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# *Venturing through the Public-Private Divide under the Human Rights Act 1998: Section 6(3)(b) and the Concept of ‘Functions of a Public Nature’*

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## ABSTRACT

A coherent framework of the public-private divide under Section 6 of the Human Rights Act 1998 is necessary to understand the reach of Convention obligations for ‘hybrid public authorities’ under Section 6(3)(b). It also contributes to clarify their amenability to judicial review under the Human Rights Act. Since the controversial decision of *YL v Birmingham City Council* [2007] UKHL 27 (hereafter, *YL*), little judicial guidance has attempted to clarify the conundrums left over by *YL* or propose approaches to determine the meaning of ‘functions of a public nature’ under Section 6(3)(b). This thesis presents a doctrinally coherent and principled approach to articulate the meaning of ‘functions of a public nature’ based on a reformulated version of Sections 6(3)(b) and 6(5). In doing so, it draws insights from (i) theories of the public-private divide in the legal context and (ii) common law judicial review under the jurisprudence developed from *R v Panel on Takeovers and Mergers, ex p Datafin* [1987] QB 815 (hereafter, *Datafin*).

## I. INTRODUCTION

This article investigates the meaning of ‘functions of a public nature’ under Section 6(3)(b) of the Human Rights Act 1998 (‘HRA’). It focuses on two issues. The first is the meaning of ‘public’ and ‘private’ under Sections 6(3)(b) and 6(5) HRA respectively, within the framework of the public-private divide (‘PPD’) under the section. The second, closely related to the first, concerns judicial approaches determining the scope of Sections 6(3)(b) and 6(5), thus the meaning of ‘hybrid

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public authorities”<sup>1</sup> (‘HPA’), under the controversial decision of *YL* and subsequent jurisprudential developments.<sup>2</sup> The decision is controversial because of its application of an institutional factors-based test in holding that Southern Cross Healthcare (‘SCH’) was not an HPA under Section 6(3)(b), despite the express wording of the section stipulating that the key issue is the public nature of any function exercised. Although more than ten years have elapsed since *YL*, the need for a coherent and workable framework for determining whether an institutionally private organisation qualifies as an HPA remains critical. This is because the effectiveness of Section 6 is pertinent to the overall success of the HRA; it is the mechanism through which the Act intends to achieve the objectives of making the rights under the European Convention on Human Rights (‘the Convention’) as incorporated in Schedule 1 HRA (‘the Convention Rights’) more accessible to individuals and easier to enforce.<sup>3</sup> Instead of only being able to raise Convention claims directly to Strasbourg, domestic private claimants can lodge Convention claims directly in domestic courts under the HRA. This article argues that the *YL*-jurisprudence on determining the meaning of ‘functions of a public nature’ and ‘private’ under Sections 6(3)(b) and 6(5) HRA respectively is unsatisfactory, and should be replaced with a principle-based approach, together with a revised version of Sections 6(3)(b) and 6(5). Given the existence of copious academic literature and judicial approach rejecting the relevance of Strasbourg jurisprudence under Article 34 of the Convention,<sup>4</sup> this article will omit any discussions on it.

The article will be divided into three parts. It will begin by analysing the nature of the obligation to act compatibly with the Convention from the perspective of HPAs. The *YL* judgment and its jurisprudence will then be unpacked and thematised into four analytical issues. Based on the identified issues, the article will then proceed to two issues which are critical to understanding the meaning of ‘public’ and ‘private’: (i) theoretical and doctrinal considerations of a framework of PPD, and (ii) the relevance of common-law judicial review on the question of ‘public function’.<sup>5</sup> Lastly, the article will examine two proposals to the meaning of Section 6(3)(b), and propose revisions to the existing statutory provisions and

<sup>1</sup> *Parochial Council of the Parish of Aston Cantlow v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [11] (Lord Nicholls).

<sup>2</sup> *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95.

<sup>3</sup> Ruth Costigan, ‘Determining “Functions of a Public Nature” under the Human Rights Act 1998: A New Approach’ (2006) 12(4) *European Public Law* 577, 579.

<sup>4</sup> Howard Davis, ‘Public Authorities as Victims under the Human Rights Act’ (2005) 64(2) *Cambridge Law Journal* 315, 321; Alexander Williams, ‘A Fresh Perspective on Hybrid Public Authorities under the Human Rights Act: Private-Contractors, Rights-Stripping, and “Chameleonic” Horizontal Effect’ (2011) *Public Law* 139, 147–154.

<sup>5</sup> Civil Procedure Rules (‘CPR’), Part 54.1. The notion dates back to *R v Panel on Mergers and Takeovers, ex p Datafin* [1987] QB 815 (CA).

methods of interpreting the new provisions. It will conclude that the new approach, in contrast to existing approaches, offers a principle-based analytically coherent approach to the meaning of ‘public’ and ‘private’ under Section 6 of the HRA, based on the principle of the need for public authorities to act compatibly with the Convention under the section.

## II. THE CONUNDRUMS UNDERLYING SECTION 6(3)(B) AND 6(5) OF THE HUMAN RIGHTS ACT 1998

### A. THE INTRICATE SCOPE OF THE OBLIGATION TO ACT COMPATIBLY WITH THE CONVENTION UNDER SECTION 6(1) HRA

Section 6(1) requires a public authority to act compatibly with the Convention. Public authorities are expected to “develop an informed respect for human rights [...] with the potential for violations thereby being reduced”.<sup>6</sup> By making public authorities answerable to allegations that they have failed to act compatibly with the Convention, Section 6(1) elucidates what constitutes ‘the State’ under the HRA. Instead of referring to the entirety of the governmental apparatus, ‘the State’ under the HRA refers to the range of organisations required to act compatibly with the Convention.<sup>7</sup> Therefore, the scope of ‘public authority’ under Section 6(1) should be understood as referring to the scope of ‘the State’ itself. Only organisations within the realm of the State are ‘public’ authorities, and thus required to act compatibly with the Convention. As will be discussed below, this is not limited to traditional governmental apparatus, for example, local authorities. The interpretation of ‘public authority’ is crucial in determining the rights of private claimants under the HRA, as they will only be able to rely on the ‘direct vertical effect’ of a Convention right if the respondent is a public authority.<sup>8</sup> In considering interpretive approaches to the HRA, it is necessary to locate them in the contemporary political and legal contexts within which the Act is situated.<sup>9</sup> This is because they affect the extent to which public authorities should be required to act in a particular manner; under Section 6(1), this refers to the expected standard of behaviour that would be considered Convention-compliant. The obligation to act compatibly with the Convention under Section

<sup>6</sup> Ruth Costigan and Richard Stone, *Civil Liberties and Human Rights* (Oxford University Press 2017) 38.

<sup>7</sup> Apart from s 6(5), Section 6 provides two exceptions to such requirement: (i) s 6(2) and (ii) either House of Parliament or a person exercising functions in connection with proceedings in Parliament (s 6(3)).

<sup>8</sup> Dawn Oliver, ‘The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act’ (2000) Public Law 476, 476.

<sup>9</sup> Conor Gearty, *Principles of Human Rights Adjudication* (Oxford University Press 2005) Chapter 1.

6(1) is further elaborated by Section 6(3)(b), where such obligation extends to “any person certain of whose functions are functions of a public nature”.<sup>10</sup> Given the lack of contrary statutory indications, ‘any person’ can include any private legal person, both individuals and organisations. Such a private person performing a public function is known as an HPA under Section 6(3)(b). By requiring an HPA to act compatibly with the Convention and allowing private persons to bring a claim against it, the HPA becomes a part of ‘the State’<sup>11</sup> – an HPA, alongside other organisations which fall under Section 6(1), are subject to the same requirement to act compatibly with the Convention. This means that ‘public authority’ under Section 6(1), by virtue of Section 6(3)(b), can include institutions owned by private individuals. The performance of public functions by privately-owned organisations epitomises a ‘modern mixed economy’ of service provision intended to be covered by the HRA involving both public and private sectors.<sup>12</sup> Delegation of governmental functions to private organisations takes place in such contexts – despite being privately-owned, HPAs, when performing functions delegated by the government, are expected to perform them in a Convention-complaint manner.

