THE REVISIONARY JURISDICTION OF THE HIGHER COURTS OF BOTSWANA AND ENGLAND IN THE REVIEW OF DECISIONS OF PRIVATE BODIES

by

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Submitted in accordance with the requirements

for the degree of

DOCTOR OF LAW

at the

UNIVERSTY OF SOUTH AFRICA

SUPERVISOR: PROF M BEUKES

DATE

FEBRUARY 2022

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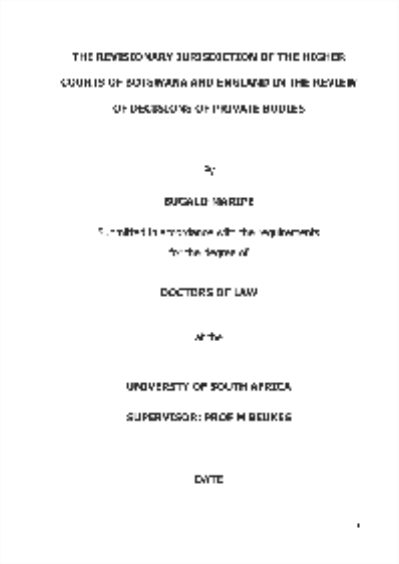
File size:	2.15M
Page count:	311
Word count:	112,676
Character count:	580,357
Submission date:	03-Feb-2022 08:08AM (UTC+0200)
Submission ID:	1753991206



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ABSTRACT

Botswana has a peculiar legal system. It is a former British protectorate, yet the British never introduced their own laws into the country. Instead Botswana was made to apply the law of the Colony of the Cape of Good Hope. Notwithstanding this development, that law indirectly incorporated English law, and this made the applicable law a hybrid of English law and Roman-Dutch law. This simultaneous application of two legal systems still causes a few problems of ascertainment of the law, especially in administrative law, and in particular in the process of judicial review.

Judicial review is generally recognised as a remedy against wrongful decisions of authorities or bodies that exercise public powers or functions. These are bodies that were described compendiously as public bodies. This excluded private bodies from the ambit of judicial review as they were said not to exercise public powers. This resulted in injustice in many circumstances. The scope of judicial review had to expand.

This thesis sets out to establish how this expansion occurred. It is a survey of the law governing the process of judicial review of acts and decisions of private bodies. It does so in a comparative manner, by focusing principally on two jurisdictions, Botswana and England. It looks at the manner in which this extension came about and the principles that underpinned the expansion of the scope for review. This reviewability of decisions of private bodies is central to this thesis.

The thesis establishes that in both jurisdictions there has been some extension of the process of judicial review to decisions of private bodies. However, in both jurisdictions there is evidence of some resistance to the expansion of the scope of judicial review. The position in both jurisdictions remains in a state of flux, requiring settlement by the highest courts.

KEY TERMS

Botswana, contract, contractualisation, England, Human Rights Act, judicial review, private bodies, public bodies, public functions, publicness.

ACKNOWLEDGEMENTS

The path leading to the completion of this work has been tortuous. It has been made possible by the encouraging and guidance of my promoter, Professor Margaret Beukes, who I wish to single out for special recognition. She was pivotal in ensuring that the work proceeds to completion, even at some point when I was almost giving up and contemplating a change of topic! Not only that, she was also instrumental in identifying editors and pushing some of the last minute logistics without which completion would not have been achieved. I wish to specially thank her. I will forever remain grateful for her immense contribution to this work.

I also wish to acknowledge the contribution of my editors, Professor Neville Botha who edited the first three chapters and Mrs Isabeau Southwood who edited the rest of the chapters. They introduced style and made the work flow smoothly and coherently and more readable. I also acknowledge the work of Mrs Thea de Villiers who formatted the work to the required standard. This team forms the core foundation on which this work rests.

I would like thank my immediate family for their understanding when I had to be away for the purpose of pushing this work. My wife Mosetsana Maripe, also contributed in more ways than one especially in resolving typing bottlenecks everytime I encountered some problems. I wish to thank her for her patience and understanding, and generally her encouragement towards this work.

LIST OF ABBREVIATIONS

A	Appellate Division
AC	Appeal Cases
AD	Appellate Division
AJ	Acting Judge
ALL ER	All England Reports
ALL SA	All South African Law Reports
BCL	Bamangwato Concessions Limited
BCLR	Butterworths Constitutional Law Reports
BDC	Botswana Development Corporation
BDP	Botswana Democratic Party
BFA	Botswana Football Association
BIDPA	Botswana Institute of Development Policy Analysis
BLR	Botswana Law Reports
BNF	Botswana National Front
BTCL	Botswana Telecommunications Corporation Limited
Buch	Buchanans Reports
C	Cape Provincial Division
CACGB	Court of Appeal, Gaborone
CACLB	Court of Appeal, Lobatse
Cap	Chapter
CC	Constitutional Court Reports
CEDA	Citizen Entrepreneurial Development Agency
CH	Chancery Division
CJ	Chief Justice
CILSA	Comparative and International Law Journal of Southern Africa
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
CLR	Commonwealth Law Reports
COD	Crown Office Digest (UK)

EWHC	High Court of England and Wales decisions
FIFA	Federation Internationale de Football Association
GP	Gauteng Province
ICR	Industrial Cases Reports (UK)
J	Judge
JA	Judge of Appeal
JAL	Journal of African Law
JP	Judge President
JR	Judicial Review
KB	Kings Bench
LJ	Lord Justice
LOO	Leader of Opposition
LQR	Law Quarterly Review
MAHFT	Miscellaneous Application, High Court Francistown
MAHLB	Miscellaneous Application, High Court Lobatse
MDCB	Mineral Development Company of Botswana
MLR	Modern Law Review
MR	Master of the Rolls
NZLR	New Zealand Law Review
OKD	Okavango Diamonds (Pty) Ltd
PAJA	Promotion of Administrative Justice Act No 3 of 2000
PEEPA	Private Enterprises Evaluation and Privatisation Agency
PL	Public law
QB	Queens Bench Division
QBD	Queens Bench Division
SA	South African Law Reports
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SCA	Supreme Court of Appeal (South Africa)
SPEDU	Selebi-Phikwe Economic Diversification Unit

THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal of Contemporary Roman-Dutch law)
T	Transvaal Reports
TPD	Transvaal Provincial Division
TS	Transvaal Supreme Courts Reports (South Africa)
UBLJ	University of Botswana Law Journal
UKHL	United Kingdom House of Lords
VC	Vice Chancellor
WLR	Weekly Law Reports
ZACC	Constitutional Court of South Africa

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CHAPTER 1

INTRODUCTION, AIMS, AND FRAMEWORK OF THE STUDY

1.1 Introduction

In most Commonwealth jurisdictions, the process of judicial review was, and in many cases still is, limited by the type of decision made and the nature of the decision maker. The definition of judicial review itself evidences an inbuilt limitation. Judicial pronouncements on the scope and limits of the process of judicial review tended to suggest that it is only applicable to 'public bodies' and not to the so-called 'private bodies'. The classification of a body as either 'public' or 'private' is also not a neat or simple process, with various *indicia* being used to distinguish the two. And these *indicia,* too, are not themselves conclusive.

The exclusion of certain acts or decisions from the purview of judicial review on the basis of the classification of the nature of the decision maker has either expanded albeit unwittingly – the scope of the process, or has restricted the breadth of or options for remedies available to a litigant. It is apt to begin by explaining briefly what judicial review means.

Writing in relation to the review of the constitutionality of legislative and executive acts, Nwabueze provides a useful basis for locating the nature and purpose of judicial review. He states:

> Judicial review is the power of the court, in appropriate proceedings before it to declare a legislative or executive act either contrary to, or in accordance with the Constitution, with the effect of rendering the act invalid or vindicating its validity and so putting it beyond challenge in future.[1]

[1] Nwabueze *The Presidential constitution of Nigeria* (1982) 309.

Absent from this definition is the power of the court in matters not involving legislative or executive acts, for example, the performance of administrative acts or decisions, or other decisions or acts not falling within the acceptable remit of the legislature or the executive. To the extent that judicial review extends to activities outside legislation and executive decisions or acts, few would deny that this definition is limited; there are a multitude of bodies which do not perform legislative acts or make executive decisions, which are not always subject to the jurisdiction of the courts on review. Additionally, judicial review is not limited solely to testing the legality of decisions as against the Constitution; it also evaluates compliance with the general law (comprising, *inter alia*, legislation and the common law).

The following definitions are appropriate in that they are not limited to constitutional review and are, it is submitted, suitable for purposes of the discussion throughout this study:

> Judicial review is the means by which the High Court exercises a supervisory jurisdiction over inferior courts, tribunals and *other public bodies* (including individuals charged with public law functions).[2]

And:

> Judicial review is the procedure whereby the High Court is able, in certain cases, to review the legality of decisions made by a wide variety of *bodies which affect the public*, ranging from Government ministers exercising prerogative or statutory powers, to the actions of certain powerful self-regulating bodies.[3]

As well as:

> Judicial review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and *decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties.*[4]

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[2] Gordon *Judicial review: Law and procedure* (1996) 1 (emphasis added).
[3] Fenwick and Phillipson *Sourcebook of public law* (1997) 679 (emphasis added).
[4] Supperstone "The ambit of judicial review" (1992) 24 (emphasis added).

Judicial review, therefore, is generally concerned with the concept of legality, and in terms of the common law, with the legality of administrative action – ie, is where a body exercises a measure of discretion, whether arising from statute or otherwise, in the exercise or discharge of its responsibilities. Judicial review goes beyond establishing conformity (or lack of it) with constitutional provisions as Nwabueze's definition would appear to imply. The scope of judicial review appears to have focussed on the activities of 'public bodies' – eg, it has been said in one of the most celebrated decisions in Roman-Dutch law that:

> [W]henever a *public body* has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the legislature, it is a right inherent in the court, which has jurisdiction to entertain all civil causes and proceedings arising within the Transvaal. The non-performance or wrong performance of a statutory duty by which third persons are injured or aggrieved is such a cause as falls within the ordinary jurisdiction of the court. And it will, when necessary, summarily correct or set aside proceedings which come under the above category.[5]

This statement is consonant with the preponderant view that the body whose act or decision is subjected to judicial review must have exercised some governmental or public power or function,[6] and must be a public body or authority[7] – a view accepted

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[5] *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111, 115 (emphasis added). This statement of the law in South Africa has been referred to in many cases in Botswana. It was cited with approval by Dingake J in the High Court of Botswana in *J & T Decorators (Pty) Ltd v North West District Council and Another* [2010] 3 BLR 820, 839 and by Kirby JP in the Court of Appeal in *Bergstan (Pty) Ltd v Botswana Development Corporation Limited and Others* [2012] 1 BLR 858(CA), 865 where the learned judge expressly the principles developed in that case are of 'equal application' in Botswana. So the statement in the *Johannesburg Consolidated Investment* case reflects the law in Botswana.

[6] See, eg, Cranston "Reviewing judicial review" (1994) 46. See also the lamentations of Woolf "Public law-private law: Why the divide? A personal view" (1986) 220, 221 and Baxter *Administrative law* (1985) 344-353. Wiechers *Administrative law* (1985) 266 opines, in relation to the statement in the *Johannesburg* case, that the 'inherent power of review of courts holds good for the proceedings and actions of voluntary associations and bodies as well; it is in this very sphere that some of the rules of administrative law find application in these private law associations'.

[7] See Boulle, Harris and Hoexter, *Constitutional and administrative law* (1989) 241-247; Wade and Forsyth *Administrative law* (2009) 540 who wrote: 'Judicial Review is designed to prevent the excess and abuse of power and the neglect of duty by public authorities'. Also see, and Bridges, Meszaros and Sunkin *Judicial review in perspective* (1996) 1 who state: 'Judicial review is the principal means by which

by the superior courts of Botswana.[8] The term 'power' is used here to include responsibility, and describes the entitlement or obligation to perform a service or to discharge a responsibility within a defined legal framework. This notwithstanding, there is, in general, no uniformity regarding the definition of a public body. Various tests have been used to characterise public bodies, but the test most often used is whether any decision-making body has exercised a public power in order to bring itself within the purview of judicial review.[9] Thus, the type of function performed or the nature of the decision made has, in the normal course, been a conclusive consideration.[10]

In many cases, and certainly in Botswana and England, where there is no specific legislation governing the content of judicial review, the law has been developed and shaped by the courts over time within the general framework of the development of the common law. But the rules they have established have not always been uniform as regards the reviewability or otherwise of the acts or decisions of voluntary associations or non-statutory bodies – what are in certain quarters referred to as 'domestic tribunals'.[11] In this work the term 'private bodies' is used throughout.

On the one hand, the courts have held that private bodies do not exercise public powers, do not perform public functions or functions of a public nature, are not public bodies, and essentially act in the sphere of private law, where the applicable rules are contractual[12] and not properly the subject of review proceedings. On the other hand,

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the courts in this country exercise supervision over the conduct of central and local government and other public authorities'.

[8] *National Development Bank v Thothe* [1994] BLR 98 (CA); *Autlwetse v Botswana Democratic Party and Others* 2004 (1) BLR 230 (HC). The *Autlwetse* case is discussed in greater detail in Chapter 6.

[9] *Pennington v Friedgood and Others* 2002 (1) SA 251(C).

[10] Boulle, Harris and Hoexter 241-247.

[11] See the conflicting decisions *R v Panel on Take-overs and Mergers ex p Datafin plc* [1987] QB 815 and *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 ALL ER 853 (CA) in England, and the conflicting decisions of *Autlwetse v Botswana Democratic Party and Others* [2004] 1 BLR 230 and *Sorinyane v Kanye Brigades Development Trust and Another* [2008] 2 BLR 5 in Botswana. That the courts have not been consistent in this regard is also recognised in *Ndoro and Another v South African Football Association and Others* 2018 (5) SA 630(GJ) in the case of South Africa.

[12] See, eg, *Law v National Greyhound Racing Club Ltd* [1983] 1 WLR 13 (CA); *Marlin v Durban Turf Club and others* 1942 AD 112; *R v Football Association Ltd, ex p Football League Ltd* [1993] 2 ALL ER 833 (QB); *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 ALL ER 853 (CA).

there is judicial[13] and academic opinion which favours the view that even in the case of such bodies, the courts can exercise their review jurisdiction notwithstanding that the body exercising a power or making the decision may not fall within the definition of a public body, or have acted in terms of the consensual scheme through which the members have bound themselves. It is said in certain circumstances private bodies even when exercising private functions owe duties of fairness and rationality, arising from the common law, to those affected by their acts and decisions.[14] 'Consensual' here means that the relationship was created by the parties themselves of their own volition, and did not arise from some necessary link – eg, the provision of a necessary public service. Given the context, this study explores the parameters in which decisions or acts of private bodies are susceptible to challenge by judicial review. The competence of the court to entertain challenges against decisions or actions of a variety of bodies, by way of judicial review, coupled with the power to issue orders sought either setting aside, prohibiting the decision or action, or compelling the body to do something it is required by to do by law, is what is defined throughout the thesis as the court's revisionary jurisdiction. It is essentially a process of correction of the processes of bodies which fall under the supervisory jurisdiction of the court. It was in this context that the Supreme Court of South Africa said; '…this Court may be asked to review the proceedings complained of and set aside or correct them'.[15] That court for purposes of this study is the High Court.

[13] For example, the dissenting judgment by Lord Denning MR in *Breen v Amalgamated Engineering Union and others* [1971] 2 QB 175; *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A); *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A);

[14] Oliver "Common values in public and private law and the public/private law divide" 632; Pannick "Who is subject to judicial review and in respect of what?" [1992] PL 1-7; Wolffe "The Scope of judicial review in Scots law" (1992) 625-637; Maripe "Judicial review and the public/private body dichotomy: An appraisal of developing trends" (2006) 23-55.

[15] *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111, 115. This statement of the law in South Africa has been referred to in many cases in Botswana. It was cited with approval by Dingake J in the High Court of Botswana in *J & T Decorators (Pty) Ltd v North West District Council and Another* [2010] 3 BLR 820, 839 and by Kirby JP in the Court of Appeal in *Bergstan (Pty) Ltd v Botswana Development Corporation Limited and Others* [2012] 1 BLR 858(CA), 865 where the learned judge expressly the principles developed in that case are of 'equal application' in Botswana. So the statement in the *Johannesburg Consolidated Investment* case reflects the law in Botswana.

1.2 Aims and objectives of the study

This study aims to identify, locate, and discuss the High Court's jurisdictional basis for the process of judicial review of the acts and/or decisions of 'private bodies' in England and Botswana. There are several reasons for the choice of these two countries. Firstly, Botswana and England share close historical ties which have significantly pervaded Botswana's legal system. For some 81 years, Botswana was a British Protectorate in which governmental affairs were regulated in accordance with British system of administration, custom, and practice. As in many African states, especially in the Anglophone countries, the adoption of customs, practices, systems of governance and laws by the colonised from the colonial masters was a commonplace. Botswana, although not *strictu sensu* a colony in the traditional sense of the term, was no exception. The other link between Botswana and England is founded on the reception formula which the territory of Botswana, then known as the Bechuanaland Protectorate, adopted at the time of the establishment of British rule. By 'reception formula' is meant the way in which foreign laws were introduced and made to apply in the territory. It is argued that, for reasons of convenience, the laws adopted in the Bechuanaland Protectorate – criminal law aside – did not directly replicate English law. However, English-law rules came to apply through the 'intermediate' process of reception from the Colony of the Cape of Good Hope in the present Republic of South Africa. It is further argued that the law applicable in the Cape Colony, although not purely English law, had an appreciable English-law component, and in the field of administrative law was predominantly English law.[16] Therefore, the application of English law in the Bechuanaland Protectorate must be traced through the law applicable at the Cape Colony pre-1885.[17] As shall be discussed more fully at Chapter 2, one of the colonial legacies that remained was the enactment of a Criminal Code modelled along the English criminal code, with a provision in the Botswana Penal Code that required interpretation in accordance with the English criminal law.[18] No provision

[16] This point is made by Baxter 32 and Khan "The reception and development of Roman-Dutch law in South Africa" (1985) *Lesotho LJ* 79 among many.
[17] This is the date on which the country now called Botswana became a British Protectorate. This will be discussed more in Chapter 2.
[18] Section 2(2) of the Penal Code, Cap 08:01 provides:

was made in respect of public law, in particular, administrative law. However, one scholar and jurist observed in 1973:

> '… until very recently, most of the judges who were subsequently called upon to carry out judicial duties in this country were all persons who were brought up under the English common law as applied elsewhere and therefore naturally made efforts to develop the common law of this country along the lines of the law with which they were familiar'.[19]

While this reality was clearly envisaged by the colonial rulers, it is a matter of conjecture why they would 'bequeath' to Botswana the criminal law, and not administrative law. This lacunae is the motivation for using England as a comparator, and it is one of the aims of this study to establish whether the rules of English administrative law correspond to the rules applicable in Botswana, and whether any major differences can be identified.

This study is significant in that it seeks to deconstruct the long-held notions on the conditions that must be satisfied if a litigant or potential litigant is to obtain relief by way of judicial review. In particular, it would appear that the preponderant view that judicial review applies only to decisions of public bodies and not those of private bodies, is increasingly giving way to recognition of the suitability of judicial review, or at least the remedies it offers, for private bodies.[20] Further, a case may possibly be made for the determination of disputes arising in the so-called 'traditional bodies' by judicial review – failure to recognise this is to deny victims of decisions of the so- called 'private bodies' a remedy, which, in turn, promotes injustice.

In assessing the application or otherwise of the judicial review process to decisions or acts of a body, the question generally arises as to the criteria that body must satisfy to qualify for judicial review.[21] In this regard it is submitted the common law has

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> 'Except where the context otherwise requires, expressions used in this Code shall be presumed to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith'.

[19] Aguda "Legal development in Botswana from 1885 to 1966" (1973) *Botswana Notes and Records* 52-63, 57.

[20] For example *R v Panel on Take-overs and Mergers ex p Datafin plc* [1987] QB 815.

[21] These criteria are spelt out in Maripe "Judicial review and the public/private body dichotomy: An appraisal of developing trends" 34-35.

created problems of identity and characterisation. 'Identity' in the sense of whether there are bodies which are, by their very nature, susceptible to judicial review. The question is then whether or not the body in issue falls within the category to which judicial review applies. 'Characterisation' on the other hand, revolves around the type of function performed or the nature of the decision made or act done by the body.[22] These factors determine whether or not that body's actions may be impugned through review proceedings. For example, it is urged in some literature[23] and case law,[24] that even if the body in question is one to which judicial review ordinarily applies, this would be so only when that body has made an 'administrative decision' or performed an 'administrative act'. This is the problem the study seeks to investigate.

