do not apply to private bodies.

Lord Woolf also welcomed the development of a substantive public/private divide, maintaining that there is a need to differentiate the standards to which public bodies should be required to conform by the courts when performing public functions, but the same should not be applicable to private bodies (Woolf 1986, 238). Public law is designed to protect the public, since it 'provides public bodies and the court with protection against applicants ...' (Woolf 1986, 229).

2.2. Criticism of the public/private divide

However, Lord Woolf's proposal seems to be outmoded in the era of privatisation and contracting-out of public power, since consideration needs to be given to private bodies which are exercising public functions. It should be noted that if the court's public role will only involve dealing with public bodies, then it means that individuals will not be protected from abuse of power exercised by private bodies and increasingly abuse of power will be left unchallenged.

Similarly, although Cane's arguments also appeared to be calling for distinct duties and obligations for public law and private law in order to maintain the divide, he fails to take into account the modern concept of governance whereby private bodies are increasingly carrying out tasks on behalf of the State, meaning that the public/private divide appears distorted and it is perhaps no longer possible to restrict public law functions to fall under public law only.

Opponents of the public/private divide consider the distinction obsolete, or normatively undesirable, as it misrepresents the way power is distributed and exercised (Bamforth 2003, 272). Since

privatisation, as public authorities contract-out their public power to private companies, the two spheres, public and private, have become intertwined by contractual notions of public functions. When private bodies exercise these public functions they should be subject to public law duties, yet the measures to secure accountability against public-sector bodies exercising similar functions (such as judicial review proceedings) do not apply when the decision-maker is deemed to fall in the private-sector. The availability of judicial review claims should be decided on the basis of the nature of power being exercised, rather than whether the body in question is classed as a government agency. Borrie suggests that, as power shifts from the public to the private sector, there should be more accountability measures, such as placing the judiciary in a supervisory role over powerful private bodies to ensure that the public are protected from abuse of power (Borrie 1989, 559).

Indeed, many commentators acknowledge that ‘... all those who wield power should be accountable and should be subject to general principles of good administration’ (Borrie 1989, 558). This would mean that public power which is exercised by private bodies would be subject to higher standards of accountability measures. It would also ensure that private bodies are acting in accordance with duties of accountability and fairness.

3. Current judicial approaches to the public/private divide

The judicial concern to label a decision-maker as belonging to either the public-sector, and therefore subject to the reach of judicial review proceedings, or the private-sector, and therefore not, has served to expose this accountability gap. Judicial review courts could make the public/private distinction appear less rigid by considering the nature of the powers being exercised, rather than focusing on the source of the power (whether the body itself is formally an organ of government). This approach, if embraced by the judges, would reduce the accountability gap; if a decision-maker wields public power they would be subject to public law remedies regardless of their legal status as a public-sector or private-sector body.

The landmark case of *R v Panel on Takeovers and Mergers, ex parte Datafin* [1987] appeared to herald such an approach when it was held that the decision of the *Panel on Takeovers*, a non-governmental body, could be challenged by means of judicial review because it was exercising a public function or a power with a public element. Lloyd LJ suggested the amenability of an entity to judicial review depends neither on the body’s identity or status, nor on the source of its power, but rather on the nature of the functions it performs. The *Datafin* approach, if followed, would expand the scope of judicial review to the exercise of public functions by either public or private entities. In

cases where public power has been contracted-out to a private body, its decisions would be challengeable through judicial review.

However, in *Datafin* the Court of Appeal failed to indicate how 'public functions' should be determined other than simply stating that the decision in question must be broadly 'governmental' or possess a 'public element'. Therefore, *Datafin*, although appearing to advocate a more flexible approach, also highlighted the difficulties of drawing a public/private divide and subsequent decisions revealed a judicial retreat to a more rigid stance.

In *R v Football Association Ltd, Ex Parte Football League Ltd* [1991], although the *Football League* exercised public power through its 'monopolistic powers' and its relationship with the public, it was held that it was not a public body susceptible to judicial review as it did not exercise governmental powers (*The Times* 1991, August 22, 913). It is worthy of note that the court followed a 'but for test' in this case; 'but for' its existence, would government have stepped in to create a similar body? However, the practicality of this test created another obstacle, since what is considered governmental depends on the politics of the judiciary. As Campbell observes, in practice this test is very difficult to apply coherently, as it requires the court to make an assessment of whether the government would undertake a particular function (Campbell 2009, 92). Now, it is unclear how the court would apply this test in order to determine what functions, or what sort of functions, the government would undertake. It is not clear as to what activities would be considered governmental leaving the law in an uncertain state.

