A Failure to Protect: The Shortcomings of the United Kingdom’s Judicial Response to the Privatisation of the Public Realm

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I. INTRODUCTION

The purpose of this article is to examine the current approach taken by the courts in the United Kingdom for determining whether a private entity is exercising functions of a public nature when under contract with a public authority. If, as is argued, private entities are performing functions of a public nature, the fundamental question is whether the near-ubiquitous practice of outsourcing of public services should be susceptible to public law protection. Answering this question is vitally important where a right under the Convention for the Protection of Human Rights and Fundamental Freedoms, scheduled in the Human Rights Act 1998 (“HRA”), is claimed to have been breached. This article falls narrowly within a much broader debate about the public administration of the United Kingdom, and the consequences of increasing levels of contractualisation for the scope of judicial control over the activities of the executive.

First, the article begins by charting the growing development of outsourcing in the provision of public services. Second, the article considers the approach that the courts have taken when faced with questions relating to the privatisation of public services. The argument put forward is that the courts have inappropriately failed to extend the remedial protection of the public law when private sector parties under contract perform services of a public nature, particularly where a Convention right is engaged. It is submitted that the public law jurisdiction, and the particular remedies available as a consequence, should be expanded to encompass the increasing provision of services of a public nature performed by the private sector on a contractual basis with the State. Third, the article considers the questions resulting from the decision of the House of Lords in YL v Birmingham, a case which effectively reduced the scope of public law supervision and protection in this field. The article considers why the courts have been slow to bring the increasingly complex web of private providers of public services within the judicial protection afforded to individuals by the public law of the United Kingdom and what the test may look like in instances where the courts are called upon to control public power exercised by private providers. Fourth, this article notes the contradiction between the judicial reticence to read into section 6 of the HRA a wide scope of supervisory jurisdiction, when the courts were far more ready to accept a flexible test in earlier jurisprudence for applications made under section 31 of the Senior Courts Act. Finally, the article makes the argument that private sector providers of public services should, where the service is evidently of a public nature, be captured by public law, specifically where rights scheduled under the HRA are exercised.

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II. A BRIEF HISTORY OF PRIVATISATION IN THE UNITED KINGDOM

Between 1945 and 1979 the overwhelming majority of public services were supplied by the administrative organs of the state: the consequence of a post-war transfer of power away from a private sector that could not meet the needs of the community, and toward the state provision or subsidisation of a diverse range of services that were desperately required by a country rebuilding itself after war. However, the last 35 years has seen a reverse of that historical process, with the contractual transfer of a plethora of services from public bodies to private and non-profit organisations. Since 1979 governments formed from Conservative, Labour, and contemporarily the Coalition – comprised of the Conservative and Liberal Democratic parties – have overseen an unprecedented transfer in the provision of public services from the State to the private sector. This has been nothing short of a revolution in the organisation of the modern British state. The privatisation phenomenon signalled a profound departure from the dominant organising paradigm of the post-war liberal democratic state: the provision of public services by the state using a centralised command and control system of government, framed by a commitment to equality and quality of opportunity for all citizens of the United Kingdom.

III. THE BORDER COUNTRY: THE CHANGING LANDSCAPE OF THE PUBLIC-PRIVATE DIVIDE

This article is not concerned with the broader socio-political trend of privatisation. Rather, it examines the consequences for public law, and the judicial protection of individual rights, where the original public service or function has been contracted out to the private sector. The contemporary legal framework used to distinguish between the delivery of a public service, authorised by a statutory or prerogative power, and the fulfilment by a private person, non-profit organisation, or commercial entity of an outsourced by contract public service, is to define the former as a public function and the latter as the satisfaction of a private contractual agreement. The assumption of this dichotomy is that when outsourced the subject-matter of the contract changes from one which would have been captured by public law remedies, if performed by a public body, to subject-matter susceptible only to the ordinary remedies of private law.

This definitional demarcation has had a fundamental effect on how courts draw the boundaries available for the protection of individual interests and rights. In the case of public functions provided by public authorities, unlawful decisions are susceptible to judicial review and, if appropriate, injunctive relief rather than damages. The same is not true of the private provision of those same services: public law controls stop at the contract, on the rather unsatisfactory assumption that private remedies will be available, in contract or tort, to those who have a legitimate cause of action. This systemic shift in thinking about the provision of public services, and the willingness to exclude private service providers of government contracts from the scope of public law control, has the potential to fundamentally undermine the availability of appropriate legal protections for individuals who have been unfairly or unlawfully treated by private providers, whether or not they had any agency in the decision to outsource those public functions which they rely upon.