1.3 Problem Statement

Throughout the Commonwealth, and in the Anglo-Saxon legal tradition in general, the pursuit of remedies by judicial review has traditionally been limited by the reach of the process as regards both the type of body whose acts or decisions are under scrutiny, and the type of decision that is susceptible to judicial review.[25] The law has created a distinction between bodies to which the process of judicial review applies, and decisions or acts which may be challenged on review. This distinction has created a problem in that not only is there no uniform classification of bodies as either 'private' or 'public', but attempts to draw a distinction between the two under common law have not been uniform. This has, in turn, given rise to the issue of 'identification' of the particular body. Further, as will be submitted, even where there is agreement that a decision is properly that of a 'public body', the type of decision made is also problematic when it comes to determining the propriety of challenging it by judicial review. Therefore, there is a general problem of 'categorisation' of decisions. It is submitted that the issue of 'identification' and the problem of 'categorisation' do not

[22] Oliver D "Functions of a public nature under the Human Rights Act" (2004) *PL* 329-351; Williams A "Public functions and amenability: Recent trends" (2017) *JR* 16-26; *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] 3 WLR 283.

[23] Thornton L "The Constitutional Right to just administrative action – are political parties bound?" (1999*) SAJHR* 351-371.

[24] *Autlwetse v Botswana Democratic Party and Others* 235-237.

[25] Forsyth "The scope of judicial review: 'public duty' not 'source of power'" (1987) PL 356-367.

provide a principled legal basis for allowing judicial review in respect of one type of body or the kind of decision for purposes of permitting judicial review remedies. And this distinction has given rise to problems of 'justification' of judgments. Among the problems identified, it appears that the separate treatment of bodies and types of decision for purposes of ascribing judicial review remedies has resulted in parallel systems of justice for litigants in that one set of rules applies in some circumstances but not in others, while both may involve essentially the same type of wrong.[26]

These problems arise from the separation of applicable rules of law – what is termed the 'public/private law divide' in this thesis. It would appear that at the very core of the separate treatment of public and private bodies for purposes of judicial review, lies the demarcation of boundaries or the scope for the application of 'public law' and 'private law'. It was long the position in many Commonwealth jurisdictions that public law applied to public bodies and private law to private bodies. 'Public law' is used here to mean the law governing the relationship between state institutions and individuals and between state institutions *inter se.*[27] 'Private law' is taken to mean the law governing the relations between private individuals.[28] Woolf has said of the two:

> I regard public law as being the system which enforces the proper performance by public bodies of their duties which they owe to the public. I regard private law as being the system which protects the private rights of private individuals or the private rights of public bodies.[29]

This may be regarded a *fait accompli* in certain quarters,[30] but is hotly contested by others[31] who contend that the distinction is 'old-fashioned and undesirable in

[26] See Jolowicz "The forms of action disinterred" (1983) *Cambridge LJ* 15-18; Maripe "Judicial review and the public/private body dichotomy: An appraisal of developing trends" (2006) 4 *UBLJ* 23-55.
[27] Beatson J "'Public' and 'private' in English administrative law" (1987) *LQR* 34-65.
[28] McEldowney *Public law* (2002) 6-7.
[29] Woolf "Public law – private law: Why the divide? A personal view" 221.
[30] For example, Pannick "Who is subject to judicial review and in respect of what?" [1992] PL 1, 2 says that public law does not regulate the decisions of bodies with which the applicant has voluntarily entered into a consensual relationship is well-established'.
[31] For example, Harlow "'Public' and 'private' law: Definition without Distinction" (1980) 241-265.

principle',[32] and is wholly irrelevant to the organisation of modern society.[33] Cranston contends that the boundaries set for judicial review are not based on principle,[34] while Woolf posits that the distinction is without justification and gives rise to injustice.[35] The distinction between public law and private law is itself not clearly articulated in that public institutions do enter into private arrangements with individuals, and it may be difficult to determine at any point when public or private law will apply to such relationships.

The problem however, is how to treat a public body which has entered into a private arrangement. Is it treated as a private body for that purpose? or does it retain its essential character as a public body for purposes of review? These are some of the issues identified by Hunt[36] as the challenges in distinguishing between public and private bodies. The distinction, therefore, rests on the categorisation of the type of body and the law applicable to different types of bodies – a distinction which itself rests on shaky ground. This has resulted in a grey area ripe for exploration as to the proper circumstances in which judicial review may be exercised in respect of the acts and decisions of private bodies.

While these distinctions have been made, the traditional boundaries appear to be narrowing at a rapid rate, and there are situations where judicial review has been extended to the acts or decisions of so-called 'private bodies'. However, this extension has not been uniform and evidences no concrete discernible foundation.[37] Even case law is not consistent. The following contrasting approaches in England demonstrate this inconsistency. Dismissing the justification for denying judicial review to bodies founded on contract as a fiction, Lord Denning held:

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[32] Harlow, "'Public' and 'private' law: definition without Distinction" 256.
[33] Harlow, "'Public' and 'private' law: definition without Distinction" 242.
[34] Cranston "Reviewing judicial review" 46.
[35] Woolf "Public law-private law: Why the divide? A personal view" 238.
[36] Hunt "Constitutionalism and the contractualisation of Government in the United Kingdom" (1997) 21-39.
[37] Cranston "Reviewing judicial review" 48. A trenchant analysis of the unsatisfactory nature of the tests used by courts to determine whether judicial review should extend to decisions of private bodies, and the decisions of the courts in that regard, is provided by Craig "Public law control over private power" (1997) 196-216.

> 'Their rules are said to be a contract between the members and the union. So be it. If they are a contract, then it is an implied term that the discretion should be exercised fairly. But the rules are in reality more than a contract. They are a legislative code by the council of the union to be obeyed by the members. This code should be subject to the control by the courts just as much as a code laid down by parliament itself'.[38]

This is to be contrasted with the following view from the same jurisdiction:

> I think that the courts must be slow to allow any implied obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts.[39]

This alone, has given rise to questions as to when and under what circumstances judicial review should apply in respect of private bodies. The principal question is: 'What is the jurisdictional basis for the reviewability of the acts and or decisions of private bodies?'

1.4 Points of departure and assumptions

The objective of this study is approached from several angles. Firstly, from a structural standpoint: the point is made here that like public bodies, private bodies are legal entities with a legal personality. Secondly, private bodies make decisions with legal consequences. Thirdly, like public bodies, private bodies, are capable of making wrong decisions. Fourthly, the decisions made by private bodies are capable of affecting their members negatively. In light of the above standpoints, it is urged that private bodies can and should properly be subjected to judicial review. Finally, the study will interrogate the practice in both Botswana and England on the rules of identification and classification of bodies as either public or private, and ultimately establish the basis for the courts' revisionary jurisdiction in respect of decisions of both public and private bodies in the two countries.

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[38] *Breen* v *Amalgamated Engineering Union and others,* [1971] 2 Q B 175, 190.
[39] *McInnes v Onslow-Fane* [1978] 1 WLR 1520, 1535 (per Megarry VC).

The primary assumptions made in this study are firstly, that at first glance, and in both Botswana and England, the High Court is the forum in which the process of judicial review is entertained. In other words, it is the only court that has original revisionary jurisdiction. Secondly, in both countries judicial review serves the same purpose and it is geared towards achieving the same ends.

This study does not consider the basis for revisionary jurisdiction, if any, in fora other than the English and Botswanan High Courts. It also does not interrogate the characteristics for qualification for judicial review of bodies, if any, which do not fit the criteria identified. It does however, consider the position in South Africa for reasons that the common law applicable in Botswana was 'imported' from the colony of the Cape of Good Hope in South Africa at the time of the establishment of protectorate status over the territory now called Botswana. The reception formula was timeless,[40] and had the effect that at least up to independence, the law that was received in Botswana continued to apply even after independence, and that both Botswana and South Africa apply the Roman-Dutch common law.[41] Botswana courts rely on South African authorities to a significant degree,[42] and it is expected that this trend will continue even after the transformation of administrative law in South Africa with the adoption of the 1996 Constitution and the promulgation of the Promotion of Administrative Justice Act.[43] This position will be discussed more fully in Chapter 6.

1.5 Hypotheses

The thesis proceeds on the basis of several hypotheses. First, early exposition of the law that public bodies, or bodies performing a public function or functions of a public nature, are the only bodies eligible for review proceedings is unsatisfactory as it is too limited in the scope of protection it offers. Second, the identification of a body whose

[40] Brewer "Sources of the criminal law in Botswana" (1974) 25; Molokomme "The reception and development of Roman-Dutch law in Botswana" (1985) 123; Poulter "The common law of Lesotho" (1969), 131 and Sanders "Legal dualism in Lesotho, Botswana and Swaziland" (1985) 28.
[41] *Silverstone (Pty) Ltd v Lobatse Clay Works (Pty) Ltd* [1996] BLR 190 (CA), 194-5.
[42] For example *Jockey Club of South Africa* v *Forbes* 1993 (1) SA 649(A) and *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111.
[43] 3 of 2000.

decisions or acts should be judicially reviewable is itself an intractable exercise as the process does not rest on generally accepted principles. Third, the features or elements of a decision to qualify a body as one open to judicial review are too open textured and altogether imprecise to constitute a general standard. Fourth, any attempt at enumerating the characteristics of a body that make it amenable to review proceedings potentially introduces very grave consequences and yields unjust results for litigants deserving of protection by judicial review. Fifth, there is no basis – in doctrine, principle, or practice – for the denial of judicial review processes and the benefits attached to them, to bodies not meeting the traditional criteria for a body open to review proceedings. And sixth, the ends of justice demand a departure from the separation of bodies based on their nature or categorisation and a widening of the scope of judicial review. Finally, current practice indicates that the scope of review is in fact widening to include review of the decisions of private bodies.

1.6 Methodology

The research is not empirical. Unless in particular instances where the context demands, it is essentially a desk-based study. As the questions suggest, the major part of the work is conducted through an examination of existing literature and both primary and secondary sources of law. This entails an examination of the various cases from the relevant jurisdictions to establish how courts have addressed issues regarding their jurisdictional basis in matters of judicial review.

Although the study primarily involves the position in England and Botswana, the position in South Africa prior to 1996 has a significant bearing on the study as it reflects, or may reflect, the law adopted or capable of being applied by the Botswana courts. In fact, the courts in Botswana continue to refer to, and place considerable reliance on, South African decisions both before[44] and after[45] the adoption of the 1996 Constitution. South African jurisprudence, therefore, remains an important source of

[44] For example *Jockey Club of South Africa* v *Forbes* 1993 (1) SA 649(A) and *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111.
[45] *Pennington v Friedgood and Others* 2002 (1) SA 251(C).

law in Botswana and is considered to the extent that it is relevant to this thesis. Although the South African position now largely entails an interpretation of the Constitution and the Promotion of Administrative Act 3 of 2000 (the PAJA),[46] it remains relevant as the problems emanating from a determination of public functions or functions of a public nature under a constitution or statute, may significantly influence decisions made elsewhere under common law. The South African decisions interpreting section 33 of the 1996 Constitution on the right to just administrative action are, therefore, considered to determine how they may impact on the classification of a public body or functions of a public nature by the courts of Botswana. Although the basis for administrative law in South Africa is now the Constitution, it has been held that the common law remains relevant as it informs the provisions of both the PAJA and the Constitution.[47] While pre-democracy South African cases are particularly relevant, the post-democratic South Africa cases are cited where relevant. This will be covered specifically in Chapter 6.

1.7 Conceptual analysis

In order to properly demarcate the field of study, it is necessary to identify the body central to the study. The phrase 'private bodies' does not lend itself to easy definition. In many cases it is used to refer to those bodies that fall outside the description of a 'public body'. The latter generally refers to entities in which there is a significant public interest in that the state is involved, in either their establishment or operation, and the entities make decisions which affect a great number of people in the pursuit of some governmental or state interest.[48] Private bodies can, therefore, take many forms, but are generally those bodies which are constituted by individuals who come together in order to pursue a common interest without the use of any state machinery. This interest too, takes many forms: religious, commercial, political, sporting, or any

[46] 3 of 2000.
[47] *Pharmaceutical Manufacturers Association of South Africa and Another: in Re ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 45. See also *Batostar Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 22.
[48] See Maripe "Judicial review and the public/private body dichotomy: An appraisal of developing trends" 27 and 34; Lewis *Judicial remedies in public law* (2000) 7.

vocation which can be better pursued in an organised fashion.[49] They are sometimes termed 'voluntary associations' in that they arise from the exercise of the free will or deliberate choice of their members. Membership of such entities is voluntary.[50] Although the state is not as a rule involved in the affairs of these entities, it may play a permissive role in the sense of enabling their formation, and in some cases even a regulatory role. Many of these bodies require some form of statutory regulation if they are to enjoy legitimacy. For example, almost all sporting bodies and religious organisations in Botswana must comply with the requirements of the Societies Act,[51] which requires, *inter alia*, submission of a constitution[52] and audited accounts to a designated public official.[53] Otherwise they are not considered essential for the operations of the machinery of the State in the running of public affairs, and the absence of these bodies does not create a lacuna in the operations of government. The regulation established in the Societies Act is purely for the protection of the members of those societies and third parties that enter into relations with them. It is not as if in their absence the government would itself provide the service they provide or exercise the functions they perform or create a public body for that purpose.[54] Although government may play a regulatory or supervisory role over such entities, in principle they regulate themselves and create their own rules for their own operations. These rules are generally embodied in a contract or a constitution.

The question arising is whether the process of judicial review should then be extended to such bodies whose affairs are regulated by contract, and in respect of which state involvement is only at the macro-level of enabling and facilitation by legislation and regulatory mechanisms to an extent, but minimal in operational issues.

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[49] *Sorinyane v Kanye Brigades Development Trust and Another* [2008] 2 BLR 5 (HC), 9-10.
[50] Bamford, *The law of partnership and voluntary association in South Africa* 3rd ed (Juta and Co, Cape Town 1982), 1-5.
[51] Cap 18:01.
[52] S 6(1).
[53] S 17.
[54] This is not an instance that brings into application the 'but for' test discussed in Chapter 5, which demands in effect that but for the existence of the private body, the State would itself provide the service or exercise the functions performed by the private body or establish a body for that purpose. This principle is expressed in *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 ALL ER 853 (CA).

1.8 Literature review

The study has touched on some of the literature relevant to specific aspects of the thesis. There is limited literature that deals directly with the reviewability of decisions of private bodies. Most of the literature addressing the topic of the thesis is generally concerned with whether or not a body satisfies the criteria for judicial review – ie, whether it is a public body, or whether it exercises public functions or functions of a public nature.[55] Since in many instances the identification of a body as either public or private depends on the nature of the power the body exercises, the literature similarly turns on that trajectory. In this regard Harlow[56] takes the view that that although there appears to be some definitions given for both there is no substance that differentiates public from private law, while Woolf questions the utility of the separation between public law and private law in the first place.[57] Before the decision in *R v Panel on Take-overs and Mergers, ex p Datafin plc* [58] *(Datafin),* the dominant view was that only those bodies that exercised 'public power' were amenable to review.[59] While there is general agreement by authors on the subject that the exercise of statutory power or the prerogative is an exercise of public power[60] and case law is to similar effect,[61] it is not always the case that a body which does not exercise statutory powers or the prerogative will be held to be exercising public power for purposes of determining revisionary jurisdiction. Whether it exercises such power or not is indeed the source of contestation by both authors and case law. This has led to the characterisation of public power and the formulation of *indicia* for its exercise. Campbell takes the view that everybody exercising a 'monopoly' function in essence exercises public power,

[55] For example, Hunt "Constitutionalism and the contractualisation of government in the United Kingdom" 21-39 and Pannick "Who is subject to judicial review and in respect of what?" 1.
[56] "'Public' and 'private' law: Definition without distinction" (1980) *MLR* 241-265. Beatson "'Public' and 'private' in English administrative law" (1987) *LQR* 34-65.
[57] "Public law-private law: Why the divide? A personal view" 220.
[58] [1987] QB 815
[59] This is the premise from which the decisions in *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex p Wachmann* [1993] 2 ALL ER 249 (QB); *Pennington v Friedgood and Others* 2002 (1) SA 251 (C) and *Autlwetse* v *Botswana Democratic Party and Others* [2004] 1 BLR 230 just to illustrate by way of case law in England, South Africa and Botswana respectively.
[60] For example, De Smith, Woolf and Jowell *Judicial review of administrative action* (1995) 170-175.
[61] Case: *Mogana and Another v Botswana Meat Commission* [1995] BLR 353.

regardless of the source of that power.[62] While Williams[63] criticises Campbell for taking a very narrow view of public power, and posits that it is a fallacy to believe that statutory power can ever be relegated to the background in the determination of the exercise of public power. Cane[64] highlights the difficulties that arise from the distinction drawn between public and private law in cases before court. Generally authors agree that the divide between public law and private law continues to exist and is applied in varied situations, yet the precise contours or the demarcation has never really been spelt out.[65] Save for a few works, such as that of Beloff[66] who writes specifically in the context of sporting bodies, all the literature invariably includes some discussion of the non-availability of judicial remedies for private bodies, coupled with what constitutes a private body.[67] In essence, the discussion of private bodies is an incidental aspect of the wider discussion of public bodies, and comes in where exclusions are considered. In other circumstances the discussion of whether a body is public or private for purposes of judicial review comes across as a substantive discussion of the nature of a private body. This is common in England, and this was intensified after the promulgation of the Human Rights Act in 1998 in terms of which various entities discharging public functions were required to satisfy the criteria for reviewability.[68] In

[62] Campbell "Monopoly power as public power for the purposes of judicial review" (2009) LQR 491-521.
[63] Williams "Judicial review and monopoly power: Some sceptical thoughts" (2017) 656-682.
[64] Public law and private law: Some thoughts prompted by *Page Motors Ltd v Epsom & Ewell* BC (1983) 202-208.
[65] Oliver "Common values in public and private law and the public/private law divide" (1997) 630-646; Oliver "Lord Denning and the public/private divide" (1999) 71-80; Meisel "The *Aston Cantlow* case, blots on English jurisprudence and the public/private law divide" (2004) 2-10 among others.
[66] "Pitch, pool, rink … court? Judicial review in the sporting world" (1989) PL 95-110.
[67] Examples are Woolf "Public law-private law: Why the divide? A personal view" 227; Harlow "'Public' and 'private' law: definition without distinction" 250; Forsyth "The scope of judicial review: 'public duty' not 'source of power'" (1987) PL 356-367, 360-361; Wade "New vistas of judicial review" (1987) 323-327, 326; Hunt, "Constitutionalism and the contractualisation of government in the United Kingdom" 28; Sinclair "Judicial review and the exercise of public power" (1992) 193-234; Campbell "The nature of power as public in English law" (2009) 90-117; Thompson "Judicial review and public law: Challenging the preconception of a troubled taxonomy" (2017) 890-927, 896. A comprehensive account of the debate may be found in Craig "What is public power" (1997) 25-41; Pannick "What is a public authority for the purposes of judicial review" in Jowell and Oliver (eds) *New directions in judicial review, current legal problems* (1988) 23-36 27; Elliott "Judicial review's scope, foundations and purposes: Joining the dots" (2012) 75-112, 84-85; Costello "When is a decision subject to judicial review? A restatement of the rules" (1998) 91-119, 92-93; Beatson "'Public' and 'private' in English administrative law" (1987) 34-65, 47; Beloff and Kerr 'Why Aga Khan is wrong" (1996) 30-33 among many.
[68] Virtually every leading textbook on administrative law in the Anglo-Saxon world has a section on this. See, eg, Wade and Forsyth *Administrative law* 542-548; Baxter *Administrative law* 344-345, and many others. Other works of Meisel "The *Aston Cantlow* case, blots on English jurisprudence and the public/private divide" (2004) 2-10; Markus "What is public power?; The courts approach to the public

Botswana, the article by Maripe[69] pursues the same discussion and draws on the cases and literature from England. The literature has certain discernible commonalities in that it highlights the absence of elaborate identification criteria, apart from the guidelines arising from the common law, and the lack of uniformity in the decisions of the courts.[70] As the position in South Africa is also relevant to this discussion by virtue of its links with Botswana as regards the reception-of-law formula, South African literature offers some useful insights to the discussion.[71] The views of several other authors on the subject are expressed in the various works referred to in subsequent chapters. So the literature available proceeds on a trajectory that begins with the public/private law divide, then the public/private body distinction and then the public /private body dichotomy. The *Datafin* case has somewhat closed these gaps, and focuses on the 'public element' in a decision, a feature which shall be called the 'publicness' of a decision in determining amenability to judicial review. In this way, judicial review has been extended to certain decisions of private bodies.