#### B. THE PUBLIC-PRIVATE DIVIDE PROBLEM AND A BRIEF EXAMINATION OF THE PRE-*YL* JURISPRUDENCE

As illustrated above, a private body only bears a Section 6(1) obligation when performing functions of a public nature. This means that Section 6(3)(b), in extending the Section 6(1) obligation beyond “core public authorities”<sup>13</sup> (‘CPA’), determines the reach of substantive obligations under the HRA.<sup>14</sup> The realm of the State is thus dependent on one’s interpretation of Section 6(3)(b). Therefore, an analytically coherent interpretation of the section, focusing on the nature of the impugned function(s), is crucial in providing an adequate safeguard against the violations of the rights of claimants by public authorities.<sup>15</sup>

The PPD under Section 6 of the HRA underpins the question of whether an organisation is subject to the Section 6(1) obligation: only a ‘public’ organisation would be subject to the obligation, and vice versa. For HPAs, an extra layer of complication is added by Section 6(5): if the nature of an act performed pursuant

<sup>10</sup> HRA, s 6(3)(b).

<sup>11</sup> Peter Cane, ‘Accountability and the Public/Private Distinction’ in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003) 250.

<sup>12</sup> Mark Elliott, “‘Public’ and ‘Private’”: Defining the Scope of the Human Rights Act’ (2007) 66 *Cambridge Law Journal* 485, 487.

<sup>13</sup> *Parochial Council of the Parish of Aston Cantlow v Wallbank* (n 1) [7]. This refers to bodies that are public authorities regardless of the function(s) they perform.

<sup>14</sup> Costigan and Stone (n 6) 39.

<sup>15</sup> Gearty (n 9) Chapter 8.

to a Section 6(3)(b) function is ‘private’, the HPA ceases to be a public authority in performing that act. This means the organisation is no longer subject to the Section 6(1) obligation, and a private claimant cannot rely on the direct vertical effect of a Convention right to litigate against it. As a result, it is important to maintain this distinction between ‘function’ and ‘act’. Lord Neuberger in *YL* observed that ‘function’ is “more conceptual and perhaps less specific”, and “a number of acts can be involved in the performance of a single function”.<sup>16</sup> For example, an HPA can breach its Section 6(1) obligation when performing some acts pursuant to a function delegated from a local authority, but other acts performed pursuant to the delegated function are only of a private nature. As the nature of an act only arises for consideration once the principal function it is based on is adjudged to be public, the function of the HPA is the first step in unpacking the “matryoshka doll”<sup>17</sup> leading to the answer of an HPA’s actual compliance with its Section 6(1) obligation.

Before turning to thematise the issues of the *YL* judgment, it is helpful to first sketch briefly the pre-*YL* jurisprudence, to highlight the analytical issues judicial approaches to Section 6(3)(b) suffer from. Firstly, in *Aston Cantlow v Wallbank* (hereafter, *Aston Cantlow*), Lord Nicholls noted that there is ‘no single test of universal application’ to determine whether a function falls under Section 6(3)(b).<sup>18</sup> A non-exhaustive list of factors was provided to assist in determining whether the impugned function is of a public nature.<sup>19</sup> In a different vein, *Poplar Housing and Regeneration Community Association Ltd v Donoghue*<sup>20</sup> and *R (Heather) v Leonard Cheshire Foundation*<sup>21</sup> (hereafter, *Heather*) have erroneously adopted an assessment based on the institutional characteristics of the private organisations rather than the functions they perform in determining whether they fall under Section 6(3)(b).<sup>22</sup> This is illustrated in Lord Woolf CJ’s judgment in *Heather*, which held that LCF’s provision of accommodation pursuant to a contract between a local authority and itself under Section 26 of the National Assistance Act 1948 (‘NAA’) is not a public function because it was performed by the charity only.<sup>23</sup> These rulings have been criticised by the Joint Committee on Human Rights as “unsatisfactory, unfair and

<sup>16</sup> *YL v Birmingham City Council* (n 2) [130].

<sup>17</sup> William Lucy and Alexander Williams, ‘Public and Private: Neither Deep nor Meaningful?’ in K Barker and D Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge University Press 2013) 78.

<sup>18</sup> *Parochial Council of the Parish of Aston Cantlow v Wallbank* (n 1) [11].

<sup>19</sup> *ibid* [12].

<sup>20</sup> *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48.

<sup>21</sup> *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All ER 936.

<sup>22</sup> Costigan (n 3) 584–589.

<sup>23</sup> *R (Heather) v Leonard Cheshire Foundation* (n 21) [15].

inconsistent with the intention of Parliament”.<sup>24</sup> It is because they failed to give weight to the functions performed by the private organisation and their impacts on claimants; such approach is “likely to deprive individuals of redress of their [Convention Rights]”.<sup>25</sup>

### C. THE *YL* DECISION

Instead of sketching the *YL* judgment in its entirety and the copious amount of academic commentary and literature on it, the following analysis thematises the judgment into three issues: (i) the majority’s inclination to an institutional, instead of a functional, test under Section 6(3)(b), (ii) the majority’s erroneous conception of ‘public’ and ‘private’ under Section 6(3)(b) and 6(5), and (iii) the judges’ differing opinions regarding the relevance of common-law judicial review cases. Continuing from *Aston Cantlow*, the non-exhaustive list of factors employed in determining whether SCH is an HPA “suffer from a lack of clarity in respect of a basic aspect of its methodology for determining whether power is public in this context”.<sup>26</sup> This is arguably because of the lack of precision of Section 6(3)(b), as Lord Neuberger observed, that “one searches for policy as an aid to interpretation”.<sup>27</sup> To date, however, *YL* remains the leading authority on determining the meaning of ‘functions of a public nature’.

The majority’s factors-based approach, focusing on the institutional identity of SCH, will first be considered. Lord Scott noted that the payment from *YL* for accommodation was for “delivering a service to a customer”,<sup>28</sup> and the obligations borne by SCH were governed by “private law contractual obligations”.<sup>29</sup> Similarly, approving Lord Nicholls’ test in *Aston Cantlow*, Lord Mance based his decision on the basis that SCH’s “private and commercial motivation”<sup>30</sup> pointed against finding its functions as falling under Section 6(3)(b). For Lord Neuberger, the Birmingham City Council’s (‘BCC’) responsibility to provide accommodation to the elderly did not automatically lead to the conclusion that the provision of such service is of a public nature.<sup>31</sup> Such an approach based on motivation is problematic, as it concentrates erroneously on the identity and motivation of SCH, rather than on the function

<sup>24</sup> Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (Seventh Report, 2003–2004) [74].

<sup>25</sup> *ibid.*

<sup>26</sup> Colin Douglas Campbell, ‘The Nature of Power as Public in English Judicial Review’ (2009) 68 *Cambridge Law Journal* 90, 103.

<sup>27</sup> *YL v Birmingham City Council* (n 2) [128].

<sup>28</sup> *ibid* [27].

<sup>29</sup> *ibid* [31].

<sup>30</sup> *ibid* [116].

<sup>31</sup> *ibid* [163].

it performs.<sup>32</sup> In contrast, the minority gave no weight to the institutional status of SCH in determining whether providing accommodation constitutes a public function. Lord Bingham noted that as residential care must be provided under the NAA regardless, the contractual arrangement between the parties is “a matter of little or no moment”.<sup>33</sup> Similarly, Lady Hale argued that the focus should be on “the nature of the function performed”<sup>34</sup> and that governmental payment for accommodation is a “strong indicator”<sup>35</sup> that the functions are of a public nature.