Similarly, in *Ex parte Aga Khan* [1993], the applicant, a racehorse owner, had agreed to be bound by the Jockey Club's contractual rules, but when the applicant's horse was disqualified he sought, in judicial review proceedings, an order to quash the Jockey Club's decision. However, judicial review was refused because the Jockey Club's powers and duties did not derive from statute. Sir Thomas Bingham MR focused on the need for governmental powers and, although he acknowledged the exercise of public power, he determined the source of power being in no sense governmental. Furthermore, Hoffman LJ advocated that the Jockey Club's activities were governed by private law, as it operated exclusively in the private sphere, and individual members were bound by the club's rules. The source of power was not public as its powers emanated from a contractual source (*Ex parte Aga Khan*, 931). Again, the Court of Appeal's decision suggests a sharp dilution of the *Datafin* approach by placing emphasis on the source of the decision-maker's power rather than the nature of the power being exercised.

Unfortunately, judicial reluctance to embrace the *Datafin* functionality test was further underpinned in *R. v Insurance Ombudsman Bureau Ex parte Aegon Life assurance Ltd (IOB)* [1994]. Rose LJ held that *IOB* was not a public body because of its private nature, its authority deriving solely from contract and, as such, it fell outside the scope of judicial review. Clearly, it can be shown that the High Court decided this case based on the source of power despite *IOB* being given State power recognised by the Financial Services Act [1986] and, more importantly, although the facts of this case were similar to *Datafin*, the court did not apply the functionality test at all. This inflexible judicial approach leaves private-sector bodies exercising public law powers and duties outside the reach of public law remedies. Indeed, according to some critics the English courts' decisions are 'ad hoc and unprincipled' (Campbell 2009, 521).

4. The judicial approach under the Human Rights Act 1998

With the coming into force of the Human Rights Act (HRA) commentators argued that the Act had potentially far-reaching significance for triggering a more liberal judicial approach to the reach of judicial review. The HRA98 does not follow the narrow 'source of power' approach to determining public-sector status so favoured by the judiciary and appears to promote the *Datafin* functionality approach to identifying decisions in the public sphere (Bamforth 1999, 159).

Although 6(1) HRA 1998 assumes a public/private divide, stating 'it is unlawful for a public authority to act in a way which is incompatible with a Convention right', 'public authority' is defined to include: 'any person whose functions are of a public nature...' (s. 6[3]b). In short, although it appears that a private body cannot be subject to any direct scrutiny under the HRA, it would be classified as a 'public authority' if its functions are of a public nature. By this definition alone, it appeared the Act had introduced a wider approach to the scope of public law which is similar to the liberal *Datafin* approach. This is supported by the comments of Jack Straw (then Home Secretary) during the 1998 Parliamentary debates on the Human Rights Bill. Straw stated that the issue of privatisation and contracted-out public functions needed to be sorted out, requiring the courts to consider the nature of a body and the activity in question (1998 HC Deb cols 409-410). In the debate on how to redress the accountability gap in human rights protection, the government foresaw 'public authorities' under the Act as including bodies, such as private-sector care homes, housing associations, and private or voluntary sector bodies providing services to children outside the maintained education sector. Clearly this goes much further than current judicial approaches to the types of body caught by judicial review and it serves to highlight further the difficulty of drawing a distinct divide between

the public and private spheres. Governmental concern, when the HRA98 was being passed, appeared to be to acknowledge changes in modern governance and therefore ensure that public functions are not left unchecked; instead a functional approach was adopted by the Act.

However, examination of judicial interpretation of the HRA98 reveals a judicial reluctance to embrace the functional approach. In the case of *R (Heather) v Leonard Cheshire Foundation* [2002], a charity, running a retirement home, was contracted to discharge the public law duties of a local authority (to provide accommodation and care for the elderly) but was held not to be a public authority under the Act. The Court of Appeal's rationale was that although its function derived from a public body, the charity itself did not have a public element, as it had to be established it was 'standing in the shoes of the State when exercising that function' (2002, paragraph 22). The Court's narrow approach was criticized by the Joint Committee on Human Rights, who stated that:

a central provision of the Act has been compromised in a way which reduces the protection it was intended to give to people at some of the most vulnerable moments in their lives (2003-4 HL 39, HC 382).

Therefore, the restrictive approach undermines the effectiveness of public law controls because there is a lack of accountability for those exercising public functions in the private sector.

Nonetheless, in *R (Beer [t/a Hammer Trout Farm]) v Hampshire Farmers' Markets Ltd* [2004], the claimant successfully brought judicial review of the decision reached by a private-sector company (which had taken-over the responsibility for the organisation of farmers' markets from the local authority) to refuse his application for a trading licence. In the Court of Appeal Dyson LJ asserted that:

unless the source of power clearly provides the answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised (paragraph 16).

The rationale for granting judicial review rested on the fact that the power being exercised had 'a public element or flavour or character to bring it within the purview of public law': the company was still assisted by the local authority and the markets were held on local authority owned land (*R (Beer [t/a Hammer Trout Farm]) v Hampshire Farmers' Markets Ltd* [2004] p. 240). Although this 'nature of

power' and functional approach appears to suggest greater flexibility, it still leaves uncertainty over the circumstances when a private body will be held to be exercising public functions.