As regards primary sources, there is a large volume of cases, particularly in England, on the subject. Indeed, it is that case law which forms the basis of the scholarly works some of which are mentioned above. There has also been a recent surge in litigation in Botswana in which the court's jurisdiction on review is implicated. Just as in England, in Botswana the criteria for determining the applicability of judicial review is not uniform. It is also interesting that there are cases from elsewhere, especially South Africa and Australia, where these matters have been subjected to judicial scrutiny, and which, to some significant extent, will help shape this study. The South African authors, writing on the approach of Roman-Dutch common law, which, as Chapter 2 will

authority definition under the Human Rights Act" (2003) 77-114; Oliver "Functions of a public nature under the Human Rights Act" (2004) 329-351, where the author analyses decided cases on the interpreting s 6(3)(*b*) of the Act, especially the phrase "functions of a public nature"; Sunkin (2004) "Pushing forward the frontiers of human rights protection: The meaning of public authority under the Human Rights Act" 643-658, to mention but a few.

[69] See Maripe "Judicial review and the public/private body dichotomy; an appraisal of developing trends" 23-56.

[70] For example, Harlow "'Public' and 'private' law: Definition without distinction" 241-265.

[71] Baxter (1984); Wiechers (1985); Boule, Harris and Hoexter, (1989); Devenish, Govender and Hulme (2001); Quinot *Administrative law, cases and materials* (2008) and Thornton "The Constitutional Right to just administrative action – are political parties bound?" (1999) 351-371.

demonstrate, applies also to Botswana, generally signify the common law basis for the courts' revisionary jurisdiction in respect of decisions of private bodies.[72]

1.9 Chapter outline

The current chapter (Chapter 1) introduces the study, discusses the objectives of the study, and outlines problems or questions pursued in the research. It further sets out the basis for the research interest, and why it merits a study of this nature.

The chapter provides a brief outline of the position of the law in Botswana and England, and explains why these two countries have been selected for the study. After laying down the basis for judicial review and the position regarding the type of body whose decisions were traditionally reviewable, it is worth noting that there are those who advocate for expanding the remedy or process of judicial review to other bodies referred to in this thesis as 'private bodies'.

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[72] For example, Boulle, Harris and Hoexter *Constitutional and administrative law: Basic principles*, 335 to opine that 'Thus public or private bodies which are contractually entitled to take disciplinary or coercive decisions should ensure that these be preceded by a hearing either on the basis of an implied term which incorporates natural justice into the contract or on the simple and obvious ground that the decision is a quasi-judicial one'. Others who express the same view are Hoexter, *Administrative law* (2012) 119-125 who maintains that:

> 'Before 1994 the courts regularly reviewed the decisions of private bodies, such as churches and clubs, taken in the exercise of powers derived from the contract between them and their members, typically in disciplinary matters but also sometimes in non-disciplinary contexts. Such decisions undoubtedly remain reviewable today- but on what basis?
> …
> …
> It seems, then, that the reviewability of private power in the post-1994 era continues to take place outside the Constitution in terms of the well-established principles of our common law.'

And Wiechers, *Administrative law* (1985), who writes that:

> 'The inherent power of review of courts hold good for the proceedings and actions of voluntary associations and bodies as well; it is in this very sphere that some of the rules of administrative law find application in these private law associations' 266.

And Quinot, *Administrative law, cases and materials* (2008), 56 who takes the position that:

> 'Under common law certain decisions of private bodies, notably disciplinary action, which did not amount to the exercise of public power or a public function were nevertheless subjected to administrative law principles and judicial review. In relation to decisions of disciplinary tribunals of bodies such as unions, universities, (sport) clubs and churches the courts mostly read these principles into the relevant contracts that governed the parties' relationships …'

In addressing the aims and objectives of the study, I trace the historical development of the law in Botswana and its link to English law in general, and more specifically to administrative law where the theme of the study is located. It further identifies the problems stemming from the legal 'pigeon-holing' (in terms of characterisation of bodies) of administrative decisions as amenable to judicial review. I then assess why it is necessary to reject this approach and extend the process of judicial review to bodies not meeting the traditional criteria for review. Having set the background, I turn to the formal problem statement which includes a brief survey of the law and why the current position is unsatisfactory.

This is followed by the points of departure, assumptions, and hypotheses adopted which lead to the conclusion that the scope of judicial review should be widened to cover decisions of private bodies and why this is so. Although not in essence empirical, the study draws lessons from Botswana and England as the primary jurisdictions surveyed, and is complimented by lessons from elsewhere, especially the Republic of South Africa whose fundamental links with Botswana are highlighted in Chapter 2 where I address the issue of the reception of law in the then Bechuanaland Protectorate.

In the penultimate segment of the chapter I briefly sketch out the essential features of a 'private body' which it is argued, should be amenable to judicial review. The chapter closes with a brief review of some of the literature available on the topic.

Chapter 2 provides a background to the Botswana legal system with particular focus on administrative law as the area of the law in which judicial review is generally located. As a Protectorate, it is understandable why two systems of law applied simultaneously in the territory in what is termed the 'duality of laws'. One was local or customary law which arose from the customary/traditional practices of the various polities that existed in the territory, while the other was 'foreign' or imported law that was 'received' from outside the country and which was to apply to the non-indigenous peoples living in the territory. The nature of this received law forms the main discussion

under this topic and shows the link between the law in Botswana and England, thus justifying a comparison between the two countries.

Chapter 3 examines the history and development of the process of judicial review in England. Although covering a wide area, I concentrate on the main elements of English administrative law and judicial review as it applies today.

In Chapter 4 I discuss the nature and characteristics of private bodies and how they can be distinguished from public bodies for purposes of applying the process of judicial review.

Chapter 5 discusses the development of the law leading to the application of the process of judicial review to private bodies in England and the considerations which informed the 'shift' to include private bodies under judicial review. The current position of this process in English law is discussed.

Chapter 6, mirrors Chapter 5 but in the context of Botswana. The extension of principles of judicial review to decisions of private bodies in Botswana, how this came about, and the considerations that were at play are discussed. The current state of the law regarding judicial review of private bodies in Botswana is highlighted. It is also in this chapter that I will briefly discuss the legal position in South Africa. This is necessitated by the historical connection between the legal systems of the two countries as will have been discussed at Chapter 2, primarily the reception of law into the Bechuanaland Protectorate from the Cape of Good Hope. This position is discussed with a view to establishing how it affects the law in Botswana or how it may do so in the future.

The closing chapter (Chapter 7) draws conclusions from the study and spells out the main findings with particular emphasis on a comparison between English and Botswanan law as regards the judicial review of the decisions of private bodies. It is

the hope that the resulting recommendations will offer guidance for both the courts and the legislatures in their future treatment of this seemingly intractable issue.

CHAPTER TWO

THE RECEPTION OF LAW AND THE SHAPING OF THE BOTSWANA LEGAL SYSTEM 25

CHAPTER TWO

THE RECEPTION OF LAW AND THE SHAPING OF THE BOTSWANA LEGAL SYSTEM

2.1 Introduction

The main objective of this chapter is to provide a context within which the process of judicial review applies in Botswana. It provides an overview of the origins, development and current state of the law so as to allow for a full appreciation of the context in which the rules relating to the process of judicial review generally and more particularly judicial review of decisions of private bodies, operate.

It must be stated from the outset that the development of the Botswana legal system is steeped in politics. It is a process that began towards the end of the nineteenth century when the British took over the political administration of the territory which they named the Bechuanaland Protectorate – now Botswana. Since the declaration of protectorate status over the territory, there has been much debate, which continues to this day, on how this protectorate's status came about. On the one hand some[1] claim it resulted from a request by members of the self-governing polities in the area at the time such as the Bangwato, Bakwena, Bakgatla and others for that protection.[2] On the other are those who posit that British occupation arose out of British concern about possible annexation of the territory by the Germans who were already in South West Africa, (now Namibia), and who had set their sights on expanding their sphere of influence.[3] This debate need not detain us here and will be pursued only in so far as it connects with the development of the legal system. Whatever the position, the introduction of protectorate status over the Bechuanaland Protectorate took place in the belief and hope by the British that at some point, the territory would be

[1] Tlou and Campbell *History of Botswana* (1984) 145-146; Bagwasi "The relationship between Botswana Chiefs and British administrators: A linguistic perspective" (2003) *Botswana Notes and Records* 33-40, 33.
[2] Tlou and Campbell *History of Botswana* (1984) 145-146.
[3] See Ramsey "The establishment and consolidation of the Bechuanaland Protectorate 1870-1910" in Edge and Lekorwe (eds) *Botswana: Politics and society* (1998), 62-98 for a summation of these various standpoints. See also Shillington *History of Africa* (1995) 321.

incorporated in the Union of South Africa which was at the time being mooted.[4] This hope never materialised as the territory would remain a British Protectorate until it attained independence in 1966. The declaration of protectorate status would later pave the way for a new legal system for the territory.

2.2 The establishment of the legal system in Botswana

The legal system in Botswana is characterised by what is termed a 'duality of laws' or 'legal dualism'.[5] This essentially means the simultaneous existence and application of modern or received law on the one hand and African traditional/customary law on the other.[6] This was in line with the British colonial policy of 'indirect rule' which entailed not supplanting native systems of law and governance in the territories they colonised,[7] save to the extent that they regarded the indigenous systems to be repugnant to morality or humanity or natural justice.[8] The Botswana legal system was shaped over time by developments before, during and after the colonial period. It is therefore necessary to determine how the three phases impacted upon the legal system to-date. The discussion will treat the three phases separately; the pre-colonial, colonial period and post-independence Botswana.[9]

2.2.1 The pre-colonial period

One of the principal features in almost all of pre-colonial Africa was the diversity of the ethnical composition of the people living in the various states. The different ethnic

[4] Aguda "Legal development in Botswana from 1885 to 1966" (1973) *Botswana Notes and Records* 52-63.
[5] Sanders "Legal dualism in Lesotho, Botswana and Swaziland" (1985) *Lesotho LJ* 47.
[6] Maripe "Land administration, politics and governance in Botswana" in Fombad (ed*) Essays on the law of Botswana* (2007) 176-202.
[7] See Fombad "Customary courts and traditional justice in Botswana: Present challenges and future prospects" (2004) *Stellenbosch LR* 166-192, 168 for an account of the British colonisation method in the Bechuanaland Protectorate.
[8] In Botswana customary law is statutorily defined. In terms of Section 2 of the Customary Law Act Cap 16: 01, customary law means 'in relation to any particular tribe or tribal community, the customary law of that tribe or tribal community in so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice'. Section 2 of the Customary Courts Act Cap 04:05 adopts the same definition.
[9] A discussion on the significance of all these periods in the colonial history of Botswana is given by Fombad *The Botswana legal system* (2013) 55.

polities lived independently of one another, under a separate administration and ruled over by the traditional royal leadership through various customary or traditional laws.[10] The scramble for Africa and the resultant partitioning of the continent among the colonisers had little regard for the ethnic divide between the inhabitants, with the result that the boundaries that were carved out separated people of the same ethnic groupings, and brought people of different ethnic groupings under one state and subject to one political administration. This absence of homogeneity is what partly explains the adoption of federal systems of government in some states.[11] The Bechuanaland Protectorate was no exception in regard to the ethnic complexion of its inhabitants. Before the arrival of the British, there were various self-governing polities occupying different areas of modern-day Botswana. These polities had their own independent existence based on common cultural practices and a defined system of administration. Despite the independence of the various ethnic groupings, there is one feature that was common to all; adherence to a system of governance based on a system of law derived from the traditional practices observed by each of them over time. When generally observed by all in uniform fashion, these practices became obligatory, to the extent that any conduct falling outside the practice would be viewed as violation of law and deserving of censure.[12] This system is called customary law.[13] This law differed from one tribal grouping to another, although there were, and still are, many common features pervading all the traditional tribal communities that make up the state of Botswana to-date.

This law was deliberately retained by the colonial administration so that it would continue to apply to the indigenous population, while the received law was to apply to the settler community as they did not subscribe to the cultural practices and traditions from whence customary law rules were created. It was also recognised by the independence administration and given solid statutory recognition and regulation.[14] It

[10] Tlou and Campbell *History of Botswana* (1984) 145-146.
[11] See Nwabueze *Constitutionalism in the emergent States* (1973) 111-138.
[12] Schapera *A handbook of Tswana law and custom* (1994) 35-52.
[13] Schapera *A handbook of Tswana law and custom* (1994) 35-52.
[14] Section 15(4)(d) of the Constitution, The Customary Courts Act Cap 04:05 the Customary Law Act, Cap 16:01 among others.

is applied in the Customary Courts[15] and the High Court in the exercise of its unlimited and original jurisdiction[16] and the Court of Appeal in its appellate jurisdiction over decisions of the High Court.[17] In conclusion, customary law applied during the pre-colonial period.

2.2.2 The colonial period: 1885 to 1966

This is the period in the history of Botswana that significantly shaped the legal system of the country. Botswana became a British protectorate in 1885.[18] However, it was not until 1891 that a formal administration was established over the territory. This was done through an Order in Council of the 9th May 1891, when, in the exercise of her powers under the Foreign Jurisdictions Act of 1890, Queen Victoria of Britain, conferred the power to administer the Bechuanaland Protectorate on the High Commissioner of the Cape of Good Hope.[19] These powers were broad and wide ranging, and included all powers to administer an independent territory and in particular to appoint judicial officers and other public officers for the purpose of running the affairs of the territory.[20] Consequently, the Bechuanaland Protectorate was to be administered and ruled from the Cape of Good Hope, in another country, South Africa. This had implications for the applicable law of the territory. The power to appoint judicial officers set the tone for the kind of law that was to be applied in the territory, at least as regards the settler community. How this came about was interesting in that it gave rise to questions as to the proper law that was to apply to the territory. In the exercise of his new powers,

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[15] Customary Courts Act Cap 04:05.

[16] Section 95(1) of the Constitution provides that: 'There shall be for Botswana a High Court which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law'. See also *Mafokate v Mafokate* [2000] 2 BLR 430 in which the High Court held that it and the Customary Court have concurrent jurisdiction to dissolve a customary marriage. In the event, the High Court determined, on considerations of convenience, to send the matter to the Customary Court to be determined in accordance with customary law.

[17] Section 106 of the Constitution and Section 10 of the Court of Appeal Act Cap 04:01 provide for appeals as of right from decisions of the High Court to the Court of Appeal.

[18] Fawcus and Tilbury *Botswana: The road to independence* (2000) 19.

[19] Bechuanaland Order in Council of 1891. Otlhogile "Constitutional development in Botswana" in Edge & Lekorwe (eds) *Botswana: Politics and society* (1998) 156-157.

[20] Aguda, "Legal development in Botswana from 1885 to 1966"; Brewer "Sources of the criminal law of Botswana" (1974) *JAL* 24-36.

the High Commissioner promulgated the first General Proclamation on the 10th June 1891. The Proclamation read:

> Subject to the foregoing provisions of the proclamation, in all suits, actions, or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope: Provided that no Act passed after this date by the Parliament of the Colony of the Cape of Good Hope shall be deemed to apply to the said territory.[21]

This Proclamation was the beginning of a process by which the law applicable at the Colony of the Cape of Good Hope was to be 'received' and applied in the Bechuanaland Protectorate. This process was however not ideal as problems soon arose with the reception formula which raised questions as to what exactly constituted the 'received law'. There is considerable literature on the subject all in a bid to ascertain the law received.[22] In so far as statute law was concerned, a definite cut-off time for the application of Cape statutes to the Bechuanaland Protectorate was stipulated. The Proclamation clearly stated that no statute passed by the Cape Parliament after the 10th June 1891 was to apply to the Bechuanaland Protectorate. However, the temporal dimension of the law other than parliamentary enactments, such as the common law, was not mentioned. The statement 'the law for the time being in force in the Colony of the Cape of Good Hope' is open to various interpretations. First, the statement could mean that the law applicable at the Cape on the 10th June 1891, but not beyond, was the law that was to be applied in the Bechuanaland Protectorate. Second, it could mean that the law to be applied in the Bechuanaland Protectorate was to be the law

[21] Section 19.

[22] Some of the works on the subject include Crawford "The history and nature of the judicial system of Botswana, Lesotho and Swaziland – Introduction and the superior courts" (1969) *SALJ* 476-485, Part 2 continued in (1970) *SALJ* 76-86; Aguda, "Legal development in Botswana from 1885 to 1966"; Brewer "Sources of the criminal law of Botswana" (1974) *JAL* 24-36; Pain "The reception of English and Roman-Dutch law in Africa with reference to Botswana, Lesotho and Swaziland" (1978) *CILSA* 137-167; Forster "Introduction to the history of the administration of justice of the Republic of Botswana" (1981) *Botswana Notes and Records* 89-100; Molokomme "The reception and development of Roman-Dutch law in Botswana" (1985) *Lesotho LJ* 121-133; Sanders "Legal dualism in Lesotho, Botswana and Swaziland" 51-56; Fombad *The Botswana legal system* 55-62.

that was applied at the Cape from time to time, as the process of development of the law occurred incrementally.[23] Poulter's interpretation is echoed by Brewer who opines:

> The use of this phrase ('the law for the time being in force') could have been taken to mean that the law to be applied was either the law in force in the Cape Colony as at the date of the reception proclamation or, alternatively, that effect should have been given to a living system of law and thus the law in force in Botswana would have been the law administered in the Cape from time to time.[24]

When it comes to 'law' other than legislation, the 'timeless'[25] nature of the reception formula not only invited problems in identifying what law had been imposed on the territory but also in defining that law. Thus the reception formula created uncertainties as to the exact law that was received in Bechuanaland Protectorate. The widespread dissatisfaction and misgivings[26] about the utility of the reception formula led to the promulgation of yet another proclamation in 1909, the purpose of which was *inter alia*, to remove doubts in the 1891 Proclamation. The 1909 Proclamation provided as follows:

> Subject to the provisions of any Order in Council in force in the Bechuanaland Protectorate at the date of taking effect of this Proclamation, and the provisions of any proclamation or regulation in force in the said Protectorate at such date … the laws in force in the Colony of the Cape of Good Hope on the 10th day of June 1891, shall *mutatis mutandis* and so far as not inapplicable be the laws in force and to be observed in the said Protectorate, but no statute of the Colony of the Cape of Good Hope, promulgated after the 10th day of June 1891, shall be deemed to apply, or to have applied in the said Protectorate unless specifically applied thereto by Proclamation.[27]

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[23] See the interpretation given by Poulter "The common law of Lesotho" (1969) *JAL* 127-144, 131, who posits that the statement relates to the situation and the law as it may exist from time to time and thus to a living system of law as it changes from time to time and not to a settled body of law at a fixed date. In a rejoinder to Poulter, Beardsley, in correspondence to the Editor (1970) *JAL* 198-121, 199-200 agrees with Poulter on the temporal dimension of the reception formula but differs on the substantive content of particular areas of the law, for example succession.

[24] Brewer "Sources of the criminal law of Botswana" 25.

[25] A description ascribed by Pain "The reception of English and Roman-Dutch law in Africa with reference to Botswana, Lesotho and Swaziland" 164 to the reception formula.

[26] Virtually all the writers (from Aguda to Sanders referred to above) express doubt as to the efficacy and utility of the formula used.

[27] General Proclamation No 39 of 1909, passed on the 22nd December 1909.