The second issue, the conception of ‘public’ and ‘private’, is closely related to the first. Based on the contractual relationship between SCH and BCC, Lord Scott held that SCH’s performance of the function as a private organisation pursuant to a contract with the BCC precluded the function from being classified as public.<sup>36</sup> The contractual context of SCH’s activities has also rendered the service of eviction notice private under Section 6(5).<sup>37</sup> Similarly, Lord Mance noted that the “contractual source and nature”<sup>38</sup> of SCH’s activities differentiated them from any function of a public nature. For Lord Neuberger, the fact that the accommodation was provided “pursuant to an ordinary contractual agreement”<sup>39</sup> rendered it a private function. In contrast, Lady Hale raised the criticism that the majority drew an artificial and legalistic distinction “between meeting [the needs of providing accommodation] and the task of assessing and arranging them”.<sup>40</sup> They both pertain to the overarching purpose of protecting the Article 8 right of *YL*. She also noted that the function is exercised “in the public interest”,<sup>41</sup> and this came closest to defining ‘functions of a public nature’ by focusing on the purpose of the function vis-à-vis the recipients of the function.

The disagreement between the majority and minority over this issue also revealed different ideological positions on the nature of the role and involvement of the government in the context of the provision of welfare.<sup>42</sup> The majority’s conservatism was reflected from its hesitation to interfere with the activities of SCH as a private organisation operating pursuant to a contract. In contrast,

<sup>32</sup> Jonathan Landau, ‘Functional Public Authorities After *YL*’ (2007) Public Law 630, 636.

<sup>33</sup> *Parochial Council of the Parish of Aston Cantlow v Wallbank* (n 1) [16].

<sup>34</sup> *ibid* [64].

<sup>35</sup> *ibid* [68].

<sup>36</sup> *ibid* [32].

<sup>37</sup> *ibid* [34].

<sup>38</sup> *ibid* [120].

<sup>39</sup> *ibid* [135].

<sup>40</sup> *ibid* [66].

<sup>41</sup> *ibid*.

<sup>42</sup> Stephanie Palmer, ‘Public, Private, and the HRA 1998: An Ideological Divide’ (2007) 66 Cambridge Law Journal 559, 571.

the minority focused correctly on the nature and purpose of the function it exercised: the provision of accommodation services. The majority and minority also disagreed about the relevance of common-law judicial review under Part 54.1 Civil Procedure Rules ('CPR'). For Lords Mance and Neuberger respectively, cases under Part 54.1 CPR are helpful in identifying the circumstances in which a body exercises a public function<sup>43</sup> and they are of "real assistance"<sup>44</sup> in light of the need for recourse to policy considerations under Section 6(3)(b). In contrast, Lord Bingham rejected the relevance of common-law judicial review authorities in determining the scope of Section 6(3)(b), on the basis that Section 6(3)(b) is likely to include "bodies which are not amenable to judicial review".<sup>45</sup> Arguing in favour of Lord Bingham's approach, Stephanie Palmer noted that since the purposes of judicial review under Part 54.1 CPR and human rights protection under the HRA are very different, there is no reason for the availability of judicial review and human rights protection to be identical.<sup>46</sup> While the relevance of Part 54.1 CPR cases is not the subject of the present analysis and will be discussed in detail below, it is sufficient to note at present that the majority's reliance on Part 54.1 CPR cases has resulted in a restrictive approach in interpreting 'functions of a public nature' by giving significant weight to the contractual nature of the source of power of SCH.<sup>47</sup>

#### D. POST *YL* JURISPRUDENCE ON THE PUBLIC-PRIVATE DIVIDE UNDER SECTION 6 HRA

##### (i) *Section 6(5)*

A key part of the 'matryoshka doll' characterising an HPA's obligation under Section 6 left unanswered in *YL* is the meaning of the 'private' nature of an act within a broader public function under Section 6(3)(b). This was directly addressed in *R (Weaver) v London and Quadrant Housing Trust* (hereafter, *Weaver*).<sup>48</sup> Holding that the act of termination of tenancy did not fall under Section 6(5), Elias LJ argued that the act was 'bound up' with the provision of social housing: once the provision of social housing is adjudged to be an exercise of public action,

<sup>43</sup> *YL v Birmingham City Council* (n 2) [86]. Lord Mance identified *R (A) v Partnerships in Care Ltd* [2002] EWHC 529 (Admin), [2002] 1 WLR 2610 and *R (Beer) v Hampshire Farmers Markets Ltd* [2003] EWCA Civ 1056, [2004] 1 WLR 233 as authorities for assimilating the tests under s 6(3)(b) HRA and Part 54.1 CPR.

<sup>44</sup> *YL v Birmingham City Council* (n 2) [156].

<sup>45</sup> *ibid* [12].

<sup>46</sup> Palmer (n 42) 568.

<sup>47</sup> *YL v Birmingham City Council* (n 2) [102] (Lord Mance), [167] (Lord Neuberger).

<sup>48</sup> *R (Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587, [2010] 1 WLR 363.

the act of terminating tenancy must also necessarily be of a public nature under Section 6(5).<sup>49</sup> He also argued that if the contractual nature of the termination was held to render the act ‘private’, it would severely limit the significance of identifying certain bodies as HPAs.<sup>50</sup> To allow the contractual nature of the termination to justify invoking Section 6(5) would leave the evicted tenant without redress. *Weaver*’s definition of ‘private’ under Section 6(5), which remains the leading authority, is that the act must be “purely incidental or supplementary”<sup>51</sup> to the identified public function. In a similar vein, Lord Collins MR argued that for an act to be public, it must be “in pursuance of the entity’s relevant functions of a public nature”;<sup>52</sup> and in the case of *Weaver*, the contractual nature of the termination played no part in determining the public/private nature of the act.<sup>53</sup>

The usefulness of Section 6(5), in light of the requirement for the act to be ‘bound up’ with the Section 6(3)(b) function to be adjudged public, has given rise to considerable doubts. It is because this may extinguish the need to assess separately whether the act itself is public, so long as the act is ‘bound up’ with the public function. In *Jones v First Great Western*,<sup>54</sup> HHJ McCahill QC argued that “whatever arguments one might make about the [other functions of] running of trains [...] being of a public nature, the control of vehicular access to private land...strikes me as a private act”.<sup>55</sup> Although the notion of an ‘act’ was employed in the analysis in determining whether the respondent is an HPA, the judge considered the management and control of land as a matter of the respondent’s function.<sup>56</sup> By characterising the analysis of the management and control of land as a matter of function, and only mentioning that they in any event appeared to be a private act, Section 6(5) contributed nothing to the judge’s analysis of the nature of management and control of land in relation to the respondent’s liability under Section 6.<sup>57</sup> Alexander Williams criticises Section 6(5) for serving no substantive purpose and for adding nothing beyond the implicit message of Section 6(3)(b): a private act is the antithesis of a public function.<sup>58</sup> This criticism is, however, problematic. This is because it assumes every act performed pursuant to the principal function (now identified as public after crossing the Section 6(3)

<sup>49</sup> *ibid* [76].

<sup>50</sup> *ibid* [77].

<sup>51</sup> *ibid* [76].

<sup>52</sup> *ibid* [95].

<sup>53</sup> *ibid* [102].

<sup>54</sup> *Jones v First Great Western* [2013] EWHC 1485 (Ch), [2013] 4 WLUK 599.

<sup>55</sup> *ibid* [291].

<sup>56</sup> *ibid* [283].

<sup>57</sup> Alexander Williams, ‘The Pointlessness of s 6(5) HRA 1998’ (2018) 23(2) *Judicial Review* 128, 140.

<sup>58</sup> *ibid* 138.