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4 See for example *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL).
The courts, in recent case law, have failed to protect those rights and interests for two reasons. First, the dominance of private law in the English legal psyche has led to a resolute rear-guard action seeking to shield private providers of public services when they should actually be subject to the same judicial scrutiny exercised against public bodies and authorities. Second, the courts, perhaps because of the fundamental inclination to maintain clear borders between public and private law, have failed to adjust to the reality of a system of public service provision by outsourced private partnerships. It is submitted that a significant adjustment needs to occur in judicial thinking on this subject and that the tests thus far propounded are unsatisfactory and fail to protect individual rights caught in this changing realm of private provision of public services.

IV. THE CURRENT SCOPE OF REVIEW

Though there are many applications requesting the intervention of the court which do not engage Convention rights, brought into force in the law of the United Kingdom under the HRA, it is in respect of applications which claim the engagement of Convention rights that the procedural flaws are most evident and ripe for reform. This is because the approach adopted by the courts in this category of cases reflects the threshold test that the courts use to determine whether or not the respondent party is definable as a public authority, and whether it is therefore susceptible to the courts’ public law jurisdiction. The current procedure that the courts adopt when determining, for the purposes of section 6(1) of the HRA, ‘whether a public authority has acted in a way which is incompatible with a Convention right’, is to first determine whether the person, authority or distinct legal entity can be defined as a public authority under the Act. For these purposes the court is concerned with section 6(3)(b), which defines a public authority as ‘any person certain of whose functions are functions of a public nature’.

Parliament has certainly not confined the scope of interpretation to public authorities with powers derived from statute alone. However, as will become plainer, while there is an arguably wide scope for interpretation out of section 6(3)(b), the judicial approach would instead be more properly characterized as an exceptionally narrow interpretation when dealing with matters where the respondent is a private party providing a public service on contract. For the purposes of this article a ‘public service’ is defined as a service that would have generated an obligation on the public authority to provide it to those individuals who possess a right to access the service subsequently provided under private contract. This would automatically exclude a significant number of contracts made between public authorities and private parties to provide goods or services which may have an indirect effect on the provision of services of a public nature but are themselves fundamentally of a private nature.

Significantly, the current judicial approach for determining what is and is not a public authority, or what may or may not be defined as a function of a public nature, reveals an unwillingness to engage in a larger debate over the consequences for English public law of the increasing corporatisation and contractualisation of public services. Moreover, the desire to stay out of this discourse has revealed the ideological divisions playing out beneath the surface of decisions made in this arena by the appellate courts in the United Kingdom. Decisions are often subjectively decided and betray an inability to grasp the nettle of an increasingly privatised administrative state, and extend public law principles into the realm otherwise governed by private law in order to protect both the Convention rights of individuals and the public interest more broadly constituted. This unwillingness is borne out in recent authority of the Supreme Court.

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1 Human Rights Act 1998, s 6(1).
The post-war jurisprudence of English public law has seen a general trend toward further judicial protection of individual rights and interests. Considered against the background of this trend, the unwillingness to deal with the consequences for those same rights and interests of greater levels of privatisation and the contracting out of public services appears to be something of an enigma. The decision in YL v Birmingham City Council follows a line of authority which set out the court's approach to the protection of fundamental rights where public duties have been discharged through the contracting out of services to the private sector.\(^7\) In YL, the case concerned an 84 year old woman suffering from Alzheimer's disease who was provided full time care and a place in a home by the first respondent local authority. The first respondent had a duty under section 21 of the National Assistance Act 1948 to make arrangements for the provision of residential accommodation for eligible persons.