There is general agreement that the stated objective[28] of the Proclamation was achieved in only one respect;[29] it was now clear that the statutes promulgated by the Cape Parliament after 10th June 1891 did not apply in the Bechuanaland Protectorate. A cut-off date was established. However, the doubts persisted as regards the common law that was to apply, as the statement 'the law in force at the Colony of the Cape of Good Hope' could be construed to refer to both legislation and common law. Did this then mean that the common law applicable in the Bechuanaland Protectorate was that which applied at the Cape of Good Hope on 10th June 1891 and not thereafter? Or should the Proclamation be construed as introducing a timeless reception of the common law? There was yet another problem. Notwithstanding that the application of Cape statutes was made certain, what was to be the position with regard to statutes that were in force on 10th June 1891, but were subsequently amended or repealed by the Cape Parliament? Were the amendments to apply with equal force in the Bechuanaland Protectorate? It would have been absurd for the Bechuanaland Protectorate to continue to apply a Cape statute that had been considered no longer to be good law by reason of its amendment or repeal. With all these lingering questions, it is not unreasonable to opine that the 1909 Proclamation left the position much as before. Perhaps it was the intention to limit it to statutes, on the application of the *expressis unius est exclusio alterius* principle, in terms of which the express mention of one thing in legislative instruments excludes those things not mentioned. This was applied in *Mothusi v The Attorney General*,[30] a case in which a public officer challenged her retirement on the basis that she had not been given an opportunity to make representations. The court held that as an opportunity to make representations was expressly provided for in the case of termination of employment by section 14 of the Public Service Act, but was not in the case of retirement in section 15 of the same Act, it meant that Parliament intended to exclude representations in the case of retirement. In this context this would mean that as the cut-off date applied only to the

[28] The Preamble to the Proclamation states that it was to 'remove doubts' as to the law applicable in the Bechuanaland Protectorate.
[29] See Brewer "Sources of the criminal law of Botswana" 27; Pain "The reception of English and Roman-Dutch law in Africa with reference to Botswana, Lesotho and Swaziland" 163-164 and Molokomme "The reception and development of Roman-Dutch law in Botswana" 125-126.
[30] [1994] BLR 246. Section 33 of the Interpretation Act Cap 01: 04 is a statutory enactment of the principle.

application of Cape statutes, the common law applicable at the Cape of Good Hope from time to time was to apply to the Bechuanaland Protectorate. This notwithstanding, the question as to the content of that law was not entirely resolved.

2.3 Content of the received law

There is general agreement that the Proclamations applicable in the Bechuanaland Protectorate brought with them the common law (and not only the statutory law) applicable in the Colony of the Cape of Good Hope. Some commentators assume that apart from statutes, the law applicable at the Cape of Good Hope was Roman-Dutch law for it is the law that was applied in Holland which the Dutch settlers brought to the Cape.[31] Others take the view that at the time of the reception that law was neither 'Roman' nor 'Dutch' but rather some primitive kind of law in the sense that it was largely undeveloped, could not provide solutions to many situations and there were no professional judges to develop it.[32] Brewer[33] opines that due to the significant influence upon the law applying at the Cape of Good Hope owing to the annexation of the Cape Colony by the British in 1814, that law could not properly be called Roman-Dutch law but could appropriately be described as 'Cape colonial law'.[34] While others assume it was Roman-Dutch common law,[35] some hold the view that at the time of the reception, the Roman-Dutch common law then applicable at the Cape of Good Hope had been so significantly influenced by English law rules in several respects that it could no longer be called Roman-Dutch common law.[36] Brewer prefers to call it 'Cape Colonial law' because it had so developed to a point where it was distinguishable from its constituent

[31] See, for example, Brewer "Sources of the criminal law of Botswana" 26; Sanders "Legal dualism in Lesotho, Botswana and Swaziland" 51; Molokomme "The reception and development of Roman-Dutch law in Botswana" 123.
[32] Aguda "Legal development in Botswana from 1885 to 1966" 57.
[33] Brewer "Sources of the criminal law of Botswana" 26.
[34] Brewer "Sources of the criminal law of Botswana" 25-26.
[35] For example, Aguda "Legal development in Botswana from 1885 to 1966" 57; Pain "The reception of English and Roman-Dutch law in Africa with reference to Botswana, Lesotho and Swaziland" 163; Molokomme "The reception and development of Roman-Dutch law in Botswana" 121; Forster "Introduction to the history of the administration of justice of the Republic of Botswana" 89.
[36] Sanders "Legal dualism in Lesotho, Botswana and Swaziland" 52-53; Brewer "Sources of the criminal law of Botswana" 26.

pillars being the Roman-Dutch and English origins.[37] As the cut-off date applied only to statutes, it would appear that the intention was that developments in and modifications to the common law would, as they arose, apply with equal force in the Bechuanaland Protectorate. This emerges from the use of the phrase '*mutatis mutandis*'. But this raises yet another problem. If a decision was made by the courts in the Bechuanaland Protectorate, it could be overridden by a decision of the Cape courts by virtue of the over-arching authority of the Proclamation. This is because the Cape decision would have binding authority by reason of the prescriptions of the Proclamation. This was a source of uncertainty and was unsatisfactory. This was further exacerbated by the fact that Roman-Dutch law itself was not a self-contained system of law but had been influenced to a great extent by rules of English law, thus making it more difficult to ascertain the law received in the Bechuanaland Protectorate. The discussion that follows seeks to establish the extent of the English influence on the law received in the Bechuanaland Protectorate.

2.3.1 English law influence on the received law

Whatever the permutations regarding the content of the law received, there is no denying the heavy influence of English law on the common law that developed at the Cape of Good Hope. Generally, in the process of development, all legal systems borrow concepts from other systems with which they come into contact and gaps are filled where one system offers a solution where others do not. In promulgating statutes, it is not uncommon for legislatures to benchmark with legislation from other countries on the same subject matter in respect of which legislation is considered. This is the reason why statutes in different countries have common or similar provisions. This would have occurred even more readily in legal systems that depended on custom or common law. Even English law itself is heavily influenced by concepts borrowed from Roman law, canon law and other systems.[38] In the case of the Bechuanaland

[37] "Sources of the criminal law of Botswana" 25-26.
[38] Sanders "Legal dualism in Lesotho, Botswana and Swaziland" 55; Allen *Law in the making* (1964), 409.

Protectorate (and subsequently Botswana), resort to English law would have been expected in that the general colonial administration was English in orientation.

Furthermore, even the Roman-Dutch common law applicable by reason of it being 'the same as the law for the time being in force in the Colony of the Cape of Good Hope', evidenced significant English influence. The following statement is indicative of the extent of the English law influences on the law received from the Cape of Good Hope:

> Generally speaking, the reception of substantive English law rules in the Southern African region has been either absolute or very strong in respect of such areas as constitutional and administrative law – including the law relating to the organization of the courts, the judiciary and the legal profession, – criminal law, the law of procedure, the law of evidence, commercial law, the law relating to the administration of estates and the law relating to the registration of deeds.[39]

Writings on the nature and content of the 'Cape colonial law' attest not only to the absorption and assimilation of English substantive rules of law but even the rules of procedure. This did not occur by accident or happenstance; it is intimately tied to the British annexation of the Cape of Good Hope from the Dutch. In fact during the second British annexation of the Colony of the Cape of Good Hope in 1806,[40] there was a deliberate and systematic process by which English law was introduced as the legal instrument by which to run government. It was a process that had as its objective the jettisoning of rules of Roman-Dutch law and replacing them with rules of English law. The process was not intended to be sudden but was a rather gradual and insidious process that would eventually relegate Roman-Dutch law to the background and promote English law.[41] Khan poignantly observed; 'When the Cape came under British rule, inevitably the law of the conqueror started filtering in. What was this law? The answer was: English law'.[42] Another commentator observes; 'The policy of Anglicisation and the pervading influence of the English law endangered the continued

[39] Sanders "Legal dualism in Lesotho, Botswana and Swaziland" 53.
[40] Walker *The Great Trek* (1938), 67; Harrington *The Great Trek* (1972), 14.
[41] Schreiner "The contribution of English law to South African law and the rule of law in South Africa" *The Hamlyn Lectures* (1967) 7-8.
[42] Kahn "The reception and development of Roman-Dutch law in South Africa" (1985) *Lesotho LJ* 69-95, 75.

survival of the Roman-Dutch law'.[43] The way it panned out is captured by Hahlo as follows:

> The process by which English doctrines and principles infiltrated into the law of the Cape resembles in many respects the reception of Roman law on the Continent during the fifteenth and sixteenth centuries. Some English institutions marched into our law openly along the highway of legislative enactment, to the sounds of the brass bands of royal commissions and public discussion. Others slipped into it quietly and unobtrusively alongside-roads and by-paths.[44]

This was given even greater impetus by several factors; the fact that the judicial system was manned by people who had studied English law at Universities in England,[45] the use of English authorities and the resort to English law where there were no readily available Roman-Dutch law rules.[46] This English influence was particularly evident in administrative law which is the focus of this study. Hoexter[47] writes:

> In South Africa, as in other jurisdictions that have come strongly under the influence of English law, a version of the rule of law (or watchdog or red light) model underpins most of the principles of our administrative law as it is argued in the courts and portrayed in the textbooks. This is hardly surprising, as we inherited most of our administrative law principles from English law at a time when the rule of law theory was unchallenged in that country.[48]

Not only were English law rules adopted by interpretation but were entrenched by legislation in various ways. This happened in cases where the legislature enacted law modelled on English statutes, or by specifically providing in particular respects that the

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[43] Fine *The administration of criminal justice at the Cape of Good Hope: 1795-1828* Unpublished PhD Thesis vol 2 University of Cape Town (1991) 470.
[44] Hahlo and Kahn *The Union of South Africa: The development of its laws and Constitution* (1960) 18.
[45] In this regard see Erasmus "The interaction of substantive and procedural law: The southern African experience in historical and comparative perspective" (1990) *Stellenbosch LR* 348-371; the same author's "Historical foundations of the South African law of civil procedure" (1991) *SALJ* 265-276. Forster "Introduction to the history of the administration of justice of the Republic of Botswana" 89 writes 'Thus, the Protectorate Courts consisted of judges educated in English schools, applying a version of Roman Dutch law filtered through the courts and modified by English common law doctrines and precedent'.
[46] See Sanders "Legal dualism in Lesotho, Botswana and Swaziland" 55.
[47] Hoexter *Administrative law in South Africa* (2012).
[48] Page 143. See also Beinart "Administrative law" (1948) *THRHR* 204 who says: 'the background of the South African constitution is English, and therefore the problems involved in administrative law are in principle the same here as in England' 206.

law would be the same as English law and in other cases by passing new law adapted from English law.[49] All these factors clearly show the extent to which the rules of English law had a profound impact in shaping the legal system applied at the Cape, and by extension the law that was ultimately received in the Bechuanaland Protectorate. In summary, the way in which South African law in general was influenced by English law is captured by Kahn as follows:

> Under British rule, strong though the attachment of the inhabitants was to the local legal system, considerable Anglicization was inevitable. The constitution of the country was framed by Britain. The crude and cruel system of criminal procedure was refashioned in 1828 along the lines of the reformed English law. Civil procedure was changed considerably to accord with that of England … The English law of evidence was taken over virtually en bloc in 1830 … .[50]

When the law was received in the Bechuanaland Protectorate, it was in the form in which it was applied at the Cape of Good Hope. Writers on the origins of procedural laws in Botswana acknowledge this development.[51] Over time however, it came to be realised that certain of the laws received in the Bechuanaland Protectorate were obsolete. This prompted the promulgation of the General Law (Cape Statutes) Revision Proclamation No 2 of 1959, the object of which was to annul the application of such 'obsolete' or 'unnecessary' laws in the Protectorate and to remove doubt as to the kind of law that was intended to be applied in the protectorate. This proclamation was adopted by the Botswana Parliament on independence in 1966, and now appears in the Statute books as the General Law Act.[52] The crucial provision for present purposes reads:

> Nothing in this Act shall –
>
> (a) …
>
> (b) …
>
> (c) …

[49] Kahn "The reception and development of Roman-Dutch law in South Africa" 77.
[50] Kahn "The reception and development of Roman-Dutch law in South Africa" 76.
[51] See in this regard Kakuli "The historical sources and development of civil procedure and practice in the High Court of Botswana" (1995) *Stellenbosch LR* 161, 161-163.
[52] Cap 14:04.

(d) be construed as affecting the continued application of the Roman-Dutch common law in Botswana, or of any other laws other than enactments of the legislative authority of the Colony of the Cape of Good Hope which were in force in the Colony of the Cape of Good Hope on the 10th day of June, 1891 and were in force in Botswana on the 1st January, 1959.[53]

This was effectively a statutory enactment of Roman-Dutch common law as the applicable law in Botswana. The judiciary also acknowledges that the law received in the Bechuanaland Protectorate was Roman-Dutch common law. In *Silverstone (Pty) Ltd v Lobatse Clay Works (Pty) Ltd*,[54] the Court of Appeal said:

> `... it is to be noted that the common law of Botswana is the Roman-Dutch law. Although this was laid down as long back as 1909 (by Proclamation No 36 of 1909*) when Botswana was still the Bechuanaland Protectorate, the Roman-Dutch law had continued to this day to be applied and is still so applied in Botswana'* (own emphasis).[55]

While this statute is clear in its exclusion of the application of Cape statutes, it recognises the application of 'any other laws'. Given that this is a statute about the application of received 'foreign' laws, it is submitted that 'any other law' would in the circumstances refer only to English law. This arrangement was subject to any changes that may be made to the law by either the promulgation of new proclamations or by amendment of existing ones. In this regard criminal law provides an example. Since there was no written Cape code on criminal law, it meant that until 1959 the unwritten substantive criminal law would be applied in the Protectorate.[56] However, in 1964, a criminal code, known as the Penal Code, was introduced in the Protectorate which was not only modelled around specific offences in England, but specifically required its provisions to be interpreted in accordance with English Law. The provision incorporating English law in the territory exists to this day.[57] A similar approach was

[53] Section 3.
[54] [1996] BLR 190.
[55] At 194-5.
[56] Brewer "Sources of the criminal law of Botswana" 28.
[57] Section 2(2) of the Penal Code Cap 08:01 provides 'Except where the context otherwise requires, expressions used in this Code shall be presumed to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith'.

adopted for the law of evidence, in both criminal and civil proceedings. Clearly this was intended to demonstrate a settled preference for the application of English law in Botswana.

Questions may arise as to why the colonial administration was keen on introducing English criminal law but not English civil law. Surely this could have been achieved by the introduction of other pieces of English legislation in Botswana, for example the Sale of Goods Act, Bills of Exchange Act and many others and inserting an interpretation provision equivalent to section 2(2) of the Penal Code. But for some reason this did not happen. Possibly due to the agrarian nature of the society at the time, which was administered in accordance with a set of customary laws, a position was taken that the introduction of a sophisticated system of laws was unnecessary, and that the rules applicable at the Cape of Good Hope would suffice, even for the settler community in the territory. However, as observed above, English law would continue to apply to the extent that it had been absorbed into Roman-Dutch law.

As regards administrative law, and judicial review in particular, it must be pointed out that these were matters in which the general common law applied. There was no statute in the Cape dealing exclusively with them. The way in which Roman-Dutch common law was influenced by English law has already been spelt out.[58] At no point was there a proclamation which introduced the rules of administrative law, other than those received from the Cape of Good Hope. Even the Botswana Parliament has not promulgated legislation to provide for law different from the common law. Judicial review is still largely a common-law remedy. Lawyers and judges alike, rely on English and South African cases, albeit that in South Africa judicial review now has a constitutional foundation. However, the South African Constitutional Court has stated that the common law, which is Roman-Dutch common law, informs both the Promotion of Administrative Justice Act (PAJA)[59] and the Constitution and that its relation to judicial review will have to be developed on a case by case basis as the courts continue

[58] Sub-chapter 2.3.1 headed 'English law influence on the law received'.
[59] 3 of 2000.

to interpret and apply the PAJA and the Constitution.[60] Therefore, to the extent that the common law is still relevant, even in the current South African legal landscape, Botswana courts quite properly rely on it alongside English case law. In summary, the principles of judicial review in Botswana are derived from both Roman-Dutch law and English law, and this has been given judicial imprimatur in Botswana jurisprudence.[61]

2.4 The establishment of the High Court and formal introduction of the process of judicial review in Botswana

The introduction of 'Cape Colonial law' in the then Bechuanaland Protectorate did not automatically provide for the forum in which such law was to be applied. This was in spite of the fact that the Bechuanaland Protectorate Order in Council of 1891 made provision for the appointment of judges by the High Commissioner.[62] There was no immediate interest on the part of the protectorate administration to establish a formal forum for the resolution of disputes even after the enactment of the reception clauses.

The High Court for the Bechuanaland Protectorate was established only in 1938, through the High Commissioner's proclamation.[63] However, the court only came into existence on the 1st January 1939.[64] The court was established as a Superior Court of Record[65] and given wide jurisdiction in both civil and criminal matters.[66] It was specifically conferred with the power to 'possess and exercise all the jurisdiction, power, and authorities vested in the Supreme Court of South Africa'.[67] The conferment of jurisdiction by reference to a foreign court presented a few challenges. Given that the Supreme Court of South Africa was a creature of, and derived its jurisdiction from,

[60] *Batostar Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 22.
[61] *Tiro v Attorney General* [2013] 3 BLR 490.
[62] Article 3.
[63] Proclamation no 50 of 1938.
[64] Aguda "Legal development in Botswana from 1885 to 1966" (1973) *Botswana Notes and Records* 52-63, 55; Kakuli "The historical sources and development of civil procedure and practice in the High Court of Botswana" (1995) *Stellenbosch LR* 161, 161-163. See also Otlhogile *A history of the Higher Courts of Botswana 1912-1990*, (1995), 21;
[65] Section 2(2).
[66] Section 4.
[67] Section 4.

statute,[68] to confer jurisdiction by reference to a foreign court or statute without incorporating the South African statute into the laws of the Bechuanaland Protectorate left the matter of jurisdiction uncertain and tenuous.[69] The danger in this mode of conferring jurisdiction can be illustrated by the following extreme example: If for any reason the South African Parliament repealed the statute from which the Supreme Court derived jurisdiction, that would mean that the Supreme Court ceases to exist. To confer jurisdiction by reference to such court would be meaningless since the Bechuanaland Protectorate court could not derive jurisdiction from a court that does not exist, unless the Proclamation were to be amended to refer to the then Supreme Court! This is clearly a very uncomfortable position. This notwithstanding, the establishment of the High Court in the Bechuanaland Protectorate confirmed the intentions of the colonial administration, which was to have the same law applicable at the Cape colony apply in the territory, and being enforced in the same way the law was enforced in South Africa. This would presumably ensure some uniformity in the administration of justice.

The High Court for the Bechuanaland Protectorate was specifically conferred with jurisdiction on judicial review.[70] However, such review was specifically limited to 'the proceedings of all subordinate courts of justice within the Territory'.[71] Given the state of development of the territory at the time, with the high offices of administration being situate at the Cape Colony, there were virtually no locally based public bodies whose decisions could be subjected to judicial review. That would necessarily apply as well to private bodies, which at that time were virtually non-existent. The lives of the general populace at that time were far removed from the modern organisation of society.

The jurisdiction of the Supreme Court of South Africa, around which the jurisdiction of the High Court of the Bechuanaland Protectorate was modelled, always enjoyed some other jurisdiction, through which it exercised, and still exercises, powers of judicial

[68] The South Africa Act of 1909.
[69] This point is made by Otlhogile *A history of the Higher Courts of Botswana 1912-1990* 21.
[70] Section 5 of Proclamation No 50 of 1938.
[71] Section 5 of Proclamation No 50 of 1938.

review. This is the inherent jurisdiction which is generally possessed by supreme courts by reason only that they are supreme courts, where, in the absence of clear rules to apply, 'it operates as a valuable weapon in the hands of court to prevent any clogging or obstruction of the stream of justice'.[72] The origins, remit and extent of this basis of jurisdiction have never been definitively laid down. It suffices for our purposes however that both English law and Roman-Dutch law recognised the existence of such jurisdiction in the Supreme Courts. The remarks of Baron Alderson in the English case of *Cocker v Tempest*[73] are often cited as one of the earliest expositions of the concept of inherent jurisdiction. His Lordship said;

> 'The power of each court over its processes is unlimited; it is a power incident to all courts, inferior and superior; were it not so, the court would be obliged to sit still and see its own process abused for the purpose of injustice'.[74]

This statement is obviously too broad, and in some respect clearly out of place. For example, inferior courts have never possessed inherent jurisdiction. English law actually developed to recognise such jurisdiction as vesting only in the superior courts.[75] South African jurisprudence has drawn inspiration from the practice in English law to accept that its superior courts also have the same jurisdiction. This is demonstrated in *Attorney General v Crockett,* where, in a case concerning the court's inherent power to summarily commit for contempt of court, the South African High Court confirmed the English origins of the concept of inherent jurisdiction as follows:

> … as regards criminal procedure, we should rather follow the procedure of the Court of King's Bench than that of the old Dutch Courts. And especially we do this in the case of contempt of court, for the jurisdiction of our courts is derived entirely from the English Crown, and if there is any question of inherent jurisdiction, it is

[72] Taitz *The inherent jurisdiction of the Supreme Court* (1985) 47.
[73] (1841) 7 M & W 501.
[74] (1841) 7 M & W 501.
[75] For example, Lord Diplock's recognition of such jurisdiction as vesting in the High Court in *Bremen VulkanSchiffbau und Maschinenfabrick v South India Shipping Corporation Ltd* [1981] AC 909, 977. In South Africa the position has long been clarified by Innes CJ in *Connolly v Ferguson* as follows: 'But, as we have laid down upon several occasions recently, magistrates' courts have no inherent jurisdiction, such as superior courts in this country possess' 1909 TS 195, 198.