(b) hurdle) is necessarily of the same nature. As a variety of acts may exist under a delegated function, it is necessary to examine the nature of each act alleged to be Convention-violating to articulate the HPA's scope of liability accurately. A sample scenario is an HPA rebutting that only some but not all the acts alleged to be Convention-violating are of a public nature. Such possible existence of a multitude of acts under the public function in Section 6(3)(b) renders it unsafe to conclude that an act under a public function is necessarily public.

(ii) *The Analytical Weakness of the Multi-Factor Test Under Section 6(3)(b)*

A major analytical issue under Section 6(3)(b) is the multifactorial nature of the test for determining 'functions of a public nature'. Neither *Aston Cantlow* nor *YL* suggested that the identified factors must be considered in all circumstances; no balancing method between countervailing factors was alternatively proposed. The lack of authoritative legal guidance, resulting from the lack of definition on 'public' under Section 6(3)(b), renders the consideration of those factors no more than an instance of cherry-picking. It is up to the judge's discretion on the weight to be given to each identified factor and how countervailing factors should be balanced. A recent example is *Fearn v The Board of Trustees of the Tate Gallery*.<sup>59</sup> In holding that the respondent was not an HPA, Mann J stated that "none of the [identified factors in paragraph 122] are (or are said by the parties to be) determinative".<sup>60</sup> His observations that the nature of the assessment is 'global', thereby rendering it necessary to consider the position in the round, do not clarify the analytical flow of determining the nature of the function(s) of the respondent organisation once the factors are identified.<sup>61</sup> The multifactorial approach is a 'poor friend' to legal certainty and predictability in human rights adjudication.<sup>62</sup>

The problematic institutional factors-based analysis in *YL* also continues to exist in recent decisions. The 'freedom' of the organisation to act solely on its own initiative, based on its institutional status, remains a key feature. An example is *Richardson v Facebook*,<sup>63</sup> where Warby J emphasised the 'commercial' nature of the subsidiaries of Facebook and Google in holding that they are not HPAs.<sup>64</sup> Similarly, in *Southward Housing Co-operative v Walker*,<sup>65</sup> Hildyard J argued that to hold

<sup>59</sup> *Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246.

<sup>60</sup> *ibid* [123].

<sup>61</sup> *ibid* [122]–[123].

<sup>62</sup> Alexander Williams, 'Public Authorities and the HRA 1998: Recent Trends' (2017) 22(3) *Judicial Review* 247, 261.

<sup>63</sup> *Richardson v Facebook* [2015] EWHC 3154, [2015] 11 *WLUK* 12.

<sup>64</sup> *ibid* [63].

<sup>65</sup> *Southward Housing Co-operative v Walker* [2015] EWHC 1615 (Ch), [2016] Ch 443.

the housing co-operative as an HPA would be inconsistent with its “mutual nature [...] that its members own and control it”.<sup>66</sup> He also noted that the organisation only provides benefits “for its members”<sup>67</sup> instead of the society at large. Analysis of the ownership and control of the housing co-operative, however, focus on its institutional status in terms of the identity of the owner; they do not pertain to the nature of the function as exercised by the organisation. The fact that its services are members-only is also irrelevant to the question of the ‘public’ nature of the function. This is because it concerns the targets of the function, which relate to the institutional identity of the organisation in terms of the group(s) of individuals it intends to serve. The source and nature of the power underpinning the exercise the impugned function, despite their questionable relevance to the analysis under Section 6(3)(b), continue to feature in these cases.<sup>68</sup> To summarise, the issues generated by the *YL*-jurisprudence in the context of Section 6(3)(b) and 6(5) can be outlined as follows:

1. The ‘cherry-picking’ nature of the multi-factorial test under Section 6(3)(b);
2. The erroneous emphasis on institutional factors, including the source of power and the institutional identity of an organisation alleged to be an HPA;
3. The relationship, if any, between Section 6(3)(b) and Part 54.1 CPR; and
4. The contribution, if any, of Section 6(5) to the determination of liability of an HPA in terms of the meaning of ‘act’.

All these issues contribute to the central question of this article, namely, *what is the framework of PPD under Section 6(3)(b) and 6(5) HRA?* Based on the identified issues, the article will now proceed to analyse two topics which offer some insights and solutions to them: (a) theoretical and doctrinal issues of the PPD as a matter

<sup>66</sup> *ibid* [224].

<sup>67</sup> *ibid* [223].

<sup>68</sup> *Fearn v The Board of Trustees of the Tate Gallery* (n 59).

of law, and (b) jurisprudence of common-law judicial review under *Datafin* and Part 54.1 CPR.

### III. TWO INSIGHTS

The scope of Sections 6(3)(b) and 6(5) HRA boils down to the meaning of two deceptively simple words: ‘public’ and ‘private’. To offer a workable adjudicative framework for determining whether an organisation is an HPA, it is necessary to first understand what ‘public’ and ‘private’ mean in the context of Section 6. Therefore, the nature of PPD as a matter of law and insights arising therefrom will first be analysed. It will be argued that a coherent framework of PPD, as a matter of law in the context of the HRA, serves to delineate the realm of the State (and thus the reach of substantive obligations under the HRA). This relates directly to the questions arising under Sections 6(3)(b) and 6(5), for organisations that can be said to be amenable to judicial review under the HRA, and whether the particular act in question constituted an “unlawful act”<sup>69</sup> violating the claimant’s Convention right(s). The implications of a framework for PPD also relate to the second insight to be discussed: the actual relevance of cases concerning ‘public function’ under the *Datafin*-jurisprudence. Insights from the theoretical considerations and implications of a framework of PPD will also be considered in analysing the implications for considering the *Datafin*-jurisprudence under Section 6(3)(b).

#### A. INSIGHT 1 – A FRAMEWORK OF THE PUBLIC-PRIVATE DIVIDE: THEORETICAL AND DOCTRINAL INSIGHTS

##### (i) *Considerations in Labelling an Organisation as ‘Public’ or ‘Private’*

The need for distinguishing ‘public’ and ‘private’ as a matter of law can be traced back to the 18th and 19th centuries as a result of the growth of ideas about the importance of the individual and the corresponding need to prevent intrusion into private autonomy by governmental actions.<sup>70</sup> The dichotomous relationship of ‘public’ and ‘private’ entails the impossibility of striking a middle ground: a legal person is either public or private. In governmental terms, the distinction between ‘public’ and ‘private’ refers to the distinction between government and non-government. By equating ‘public’ with governmental (and ‘private’ with non-governmental), organisations labelled as ‘public’ would be expected to bear governmental rights and duties when exercising their functions. This has considerable implications on the nature of functions and activities that can be

<sup>69</sup> HRA, s 7(1).

<sup>70</sup> Cane (n 11) 253.

carried out by the organisation. They are expected to be ‘governmental’, reflecting particular standards of behaviour. As a result, given that ‘public’ and ‘private’ are normatively charged terms, the chosen label should only be imposed on an organisation when “the relevant normative consequences are appropriate”.<sup>71</sup> This refers to possible changes in the standard of function and activities as performed by the organisation. An organisation should only be labelled as ‘public’ if consequent changes in its standard of behaviour can reach the standard governmental organisations are expected to display in the relevant context.

Peter Cane observed two basic issues underpinning the legal debate over the substantive content of PPD: (i) control of and accountability for decision-making, and (ii) modes of involvement of interested individuals and groups in decision-making.<sup>72</sup> When adjudging an organisation as ‘public’, the focus is on the appropriateness of deeming it as having assumed the position of governmental decision-making which is said to affect others by the exercise of power in that capacity. On ‘function’, Peter Cane also noted that the concept ‘public function’ is “used dispositively to subject private bodies performing functions pertaining to the rules of natural justice”, and compliance with such rules is “usually seen as a burden and a disadvantage”.<sup>73</sup> When such an organisation is labelled ‘public’ by virtue of the functions it performs, it is required to perform them in a way not solely intended to benefit itself. Such a mode of performance is also unlikely to coincide with private benefits, for example profit-maximisation, that the organisation may reap if the function is not of a public nature. This is because the organisation may be required to invest extra resources to uphold a standard of performance higher than that on which profit-maximisation can be achieved. In light of such disadvantages that the organisation might face, a definition of ‘public’ should be able to justify the normative consequences that may arise as a result of imposing such a label on it. It would, however, be premature to assume that ‘public’ can be defined convincingly once ‘decision-making’ is placed at the centre of the question of determining what ‘public’ means.