The first respondent contracted with the second respondent, a provider of health and social care services, to provide a place for the claimant in one of its care homes, which accommodated both privately-funded residents and those whose fees were paid by the council in full or in part. The second respondent sought to terminate the contract and remove the claimant from the home, because publicly funded places were less lucrative than the rate chargeable to privately funded places. The claimant, through the Official Solicitor, commenced proceedings in the family division of the High Court seeking, inter alia, declarations that it would not be in the claimant's best interests to be moved out of the home and that the company, in providing accommodation and care for the claimant, was exercising public functions within section 6(3)(b) of the HRA; further, that should the company be successful in evicting the claimant from the home, it would breach her rights under Articles 2, 3 and 8 of the European Convention on Human Rights, contrary to section 6(1) of the HRA. The judge hearing the matter held as a preliminary issue that the company was not exercising a public function and therefore did not fall within the meaning of the Act. The Court of Appeal upheld this finding. The case proceeded on appeal to the House of Lords.\(^8\) It was held that the second respondent was not performing functions of a public nature within the meaning of section 6(3)(b). It is submitted that this decision was incorrect and drew a far too restrictive scope for what constitutes a function of a public nature.

The core of the argument for the claimant was that the second respondent had been performing functions of a public nature within the scope of the Act. What exactly constituted "functions of a public nature" caused some considerable difficulty to the Court. Lord Neuberger expressed this problem by explaining the approach that would have to be adopted in the circumstances and how the approach was inherently susceptible to the subjective interpretations of the individual judges:

'The centrally relevant words, 'functions of a public nature', are so imprecise in their meaning that one searches for a policy as an aid to interpretation. The identification of the policy is almost inevitably governed, at least to some extent, by one's notions of what the policy should be, and the policy so identified is then used to justify one's conclusion. Further, given that the question of whether section 6(3)(b) applies may often turn on a combination of factors, the relative weight to be accorded to each factor in a particular case is inevitably a somewhat subjective decision.'\(^9\)

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\(^8\) Subsequently, the decision in YL v Birmingham City Council [2007] UKHL 27, [2008] 1 A.C. 95 has been reversed by section 1 of the Health and Social Care Act 2008, though it still maintains precedential value when considering the scope of section 6(3)(b) of the HRA.

\(^9\) YZ (n 2) [128].
The remarkably honest dicta from Lord Neuberger exposes the inherently subjective approach taken when determining whether a body is to be considered a public authority for the purposes of proceedings which engage a Convention right. Ultimately, rather than being guided by a clear and transparent test, adjudication of what constitutes a function of a public nature, within the context of the Human Rights Act, requires the individual judge to consider what, in the circumstances, they believe ought to be the policy that the court adopts. Lord Neuberger is correct to argue that ‘functions of a public nature’ is an insufficiently precise phrase, and that it is therefore incredibly difficult to formulate an objective test when considering whether a respondent party is carrying out such functions. However, it is hard to accommodate such a view in the case of YL when an objective answer may be found on the facts. It is submitted that the court, on the facts of YL, could have reached the opposite conclusion by asking itself two basic questions. First, whether the function that was being carried out was being carried out in fulfilment of a statutory obligation or duty whether by a public body which is itself a creature of statute, or by a private party who has contracted with a public body to undertake certain functions which the public body is duty bound to deliver. This is inherently a question of fact. In YL, the first respondent had provisionally discharged its statutory duty to the claimant by providing them with appropriate accommodation. The legal form of the performance of that duty was through contract with a private provider. The function did not change, but the provision of the public service was now being carried out by the second respondent, a private entity undertaking the service for profit.

Second, the court should have asked itself whether the contracting out of that public function alters the function or service provided in such a manner as to effectively deprive it of its public nature or whether the service is unchanged and the public function flows through the private contract itself. The second limb of this test does introduce a degree of subjectivity. However, it is submitted that in the majority of cases engaging Convention rights the service cannot change significantly from that which would have been delivered by a public body because the subject-matter of the contract has to discharge the previously public obligation. Instead, when faced with the second limb of the test, the court asked itself a question which entailed an either-or response: specially, whether the public nature of the function flowed through the contract with the second respondent, or, alternatively, whether the services offered by the private contractor were in essence ‘private acts or functions’ sitting outside the scope of the Act and therefore not susceptible to public law remedies.\(^{10}\)