> to the jurisdiction of the court of Kings Bench the direct descendant of the *Aula Regis*, that we should look for analogy.[76]

In so far as the jurisdiction of the High Court of the Bechuanaland Protectorate was linked to that of the Supreme Court of South Africa, the case of *Attorney General v Crockett* is clear testimony that the High Court of the Bechuanaland Protectorate possessed inherent jurisdiction, to the extent that its jurisdiction was to be the same as that vesting in the Supreme Court of South Africa.[77] The courts in Botswana have also accepted that they have such inherent jurisdiction.[78] Is the inherent jurisdiction of the High Court exercisable on judicial review? Case law in England,[79] South Africa[80] and Botswana[81] all confirm that a superior court can exercise jurisdiction on review. It has been said this is some sort of default jurisdiction exercisable to provide a remedy where none exists within the prevailing law in order to prevent or redress injustice.[82]

2.5 Post Independence Botswana

At independence, the law applicable had been taken care of by the reception formula and the retention of customary law. The judiciary had also been established through the various proclamations and the courts' jurisdiction spelt out. The post-independence stage in the development of the legal system is significant in two major respects; the

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[76] 1911 TPD 893, 917, per Wessels J. The English origin of the Supreme Court's inherent jurisdiction is also supported by prominent writers, eg Taitz *The inherent jurisdiction of the Supreme Court* (1985) 9-10 and Pistorius *Pollak on jurisdiction* (1993) 27. For a judicial exposition and comprehensive treatment of the notion of inherent jurisdiction in South Africa, see *Chunguete v Minister of Home Affairs and Others* 1990 (2) SA 836(W).

[77] Section 4 of Proclamation no 50 of 1938.

[78] *State v Moyo* [1988] BLR 113, in which Hallchurch J held that 'the High Court of Botswana has inherent powers to review any matter which arises in proceedings of a subordinate court unless it is excluded expressly or by implication' 117 and the Court of Appeal decision in *Re: Attorney General's Reference: State v Malan [*1990] BLR 32 Bizos JA said:' The High Court has inherent jurisdiction to regulate its proceedings in the interests of the proper administration of justice.' 41. In *Osupile v Osupile and Another* [2015] BLR 155, Moroka J said that 'The term inherent jurisdiction refers to the innate powers of the High Court to regulate its own procedure and to adjudicate upon any unlawful interference with rights…..This power is to be exercised sparingly and within the law and in the interests of the proper administration of justice.' 160-161.

[79] *In Re Jones & Carter's Arbitration* (1922) 2 Ch 599; *Racecourse Betting Control Board v Secretary of State for Air* (1944) Ch 114.

[80] *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111; *Leach v Secretary for Justice, Transkeian Government* 1965 (3) SA 1(ECD) 8.

[81] *Attorney General v Morris Banda* [1968-70] BLR 206.

[82] Kakuli *Civil procedure and practice in the High Court of Botswana* (2005) 25.

adoption of the Constitution of the Republic of Botswana on the 30th September 1966 and the acceptance of common-law jurisdiction by the High Court which enables it to entertain matters on review apart from its inherent jurisdiction. The Constitution reflected in large measure a basic template of the Westminster model that was given to other former British colonies and dependencies on their attaining independence.[83] In the legal landscape of Botswana, the Constitution, like in many other countries, is the basic or supreme law, to which all other laws owe, and from which they derive their validity. This is in spite of the fact that there is no specific provision declaring it as such.[84] This notwithstanding, several commentators opine that the Constitution must necessarily be supreme since it is the Constitution that establishes the organs of state, that sets up Parliament, vests it with legislative powers, and prescribes the mode of making laws, formulates the general principles and tenor with which all other laws, be they statutory or non-statutory, must conform.[85] The supremacy of the Constitution has been recognised by the courts and is now cemented in Botswana law.[86] This supremacy of the Constitution entails that any law, whether it is primary legislation,[87] secondary or subordinate legislation,[88] common law,[89] custom or customary law,[90] that is in conflict with the Constitution is void to the extent of the inconsistency and will be set aside at the instance of the party who challenges it on that basis. In this regard the supremacy of the Constitution provides a basis for judicial review on the ground of illegality as propounded in the oft-cited House of Lords decision in *Council of Civil Service Unions and Others v Minister for the Civil Service* (the '*GCHQ'* case).[91]

[83] Nsereko *Constitutional law of Botswana*, (2002) 3.
[84] This is in stark contrast to the position in other countries, for example, Constitution of the Republic of South Africa Act 108 of 1996, s 2, Constitution of Namibia, Art 1(6); Constitution of Uganda, s 2 to mention a few.
[85] Otlhogile "Constitutional development in Botswana" in Edge & Lekorwe (eds) *Botswana: Politics and society* (1998) 156-157; Nwabueze *Constitutionalism in the emergent states (*1981) 5; Nsereko *Constitutional law in Botswana*, (2002) 36; Otlhogile "Constitutional development in Botswana" 157.
[86] *AG v Dow* [1992] BLR 113 (CA); *Good v AG* [2005] 2 BLR 337 (CA) and many others.
[87] *AG v Dow* [1992] BLR 113; *Petrus v The State* [1984] BLR 14.
[88] *Ngope v O'Brien Quinn* [1986] BLR 335.
[89] *Ndlovu v Macheme* [2008] 3 BLR 230 (HC).
[90] *Ramantele v Mmusi and Others* [2013] 2 BLR 658.
[91] [1984] 3 ALL ER 935 (HL), 950 where Lord Diplock pointed out in broad outline the grounds for review as illegality, irrationality and procedural impropriety.

The common-law jurisdiction on review has been largely anchored in bodies exercising quasi-judicial functions, without reference to whether or not the decision-maker is a public or private body. It has been said that 'quasi-judicial functions' have been very broadly defined as 'those requiring a factual inquiry into a matter where the decision may affect rights of the applicant or involve legal consequences to him.'[92] In *Brits Town Council v Pienaar, N.O., and Another*[93] the court said a 'quasi-judicial decision, generally speaking, is an administrative decision some stage of which possesses judicial characteristics.'[94] This has been accepted by the courts of Botswana.[95] It does appear that the assignment of the label 'quasi-judicial function or decision' is dependent on the effect it has on the person concerned. It will qualify as such if it interferes with one or other of his rights, and deserving of challenge by way of review.

2.6 The approach to judicial review

Judicial practice in Botswana is ambivalent on the application of either Roman-Dutch or English law. In the specific area of administrative law, this ambivalence is evident not only in respect of the substantive rules of law but also in the procedure to be adopted in cases involving judicial review.[96] An illustration of this ambivalence is the case of *Sorinyane v Kanye Brigades Development Trust and Another*[97] *in which* Kirby J (as he then was) said

> 'As to the appropriate procedure for reviews, there are also differences between the approach in England and that under the Roman Dutch law. In England it is impermissible and an abuse of the process of court to bring review proceedings (a remedy in public law) by means of a private law action. They must be brought under the specific rule introduced for the purpose (Order 53 in that country), the use of which is mandatory….

[92] *Tabakain v District Commissioner, Salisbury* 1974 (1) SA 604 (R), 606.
[93] 1949 (1) SA 1004 (T)
[94] At 1019, per Blackwell J.
[95] *Tsogang Investments (Pty) Ltd t/a Tsogang Supermarket v Phoenix Investments (Pty) Ltd t/a Spar Supermarket and Another* [1989] BLR 512; *Sorinyane v Kanye Brigades Development Trust and Another* [2008] 2 BLR 5 (HC); *Botswana Democratic Party and Another v Marobela* [2014] 2 BLR 227 (CA).
[96] See *Sorinyane* v *Kanye Brigades Development Trust and Another* [2008] 2 BLR 5, 9. Now as Judge President of the Court of Appeal, he traversed the same distinction in *Tiro v Attorney General* [2013] 3 BLR 490, 495-504.
[97] [2008] 2 BLR 5.

> In South Africa the approach is more relaxed. Despite the apparent peremptory terms of the rule in question (rule 53, which is the same as our Order 61) it has been held that in appropriate cases use of the standard application procedure (South African rule 6, which is again in pari materia with our Order 12) is permissible….
>
> In our courts the approach has not been consistent either as to substance or procedure. Some cases have been determined on English law principles',…In other cases (and a clear majority) South African, or Roman Dutch law principles have been followed, and this it seems is the proper course, since Roman Dutch law remains the common law of Botswana….
>
> On the issue of the quasi-judicial acts of which bodies are subject to review, review proceedings have been entertained by the High Court, and Court of Appeal, relating to the conduct of the affairs of many legal entities other than state bodies or public officials.' [98]

This ambivalence can be illustrated by a brief discussion of how judicial review has been approached in England, South Africa and Botswana. In respect of substantive law, and administrative law in particular, it is worth observing that unlike in South Africa where judicial review of administrative action has, since the adoption of the 1996 Constitution (Constitution of the Republic of South Africa, 1996), become a constitutional remedy enforceable through legislation, the Promotion of Administrative Justice Act[99] and Rules of Court, in Botswana judicial review is still very much a

[98] At page 9. In saying this the judge cited and relied on the English cases *O'Reilly and Others v Mackman and Others* [1982] 3 ALL ER 1124 HL (E) and *Equal Opportunities Commission and Another v Secretary of State for Employment* [1994] 1 ALL ER 910, and the South African case of *Jockey Club of South Africa v* Forbes 1993 (1) SA 649 (A) and the Botswana case of *Mothusi v The Attorney General* [1994] BLR 246 (CA) in drawing out the distinguishing features.

[99] Section 33(1) of the South African Constitution, provides that 'everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Section 33(3) of the same Constitution requires national legislation to be enacted to give effect to the rights provided for at section 33(1). The Promotion of Administrative Justice Act 3 of 2000 is therefore the vehicle through which the constitutional administrative justice principles are being rolled out, and the Act applies to administrative action (defined as 'any decision taken, or any failure to take a decision, by –

(a) an organ of state, when
  (i) exercising a power in terms of the Constitution or a provincial constitution; or
  (ii) exercising a public power or performing a public function in terms of any legislation; or
(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which (decision) adversely affects the rights of any person and which has a direct, external effect, but does not include… (all in all nine categories of actions that do not qualify as 'administrative action, including *inter alia* the exercise of executive, legislative and judicial powers …' section 1).

common law remedy, founded on the principles of the common law[100] and in the exercise of the court's common law[101] and inherent[102] jurisdictions. The issue around procedure has long been a vexing one. In England, the procedure is governed by Order 53 of the Rules of the Supreme Court, as revised in 1977. Before this, an applicant had to obtain leave to apply for judicial review or proceed by way of a writ of summons in which declaratory relief[103] was sought. The application for review[104] was the prescribed procedure if the applicant sought a remedy in public law and not a vindication of private rights. Failure to do so was an abuse of court process.[105] In particular, towards the end of the 1980s with the *Datafin* case[106] and others that followed in the 1990s, judicial review was a public law remedy, enforceable in respect of infractions of public rights only.[107] Thus a dichotomy arose between public and private rights, which was regarded as crucial in that 'it is only public law rights that must be vindicated by the application for judicial review'.[108]

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[100] *Attorney General and Another v Kgalagadi Resources Development Company (Pty) Ltd* [1995] BLR 234(CA) adopting the decisions in the *GCHQ* case and Lord Green MR's formulation of 'unreasonableness' in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (the '*Wednesbury* case') 1948 (1) KB 223 and Corbett JA's formulation of grounds for review in *Johannesburg Stock Exchange v Witwatersrand Nigel* Ltd 1988 (3) SA 132 (A), 152.

[101] *Botswana Democratic Party and Another v Marobela* [2014] 2 BLR 227.

[102] *State v Moyo* [1988] BLR 113.

[103] This refers to a court pronouncement on or declaration of the rights and duties of the parties, without the necessity of decreeing any consequential or coercive relief that compels one of the parties to do anything. See JM Evans *De Smith's Judicial review of administrative action* (1980) 475. See *O'Reilly v Mackman and Others* (1982) 3 ALL ER 1124 (HL).

[104] This is a procedure used where there is little or no dispute of fact and the contestations of the parties are as regards the legal implications or consequences arising from the undisputed facts. See *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155, a case of venerable authority both in South Arica and Botswana. The *Room Hire* principle was specifically approved of and applied in *Moita v Dugmore* [1984] BLR 105 and has consistently been applied since.

[105] Notable cases include *O'Reilly v Mackman and Others* (1982) 3 ALL ER 1124 (HL) and *Equal Opportunities Commission and Another v The Minister of State for Employment* (1994) 1 ALL ER 910 (HL).

[106] *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 (CA). This and other relevant cases are discussed further below.

[107] These are rights belonging to all citizens, or a collective, and usually vested in a public official who enforces them on their behalf. This is in contradistinction to private rights which are personal to an individual. This distinction is spelt out in *Boyce v Paddington Borough Council* [1903] 1 Ch 109 and *Gouriet v Union of Post Office Workers* [1978] AC 435. The two cases lay down the principle that it is only the Attorney General who can vindicate public rights.

[108] Beatson '"Public' and 'private' in English administrative law" (1987) *LQR* 34-65, 39. The judicial authority for this proposition is to be found in *Boyce v Paddington Borough Council* [1903] 1 Ch 109 and *Gouriet v Union of Post Office Workers* [1978] AC 435.

Although also governed by procedures laid down in Supreme Court rule 53, the pre-1996 position in South Africa remains relevant to Botswana as rule 53 is couched in similar terms to Botswana's Order 61.[109] It would therefore make far more sense for Botswana courts to rely on South African case law when interpreting those rules.[110] In early South African law, at least before the adoption of the new Constitution, the law relating to judicial review did not distinguish between private and public bodies for purposes of judicial review on procedural fairness considerations – particularly in the application of the rules of the natural justice.[111]

It has been shown above that the law received in the Bechuanaland Protectorate was that which applied at the Cape of Good Hope. This consisted of principles of administrative law in terms of which judicial review applied, in the main, to public bodies but with limited application to private bodies apart from situations which required the observance of rules of natural justice. Roman-Dutch common-law principles at the Cape Colony were derived largely from English law.[112] After discussing the similarities between English law and South African law, Baxter[113] posits:

> In the light of these formal similarities with English law, it is not surprising that the South African administrative law is similar in many respects to that of English law – especially in relation to judicial review of administrative action and that English and British Commonwealth cases are frequently cited in and relied upon by the South African courts.[114]

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[109] This was laid down in *Tiro v Attorney General*, [2013] 3 BLR 490, 498.

[110] The decision of the Supreme Court in *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) is particularly relevant as it also discusses the difference between the procedure in South Africa in contradistinction with the procedure for review in England. The distinction in the approaches and the permutations it brings in the jurisprudence in Botswana is substantively discussed in in *Tiro v Attorney General* [2013] 3 BLR 490, 495-504, and the court reached the conclusion that the procedure in South Africa is more in sync with that in Botswana and that reliance should be placed more on South African authorities than those in England.

[111] Baxter *Administrative law* (1984) 101; Boulle, Harris and Hoexter, *Constitutional and Administrative Law* (1989) 335. This is given judicial imprimatur in a number of cases including *Jockey Club of South Africa and Others v Feldman* 1942 AD 340; *Turner* v *Jockey Club of South Africa* 1974 (3) SA 633 (A); *Theron en Andere* v *Ring Van Wellington van die N.G. Sending Kerk in Suid-Africa en Andere* 1976 (2) SA 1 (A); *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A).

[112] This point is made in Sanders "Legal dualism in Lesotho, Botswana and Swaziland" 53 where he writes "Generally speaking the reception of English law rules in the Southern African region has been either absolute or very strong in respect of such areas as constitutional and administrative law..."

[113] *Administrative law* (1984)

[114] At 32.

With the above context, would the scope for the application for judicial review have been similar under the law that was bequeathed to Botswana? English law was long categorical in its rejection of the application of judicial review to private bodies. With time however, the rules of natural justice were accepted as applying to decisions of 'domestic tribunals' and finally to private bodies in general. The way the common law developed in South Africa followed the same trajectory. This is discussed fully in Chapters 3 and 4. However, an issue under both sets of laws was the procedure by which to impugn a decision by way of review. While in both South Africa and England the procedure was dictated by rule 53, it was held in *The Jockey Club of South Africa v Forbes*:

> '[o]ur rule 53 and our practice for the review of decisions by extra-judicial tribunals differ *toto caelo* from Order 53 of English Practice. Indeed virtually all they have in common is the number … In England the procedure of Order 53 is not applicable to reviews of decisions by non-statutory bodies. It falls in the realm of public law and finds no application in a case such as this, where the decision under review was taken by a domestic tribunal purportedly acting under rights conferred by contract.'[115]

It must be said that although this statement presents the position in England as it was at the time, there was a groundswell that had come to see the injustices in this rigid and pigeonholed approach to judicial review. It was considered unjust to deny somebody the processes of review solely because the decision they were complaining of was that of a private body.[116] Given developments in English case law over the

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[115] 662 per Kriegler AJA.

[116] The minority judgment of Lord Denning MR in *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 (CA) is an example. The same judge had ten years earlier delivered the majority opinion of the Privy Council in *Annamunthodo v Oilfields Workers Trade Union* [1961] AC 945 in respect of a decision from Trinidad and Tobago, where a member of a trade union was convicted under the rules of the trade union. He said at 956:

> 'If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the courts. It is a prejudice to any man to be denied justice. He will not, of course, be entitled to damages if he suffered none. But he can always ask for the decision to be set aside.'

In the *Breen* case, even the majority were not confident of their own decision as reflected in the views of Edmund Davis LJ who delivered the majority judgment. He opened his judgment thus at 194:

> 'I entertain substantial doubts that the judgment I am about to deliver will serve the ends of justice. That is to say the least, a most regrettable situation for any judge, but I see no escape from it. Its effect is to throw away empty-handed from this court an appellant who, on any view, has been grossly abused. It is therefore a judgment which gives me no satisfaction to deliver.'

years, it is doubtful whether the judge in *Forbes* or a South Africa court for that matter, would hold the same view today. However, it is submitted that the statement is authority for the proposition that South African law did, on limited grounds, allow for the review of actions by non-statutory bodies, which I term 'private bodies' in this study.

In Botswana the courts tended to follow either the approach in England or that in South Africa. The strongest proponent of the English approach was the Court of Appeal decision in *Mothusi v Attorney –General* [117] which favoured the approach in English law. Those that followed the South African approach include *Ditswane v Botswana Railways*[118], *Nyoni The Chairman, Air Botswana Disciplinary Committee and Another*,[119] *Botswana Unified Local Government Service Association v The Attorney General*[120] and *Sorinyane v Kanye Brigades Development Trust and Another.*[121] In the latter case it was decided that decisions of some entities that are not the traditional public bodies may be susceptible to common law review. Such bodies were enumerated, not exhaustively, as sports bodies, churches, trade unions, schools and other bodies in *Tiro v The Attorney General.*[122] However, the position, which seemed to be concretising was again thrown in doubt in *Du Preez v Debswana Diamond Company (Pty) Ltd and Others*[123] in which the court held that a decision of a private company was not susceptible to judicial review. However, the court accepted review of decisions of a political party in *Botswana Democratic Party and Another v Marobela.*[124] The demarcation as to when to accept and refuse judicial processes has not been outlined. It still remains elastic. This will be discussed more in Chapter 6.

[117] [1994] BLR 246 (CA). This was followed in and in *Panye v Kweneng Land Board* [2003]1 518 and in *Segwabe v Botswana Defence Force* [2010] 2 BLR 449.
[118] [1997] BLR 1088.
[119] [1999] 2 BLR 15.
[120] [1998] BLR 495.
[121] [2008] 2 BLR 5.
[122] [2013] 3 BLR 490.
[123] [2012] 1 BLR 264.
[124] [2014] 2 BLR 227.

In summary, the law received in Botswana is the law that applied at the Cape Colony in 1909, with the necessary adjustments to the common law, which over time came to recognise judicial review of the decisions of private bodies. However, the practice in the courts of Botswana indicates that this position has not been settled, to the extent that in certain cases the approach in England was followed, while in others the South African approach has been preferred. It is this uncertainty that triggered this study.