The major issue, as William Lucy and Alexander Williams cogently identified, is that versions of PPD are “almost never doctrinally dispositive”.<sup>74</sup> When ‘public’ and ‘private’ are understood on their own in a juristic sense, they do not

<sup>71</sup> Peter Cane, ‘Public Law and Private Law: A Study in the Analysis and Use of a Legal Concept’ in J Eekelaar and J Bell (eds), *Oxford Essays in Jurisprudence: Third Series* (Clarendon Press 1987) 70.

<sup>72</sup> *ibid* 71.

<sup>73</sup> *ibid* 67.

<sup>74</sup> Lucy and Williams (n 17) 75.

necessarily carry only one single meaning.<sup>75</sup> This problem becomes evident when considering their possible meaning(s) under Sections 6(3)(b) and 6(5). There exists at least two possible meanings to the distinction between ‘public’ and ‘private’: (i) a distinction between the realm of the State and the realm beyond or free from the State; (ii) a distinction between public and private law, and HPAs should only be governed by the former when performing public functions and acts.<sup>76</sup> When required to apply one meaning as ‘the’ PPD under Section 6, it would be difficult to argue conclusively why the adopted version should rank over other(s). So long as a meaning is not explicitly rejected by the statutory text itself, the choice becomes a question of the extent of cogency, and not a question of correctness.

The lack of a conclusive definition to PPD, in light of the need to give a judgment for the parties before the court, can be understood as ‘hard case’ adjudication – a situation where “reasonable lawyers disagree”.<sup>77</sup> Different juristic approaches to ‘hard cases’ suggest that expecting any version of PPD to be “of use”<sup>78</sup> in adjudication is misguided.<sup>79</sup> It would, of course, be unproductive and pointless to simply surrender to the idea that there exists a non-exhaustive list of the meaning of ‘public’ and ‘private’. An assumption of the analysis in the foregoing paragraph is that once a framework of PPD is selected, no other considerations can or should be added to the analysis, regardless of how they might seek to reconcile reasonable disagreement between lawyers. The issue with the analysis advanced by William Lucy and Alexander Williams is that it overlooks the purposes of the PPD under Sections 6(3)(b) and 6(5): to determine whether a privately-owned organisation is required to act compatibly with the Convention, and if so, holding it accountable for any breaches of its Section 6(1) obligation. In criticising PPD under Section 6 as a “complete failure”, they subdivided it into three iterations to illustrate the variety of meanings ‘public’ and ‘private’ can entail: (i) whether the organisation is an institutionally public person, (ii) whether the organisation is performing a public function, and (iii) whether the particular act is public.<sup>80</sup> Iteration (i) can be dismissed as irrelevant, as Sections 6(3)(b) and 6(5) exclude institutional factors. On the other hand, while iterations (ii) and (iii) are valid distinctions based on Sections 6(3)(b) and 6(5) respectively, their respective

<sup>75</sup> William Lucy, ‘Public and Private: Some Banalities about a Platitude’ in C Amhaligh, C Michelon, and N Walker (eds), *After Public Law* (Oxford University Press 2013) 58–59.

<sup>76</sup> *ibid* 74.

<sup>77</sup> Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1978) xiv.

<sup>78</sup> Lucy and Williams (n 17) 78–79. This means if the adopted distinction is expected to be conclusively dispositive of a hard case.

<sup>79</sup> William Lucy, ‘What’s Private about Private Law?’ in A Robertson and T H Wu (eds), *The Goals of Private Law* (Hart 2009) 70–72.

<sup>80</sup> Lucy and Williams (n 17) 80.

assessment of public and private nature should be seen as falling under the same scheme of PPD. It is because they both pertain to the same purpose of Section 6: to determine what institutionally private organisations should be categorised as ‘public’ and thus required to act compatibly with the Convention.

(ii) *Consequences of Labelling an Organisation as ‘Public’ or ‘Private’*

Returning to the broader context of a general framework of PPD, taking into account the possibility of a private organisation being labelled as ‘public’ by virtue of its functions, the question becomes the degree to which public law values should be extended into the sphere of privatised power.<sup>81</sup> Such extension is necessary as a private organisation, by performing public functions, is assuming the decision-making capacity of a governmental organisation. Instead of being considered as abstract values,<sup>82</sup> public law values should be seen as the purposes the public side of a framework of PPD attempts to achieve. This offers clear guidance on the standard of behaviour that should be expected from a private organisation. It also hints at the possible implications of labelling an organisation as ‘public’ or ‘private’, and requires the law to tailor the framework to balance any clash of interests the organisation may face as a result of being required to have regard to public law values when exercising its powers. The distinctive feature of ‘public’ power is that an organisation exercising such power must be held legally accountable in public law, to individuals impacted by such exercise, for the exercise of such power itself.<sup>83</sup> The picture, however, is complicated by the existence of a contract delegating a public function from the government to a private organisation; it signifies the contracting out of a public function to the private sector. The contractual relationship operates as “part of or against the background of a statutory regime that establishes the duties of service provisions or powers of regulation”.<sup>84</sup> Such a contract also reinforces the institutional identities of the contracting parties: the governmental organisation delegating the function is public, while the organisation performing the delegated function is private.

That being said, it is a *non-sequitur* to assume that the contractual basis of the service provider’s functions dictates that its obligations can only reside in private law.<sup>85</sup> Even if the performance of the function may be for profit, the organisation is nevertheless engaged in fulfilling governmental responsibilities. The change in the institutional status of the performer of the function does not alter the nature and

<sup>81</sup> Anna Grear, ‘Theorising the Rainbow? The Puzzle of the Public-Private Divide’ (2003) 9(2) *Res Publica* 169, 170.

<sup>82</sup> For example, Cane’s unelaborated notion of ‘rules of natural justice’ mentioned at (n 73).

<sup>83</sup> Anne Davies, ‘*Ultra Vires* Problems in Government Contracts’ (2006) 122 *Law Quarterly Review* 98, 99.

<sup>84</sup> Cane (n 11) 270.

<sup>85</sup> Paul Craig, ‘Contracting Out, the Human Rights Act and the Scope of Judicial Review’ (2002) 118 *Law Quarterly Review* 551, 555.

objective(s) of the function performed. For Anna Grear, to maintain a coherent distinction between ‘public’ and ‘private’ in such context, it is necessary for a framework of PPD to recognise the existence of distinctive ‘archetypal conceptual paradigms’.<sup>86</sup> Public law power, in such paradigms, can be conceptualised as unilateral and institutionalised power:<sup>87</sup> it should be exercised in particular way(s) as demanded by the context it belongs to, exhibiting a particular normative standard of behaviour. Under the HRA, such institutionalisation of power is exemplified in the obligation to act compatibly with the Convention under Section 6(1), and that the standard of exercise of such power must be Convention-compatible.

Moreover, such power does not only exist under the HRA, but is “the central case of English public law: judicial control of governmental power delegated by Parliament to public bodies and decision-makers”.<sup>88</sup> The scope for judicial review of contracted out powers, which are ‘public’ by virtue of private organisations assuming the unilateral and institutionalised power originally exercised by the government, must not be restrictively interpreted. This is because it is important to ensure that public law values are observed by a private organisation performing public functions,<sup>89</sup> requiring it to exercise its powers in a similar if not identical way as the government would. A restrictive interpretation would limit the reach of public law in holding private organisations for subpar performances of public functions.