It is submitted that this distinction is illogical and that the functions of a public nature must flow through outsourced private contracts. If the provision of the service is the same as would have been provided by the public authority which had a statutory duty to provide it, and if the profit made by the private contractor comes directly from a contract to provide those public services, there appears to be little reason to find that the functions have evolved sufficiently so as to be defined as functions of a private nature. It is almost impossible to think that a contract, which sufficiently discharges a public obligation to a corresponding individual right to a service, could be altered to effectively exclude the original public nature of the subject matter it was intended to discharge. Moreover, such an approach implicitly departs from the broader formulation that Parliament arguably intended, and the flexible test for a public function developed by earlier case law under section 31 of the Senior Courts Act 1981 (which will be dealt with more fully further on). This is not however the direction the courts have taken. The current judicial position suggests that the private provision of services either for profit, or by non-profit organizations, should not carry with it any susceptibility to public law remedy.

\(^{10}\) YL (n 2) [129].
VI. THE PRE-YL SECTION 6 CASE LAW

Prior to YL, the courts were already travelling down the restrictive road of excluding public law remedies for the provision of services under contract. In Aston Cantlow PCC v. Wallbank, Lord Nicholls’ interpretation of the operation of section 6(1) in light of section 6(3)(b) has been adopted as the flexible framework through which to view cases engaging Convention rights where one or more of the respondent parties may challenge the classification of their legal definition as a ‘public authority’. Aston Cantlow developed a dual categorisation of a public authority: first, Lord Nicholls argued that there were ‘core’ public authorities ‘whose nature is governmental in a broad sense’, such as local authorities, the armed forces, or police. He argued that ‘behind the instinctive classification of these organisations as bodies whose nature is governmental lie factors such as the possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, and a statutory constitution…” The second category of public authorities formulated in Aston Cantlow comprises ‘hybrid’ or ‘functional’ public authorities, only some of whose functions are of a public nature. Under section 6(5) of the HRA, an entity which would otherwise be a hybrid public authority is nonetheless not to be treated as such in relation to an act ‘the nature of [which] is private’, an exception that does not apply to core public authorities. This formulation of the test had also previously been considered in Poplar Housing and Regeneration Community Association Ltd v. Donoghue, where Lord Woolf CJ said:

The fact that a body performs an activity which otherwise a public body would be under a duty to perform cannot mean that such a performance is necessarily a public function. A public body in order to perform its public duties can use the services of a private body. Section 6 should not be applied so that if a private body provides such services, the nature of the functions are inevitably public.... Section 6(3) means that hybrid bodies, who have functions of a public and private nature are public authorities, but not in relation to acts which are of a private nature....

VII. THE APPLICATION OF THE TEST IN YL

This was the reasoning adopted by Lord Mance and Lord Neuberger in YL, when considering the application of the Act to hybrid public authorities. The question then seems to turn on a bipartite test of categorization: first, the court engages in a discovery of the type of public authority the respondent party is; second, the court applies a subjective test of what functions or acts that entity is undertaking to decide whether the acts in question are of a public nature and whether they are susceptible to the jurisdiction of the court in judicial review proceedings. As Lord Mance argues in YL, the inquiry is inherently context-specific. It is submitted that this is undoubtedly the case. Though it may not be possible to develop a universal objective test of what may or not be a function of a public nature, it does not follow that merely because a service is provided under contract it loses its public nature. Indeed, the question of whether or not the function of a public nature flows through the contract is equally context-specific.

[12] ibid [7]-[9].
[16] YL (n 2) [105] (Lord Mance) and [110] (Lord Neuberger).
The second stage of discovery considered by Lord Nicholls in *Aston Cantlow* seems to be more in line with Lord Neuberger’s discussion of how the judge’s task has inherently subjective contours in reaching a conclusion. In *Aston Cantlow*, Lord Nicholls suggested that ‘clearly there is no single test of universal application’. Indeed, he noted that it is necessary when looking to determine ‘whether a function is public for [the] purpose’ to weigh the relevant factors in order to decide whether the matter falls within the public law jurisdiction of the court, and whether it is therefore capable of injunctive or remedial protection. In his search for what might be taken into account Lord Nicholls fell upon a list of potential, though not exhaustive, factors that might guide the judgment of the court:

> [F]actors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.

On the face of it, these factors seem to be somewhat determinative; however, when given further consideration the task of the judge becomes less clear.