2.7 Conclusion

The establishment of English administration over the Bechuanaland Protectorate meant in large measure that the settler community applied English law, the law of the colonial administration. However, the circumstances around which the administration was exercised brought a different dimension to the question as to which law was to apply to the Protectorate. The Protectorate was to be governed on behalf of the English from the Colony of the Cape of Good Hope by the Cape administration through Proclamations. These Proclamations dictated that the law at the Cape of Good Hope was to apply. While the Cape statutes invited no controversy, the common law remained uncertain. This was largely Roman-Dutch law, with significant English influence. In the area of judicial review differences between this law and English law were discernible. The main difference lay in the acceptance of judicial review of decisions of private bodies in Roman-Dutch law for violation of rules of natural justice, while this was not the position in England until fairly recently. While some judges stuck to Roman-Dutch law, others applied English law. This led to inconsistencies in the precise legal environment applying to judicial review of decisions of private bodies. The vicissitudes in judicial application are what this thesis seeks to unravel.

This chapter has highlighted how English law came to be part of the applicable law first in the Bechuanaland Protectorate and currently applying in Botswana, particularly in matters of judicial review. Chapter 3 seeks, in brief outline, to trace the development of the law relating to judicial review in England and to demonstrate the effect it has had on the question of judicial review generally, and in particular, of private bodies in Botswana. This will also shed light on how the development of English law rules on

judicial review has impacted Southern African jurisprudence dealing with the topic. As both English and South African law are persuasive sources of authorities in Botswana, this is deemed to be the proper place to discuss their development.

CHAPTER THREE

THE HISTORY AND DEVELOPMENT OF THE JUDICIAL REVIEW PROCESS IN ENGLAND 53

CHAPTER THREE

THE HISTORY AND DEVELOPMENT OF THE JUDICIAL REVIEW PROCESS IN ENGLAND

3.1 Introduction

The discussion in the previous chapter highlighted how the law in general and administrative law in particular in both Botswana and South Africa, was influenced by English law. This influence began with the British annexation of the Cape of Good Hope in 1806 and was continued during the second annexation in 1814. As Chapter 2 demonstrated, the law applying in the Bechuanaland Protectorate was the law applicable at the Cape of Good Hope and that law had already been subjected to significant English-law influence. However, the English influence on the law of the Bechuanaland Protectorate, and later of Botswana, did not come solely through the law of the Cape of Good Hope. The judges in the Bechuanaland Protectorate were almost exclusively English and had a very strong English background in terms of training and orientation.[1] This had a very significant impact in the shaping of the law as it developed from time to time. This applied to many areas of the law, save those altered by legislation.[2] Administrative law in Botswana is based largely on the common law and the English influence persists and continues to shape it. This necessitates a discussion of the history and development of English law. As this dissertation is focused on judicial review of private bodies, this chapter traces the development of the process of judicial review in general in English law. In the subsequent chapters a discussion will be made as how the process of judicial review was extended to the acts and decisions of private bodies.

[1] Aguda "Legal development in Botswana from 1885 to 1966" (1973) *Botswana Notes and Records* 52-63, 57.
[2] Aguda "Legal development in Botswana from 1885 to 1966" 57.

3.2 The origins of the judicial review process in England

The starting point here is to sketch in brief outline how the process of judicial review arose and the purpose it was intended to serve. The origins of the process of judicial review in England are necessarily tied to, and cannot easily be separated from, the evolving constitutional order in that country.[3] The historical development of judicial review is a concomitant aspect of the general English constitutional development.[4] It is an historical account that illuminates the tussle for power between the monarchy, Parliament and the courts, usually expressed as monarch, Commons and the Lords, and later on the courts as well.[5] Before the seventeenth century and in early British societal organisation, the monarchy wielded immense powers of administration over society.[6] All executive, legislative and judicial power vested in the monarch. The principle of separation of powers had not yet developed to current standards and the King or Queen[7] exercised all governmental power. The King would exercise all his powers and make the necessary decisions at the *Curia Regis*, which was 'the supreme central court where the business of government in all its branches was transacted'.[8] The exercise of judicial power entailed in the main the control of the institutions that fell under the supervision of the King, to ensure that they acted within the powers

[3] Jaffe & Henderson "Judicial review and the rule of law: Historical origins" in Galligan (ed) *Administrative law* (1992) 339-358, 345-346

[4] McGovney "The British origin of judicial review of legislation" (1944) *University of Pennsylvania LR* 1-49.

[5] Norton "Parliament: The best of times, the worst of times" in Jowell & O'Cinneide (eds) *The changing constitution* (2019) 157-187, 157; McGovney "The British origin of judicial review of legislation" (1944) *University of Pennsylvania LR* 1-49.

[6] Barendt "Separation of power and constitutional government" (1995) *PL* 599-619; Ville *Constitutionalism and separation of powers* (1967), 3 posits that the doctrine of separation powers emerged as a response to the need for a new constitutional theory, when a system of government based upon a mixture of the King, Lords and Commons seemed no longer relevant; Bagehot *The English Constitution* (1963) 65 has said that '[t]he efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers'.

[7] Note that reference to 'the King' includes a reference to the 'Queen'.

[8] Holdsworth *A history of English law* (1956) 32. A fuller account of the purpose of the writ is given in *Rex v Northumberland Compensation Appeal Tribunal* [1951] 1 ALL ER 268, 272 in which Lord Goddard said: '*certiorari*, as has often been pointed out in this court, is a remedy of a special character. In most cases it is moved and granted on questions as to whether or not an inferior court or tribunal has jurisdiction. It never goes to a superior court, but an order of *certiorari* will be made where it is shown that an inferior court has either no jurisdiction in a particular matter or has exceeded its jurisdiction.' A rendition that received the imprimatur of the Court of Appeal in the same case, reported at [1952] 1 KB 338.

conferred upon them by royal command.[9] It is submitted that this control and supervision was a form of judicial review.

The origins of Parliament are traceable to the thirteenth century when the Knights and Burgesses would be summoned by the King to approve the King's request for additional tax.[10] These were noble men who were trusted by the King and upon whom had been bestowed an official title of recognition. In time their role was expanded to include redress of grievances.[11] This is where the appellation High Court of Parliament is derived. It is said that the requests for redress were made in the form of petitions, and later in the fourteenth century developing into statutes, which required the approval of the three stakeholders of the Commons, Lords and monarch.[12] Public affairs were administered by justices of assize who dealt with all manner of breaches of state affairs.[13] This was further strengthened by the establishment of the Privy Council, whose authority was exercised through the Star Chamber.[14] The Star Chamber was abolished in 1642[15] at a time when a new dimension had been introduced to the struggle for dominance when the judiciary asserted a power of supervision over parliamentary legislation. *Dr Bonham's* Case[16] demonstrates the standoff and more significantly that judicial review of parliamentary legislation was permissible in early English law.

Dr Thomas Bonham's Case

The facts of the case need to be briefly stated. The dispute was about the unlicensed practice of medicine. Dr Thomas Bonham had graduated with a degree in physic medicine from the University of Cambridge. In 1606, Bonham was discovered to be practising medicine without a licence, and was summoned to appear before the

[9] Norton "Parliament: The best of times, the worst of times" 157.
[10] Norton "Parliament: The best of times, the worst of times" 157.
[11] Norton "Parliament: The best of times, the worst of times" 157.
[12] Norton "Parliament: The best of times, the worst of times" 157.
[13] Wade & Forsyth, *Administrative law* (2010) 11.
[14] Wade & Forsyth, *Administrative law* 11.
[15] Wade & Forsyth, *Administrative law* 12.
[16] [1609] 8 Co Rep 114 (Court of Common Pleas).

censors at the London College of Physicians, who claimed regulatory jurisdiction over the practice of medicine on the basis of its statute of incorporation. After examination by the censors he was found to be unfit to practice medicine and was ordered to desist from such practice. He refused to comply, was arrested again but refused to undergo further examination. He asserted that as a graduate of Cambridge, the London College of Physicians had no jurisdiction over him and thus possessed no authority to arrest or fine him, promising to continue his practice if released. He was immediately jailed. The case came before court on a declaration that his continued detention amounted to False Imprisonment. The case came before Edward Coke CJ who decided in favour of Dr Bonham on three fronts. First, that as the college censors were under statute entitled to receive a portion of the fine they imposed on Dr Bonham, the statute made them prosecutor, plaintiff and judge in the dispute. This compromised their impartiality as they were judges in their own cause. He was invoking the *nemo judex in causa sua* principle. Secondly, extrapolating on the first basis he held that:

> [I]t appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common laws will control it, and adjudge such Act to be void.[17]

Third, that in so far as Dr Bonham was being fined for practising without a license, the fine could not be levied by the Censors but only by a court. This third basis is anchored in the jurisdictional issue. In so far as the court purported to lay down a principle of wide and universal application, this would not necessarily be correct as many modern regulatory statutory frameworks empower regulatory authorities to take appropriate measures against erring members of the regulated activity. Surely that power cannot in all the circumstances be exercised by resort to a court. That would be to transfer the regulatory functions to the court, which would not only be undesirable but would be cumbersome and would defeat the objectives of the law. This case has attracted quite some significant academic analyses.[18] It was the first case in which the judiciary

[17] [1609] 8 Co Rep n 114 (Court of Common Pleas) at 118a. Justices Warburton and Daniel concurred.
[18] For example, Thorne "Dr Bonham's case" [1938] *LQR* 543-552; McGovney "The British origin of judicial review of legislation"; Smith "*Dr Bonham's* case and the modern significance of Lord Coke's influence" (1966) *Washington LR* 297-314; Berger "*Doctor Bonham's* case: Statutory construction or constitutional

claimed a power of control over Parliament, and in particular in which a rule of judicial review of legislation was asserted and accepted. To the extent that the court invalidated a statutory provision on the basis that it was against 'common right and reason, and repugnant', the court was appealing to the supremacy of some higher law.[19] However, Coke CJ did not define 'common right or reason' or 'repugnant'. He was to do so in a subsequent case,[20] where he said this was a superior and immutable law of nature derived from God.[21] This is in essence a restatement of the natural law theory as propounded by jurists of international acclaim.[22]

The doctrine of judicial oversight into parliamentary business added another layer into an already strained relationship between the monarchy and Parliament. Parliament was feuding with the monarch as to who wielded supreme legislative authority, and now the judiciary was expressing some supervisory powers over Parliament on the strength of some supernatural higher law.[23] This would later develop into a clash for dominance and authority, especially between Parliament and the monarch. This standoff would continue to exist between the sixteenth and seventeenth centuries. This 'civil war' was so serious that it led to the period in history called the Glorious Revolution of 1688-9 when the King was prohibited by the Bill of Rights from making law without the approval of Parliament.[24] This would ultimately lead to the constitutional set-up in England with the related principles of parliamentary sovereignty and supremacy.[25] The revolution resulted also in the Privy Council's executive powers. The central authority had thus been broken. This led to the emergence of the Court of King's Bench from whence control of administration would

theory" (1969) *University of Pennsylvania LR* 521-545; Jaffe & Henderson "Judicial review and the rule of law: Historical origins" in Galligan (ed) *Administrative law* (1992) 339-358, 345-346; Edwards "*Bonham's* case: The ghost in the constitutional machine" (1996) *Denning LJ* 63-90; Jackson & Leopold *O Hood Phillips & Jackson: Constitutional and administrative law* (2001), 45-46; Helmholz "*Bonham's* case, judicial review and the law of nature" (2009) *Journal of Legal Analysis* 325-354.

[19] Edwards "*Bonham's* case: The ghost in the constitutional machine" 64.

[20] *Calvin's* case 7 Co I 4b [1610] 12a-12b.

[21] Edwards "*Bonham's* case: The ghost in the constitutional machine", 64.

[22] For example, Fuller *The morality of law* (1978); Finnis *Natural law and natural rights* (1980). See also Lloyd & Freeman *Lloyd's introduction to jurisprudence* (1985) 92-148.

[23] Norton "Parliament: The best of times, the worst of times" 158.

[24] Norton "Parliament: The best of times, the worst of times" 158.

[25] Bradley and Ewing *Constitutional and administrative law* (2007) 65-66.

be exercised.[26] This marked the beginning of a process in which judicial review in its present form was to be shaped. It is generally believed that the standoff between Parliament and the monarch was resolved in favour of Parliament after the revolution, but the principle in *Bonham* was on finally abrogated by the House of Lords in *British Railways Board v Pickin*,[27] a case often cited as laying down the principle of parliamentary supremacy, a fundamental principle of British constitutional law or, as some authors term it, 'the one fundamental law of the British Constitution, for it is peculiar in that it could not be altered by ordinary statute, but only by some fundamental change of attitude on the part of the courts resulting from what would technically be a revolution'.[28] So Parliament had thus prevailed in the standoff that had occurred over a very long period of time.

In summary, judicial review in England began as a way in which the King exercised control over state institutions. This power of control was later delegated to the Court of King's Bench. At the beginning of the process in which control mechanisms over decision making bodies were introduced, the power of control was so broad as to include judicial review of parliamentary legislation as illustrated by the *Bonham* and *Calvin* cases, in addition to the exercise of powers by statutory bodies. However, judicial review of legislation paled into oblivion with the rise of the twin principles of parliamentary sovereignty and supremacy, with the judiciary accepting that they could not question the wisdom of Parliament in enacting a law, and could not set aside legislation on any basis. This is illustrated by the *Pickin* case.

The discussion that follows illustrates the development of judicial review of the activities and decisions of statutory bodies other than Parliament itself.

[26] Wade & Forsyth *Administrative law* 12.
[27] [1974] AC 765. The speech of Lord Morris of Borth-y-Gest at 788-89 is quite instructive in laying down the principle that the courts cannot question the validity of an Act passed by Parliament.
[28] Jackson & Leopold *O Hood Phillips & Jackson: Constitutional and administrative law* 47.

3.3 History of revisionary powers in England

It appears from the brief account above that from the very beginning there was no separate independent exercise of revisionary power by any designated body. Such powers were subsumed under the whole gamut of governmental power that the King exercised over decisions of public bodies. In time, however, with the intensification of bodies which fell directly under the royal supervision, it was felt necessary, for reasons of convenience and expediency, that some of the powers be decentralised, and be exercised by other bodies on behalf of the King. When the de-centralisation of power from the King occurred, the court of King's Bench became the deliberate repository of powers of control over statutory bodies. From the seventeenth century it developed to a point where it exercised supervisory powers over the actions of government bodies, and in particular, bodies created by statute.[29] This power, which today expresses itself in the process of judicial review, was in the nineteenth century cemented through the pronouncements of the courts. It was held in *R v Local Government Board* that:

> [W]here the legislature entrusts to anybody of persons other than to the superior courts the power of imposing an obligation upon individuals, the courts ought to exercise as widely as they can the power of controlling those bodies.[30]

The power of control that is given to the courts is stated to be excisable 'as widely as they can.' But this case in which orders of prohibition were sought by a local authority against a central government body, is but one example of the exercise of the courts' powers over the actions of statutory or administrative bodies. In this case the court did not lay down the parameters for control. It would not have been advisable to lay down specific parameters given the range of possible circumstances that could require the intervention of the courts. It was probably sufficient in the circumstances to only lay down a general rule. The process of judicial review was neither uniform nor

[29] Evans *De Smith's judicial review of administrative action* (1980) 381.
[30] (1882) 10 QBD 309, 321. This statement is similar in effect to that laid down by the Supreme Court of South Africa in *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111, 115 to the effect that 'whenever a public body has a duty imposed upon it by statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this court may be asked to review the proceedings complained of and set aside or correct them'.

systematic. At the beginning, the power of control over statutory and other governmental bodies was exercisable in the main through the *ultra vires* doctrine. That was to check if the statutory bodies exercised power within the limits of the statute that conferred power upon them and if they acted outside the limits of their powers, their acts or decisions would be set aside at the instance of an aggrieved party. This is what Dicey regarded as the principle of legality when defining the elements of the rule of law.[31] In fact, some modern authors regard the *ultra vires* doctrine as the central principle of administrative law,[32] and there is judicial authority for the proposition that 'the juristic basis of judicial review is the doctrine of *ultra vires*'.[33] However, this standpoint has its own critics, who argue that the process of judicial review has so developed beyond the *ultra vires* doctrine that it would be inappropriate to locate it around the *ultra vires* doctrine.[34] It is argued that the basis of, and grounds for, judicial review have been extended by Lord Reid in the 'quartet'[35] of cases and by Lord Diplock in the *GCHQ* case.[36] The expansion of the bases for control of power conferred by the legislature on anybody is what was envisaged in the *R v Local Government Board* case, and clearly serves the purposes of review. The question arising would then be how this power of control was exercised. This was through the process of review which developed in the Court of Common Pleas, as evidenced by the *Bonham*'s case, and then in the King's Bench. The court used various orders to provide redress to deserving litigants. These orders are still available to-date. It is apposite at this stage to trace their historical development. It would appear that the various remedies or orders now available under a successful review application developed

[31] Dicey *The law of the Constitution* (1968) 188-200.
[32] Wade & Forsyth, *Administrative law* (2010) 30; Forsyth "Of fig leaves and fairy tales: The *ultra vires* doctrine, the sovereignty of Parliament and judicial review" (1996) *Cambridge LJ* 122-140; Elliot "The *ultra vires* doctrine in a constitutional setting: Still the central principle of administrative law" (1999) *Cambridge LJ* 129-158. This seems to have received some judicial imprimatur in *R v Lord President of the Privy Council ex p Page* [1993] 2 AC 682, 701-702, where Lord Browne-Wilkinson, citing the earlier edition of Wade with approval, said: 'The fundamental principle (of judicial review) is that the courts will intervene to ensure that the powers of public decision making bodies are exercised lawfully'.
[33] *Boddington v British Transport Police* [1999] 2 AC 143 (HL), 164.
[34] Oliver "Is the *ultra vires* rule the basis of judicial review?" 1987 *PL* 543-569; Craig "*Ultra vires* and the foundations of judicial review" (1998) *CLJ* 63-90.
[35] These are the House of Lords decisions of the 1960s in *Ridge v Baldwin* [1964] AC 40 (HL); *Conway v Rimmer* [1968] AC 910; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 and *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 AC 147(HL). See Arvind & Stirton "The curious origins of judicial review" (2017) *LQR* 91-117, 91.
[36] *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] 1 AC 374 (HL).

independently of one another, and represent procedures or ways in which the ruler (the King) administered justice in his territory.

3.4 Historical development of judicial review from the remedies

One of the interesting features of the development of the system of judicial review in England is the fact that remedies emerged before the process of judicial review could be crystallised on solid principles. The principles were to follow after the remedies had become established.[37] The reason perhaps is that these remedies were developed by the monarchy, without resort to general principles of law but based on the King's sense of justice at the time. The process of judicial review was therefore anchored in remedies. There is current judicial opinion that English law is anchored more in remedies than principles.[38] This is official recognition of how the development of remedies pre-dated the principles that shape the process of judicial review in its current form. It is now apt to sketch out how the remedies developed.

Literature on the specific orders and their scope abounds, and there is general agreement on the purpose each was intended to serve.[39] The ruler administered justice by way of 'writs' which in the main took the form of commands to particular bodies subject to his authority. These writs became known as the 'prerogative writs' as they were connected with the crown, and generally issued at the instance and in the discretion of the King.[40] The most prominent of these writs during this stage of development were the writs of *certiorari*, *prohibition*, *mandamus,* and *habeas corpus*. A history of the first three, together with the limits of their application is treated comprehensively by Henderson,[41] complemented by other writers on the peculiar

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[37] Jaffe & Henderson "Judicial review and the rule of law: Historical origins" in Galligan (ed) *Administrative law* (1992) 339-358, 345-346, De Smith "The prerogative writs" (1951) *Cambridge LJ* 40-56.

[38] *Davy v Spelthorne Borough Council* [1984] AC 262, 276 in which Lord Wilberforce emphatically laid down that 'English law fastens, not upon principles, but upon remedies.'

[39] Most of the standard works texts on administrative law such as Wade and Forsyth *Administrative law*; Phillips and Jackson *Hood Phillips' Constitutional and administrative law* (1987); Bradley and Ewing *Constitutional and administrative law* (2007); McEldowney *Public law* (1998), to mention but a few, carry a section on the historical development of judicial review and how the remedies developed.

[40] De Smith "The prerogative writs" (1951) *Cambridge LJ* 40-56.