One last point should be discussed: the meaning of ‘value’ in public law. In their analysis of a framework of PPD, both Peter Cane and Anna Grear draw inspirations from Gunther Teubner’s “polycontextuality” thesis.<sup>90</sup> Teubner rejects a state/non-state institutional dichotomy and establishes a ‘values-based’ PPD. A function or act should be ‘public’ if it is “oriented toward the public interest”,<sup>91</sup> and private if it is “profit-oriented”.<sup>92</sup> When taken on its own, it would be difficult to argue conclusively what ‘the’ public interest requires. The diversity of, *inter alia*, welfare and political interest the public may be said to have will render any attempt of reaching a conclusive definition of ‘public interest’ on an abstract level futile. When read within the context of Section 6(3)(b), however, the picture becomes clearer. Given that the purpose of the HRA is ‘bringing rights home’ and improving accessibility to the Convention Rights by allowing individuals to

<sup>86</sup> Grear (n 81) 169.

<sup>87</sup> *ibid* 181–182.

<sup>88</sup> *ibid* 182.

<sup>89</sup> Murray Hunt, ‘Constitutionalism and Contractualisation of Government in the UK’ in M Taggart (ed), *The Province of Administrative Law* (Hart Publishing 1997) 38.

<sup>90</sup> Gunther Teubner, ‘After Privatisation? The Many Autonomies of Private Law’ (1998) 51(1) *Current Legal Problems* 393.

<sup>91</sup> *ibid* 402.

<sup>92</sup> *ibid*.

bring claims against public authorities in domestic courts,<sup>93</sup> the public interest to be furthered under Section 6(3)(b) is the adequate observance and upholding of Convention Rights on the part of HPAs. Holding an HPA accountable for any subpar exercise of functions encourages it to observe diligently the need to protect and uphold the Convention Rights of the recipient(s) of its functions. The value of public law, in the Section 6(3)(b) context, is to ensure that HPAs serve the general public interest of protecting and upholding the Convention rights of the recipients of its functions. This ensures that the rights of the recipients of public functions under Section 6(3)(b) will be adequately respected.

## B. INSIGHT 2 – COMMON-LAW JUDICIAL REVIEW UNDER *DATAFIN*: RELEVANCE AND APPLICABILITY?

### (i) *The Datafin Jurisprudence and Its Relationship with Section 6(3)(b) HRA*

‘Public function’ as a ground of application under Part 54.1 CPR originated from *Datafin*, which formulated a public/private function test to “recognise the realities of executive power”<sup>94</sup> and provided a remedy for a grievance where no other redress is available.<sup>95</sup> In holding the Panel susceptible to judicial review, Lord Donaldson MR noted that the Secretary of State deliberately relied upon it “as the centrepiece of his regulation of [the takeovers and mergers] market”.<sup>96</sup> Despite the considerable emphasis on the function and purpose of the Panel in his leading judgment, *Datafin*’s shift from the “source of the power” test was incomplete.<sup>97</sup> Concurring with Lord Donaldson MR, Lloyd LJ noted that it is “helpful to look not just at the source of the power but at the nature of the power”,<sup>98</sup> and that determining the amenability of a body to judicial review solely on the ground of its source of power would “impose an artificial limit on the developing law of judicial review”.<sup>99</sup> Thus, source of power as an institutional factor was not completely ruled out. Authorities post-*Datafin* continue to consider institutional factors. In *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan*,<sup>100</sup> (hereafter, *Aga Khan*) Lord Bingham noted that “the powers which the Jockey Club exercises over those who [...] agree to be bound by the Rules of Racing derive from the

<sup>93</sup> Home Office, *Rights Brought Home: The Human Rights Bill* (White Paper, Cm 3782, 1997) [1.18].

<sup>94</sup> *R v Panel on Takeovers and Mergers Ex parte Datafin Plc* [1987] QB 815, [1987] 2 WLR 699, 838–839.

<sup>95</sup> Stephanie Palmer, ‘Public Functions and Private Services: A Gap in Human Rights Protection’ (2008) 6 *International Journal of Constitutional Law* 585, 600.

<sup>96</sup> *R v Panel on Takeovers and Mergers Ex parte Datafin Plc* (n 94) 838.

<sup>97</sup> Palmer (n 42) 567.

<sup>98</sup> *R v Panel on Takeovers and Mergers Ex parte Datafin Plc* (n 94) 847.

<sup>99</sup> *ibid* 848.

<sup>100</sup> *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 1 WLR 909 (CA).

agreement of the parties and give rise to private rights [...]”.<sup>101</sup> Holding the Club non-amenable to judicial review on the aforementioned ground of its source of power, he nevertheless noted that the Club “regulates a significant national activity, exercising powers which affect the public”.<sup>102</sup>

Similarly, in *R v Servite Houses, ex p Goldsmith*,<sup>103</sup> (hereafter, *Servite*) Moses J noted that there was a lack of “sufficient statutory penetration which goes beyond the statutory regulation of the manner in which the service is provided”.<sup>104</sup> He also held that *Datafin* and *Aga Khan* are authorities for the proposition that “courts cannot impose public law standards upon a body the source of whose power is contractual”, and thus rejected the application of judicial review since *Servite Houses*’ powers “derive from a purely commercial relationship”.<sup>105</sup> Its source of power of offering residential accommodation to the applicants was regulated entirely by the contract between the Wandsworth London Borough Council and it. What is puzzling, however, is that the source of the power of *Servite Houses* is given significant weight in determining its amenability to judicial review. The lack of statutory support, as a source of power consideration, pointed against *Servite Houses* from being considered as exercising a public function. The *Servite* analysis is also not fully compatible with Dyson LJ’s observation in *R (Beer) v Hampshire Farmers Market Ltd*,<sup>106</sup> (hereafter, *Beer*) that “unless the source of power clearly provides the answer, [the amenability question] requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character”.<sup>107</sup> In contrast to *Servite*, *Beer* places consideration of the nature of the impugned power and function as the primary issue to be assessed under the public function test. The source of power should only be given significant weight if it hints to a clear answer. Part 54.1, however, did not clarify the meaning of ‘public function’. An application under Part 54.1 on

<sup>101</sup> *ibid* 924.

<sup>102</sup> *ibid* 923.

<sup>103</sup> *R v Servite Houses, ex parte Goldsmith* [2000] 5 WLUK 327 (HC).

<sup>104</sup> *ibid* [76].

<sup>105</sup> *ibid* [92].

<sup>106</sup> *R (Beer) v Hampshire Farmers Market Ltd* (n 43).

<sup>107</sup> *ibid* [16].

the lawfulness of a decision, action or failure to act in relation to the exercise of a public function must still satisfy the *Datafin* criteria.<sup>108</sup>

(ii) *Cautions Required in Linking the Datafin Jurisprudence and Part 54.1 CPR to Section 6(3)(b) HRA*

Although the correctness of judicial approaches to ‘public function’ under the *Datafin*-jurisprudence is beyond the scope of this article, their mixed consideration of institutional and functional factors carries significant implications in terms of their referential value under Section 6(3)(b). An initial difficulty in drawing a link between Section 6(3)(b) and *Datafin* is that both adopt a non-exhaustive multifactorial test in determining whether the function in question is public. In light of the lack of authoritative judicial statements on what may be considered under both tests, there may be a “potentially infinite number of considerations whose relative weight is prone to vary according to the feel or instinct of individual judges”.<sup>109</sup> It would be very difficult to transplant the considerations under *Datafin* to Section 6(3)(b) directly. Judicial decisions to date, however, have assumed their relevance to one another without elaborating in detail the reasons underneath. In *R (Mullins) v The Appeal Board of the Jockey Club*,<sup>110</sup> Stanley Burton J noted that the “similarity between the language of Section 6(3) and that of CPR Part 54.1 is striking”.<sup>111</sup> Interpreting Part 54.1 as intending to apply to the same functions as those under Sections 6(3)(b) and 6(5) “avoids different meanings be given to similar phrases in the same context”.<sup>112</sup> Similarly, in *R (A) v Partnerships in Care Ltd*,<sup>113</sup> Keith J stated that the issue of amenability to judicial review under Part 54.1 and Section 6(3)(b) “stand or fall together”.<sup>114</sup> If an organisation, in making a particular decision, is “a public authority within the meaning of section 6 [...] that decision is also susceptible to judicial review”.<sup>115</sup> It is apparent that judges drew the parallel between Part 54.1 and Section 6(3)(b) on the basis that they both belong to the context of public law, their formulations are nearly identical, and it being necessary to give a similar if not uniform interpretation to the phrases.