**VIII. THE DISSENT, IDEOLOGICAL DIFFERENCES, AND MISTAKE IN YL**

In *YL*, taking the test laid down in *Aston Cantlow* as a starting point, the court had to decide whether the second respondent was susceptible to the jurisdiction of the court as a hybrid authority which was providing a function of a public nature. While the court’s eventual judgment was that the second respondent did not fall within section 6(3)(b) of the HRA there was significant division of opinion on this question. The dissenting opinions of Lord Bingham MR and Baroness Hale contain forceful arguments that private providers of public services of the kind of category that the second respondent fell into ought to be considered to be within the meaning of the Act. At least superficially, this is an indication of the challenge facing the courts in such instances, and the degree of disagreement in *YL* may well be indicative of the underlying ideological compasses that guide the interpretative activities of individual judges. Lord Bingham’s core category of factors, which ought to influence a judgment one way or another, exposes this underlying tension. Lord Bingham noted that the presence of regulatory supervision, the existence of a statutory duty or obligation, the longstanding position of the state in reference to the provision of the service, and the funding relationship that exists all ought to be considered when deciding on the nature of the function being challenged. In *YL*, Lord Bingham asserted, having weighed such relevant factors, that the claimant was entitled to the court’s protection, not least because the courts themselves have a duty to protect human rights under the Act. Moreover, it was no answer to say that the claimant may have rights under private law for breach of contract. Lord Bingham made the perceptive and telling *obiter* observation that it was irrelevant if the body in question would not ordinarily be susceptible to judicial review, and further that there may be multiple parties with whom the claimant had a justifiable claim for breach of a Convention right:

> Certain factors are in my opinion likely to be wholly or largely irrelevant to the decision whether a function is of a public nature. Thus it will not ordinarily matter whether the body in question is amenable to judicial review. Section 6(3)(b) extends the definition of public authority to cover bodies which are not public authorities but certain of whose functions are of a public nature, and it is therefore likely to include bodies which are not amenable to judicial

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17 *Aston Cantlow* (n 11) [12].
18 ibid.
19 ibid.
20 *YL* (n 2) [5] –[11].
review. In considering whether private body A is carrying out a function of a public nature, it is not likely to be relevant that public body B is potentially liable for breach of an individual’s Convention right. The effect of the Act may be that both A and B are liable. It will in my opinion be irrelevant whether an act complained of as a breach of a Convention right is likely to be criminal or tortious: the most gross breaches of the Convention the improper taking of life, inhumane treatment, unjustified deprivation of liberty will ordinarily be both criminal and tortious.21

Lord Bingham exposed the weakness of the argument thus far propounded by the courts: if there is a remedy in private law, where a Convention right is also engaged because the offending party was a private entity exercising functions of a public nature, then the court will not subject the offending party to the jurisdiction of public law. This is evidently nonsensical. The presence of a private remedy points to the presence of a private remedy, it says nothing about whether it would also be appropriate and proportionate to extend the protection of public law relief to the matter under consideration. It may be the case, as was evident in YL, that the remedy available in private law would be wholly unsatisfactory to the circumstances of the case. Though the claimant in YL may have had a strong cause of action for breach of contract, and may well have received a remedy in private law, if the private provider was not held to fall within the scope of the Act, then there was no public law protection that could have been afforded. The claimant would not have been able to retain her place in the care home, something that would have been available through injunctive relief offered by the court in public law and of greater benefit to the claimant than any damages awarded in private law. Moreover, this failure to extend the protection of public law remedies existed where not doing so was likely to actively abrogate the claimant’s Convention rights. There is certainly a case to be made that the private law rights of the respondent should not effectively trump, as a matter of policy, the individual’s rights and fundamental freedoms guaranteed under the Convention.