[41] Henderson, *Foundations of English administrative law* (1963) 46-160.

writs.[42] The writ of *habeas corpus* is generally treated differently from the others, although ultimately it lies to be classified as a prerogative writ. The historical development of remedies available under judicial review, and how history has shaped the remedies in their present form is what immediately follows. This development is contextualised within the revisionary jurisdiction of the High Court in England, and ultimately, Botswana.

3.4.1 Certiorari

In a system in which certain authorities[43] and tribunals were tasked with the responsibility of making decisions, supervisory powers over those authorities were reserved for the King. The King would demand to be informed of some matter before those authorities and would call up the matter by a royal command. This appears to have been the first characteristic of *certiorari,* a royal demand for information before or after the conclusion of the proceedings.[44] In what would appear to be a rare historical treatment of the subject in the context of judicial proceedings, in *Rex v Chancellor of St Edmundsbury and Ipswich Diocese ex parte White*[45] the Court of Appeal traced the history and original purpose of *certiorari* and prohibition in a case in which both orders were sought against an ecclesiastical court. Wrottesley LJ cited a number of sources in tracing the origins and purpose of the writ. He particularly approved Sir Fitz-Herbert's[46] exposition to the effect that:

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[42] Some of the specific works on the subject include De Smith, "The prerogative writs" 40-56; De Smith "Wrongs and remedies in administrative law" (1952) *Modern LR* 189-208 ; Hanus "*Certiorari* and policy-making in English history" (1968) *American Journal of Legal History* 63-94*;* Jenks "The prerogative writs in English law" (1923) *Yale Law Journal* 523-534; Gordon "*Certiorari* to an Ecclesiastical court" (1947) *LQR* 208-213; Yardley "The scope of the prerogative orders in administrative law" *Northern Ireland Legal Quarterly* 142-153; Yardley "Statutory limitations on the power of the prerogative orders in England" (1957) *University of Queensland LJ* 103-121; Wade "The future of *certiorari*" (1958) *Cambridge LJ* 218-213; Yardley "The grounds for *certiorari* and prohibition" (1959) *Canadian B Rev* 294-355.

[43] These included justices of assize, escheators (escheat is a common-law doctrine in terms of which real property of a person who died without heirs is transferred to the Crown or state. See Makins (ed) *Collins Concise English Dictionary* (1992) 436. Escheator is a royal officer appointed to assess the value of the escheat, Garner (ed) *Black's Law Dictionary* 624, coroners, chief justices, treasurers, barons of the exchequer, mayors of clerk of the common bench. See Jenks *The prerogative writs in English law* 529.

[44] De Smith "The prerogative writs" 45.

[45] [1948] 1 KB 195.

[46] Fitz-Herbert *Natura Brevium* (1718). Cited in *Rex v Chancellor of St Edmundsbury and Ipswich Diocese, ex parte White*, 212-213.

> *Certiorari* is an original writ, and issueth sometimes out of the chancery, and sometimes out of the King's bench, and where the King would be certified of any record which is in the treasury, or in the common pleas, or in any other court of record, or before the sheriff and coroners, or of a record before commissioners, or before the escheator; he may send his writs to any of the said courts or offices to certify such record before him in banco, or in the chancery.[47]

Writing on the emergence of the writ of *certiorari*, Jaffe and Henderson posit that:

> In medieval times it was used for a number of purposes other than review: to remove a case to the King's Bench before trial or judgment where the King's interest was involved or perhaps occasionally to test the lower court's jurisdiction; to obtain a record from one court for use in a suit in another, as in debt on a record; to obtain execution against property of the defendant situated in another county; to obtain information from non-judicial officials for use in a lawsuit …[48]

De Smith contends that the original purpose of the writ was fourfold: to supervise the proceedings of inferior courts to ensure that they did not exceed their jurisdiction; to obtain information for administrative purposes; to make available the record of proceedings; and to transfer the indictments and proceedings to the King's Court, with the result that the King would from then on be seized with the matter himself.[49] Once seized with the matter, the King would exercise all his powers and make the necessary decisions at the *Curia Regis*, which was 'the supreme central court where the business of government in all its branches was transacted'.[50] A fuller account of the purpose of the writ is given in *Rex v Northumberland Compensation Appeal Tribunal* [51] in which Lord Goddard said:

> '*certiorari*, as has often been pointed out in this court, is a remedy of a special character. In most cases it is moved and granted on questions as to whether or not an inferior court or tribunal has jurisdiction. It never goes to a superior court,

[47]Fitz-Herbert *Natura Brevium* (1718). Cited in *Rex v Chancellor of St Edmundsbury and Ipswich Diocese ex parte White* 212-213.
[48] Jaffe & Henderson "Judicial review and the rule of law: Historical origins" 344-345.
[49] De Smith "The prerogative writs" 46-47.
[50] Holdsworth *A history of English law* 32.
[51] [1951] 1 ALL ER 268.

> but an order of *certiorari* will be made where it is shown that an inferior court has either no jurisdiction in a particular matter or has exceeded its jurisdiction.'[52]

The King thus exercised all legislative, administrative, and judicial power.[53] It was in the exercise of his judicial powers that the King would quash the proceedings and decisions of the lower tribunals or authorities if in his view the proceedings were tainted with some illegality. To this extent the illegality was broader than just going beyond the limits of statutory power but included all manner of misgivings that the King would have, or if it offended his sense of justice. The King's power to call for the record from the lower authorities to his court was absolute, while the quashing of proceedings was in his discretion and not automatic.

Subsequently, permission was given to private litigants to apply to the King's Court to have the proceedings in matters in which they were involved quashed for want of legality, or for any consideration not consonant with the prevailing sense of justice.[54] In that way the King would then exercise his discretion to either uphold or quash the proceedings. Consequently, *certiorari* was a discretionary remedy granted by the King, and notwithstanding that the applicant could in any one case demonstrate a basis for quashing the proceedings before the lower or subordinate authority, he had to satisfy the King that there was a substantial ground or basis for the exercise of the King's discretion in his favour.[55] Even then, the remedy could be refused if in the King's view an adequate alternative remedy existed in the circumstances.[56]

In its modern form *certiorari* has followed closely on its traditional origins, and although it serves to nullify previous proceedings, its scope has been expanded to quashing or setting aside previous decisions tainted with procedural irregularities or other illegalities as expanded from time to time by the courts as the circumstances dictate. Perhaps a comprehensive basis for setting aside decisions of inferior courts, and thus

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[52] At page 272. This exposition of the writ of *certiorari* received the imprimatur of the Court of Appeal in the same case, reported at [1952] 1 KB 338.
[53] Holdsworth *A history of English law* 32.
[54] De Smith "The prerogative writs" 44.
[55] Jenks "The prerogative writs in English law" 529.
[56] De Smith "The prerogative writs" 44.

an expression of the reach of *certiorari* is to be found in the House of Lords decision in *Anisminic Ltd v Foreign Compensation Commission.*[57] There are various other cases, too, which have addressed some of the bases laid down in *Anisminic,* notably *Council of Civil Service Unions and Others v Minister for the Civil Service.*[58] In fact, the setting aside procedure is now the most common basis for challenging decisions on judicial review. This applies to both public and private bodies.

3.4.2 Prohibition

Commentators agree on the history and purpose of the writ of prohibition. It is an old writ, traceable to around the thirteenth century and whose principal focus was the ecclesiastical and admiralty courts.[59] This position received judicial imprimatur in *Rex v Chancellor of St Edmundsbury and Ipswich Diocese, ex parte White*,[60] where Wrottesley LJ held that its reach extended to other inferior courts such as the Old Admiral Court and the Courts of the Counties Palatine.[61] It was defined by McCardie J in *Turner v Collieries Ltd* [62] as follows:

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[57] [1969] 2 AC 147 where Lord Reid, 171 in delivering the majority judgment of the court held that a decision would be set aside if:

> 'the tribunal or body acted without jurisdiction, or where although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account.'

Lord Reid did indicate that the list of grounds was not intended to be exhaustive.

[58] [1985] AC 374, 410, where Lord Diplock classified under three heads the grounds upon which administrative action would be subject to control by judicial review. Those are 'illegality', 'irrationality' and 'procedural impropriety'. 'That is not to say that further development on a case by case basis may not in course of time add further ground'.

[59] De Smith "The prerogative writs" 48-49; Jenks "The prerogative writs in English law" 528; Phillips and Jackson *Hood Phillips' Constitutional and Administrative law* 687; Henderson *Foundations of English Administrative law* 120; Wade and Forsyth *Administrative law* 513.

[60] [1948] 1 KB 195, 205.

[61] At 205. It has more recently been said that 'prohibition issues to restrain all inferior courts, whether such courts be temporal, ecclesiastical, maritime, or military'. See *Halsbury's Laws of England* IX, 830.

[62] (1921) 3 KB 169.

> Now a writ of prohibition is a judicial writ issuing from a court of superior jurisdiction and directed to an inferior court for the purpose of preventing it from usurping a jurisdiction with which it is not legally vested.[63]

Its purpose was to ensure that courts remained within the realm of matters in which they were empowered to take decisions, and not to usurp for themselves powers that were not legally conferred on them.[64] It therefore had, as its purpose, the control of jurisdiction. In its operation, the King's Bench (initially presided over by the King himself) issued commands to the lower courts to cease or refrain from continuing with or prosecuting a matter if it, or some aspects of it, did not fall within the jurisdiction of the court.[65] With the increase in the number of spiritual courts, some with statutorily defined jurisdiction, challenges relating to want or excess of jurisdiction increased. It is submitted this was a deliberate measure to eschew usurpation by an authority or some other person power allocated to a different authority, and to ensure that no court or authority would exercise a power that it did not have. This was the basis for the extension of the writ to other bodies, whether established by statute or exercising prerogative powers. In the modern era the writ, now termed the order of prohibition, 'issues to prevent an inferior court or tribunal from exceeding or continuing to exceed its jurisdiction or infringing the rules of natural justice'.[66] But this is a narrow view of the breath of the remedy as it can be used to prevent any transgression of the law by a public authority.[67] Thus, in the modern era the writ or remedy extends to any authority, especially those exercising public power, which seeks to exercise a jurisdiction or a power not conferred upon it by law. The modern expression and reach of the remedy is set out by Lord Denning MR in the *R v Greater London Council ex parte Blackburn*:

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[63] At 174.
[64] *Turner v Collieries Ltd,* at 174.
[65] An historical account of the origins of the Court of King's Bench and its operations is to be found in Wiener "Tracing the origins of the Court of King's Bench" (1973) *American Bar Association Journal* 753-758.
[66] Phillips and Jackson *Hood Phillips' Constitutional and Administrative Law* 687.
[67] *R v Greater London Council ex parte Blackburn* [1976] 1 WLR 550.

> It is available to prohibit administrative authorities from exceeding their powers or misusing them. In particular, it can prohibit a licensing authority from making rules or granting licenses which permit conduct which is contrary to law.[68]

In its origins as a prerogative writ, it was, like *certiorari*, a discretionary remedy issued in the discretion of the King. This feature has not dissipated in the modern era, when, like *certiorari,* it may be granted in the discretion of the court.

Although the purposes of the two remedies differ, they share a common objective – the prevention of usurpation of power by authorities exercising public powers or functions, or functions or powers conferred by law. While *certiorari* operates to quash and set aside a decision made in violation of the law, prohibition operates to stop the authority from making of an order in violation of the law, or the enforcement of such an order should it have been made in contravention of the law. Thus prohibition is preventative, while *certiorari* is curative.[69] To this extent, the writs developed as complimentary to each other, a feature which still subsists today.[70]

In summary, it is apt to reproduce the oft-cited dictum of Atkin LJ in *Rex v Electricity Commissioners, ex p London Electricity Joint Committee Co* (1920) Ltd [71] which essentially brings out both the historical development of the two writs and their modern application. The judge stated:

> Both writs are of great antiquity, forming part of the process by which the King's courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrained the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of Justice. Wherever

[68] 559.
[69] *Rex v Chancellor of St Edmundsbury and Ipswich Diocese, ex parte White* 215 per Wrottesley LJ. The practical effect of the orders is also discussed by Wade and Forsyth *Administrative law* 509-514.
[70] Wade and Forsyth *Administrative law* 509-514.
[71] [1924] 1 KB 204 (CA).

> anybody of persons having legal authority of determining questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.[72]

This statement, and in particular the latter sentence, has been subject of trenchant analysis by several prominent writers on the subject of judicial review in England.[73] For purposes of this chapter it is unnecessary to traverse all that analysis, save to state that the remit of these writs were bodies that exercised jurisdiction or power conferred by law, what would, in modern parlance, be described as 'public bodies'. It is the observations that the judge made subsequent to the statement that bear pointing out at this stage. Having stated his position as such, the judge went on to opine that there was no difference in principle between the two save with respect to the stages at which they are invoked. Atkin LJ poignantly observed:

> I can see no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earlier stage. If proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari, I think that prohibition will lie to restrain it from so exceeding its jurisdiction.[74]

There is some support for Atkin LJ's proposition by a prominent writer on the subject of judicial review, who opines that:

> Perhaps the most important judicial remedies in administrative law are the two orders replacing the old prerogative writs of prohibition and certiorari. Today there appears to be no significant difference between the scope of the two orders, except that prohibition will not issue if there is nothing left to prohibit.[75]

[72] 205.
[73] Evans *De Smith's judicial review* 383-395; Wade and Forsyth *Administrative law* 515-517.
[74] 206.
[75] De Smith "Wrongs and remedies in administrative law" (1952) *Modern LR* 191.

Later in this chapter I will briefly highlight how these writs play out in the context of modern law and the practice of judicial review.

3.4.3 Mandamus

The conclusion reached above in relation to *certiorari* and, more specifically, its discretionary nature as a prerogative writ, applies with equal force to the writ of *mandamus*.[76] It is, however, in the manner in which it originated and its purpose that differentiate it slightly from *certiorari*. *Mandamus* began as a 'command issuing in the king's name from the Court of King's Bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office or duty.'[77] It was the purpose of the remedy to stop contempt of the crown which consisted mainly in the neglect of an official public duty.[78] Some authors posit that the remedy is something of a mystery.[79] The basis for the assertion is that the Court of King's Bench had been granting orders akin to its modern form, but without formally recognising it as such. The case that is usually cited as the official judicial recognition of the remedy is *James Bagg's* Case.[80] James Bagg, a chief burgess[81] at Plymouth, was removed from his position by his fellow burgesses. He challenged the legality and validity of that removal in the Court of King's Bench. In ordering Bagg's reinstatement, Coke CJ said:

> And in this case it was resolved, that to this Court of King's Bench belongs authority, not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of the peace, or oppression of subjects, or to the raising of faction, controversy, debate or any manner of misgovernment; so that no wrong or injury, neither private nor public, can be done, but that it shall be here reformed or punished by due course of law.[82]

[76] De Smith "The prerogative writs" 44.
[77] Holdsworth *A history of English law* 224.
[78] De Smith "The prerogative writs" 53.
[79] Jaffe & Henderson "Judicial review and the rule of law: Historical origins" 353.
[80] (1615) 11 Co Rep 94.
[81] This was an elected or unelected official of a municipality, or a representative of a borough in the English House of Commons. See Chisholm (ed) *Encyclopaedia Brittanica* (1911) 814.
[82] See Jaffe & Henderson "Judicial review and the rule of law: Historical origins 353.

This was quite some broad and sweeping statement of the reach of the remedy. However, it seems to have received some support more than a century later in *R v Baker*[83] a case in which Lord Mansfield laid down in similar sweep the purposes of *mandamus*. He said:

> It was introduced to prevent disorder from a failure of justice and defect of the police. Therefore, it ought to be used on all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.[84]

The basis laid down for the application of the remedy is quite broad, especially that the requirements of 'failure of justice' and 'defect of the police' are so open-textured as to be imprecise, and quite malleable in their reach and application. However, these were to become moderate over time. With time it came to be issued at the instance of a litigant who alleged harm arising from failure by a public official or authority to perform a public duty.[85] In *Padfield v Minister of Agriculture, Fisheries and Food* [86] the House of Lords held that where a minister had by statute an unfettered discretion whether or not to refer a complaint to a committee, and he relied on irrelevant considerations in withholding referral, he should be compelled by a *mandamus* to consider the complaint properly and lawfully.

Like *certiorari,* it was discretionary and would not be granted if there was another more convenient remedy available. In so far as it is directed at compelling the performance of public duties, it assumes a lesser role in the review of the decisions of private bodies, but falls to be extended to those situations where a private body has failed to perform a function of a public nature that it is obliged to perform.

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[83] (1762) 3 Burr 1265
[84] See Jaffe & Henderson "Judicial review and the rule of law: Historical origins" 354.
[85] Phillips and Jackson *O Hood Phillips' Constitutional and Administrative law* 688-689 and Evans *De Smith's judicial review* 584-595.
[86] [1968] AC 997.

3.4.4 Quo Warranto

This writ developed to serve almost the same purpose as prohibition. The difference lay in that while prohibition applied to spiritual, admiralty, and such other inferior courts, *quo warranto* was directed at other officials. It was a right 'for the King against persons who claimed or usurped any office … or privilege belonging to the crown, to inquire by what authority they maintained their claim and to have the right determined'.[87] Originally it was aimed at extracting information and demanding justification for the alleged usurpation.[88] It later became available to a private person aggrieved by such usurpation. In the modern era, its use appears not to be easily distinguishable from prohibition, and the view has been expressed that it has gradually fallen into disuse.[89] It is, therefore, not further considered in this thesis.

3.4.5 Habeas Corpus

Habeas corpus became known as the great writ of liberty. A person arrested by officials of the State would normally be kept in custody pending determination of the infraction of the law of which he or she is accused. The King would then issue a royal command, directed to those officials, that he wished the body of the accused person to be brought before him or the justices to have the lawfulness or otherwise of the arrest determined.[90] Later it was made available to a private person who alleged that some person had unlawfully been imprisoned and to secure the release of that person to a court or some competent authority where the lawfulness of the imprisonment would be determined, and by extension to challenge the validity of the order which caused the detention and to have its legality determined.[91] In England, this writ was later taken up in legislation – the *Habeas Corpus* Acts of 1679 and 1816 – and today it is available as an instrument of review of administrative action.[92]

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[87] Holdsworth *History of English law* 229-230.
[88] Jenks "The prerogative writs in English law" 523.
[89] Holdsworth *A history of English law* 230.
[90] Jenks "The prerogative writs in English law" 525. A fuller account of the origins and purposes of the writ is provided by Sharpe *Law of Habeas Corpus* (1989) 46-54.
[91] Wade and Forsyth *Administrative law* 501.
[92] Wade and Forsyth *Administrative law* 503-506.

The writ was adopted in Roman-Dutch law, the common law applicable in both Botswana and South Africa, where it is known as the *writ de homine libero exhibendo* and served the same purpose as in English law. In Botswana, it was applied in *Mtetwa v OC State Prison, Lobatse and Others*,[93] following the decision of the Supreme Court of the Colony of the Cape of Good Hope in *Willem Kok and Nathaniel Balie.*[94] The Botswana High Court held:

> Although there may be differences in the procedure followed, the writ *de homine libero exhibendo* is of the same nature as *habeas corpus* in the United Kingdom … in the exercise of its powers to issue a writ this court is entitled to follow closely the principles which have guided the English Courts in *habeas corpus* proceedings.[95]

From this account the writ would not ordinarily apply to private bodies. However, it does not seem that it is prohibited from applying to private bodies in principle, especially in the modern era in which it is submitted that private individuals are capable of kidnapping and detaining others and all manner of unlawful deprivation of freedom or liberty.