In *YL v Birmingham City Council* [2007], the claimant (YL) was an Alzheimer's disease sufferer and resident in a care-home run by Southern Cross Health Care Ltd (a commercial company). Her place in the home was funded by the local authority (Birmingham City Council) under its statutory duty to provide residential accommodation for those in need of care. The dispute arose after the care-home gave her notice to leave the home, following a disagreement between care-home staff and her family. The central issue in the claim centred on whether Southern Cross was a public authority under the Act. The House of Lords adopted a very narrow approach to the issue and concluded that Southern Cross was not carrying out public functions and therefore was not caught by the Act. The Lords drew a tenuous distinction between the statutory functions and responsibilities of the council (the actual *arrangement* of care) which amounted to governmental functions and, therefore, were subject to challenge and the mere *provision* of care and accommodation by Southern Cross which were not challengeable in public law. The Lords also felt it significant that Southern Cross was a private, commercially-driven, company with a profit-making goal, something which distinguished it from a local authority run care-home. Lord Scott held that it was necessary not only to look at the nature of the powers being exercised, but also to focus on the reason why those powers were being exercised.

Public bodies exercise their powers in order to discharge their public law obligations, yet private-sector bodies acted under private law contractual obligations in pursuit of commercial activities. The judicial concern (of the majority) in this case appeared to be that it was not appropriate to apply public law accountability standards to private-sector bodies as this would reduce their commercial competitiveness, making it less likely that private companies would come forward to assist with the discharge of local authorities statutory duties. Accordingly, the public/private divide was necessary; only if there was a much closer connection between the private company and the local authority would public functions exist. It is clear from this decision there are several factors the courts will take into account to determine public functions, for example, where a company receives substantial public subsidies, or it is primarily discharging statutory duties rather than acting for commercial gain, or has coercive powers over the public.

Accordingly, although this decision was widely criticized for its narrow approach, it does seem apparent that the Lords contemplated that there would be some circumstances when private bodies

exercising public functions will be deemed susceptible to public law scrutiny. However, the law is left in an uncertain state with the boundaries between public and private law as unclear as ever. It appears that although there are a variety of factors the courts will take into account, there is not one determinative issue and whether a body is performing a public function or not, for the purposes of the Act will be determined depending on the facts presented before the court. Whilst the boundaries have become more difficult to draw, the public/private distinction has increasingly become blurred and the decisions by the English courts have left some wider complications in relation to the reach of public law. As such, Oliver suggests that the HRA 1998 should place emphasis on whether it enjoys special powers and authority. Moreover, clarity should also be given whether it is under duty to act in the public interest through democratic accountability (Oliver 2000, 492). As a result, the meaning of public authority would cover various bodies, because the courts would be required to adopt a more flexible approach to determining the existence of public functions. Therefore, those subjected to abuse of power would be protected regardless of their position within the public or private sector.

More importantly, the courts' attempts to maintain the public/private divide could also have wider implications for public law. Freeland has commented that the public/private divide is more about whether to recognise or accept public law as a distinct part of English law (Freeland 2006, 95). Similarly, Palmer argues that in order for human rights values to infiltrate our institutions and to become part of our culture they must overlap both public and private spheres (Palmer 1998, 573). Evidently, the growth of contracting-out of public power to private bodies has caused the two spheres to merge and, therefore, public law cannot be viewed distinctly. The legal uncertainties left by the divide or the blurred distinction expose an accountability gap; this does not make sense and a more liberal approach should be adopted by abolishing the entire divide.

5. Conclusion

From the examination of the English case law on the definition of a 'public body', it appears that the courts have adopted a narrow view in determining the status of a public body for the purposes of judicial review claims. Although a flexible functional approach was adopted in *Datafin*, the courts reverted back to the restrictive approach in its subsequent cases. Although the HRA 1998 indicated that a flexible approach should be taken, with its emphasis on whether a body is exercising public functions, the courts still followed a narrow approach. The courts appear too reluctant to accept that a private-sector body is carrying out public functions. However, that said, the HRA98 case law does reveal a judicial willingness to stretch the narrow approach by looking into the duty placed on a

body. The case law reveals a judicial check-list of factors which may be determinative of a public function in order to determine whether they would be susceptible to judicial review, in order to protect individuals' rights. Here, the courts have also shown some leniency in judicial review proceedings by adopting a fairly limited functional approach rather than a source of power approach. Therefore this shift is of great significance, indicating the courts' willingness to consider if there has been an abuse of power, which in effect undermines the public/private distinction.

The development of contracting-out power has caused some difficulties in drawing a clear divide, as public functions are being exercised by private bodies. Although the public/private divide continues to exist in theory, it appears quite blurred in reality. Developments of judicial review and the HRA 1998 in creating a distinct divide appear to have fallen through, especially in this modern age of privatisation and contracting-out of public power. In essence, following the modern concept of governance, private bodies are increasingly exercising public functions thereby undermining the principle of the public/private divide. Therefore, in order to control abuse of power and ensure that those exercising power are subject to accountability, this paper advocates that the public/private divide should be abolished.

Note

This article is extracted from a final year dissertation (2012) and has been amended slightly to complement Rahela Akhter's article, 'The public/private divide in EU law', published in *Diffusion* Volume 4, Issue 1.

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