This judicial reluctance to adopt a more purposive approach toward statutory interpretation has seen the development of an alternative argument aimed at narrowing the parameters of interpretation. Lord Scott, who was in the majority in YL, argued that to bring the second respondent within the meaning of section 6(3)(b) would have a floodgates effect on other private providers. His Lordship argued that it was ‘absurd to suggest that the private contractor, in earning its commercial fee for its business services, is publicly funded or is carrying on a function of a public nature.’22 However, this argument fundamentally ignores a central point: a private contractor does not need to tender for government services. In creating a contract with a public authority to carry out the agreed services the private party is performing what would have otherwise have been provided by the public body or another private provider. Nor does Lord Scott’s analysis accept, as both Lord Neuberger and Lord Mance’s judgments do, that there will be instances where there will be contracts that do provide core public services and some contracts that do not. There seems no logical reason for saying that the provision of certain public services – like social and health care – sit outside the scope of the HRA, and are therefore not subject to control by the court simply because the service is provided for profit. If anything, profit motive, with its attendant qualities of cutting certain elements of service for the sake of efficiencies and heightened profit margins seem to make it riper for greater levels of judicial supervision. Lord Scott’s reasoning is in keeping with a traditional English common law emphasis on the protection of private law rights. In Lord Scott’s view the remedy available in tort or contract is deemed to be sufficient.

This argument is susceptible to the complaint that private law remedies do not have the same character of the relief provided by public law. For an 84 year old woman suffering from Alzheimer’s

21 YL (n 2) [12].
22 ibid [27].
disease, the public law protections are of greater significance: the ability to stay in the home which has been provided, with all the attendant qualities of that stability for someone in need of care and dependent on the State is far more powerful an argument for public law protection than the availability of remedies for breach of contract, though these would also be available in a separate but parallel action. It is submitted that if it is manifestly inadequate to provide a private law remedy alone, and if in the interests of protecting a right possessed by an individual, the only remedy that appears appropriate to the court is a public law remedy, then it would seem logical to extend the scope of public law protection to privately outsourced contracts which provide services that would otherwise be provided by public authorities whether core or hybrid.23

IX. WHY HAS THIS JUDICIAL APPROACH BEEN ADOPTED?

Why then has the judicial approach been to slow use flexible tests in public law to account for the systemic delivery of services and functions of a public nature by private entities? Certainly the judicial respect for Parliamentary sovereignty goes some way to explaining the current state of affairs. Governments must be allowed to conduct the effective administration of the State. Parliament legislates for the provision of certain services to be provided by public bodies overseen by a Minister of the Crown, who is accountable for all their actions to Parliament. If Parliament has legislated for the Minister or ancillary regulatory bodies administering a certain area of public policy or service provision to contract with a private provider, then the court may deem it entirely proper to allow the executive to retain unfettered discretion as to how those statutory duties will be fulfilled. In principle, there is nothing unsatisfactory about the provision of public services through contractual agreements with private parties. The issue is that the traditional laissez-faire attitude to letting the contract run, and seeking remedial action where the contract has been breached, ignores the vitally important status of the individual who benefits from the public service provided under the contract. Those individuals eligible for certain public services are unlikely to have any rights in respect of the discretionary power used to create the contract for the delivery of those services which are depended on. When deference to the executive is coupled with a judicial approach that prefers private law remedies, the courts’ disinclination to widen the scope of public law is set in a broader socio-legal context. This stance causes a problematic conflict, in particular when the court is called upon to interpret section (6)(3)(b) of the HRA.

Moreover, an argument that runs along deference lines fails to take sufficient account of the Parliamentary intent behind section 6(1) of the HRA. By 1998, the contractualisation of government services and the formation of hybrid public service provision was substantially entrenched; to think that Parliament did not have in mind the susceptibility of a private company that was running a prison, or a hospital, and who therefore might have some regulatory powers or duties in the exercise of those functions, seems a particularly fanciful reading of the Act. It would perhaps be more appropriate, given the background of public service provision since 1979, to interpret the Act purposively and read into it Parliament’s intent that hybrid public authorities, or private entities carrying out public functions under contract, are susceptible to the public law jurisdiction of the court.

The decision of the majority in YL does however reflect a reasonable concern that must be proportionately considered against the background of the individual rights of the claimant. Specifically, by not drawing the second respondent into the scope of the public law, there is greater certainty as to what liability private parties will be susceptible to when entering into contracts with public bodies. The central complaint with this argument is that the individuals for whom the service is provided are forgotten, or at least deemed to be of less importance than the private parties right to be excluded from the scope of public law interference. Arguably, there needs to be certainty for parties entering into contracts providing public services, but there appears to be no good reason, on the ground of protecting private parties, simply because they are private parties, from the exercise of the courts’ public law jurisdiction when that private party fails to provide the function which they were contracted to provide. The consequences for an individual’s rights is an unfortunate and potentially unintended consequence of the state’s increasing reliance and belief in the private provision of services.