It is submitted that two analytical issues should undermine the judicial confidence in drawing parallels between Part 54.1 and Section 6(3)(b) directly.

<sup>108</sup> Timothy Endicott, *Administrative Law* (Oxford University Press 2015) 615.

<sup>109</sup> *Fearn v The Board of Trustees of the Tate Gallery* (n 59) 248.

<sup>110</sup> *R (Mullins) v The Appeal Board of the Jockey Club* [2005] EWHC 2197 (Admin), [2005] 10 WLUK 434.

<sup>111</sup> *ibid.*

<sup>112</sup> *ibid* [42].

<sup>113</sup> *R (A) Partnerships in Care Ltd* [2002] EWHC 529 (Admin), [2002] 1 WLR 2610.

<sup>114</sup> *ibid* [9].

<sup>115</sup> *ibid.*

Firstly, the two statutory schemes serve different purposes. Despite their textual similarities, Part 54.1 is concerned with the decision-making process of the respondent organisation, while the HRA is concerned with the substantive outcome of the decision vis-à-vis an individual's Convention Rights.<sup>116</sup> This means the reasons for satisfying the requisite standard of the organisation in exercising a public function under Part 54.1 and HRA are different. Under Part 54.1, courts are concerned with ensuring that the respondent organisation has followed the necessary and appropriate procedures in exercising its functions. On the other hand, under the HRA, courts are more concerned with the recipient-end of the exercise of the function – that they should be compatible with the recipient's Convention Rights. This reveals a more fundamental problem, namely that the meaning and expectations of 'public' function under the CPR and HRA are different. Any attempt to define the term conclusively, for instance by reference to a textually similar test existing in a different statutory context, would be impractical. Although they are "in the context of public law", it is premature to jump immediately to the conclusion that the meaning and substantive considerations underpinning the public law contexts for CPR and HRA are identical. The 'publicness' of the function under Part 54.1 concerns only domestic administrative law; in contrast, the 'publicness' of the function under Section 6(3)(b), when read together with Section 6(1), refers to the State's obligation to act compatibly with the standards of a supranational human rights instrument.

At this point, it is clear that great caution must be exercised when considering the *Datafin*-jurisprudence under Section 6(3)(b). It would, however, be unnecessary to dismiss its reference value completely. An important theme highlighted by *Datafin* is that the government's intention, as expressed via the functions of the Panel, contributed significantly to the conclusion that the impugned functions were public. Even though there was no clear and formal act of contracting out, the deliberate absorption of the Panel into the government's regulatory strategy without a clear statutory basis, as a "complete anomaly",<sup>117</sup> indicates that the Panel was exercising public functions. This can also be reflected in *Beer*'s observation that the nature of the power exercised hints to the public character of the impugned decision, and it was "particularly relevant" that the decision amounted to exercising regulatory authority to control the common law right of access to a public market.<sup>118</sup> But if the source of power "clearly provides the answer",<sup>119</sup> it may be given primary weight in determining whether the body is amenable to

<sup>116</sup> Costigan and Stone (n 6) 39.

<sup>117</sup> *R v Panel on Takeovers and Mergers Ex parte Datafin Plc* (n 94) 835.

<sup>118</sup> *R (Beer) v Hampshire Farmers Market Ltd* (n 43) [30].

<sup>119</sup> *ibid* [16].

judicial review. In essence, the notion ‘public’ in ‘public function’ under the *Datafin*-jurisprudence characterises governmental involvement into private relationships that do not necessarily require direct governmental regulation in the first place. This characterisation provides a bridge for considering the *Datafin* ‘public’ function under Section 6(3)(b): both concern the intention of the government, regardless if explicit or implicit, in delegating a function which she can perform to an institutionally private organisation. Such intention can be reflected in two ways – either via an explicit act of contracting out, or the *Datafin*-esque inclusion of the organisation into the government’s policies in the respective field(s).<sup>120</sup>

#### IV. A SOLUTION – PRINCIPLE-BASED REFORMATION AND INTERPRETATION

##### A. REWORDING SECTION 6(3)(B) AND 6(5) HRA

For the criteria determining what constitutes an HPA to be more analytically coherent, any approach must articulate with sufficient certainty and clarity the role of such organisation under the HRA. The *YL*-jurisprudence demonstrates that a highly contextual and multifactorial approach to Sections 6(3)(b) and 6(5) without a coherent base principle is impractical and unpredictable. By basing the approach on a principle of sufficient clarity and with a clear purpose, judicial approaches under Sections 6(3)(b) and 6(5) can become more coherent. Before unveiling this article’s proposed reformulation, it is useful to first consider two existing alternative reformulations.

##### (i) *Wordings of Previous Bills*

Two Bills had previously been proposed by Mr Andrew Dismore MP, both of which attempted to define ‘public function’ under Section 6(3)(b). The Bill introduced in the 2006–2007 (‘the First Bill’) parliamentary session defined public function as one performed ‘pursuant to a contract or other arrangement with a public authority which is under a duty to perform that function’.<sup>121</sup> The Bill introduced in the 2007–2008 parliamentary session (‘the Second Bill’) defined public function as one “which is required or enabled to be performed wholly or partially at public expense”.<sup>122</sup> The proposed definitions highlight two issues that should be addressed in a new version of Sections 6(3)(b) and 6(5). Firstly, the First Bill shows that it is necessary to ensure that a connection, regardless of form, between the respondent HPA and a relevant local authority must be available for

<sup>120</sup> Anne Davies, *Accountability: A Public Law Analysis of Government by Contract* (Oxford University Press 2001) 5–6.

<sup>121</sup> Human Rights Act 1998 (Meaning of Public Authority) HC Bill 2006–2007, Clause 1.

<sup>122</sup> Human Rights Act 1998 (Meaning of Public Function) HC Bill 2007–2008, Clause 2.

the HPA to be considered as a part of the ‘State’. This can provide a solid proof of the public nature of the function performed by the HPA – that it is based on an obligation to act compatibly with the Convention under Section 6(1). Secondly, as Alexander Williams rightly criticises,<sup>123</sup> the Second Bill does not address Lord Scott’s argument in *YL* that the act of serving notice of eviction, in the context of a broader function of providing care home services, is a private act under Section 6(5) HRA.<sup>124</sup> To ensure that judicial interpretation of ‘act’ under Section 6(5) does not unduly restrict the scope of protection for individuals offered by Section 6, it is necessary to ensure that any act that can be deemed as ‘private’ should be irrelevant to function which is adjudged to fall under Section 6(3)(b).

(ii) *New Versions of Sections 6(3)(b) and 6(5)*

Analysis in the foregoing parts and Mr Andrew Dismore MP’s proposals point firmly to the proposition that a precise rewording of Sections 6(3)(b) and 6(5) is an appropriate solution to the existing unsatisfactory approaches. Firstly, for Section 6(3)(b), it is proposed that ‘functions of a public nature’ should be defined as follows:

“A function is public if it is performed, regardless of method, by a person on behalf of a core public authority pursuant to a formal arrangement, without such person the core public authority would be directly responsible for the protection of a Convention right”.