X. THE BLURRED BOUNDARY BETWEEN THE PROVISION OF PUBLIC SERVICES AND THE PRIVATE FUNCTIONS OF GOVERNMENT

Many government contracts may exist which will never engage a Convention right, create grounds for judicial review, or become the subject of an application for judicial protection. For example, it is difficult to foresee the success of an application relating to the purchasing of stationery by a public authority. Given the administrative scale of the modern nation state it is appropriate that there are some contractual arrangements which the courts will decline to interfere with, on the grounds that to interfere will open the floodgates for unreasonable or irrelevant claims in all sorts of fields where there is interaction between the administrative state and the private sector. There may also be reasonable disputes as to whether a particular contractual arrangement amounts to a public service, or whether it is simply a function of the ordinary running of government. This dispute could be resolved through a fairly straightforward consideration of the public benefit derived from the function. A private contract to provide cleaning services in Ministerial departments is unlikely to affect the lives of individuals on such a level as to require the court to exercise its public law jurisdiction if a dispute arises. Disputes arising in such a situation would ordinarily involve straightforward principles of contract or tort law.

Conversely, in situations such as the provision of hospitals or care homes, education, pensions or benefits, the public benefit is evident and there is a weaker argument for holding that this should not be susceptible to the public law jurisdiction of the courts. These two examples offer an obvious contrast where it is easier to distinguish between a service benefiting the public, and a function of government with no fundamental benefit to the public. Though there may be policy disagreement as to what the government should and should not do, it is not necessary for the courts to delve too deeply into this inquiry. In the majority of applications where a respondent is a private person or entity, the contract that they hold with a public body will have some statutory duty, obligation or power attached to it. The court will be able to clearly distinguish between a contract made to facilitate a statutory duty to provide a public service, and a contract to facilitate internal functions of the government itself. The court’s ability to trace the duty as part of the test to establish the public nature of the function ought to be enough to negate any floodgates argument that all contracts between private parties and the State would fall inside the jurisdictional scope of public law.
XI. JUDICIAL REVIEW AND THE ADAPTABLE SCOPE OF JURISDICTION IN PUBLIC LAW JURISPRUDENCE FOLLOWING DATAFIN

While YL offers a more recent consideration of the boundaries of public law, it is confined to the court’s statutory interpretation of the provisions within HRA. In order to appreciate the difficulty posed by the decision in YL, it is helpful to note that the courts have previously seen fit to extend the jurisdiction of public law to other areas of quasi-public interaction. The governing procedural mechanism for such matters is now section 31 of the Senior Courts Act 1981. Notably, the Court of Appeal’s decision to extend the scope of judicial review in Datafin,24 consequently bringing into public law jurisdiction a quasi-judicial panel without any statutory or regulatory foundation, emphasized the adaptability of the judiciary’s public law jurisdiction. In Datafin, the applicants were in bidding competition with the defendants to take over another company. They complained to the Panel of Takeovers and Mergers that the defendant had acted in concert with other parties in breach of the City Code on takeovers and mergers. The Panel dismissed the applicant’s complaint. The applicant applied to the High Court seeking, inter alia, certiorari to quash the Panel’s decision and mandamus to compel the Panel to reconsider the complaint. The High Court judge refused permission on the ground that the Panel’s decision was not susceptible to judicial review. The Court of Appeal granted leave in order to consider the question of jurisdiction and the substantive issues that would have been considered on review. Sir Donaldson MR reversed the decision of the High Court judge finding that the panel were susceptible to judicial review however refused the application on the substantive merits.

The case was important because it clearly demonstrated the flexibility of a public law framework that would adapt the jurisdiction of the court based on the presence of certain factors, though these factors need not be exhaustive or all present to attract the court’s jurisdiction. First, the Panel, though self-regulated, was ‘supported and sustained by a periphery of statutory powers and penalties’. Second, if the decisions of the Panel were deemed to be ultra vires then public law remedies would apply.25 Finally, determining whether the body in question was providing a public function, which would affect the citizenry, was crucial in exercising the supervisory jurisdiction of the court under section 31. Secondary matters were also considered by the court, including the fact that though the panel was not founded on a statutory instrument, its lack of a statutory foundation was a ‘complete anomaly, judged by the experience of other comparable markets world-wide’.26 Most importantly, Sir Donaldson MR suggested, obiter, that possibly the only crucial factor that had to be present to exercise the public law jurisdiction of the court was that the decision questioned had to have a ‘public element’.27 What exactly constituted a public element was kept purposefully vague. It is submitted that there was good reason to introduce such flexibility into the definition. Requiring the fulfilment of an exhaustive, or even a non-exhaustive list of factors which would exercise the jurisdiction of the court’s supervisory powers only limited the possibility that future applications would be refused, whether meritorious or not, based on a test that would ultimately fall behind the institutional management of matters affecting the public. Why exactly this flexibility has been departed from in respect of section 6 claims is unclear. It is possible that there are rule of law concerns, particularly in respect of the uncertainty that a vague test of public element introduces into the provision of public services by private bodies. But it is submitted that the degree of uncertainty in this area is to be tolerated where the alternative is the abrogation of individual rights, without recourse to appropriate remedy, simply because the breaching party is a private entity.

24 R v Panel on Takeovers and Mergers, ex parte Datafin PLC and another [1986] 1 QB 815 (CA).
25 ibid 835 (Sir Donaldson MR).
26 ibid.
27 ibid 838.
In _YL_, Lord Neuberger and Lord Mance both acknowledged that there was a connection between section 6 cases and the earlier cases concerning section 31 of the Senior Courts Act. Specifically, Lord Mance considered the connection between ‘the existence and source of any special powers or duties’, which was considered of fundamental importance in _Datafin_, and the view a court takes when ‘considering whether state responsibility is engaged in Strasbourg or whether section 6(3)(b) applies domestically.’

Similarly, Lord Neuberger accepted that though _Aston Cantlow_ had not deemed the existence of statutory power a sufficient condition to bring the action complained of automatically into the jurisdiction of the court, if the overarching framework was one that could be categorized as a ‘relatively wide-ranging and intrusive set of statutory powers in favour of the entity carrying out the function in question’, then such a state of affairs would be ‘a very powerful factor in favour of the function falling within section 6(3)(b). Indeed, it may well be determinative in many cases, because such powers are very powerfully indicative of a public institution or service.’

Though neither Lord Neuberger nor Lord Mance felt that such a framework existed on the facts, it is interesting to note that they were willing to accept that such a statutory arrangement may well be determinative of a situation falling within the scope of the Act. However, what is perhaps more interesting is that neither judgments considered the dicta of Sir Donaldson MR on the question of the public element. It is submitted that this element of the decision in _Datafin_ ought to have been considered because it provides the earlier broader scope test for determining whether an action is a public function or not. Without explicitly departing from this earlier possible test of scope there is still inherent uncertainty in the law in respect of the matters considered in this article.

**XII. CONCLUSION**

This article has considered the inadequacy of the judicial response to the increasing contractualisation of government and the implications such an approach to service delivery has on the individual rights of those who are entitled to government support and protection. It must be hoped that the slide toward the privatization of public services through outsourcing does not constitute an increasing restriction of access to public law protections and remedies for individuals whose human rights are arguably engaged by providers who take the benefit of public contracts without bearing the responsibilities to act like public authorities. To arrest this slide, far more flexible tests are required when considering what constitutes a public function under section 6.

It is submitted that the appropriate test should consider the following non-exhaustive factors when deciding whether the exercise of a power or the provision of a service is public in nature: first, whether the provision of the service engages a Convention right; second, whether the service is one which the recipient is entitled to by statutory provision; third, whether the only adequate remedy is one provided by public law supervision. Finally, it is submitted that the majority judgment in _YL_ significantly departed from the pre-HRA case law and set out an erroneous case that private parties are to be protected above the individuals who depend on the services provided by private contract. It is worrying that such judicial reticence has failed to grasp the necessity of extending public law protections in an era where outsourcing and privatization is the preferred method of service delivery. It is hoped that such a narrow approach gives way in time to a more flexible and adaptable scope of interpretation and review.

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28 _YL_ (n 2) [102].
29 ibid [167].