Secondly, the ‘function’ and ‘act’ distinction, as discussed above, should be maintained. It is proposed that Section 6(5) should be revised as follows:

“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 wholly irrelevant to the core public authority’s obligation to protect a Convention right under the subsection”.

The emphasis on the protection of Convention Rights in the proposed revisions flows from the analysis in relation to theoretical issues arising from a framework of PPD that a workable meaning of ‘public’ under Section 6 should take into account the purpose of the HRA. Such emphasis also reflects a coherent understanding of the value of Section 6(3)(b): to protect the public interest by ensuring that the liability of an HPA will be adjudged solely on grounds of its

<sup>123</sup> Alexander Williams, ‘*YL v Birmingham City Council*: Contracting Out and “Functions of a Public Nature”’ (2008) *European Human Rights Law Review* 524, 530.

<sup>124</sup> *YL v Birmingham City Council* (n 2) [34].

functions' compatibility with the Convention. In terms of engagement with existing judicial authorities, by excluding the method of performance as irrelevant in determining whether the function is public, the new definition avoids the *YL* majority's erroneous emphasis on the relevance of the contractual framework SCH was operating pursuant to. On the other hand, the requirement of a formal arrangement between a CPA and an HPA ensures that the basis of the performance of the function can be traced to the public authority's obligation to act compatibly with the Convention under Section 6(1). This limits the potentially expansive reach opened by *Datafin*, which allowed for the possibility of 'implicit' contracting out by basing its ruling of 'public' function on the government's deliberate inclusion of the Panel into its regulatory strategy. It also enhances legal certainty in holding an organisation to be an HPA by requiring the proof of a document stipulating the act of contracting out from the government. Moreover, the new requirement of direct governmental involvement, in the case where the function is not performed by an HPA, reflects Lady Hale's dissent in *YL* on how the performance of a function by HPA is, in essence, a task performed "in the form of the state".<sup>125</sup> The performance of the function, whether by an HPA or a CPA, is an exercise of unilateral and institutionalised public power that has to be compatible with the Convention.

The new Section 6(5), following the emphasis on an individual's Convention rights under the new definition of 'functions of a public nature', adopts a similar method in determining the nature of an act. A separate assessment of 'function' and 'act', contrary to Alexander Williams's argument,<sup>126</sup> remains necessary, as governmental intention evidenced in the nature of a function is not necessarily replicated in an act under the aforementioned function. The HPA is required to show that the impugned act is 'wholly irrelevant' to the CPA's obligation under the new definition of 'functions of a public nature'. Such direct reference to the obligation of an CPA serves two purposes. Firstly, it ensures that so long as the impugned act can be deemed as relevant to the function under subsection 3(b), the act would be considered a 'public' act and thus not protected by Section 6(5). This addresses Lord Scott's argument in *YL* that serving an eviction notice in a care home is not a public act. Secondly, as the determinative factor of 'publicness' under Section 6(3)(b) is engagement of governmental responsibility, the requirement of irrelevance with such responsibility under subsection 5 provides a coherent framework for determining what is public or private under it. If the act in question

<sup>125</sup> *ibid* [65].

<sup>126</sup> Williams (n 62).

cannot be said to fall within the purview of an obligation to protect a person's Convention right, it should not be labelled as 'public' under Section 6.

### B. INTERPRETING THE NEW SECTION 6(3)(B) AND 6(5) HRA

The interpretation of two phrases of the new provisions is of particular importance: (i) 'directly responsible' and (ii) 'wholly irrelevant'. It is because 'directly responsible' denotes the public nature of the impugned function by linking it to an CPA's Section 6(1) obligation, while 'wholly irrelevant' denotes the lack of relationship between the impugned act and the public function under Section 6(3) (b). They underpin, respectively, the public and private nature of the function and act under consideration.

Evaluation of the phrase 'directly responsible' will first be taken. Insights can be drawn from the *Datafin*-jurisprudence. As argued above, governmental intention can play an important role in determining whether a function is public. Involvements in the takeover and mergers market and access to public market in *Datafin* and *Beer* respectively, despite not directly undertaken by the government, are indicative of the government's intention to be involved in the relevant exercise of function. In terms of contracting-out under the HRA, while a CPA is not directly involved in the performance of the impugned function, it is nevertheless indirectly involved in ensuring that the function is performed by an HPA and thus the Convention Rights of the function's recipients protected. Therefore, 'directly responsible' should entail that an HPA is obliged to act compatibly with the Convention if the relevant CPA can be said to have an intention to perform the impugned function for the purpose of protecting the relevant right(s) as argued by the claimant.

As for the 'source of power' consideration, given that it concerns the institutional identity of the performer of the function, it should be of minimal reference value in the new Section 6(3)(b). That being said, following Dyson LJ's observation in *Beer*, it may be of assistance if the government's intention cannot be ascertained with sufficient clarity on the nature of the performed functions alone. This is because under the new requirement of proof of formal arrangement, the details of contracting out as stipulated in the document may provide insights on the scope and reach of the impugned function as intended by the CPA privy to the contract. In terms of analytical flow, the source of power should only be considered once the court has analysed the nature of the impugned function but unable to determine whether it is public. The requirement for an act under Section 6(5) to be 'wholly irrelevant' to the Section 6(3)(b) function implies that its performance cannot be said to be intended by the relevant CPA.

In terms of existing approaches, Elias LJ's requirement in *Weaver* for the act to be 'purely incidental or supplementary' to the principal function risks confusing

the boundaries of ‘public’ and ‘private’ as it allows the private act to have a limited degree of relationship to the public function. This blurs the nature of the act – despite being private, it is still vaguely related to the public nature of the impugned function. It is thus submitted that Elias LJ’s interpretation should be rejected. Lord Collins MR’s requirement of relevance to the public function, on the other hand, provides a succinct line of demarcation between ‘public’ and ‘private’: an act is public if it is relevant to the public function as identified under Section 6(3)(b). An act should be considered as ‘wholly irrelevant’ to the public function under Section 6(3)(b) if the act can under no circumstances be said to be relevant to the relevant CPA’s intention and need to act compatibly with the Convention. This follows from the need for a coherent and uniform approach to PPD under Sections 6(3)(b) and 6(5): ‘public’ and ‘private’ under the respective subsections should be assessed by the same criteria. If the impugned act cannot be said to be relevant to the need to act compatibly with the Convention, the act does not fall within the realm of activities of the State. The realm of the State should be interpreted as coterminous with the scope of functions and activities as performed by organisations that have to be compatible with the Convention.

## V. CONCLUSION AND FURTHER REMARKS

The obligation imposed on HPAs to act compatibly with the Convention under Section 6(3)(b) of the HRA reflects the indispensable need for an analytically workable framework for determining the meaning of ‘public’ and ‘private’ under the HRA. Determining their meaning, however, requires consideration of not only the context in which the terms are being defined, but also the purpose(s) for which they are defined. Existing judicial approaches to Section 6(3)(b) are, unfortunately, incoherent and risk adjudicative uncertainty. While a comprehensive examination of the issues associated with the *YL*-jurisprudence cannot be examined in the limited space of this article, it is clear that a substantive revision, both in terms of statutory provisions and interpretations, to the existing approaches to Section 6(3)(b) and 6(5) is imperative. This is supported by a coherent and careful interpretation of the *Datafin*-jurisprudence and theoretical concerns of a framework of PPD. In contrast to the existing approaches under *YL* and the *Datafin*-jurisprudence, the issues identified and solutions proposed in this article points to one single answer: the dividing line of ‘publicness’, in the context of Section 6, should be contingent upon the involvement of the claimant’s Convention right(s).