3.5 Legislative intervention with respect to the remedies

The High Court in England has made a profound contribution in shaping the writs discussed above. From the delegation of the King's authority to the Court of the King's Bench, the essential features and character of the writs have gradually mutated to suit the exigencies of what at every point in time was perceived to advance the course of justice. A successful invocation of any of the writs by a litigant led to the issuing of an order enforceable by court process. These writs (which had transformed into orders) were consolidated by the Administration of Justice (Miscellaneous Provisions) Act.[96] Save for the writ of *habeas corpus*, the writs of *certiorari,* prohibition, and *mandamus* were placed on a solid statutory foundation when they were replaced by and renamed

[93] 1976 BLR 1.
[94] 18(9) Buch 45.
[95] *Mtetwa v OC State Prison, Lobatse and Others* 1976 BLR 1, 3.
[96] 1938. See De Smith "The prerogative writs" 40.

orders, while *quo warranto* was abolished and *habeas corpus* left untouched.[97] The change in nomenclature did not alter either the substance or the essential features of the remedies; it was solely aimed at simplifying the statutory procedure of invoking them.[98] Since then (1938) the legislature has been active in shaping the form and remit of the remedies and the procedure in relation to their enforcement. This period has been accompanied by judicial activity where the courts have been called upon to provide guidance on both the purpose and propriety of the remedies for various functions.[99] Perhaps the major legislative innovation came in 1977, when, following proposals by the Law Commission, an applicant was, by statutory instrument,[100] permitted to apply for judicial review, to seek any one or more of the remedies of *mandamus*, *certiorari*, prohibition, declaration, or injunction.[101] This was to be done in terms Order 53 of the Rules of the Supreme Court, which introduced a new procedure for launching applications for judicial review.[102] These innovations were subsequently incorporated in the Supreme Court Act of 1981, which provides that:

> The High Court shall have jurisdiction to make orders of *mandamus*, prohibition and certiorari in those classes of cases in which it had power to do so immediately before the commencement of the Act.[103]

This is evidently a statutory codification of the procedure that existed at common law, to the extent that it 'provides' the High Court with the power it had before the commencement of the Act. The application, as opposed to other originating processes like a writ of summons or petition, was the only procedure permitted in all matters in which remedies for judicial review were sought and any departure from that was considered an abuse of court process. In this regard it is apt to highlight this judicial

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[97] De Smith "The prerogative writs" 40.
[98] A concise account of this legislative development is provided by Yardley, "The grounds for *certiorari* and prohibition" 294.
[99] For example, *O'Reilly and Others v Mackman and Others* [1983] 2 AC 237.
[100] SI 1977 No 1955.
[101] These reforms are discussed in Wade and Forsyth *Administrative law* 552-557 and Williams "Administrative law in England: The emergence of a new remedy" (1986) *William and Mary LR* 715-725.
[102] Wade and Forsyth *Administrative law* 552-554.
[103] Section 29(1) re-enacting section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938.

mind-set by reference to what the House of Lords stated in *O'Reilly* and *Others v Mackman and Others*:

> [I]t would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.[104]

The courts thus laid down a principle in the context of judicial review which translated into a procedure from which derogations would generally not be permitted. This procedure became known as the doctrine of 'exclusivity'.[105] The exclusivity principle requires that challenges to a public body's 'purely public law' decisions or actions must take the form of judicial review proceedings, and that private parties who institute proceedings against public authorities by writ or summons to impugn their public law decisions will generally be non-suited for abuse of process.[106]

3.6 The *O'Reilly and Others v Mackman and Others* aftermath

The case of *O'Reilly and Others v Mackman and Others* is undoubtedly one of the most significant judicial decisions[107] in English administrative law for its reach not only on matters of procedure, but of substance as well. It not only 'prescribed' the procedure to follow in judicial review proceedings, but also 'prescribed' what remedy is available and in respect of which kind of decision. Because of the significant shift that it introduced in the provenance, direction and procedure in judicial review, it is not

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[104] *O'Reilly and Others v Mackman and Others* [1983] 2 AC 237 (HL), 285 per Lord Diplock. This echoed the earlier views of Lord Denning MR in the Court of Appeal in the same case. Denning MR stated that the Order 53 application 'should be the normal recourse in all cases of public law where a private person is challenging the conduct of a public authority or a public body, or of anyone acting in the exercise of a public duty'. See *O'Reilly and Others v Mackman and Others* [1983] 2 AC 237 (HL), 256.

[105] Forsyth "Beyond *O'Reilly v Mackman*: The foundations and nature of procedural exclusivity" (1985) *Cambridge LJ* 415-434.

[106] Forsyth "Beyond *O'Reilly v Mackman*: The foundations and nature of procedural exclusivity" 415; Jolowicz "The forms of action disinterred" 1983 *Cambridge LJ* 15-18, 18.

[107] See in this regard, Jolowicz "The forms of action disinterred" 15-18.

surprising that it has been the subject of considerable academic commentary.[108] Briefly stated, the five applicants in the case alleged that decisions of the Hull Prison Board of Visitors depriving them of remission because of their conduct during some riots in 1976 had been reached in breach of the rules of natural justice (they said they had not been allowed the opportunity to call witnesses and that the Board had been biased). Instead of using the procedure for challenging decisions under Rules of the Supreme Court, Order 53, and section 31 of the Supreme Court Act, 1981, which is by way of application for judicial review, they instituted a private action by writ of summons claiming declarations. The court struck out the proceedings as an abuse of court process, and as an unjustified attempt to circumvent the safeguards granted to a public body under Order 53. The court decided that proceedings in which relief is sought against the decision of a public body must be taken by way of an application for judicial review, rather than by way of originating action or writ, and to do the reverse is an abuse of process.[109] Such was the prescriptive message that where the applicants had, by way of private action commenced by summons instead of an application for judicial review under Order 53, alleged that the decision of the Hull Prison Board of Visitors depriving them of remission had been reached in violation of the rules of natural justice, the action was struck off as incompetent.[110] But this was to be the position with respect to 'public' bodies as opposed to 'private' bodies as the distinction was still made as to the breadth of the remedies as described above. The other consequence arising from the decision was the distinction made between public and private law as regards the availability of remedies. The court emphasised that judicial review is a public law remedy which is not ordinarily available in claims arising

[108] Some of the works on the subject include Dexter "*O'Reilly v Mackman*: Further confusion in judicial review" (1983) *Liverpool Law Review* 187-197; Grubb "Two steps towards a unified administrative law procedure" (1983) *PL* 190-202; Cane "Public law and private law: Some thoughts prompted by *Page Motors Ltd v Epsom & Ewell BC*" (1983) *PL* 202-208; Wade "Procedure and prerogative in public law" (1985) LQR 180-199; Forsyth (1985) *Cambridge LJ* 415-434; Williams "Administrative law in England: The emergence of a new remedy" (1986) *William and Mary Law Review* 715-725; Wade "Procedure and prerogative in public law: Reform for better or for worse?" 1985 *LQR* 180-190; Peiris "The exclusivity of judicial review procedure: The growing boundary dispute" (1986) *Anglo-American Law Review* 83-111; Matthews "Injunctions, interim relief and proceedings against crown servants" (1988) *Oxford Journal of Legal Studies* 154-168; Lewis *Judicial remedies in public law* (2000) 81-97 and many other works cited in the works mentioned under this footnote. Most of them express some misgivings on the positions taken in the case.

[109] *O'Reilly and Others v Mackman and Others* [1983] 2 AC 237, 284.

[110] The same panel of the court, in a decision delivered the day following *O'Reilly and Others v Mackman and Others*, concurred in *Cocks v Thanet District Council* [1983] 2 AC 286 (HL).

from private law. This was echoed throughout the judgment of Lord Diplock.[111] This distinction is important as it determines the seminal question as to the reviewability or otherwise of decisions of either public or private bodies. Almost all the commentators on the case have expressed some misgivings on its import and effect, as it may result in injustices by reason only that the wrong procedure was adopted, without reference to the substance of a litigant's claim.[112] Professor Jolowicz finds it astonishing that the judgment heralds a return to the formalism from which most people thought English law had long freed itself.[113] To the extent that it introduces the exclusivity principle, it is an appeal to form rather than substance, and the criticisms mounted against it are not unreasonable but justified. To the extent that the distinction exists, some authors have crystallised its importance, at least, in determining when it is necessary to bring proceedings by way of judicial review, by whom and against whom proceedings which raise public law issues may be brought, the principles which the court will apply and the remedies which may be granted.[114]

One of the significant results was the distinction separating public law from private law for purposes of judicial review. The court did not draw out the distinction but emphasised that judicial review is a public law remedy and does not apply in private law matters. In so far as this is relevant in this chapter, it is apposite to sketch out, very briefly, the difference between public law and private law and to show the extent

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[111] This to the astonishment of those who believed this was the formalism that had long dominated English law which and had outlived its usefulness. See in this regard Jolowicz "The forms of action interred" 18 who opined that:

> 'for a complainant, whether against a public authority or not, to find his complaint dismissed without an investigation of its merits, not on the ground that it is without substance … but purely and simply because he selected the wrong form of action is a singularly unfortunate step back to the technicalities of a bygone age'.

[112] For example, Dexter, "*O'Reilly v Mackman*: Further confusion in judicial review", (1983) *Liverpool Law Review* 187-197; Wade "Procedure and prerogative in public law: Reform for better or for worse?" (1985) *LQR* 180-190.

[113] Jolowicz 16. He posits that the effect of the judgment is a direct negation of the principle long laid down by Bowen LJ in *Cropper v Smith* (1884) 26 Ch D 700, 710 to the effect that: 'it is a well established principle that the object of courts is to decide the rights of the parties, and not to punish them for the mistakes they make in the conduct of their cases by deciding them otherwise than in accordance with their rights' at 16.

[114] Woolf, Jowell and Le Sueur, *Principles of judicial review* (1999), 53-54.

to which it impacts on the topic of the thesis. There is literature[115] and case law[116] suggesting that public law applies to public bodies, whereas private law applies to private bodies. It has been said that the public/private law dichotomy is crucial, 'for it is only public law rights that must be vindicated by the application for judicial review',[117] and it was decided in several cases that the decisions of a jockey club and its disciplinary committee – to the extent that they are decisions of private bodies, do not fall within the sphere of public law, and may not be subject to an application for judicial review.[118] In line with this policy or legal prescription, in *R v Criminal Injuries Compensation Board*, *ex p Lain* – a case in which *certiorari* was sought against the decision of a private body – the court was emphatic in its view that certiorari was not available to parties in private or domestic tribunals to the extent that their relations arose from their private arrangements.[119]

The public/private law dichotomy therefore assumes critical relevance in this thesis to the extent that it determines whether the acts and decisions of private bodies may be judicially reviewed.[120] The prerogative orders are available in respect of acts and decisions of public bodies as against those of private bodies. This, however, has shifted slightly to include in the purview for judicial review decisions of private bodies in certain

[115] See, eg, Woolf "Public law-private law: Why the divide? A personal view" (1986) *PL* 220-238; Meisel, "The *Aston Cantlow* Case: Slots on English jurisprudence and the public/private law divide" (2004) *PL* 2-10; Beatson "'Public' and 'private' in English administrative law" (1987) *LQR* 34-65.
[116] Lord Denning MR said in *O'Reilly v Mackman* 255 that 'private law regulates the affair of subjects as between themselves. Public law regulates the affairs of subjects *vis-à-vis* public authorities.'
[117] See, eg, Beatson (1987) *LQR* 39.
[118] *R v Disciplinary Committee of the Jockey Club, ex p Massingberd-Mundy* [1993] 2 ALL ER 207 (QB); *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 2 ALL ER 853 (CA); *R v Jockey Club, ex parte RAM Racecourses Ltd* [1993] 2 ALL ER 225 (QB) where, however, Stuart-Smith LJ expressed the view at 244, that were it not for the preponderant line of authority, he would have held that the decision of a Jockey Club was susceptible to judicial review.
[119] *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 ALL ER 770 (CA), 778, per Lord Parker CJ.
[120] This dichotomy is contested not only by commentators but even in case law. As to commentators see Woolf (1986) *PL* 220-238; Williams (1986) *William and Mary Law Review* 715-725. Cases include *Davy v Spelthorne Borough Council* [1984] AC 262, 276 in which Lord Wilberforce warned that terms such as 'public law' and 'private law' should be used with caution for English law fastens on remedies and not principles; and *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 (HL), 178 in which Lord Scarman expressed unease with the 'newly fledged distinction in English Law between public and private law'.

circumstances.[121] Lastly, the court emphasised the special nature of the judicial review process in that it does not exist as a matter of right, but is available on leave granted by a court at the request of the person complaining of the decision or act of a public body.

In 2000, new set of rules, embodied in Part 54 of the Civil Procedure Rules, replaced Order 53.[122] Under this instrument, the remedies were renamed: *mandamus* became a mandatory order; prohibition a prohibiting order; and *certiorari* a quashing order.[123] Again the writ of *habeas corpus* remained untouched by these legislative interventions. The scope of the remedies remained largely unchanged. However, before the replacement of Order 53 there were moves to expand the scope of the remedies to include decisions and acts of bodies that traditionally were not the subject of review – ie, private bodies. How this shaped up is discussed in Chapter 5.

3.7 The various forms of review in England

It has been established above that at some point judicial review of legislative enactments was permissible. An Act of Parliament could be declared invalid on the basis that it was in conflict with common right and reason, or repugnant, or impossible to be performed. In other words, natural law operated in such a way as to be superior to parliamentary legislation. The clearest exposition of this principle is the *Dr Bonham's* case. With the emergence and ultimate solidification of the principle of parliamentary supremacy in British constitutional law, legislative review is no longer existent in England.

What is in existence now is judicial review of the acts and decisions of 'public' bodies in the exercise of their statutory or prerogative powers, or generally in the exercise of public functions. This will be the subject of discussion under Chapter 4. The remedy of

[121] *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 (CA) in which the court held that decisions of private bodies could be reviewable if the decision included a 'public element'. This is discussed further in Chapters 4 and 5.
[122] SI 2000 No 2092 (Schedule 1).
[123] Wade and Forsyth *Administrative law* 553.

judicial review has now expanded to cover decisions of other 'non-state' actors which, although not typically 'public' in the traditional sense of being established by statute or the royal prerogative, nonetheless discharge functions of a public nature as envisaged under the Human Rights Act. This is what is generally called the 'contracting out' jurisprudence. This will be a subject of discussion under Chapter 5. And finally, the emerging jurisprudence accepts that even decisions of purely 'private' bodies can quite properly be subjected to judicial review. This will be a subject of discussion under Chapter 5.

3.8 Conclusion

What emerges above is a picture of a process of judicial review with its roots in ancient British practices of administration exercisable at the instance of the royal authority. It was anchored on the issuance of royal commands, at the instance of the King, directed to particular bodies for one purpose or another. With time the power was delegated to the Court of King's Bench which, in the exercise of its judicial function, issued the same instructions, now as prerogative writs, for the purpose of doing justice to a cause before it. By a process of steady and systematic development these writs were adopted by the High Court in the form of orders of court in matters involving the review of decisions of public bodies. The statutory reforms that were introduced did not alter the essential character of the orders or their scope, only the nomenclature changed slightly, while the *quo warranto* was abolished and subsumed under the prohibiting order, and the *habeas corpus* remained unchanged and was placed within an independent statutory framework.

So far all these developments have focused on decisions and acts of public bodies, it being a matter of policy that judicial review was not available to decisions of private bodies. A person aggrieved by a decision by a private body was expected, in fact required, to pursue remedies under the law of contract. But this ignores the fact that the law of contract does not provide sufficient remedies to all situations, and some contractual remedies would not necessarily be suitable to circumstances which require revisionary remedies to address. This seemingly 'cop out' position harbours great

potential for injustice. Judicial review was then, by judicial innovation, extended to decisions of private bodies in certain circumstances. This development influenced the reform of the judicial review processes in Botswana as is shown in Chapter 6.

The next chapter addresses the nature and characteristics of private bodies and how they differ from public bodies. It will be demonstrated that the difference in the nature of public and private bodies, respectively is the basis for accepting the process of judicial review in respect of decisions of public bodies but not those of private bodies. The reason for such a distinction will also be discussed.

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CHAPTER FOUR

THE NATURE AND CHARACTERISTICS OF PUBLIC BODIES AND THEIR DISTINCTION FROM PRIVATE BODIES

4.1. Introduction

The discussion in the previous chapters has shown that traditionally, judicial review was conceptualised as a public law remedy available to litigants with grievances against decisions of public bodies.[1] In a case in which injunctive relief was sought, the court in *Roberts v Gwyrfai District Council* [2] Lindley MR, said:

> 'I know of no duty of the court which it is more important to observe, and no power of the court which it is more important to enforce, than its power of keeping public bodies within their rights. The moment public bodies exceed their rights they do so to the injury and oppression of private individuals, and those persons are entitled to be protected from injury arising from such operations of public bodies.'[3]

The emphasis on the application of judicial review to decisions of public bodies is therefore quite discernible. The converse, which is very much alive in literature and jurisprudence, is that judicial review is generally not available in respect of decisions of those bodies not described as public bodies. These entities are generally described variously as domestic bodies or tribunals, voluntary associations or generally as private bodies.[4] They have assumed nomenclature that takes away the essential 'public' element for purposes of determining their suitability or otherwise for judicial review. It was held in *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan*[5] that

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[1] Giusanni *Constitutional and administrative law* (2008) 251 posits that: 'Judicial review is only available to review a decision made by a public body'. See also Pannick "What is a public authority? for the purposes of judicial review?" in Jowell and Oliver (eds) *New directions in judicial review, current legal problems* (1988) 23-36, 27.

[2] [1899] 2 Ch 608

[3] at 614-615

[4] These are tribunals that are not established by statute, and are described by Wade and Forsyth *Administrative law* (2009) 537 as: 'Tribunals whose jurisdiction is confined to the internal affairs of some profession or association'. They are normally set up to resolve disputes in contractual arrangements and find their basis in the constitutive documents of voluntary arrangements.

[5] [1993] 2 ALL ER 853 (CA).

remedies in public law are not available in respect of decisions of private or domestic bodies as their power to make decisions is derived exclusively from the terms of the contract.[6] This has far-reaching implications for the question of the type of bodies whose decisions are amenable to judicial review to date. Interpreting judgments along similar lines, commentators generally locate the power of the court on review to be in respect of decisions of public bodies and thus to the exclusion of other bodies that do not fit the description or characteristics of public bodies. A few examples will illuminate this position. One of the leading counsel on public law in the United Kingdom, Richard Gordon posits as follows:

> Judicial review is the means by which the High Court exercises a supervisory jurisdiction over inferior courts, tribunals and other public bodies (including individuals charged with public law functions).[7]

Implicit in this formulation is an exclusion of the application of judicial review to private bodies. There is however, no indication as to what constitutes a public body for purposes of determining whether that body's decisions are or may be susceptible to judicial review. Other scholars take the view that:

> Judicial review is the procedure whereby the High Court is able, in certain cases, to review the legality of decisions made by a wide variety of bodies which affect the public, ranging from Government ministers exercising prerogative or statutory, to the actions of certain powerful self-regulating bodies.[8]

In terms of this definition, decisions are reviewable if they affect the public in one way or another. That suggests that a body whose decisions affect the public in some way is to be regarded as a public body for purposes of assigning judicial review. There is within the same definition a suggestion that there may be other bodies which are

[6] Per Farquharson LJ at 872. The same reasoning has been invoked in similar cases dealing with sporting bodies such as *Law v National Greyhound Racing Club* [1983] 1 WLR 1302 (CA); *R v Jockey Club, ex parte RAM Racecourses Ltd* [1993] 2 ALL ER 225 244 (QB); *R v Disciplinary Committee of the Jockey Club, ex p Massingberd-Mundy* [1993] 2 ALL ER 207 (QB); *R v Football Association Ltd, ex p Football League Ltd* [1993] 2 ALL ER 833 (QB).

[7] Gordon *Judicial Review: Law and procedure* (1996) 1.

[8] Fenwick and Phillipson *Sourcebook on public law* (1997) 679.

generally not public bodies but would still be amenable to judicial review. Other than to use an amorphous and omnibus description of 'certain powerful self-regulating bodies' there is no indication as to how these bodies are to be identified. So a lot of questions still remain open in any attempt to define a public body, or to identify those bodies whose are susceptible to judicial review.

Others lend their support to the narrative that judicial review applies to decisions of public bodies by providing some basis for the exclusion of private bodies and the normative basis for the separation in the following terms:

> As a general rule, the doings of private individuals and organisations are not reviewable by courts of law, while those of 'public' bodies are … By contrast, private bodies and individuals acting in terms of their private rights have far more freedom to do as they please.[9]

This position arises from a distinction frequently made between public law and private law, in terms of which public bodies are said to be governed by public law rules, whereas the affairs and operations of private bodies are governed by private law rules.[10] Ultimately, the availability of judicial review remedies depends on the nature of the body that has made a decision giving rise to complaints. This is necessarily a preliminary issue as it involves the jurisdiction of the courts – whether the courts should exercise their supervisory jurisdiction or not. Sir Clive Lewis has explained that:

> Judicial review is *only* available against *a body exercising public functions in a public law matter*. In essence, two requirements must be satisfied. First, the body under challenge must be a *public body or a body performing public functions.* Secondly, the subject-matter of the challenge must involve claims based on *public law principles, not the enforcement of private law rights.*[11] (emphasis added).

[9] Boulle, Harris and Hoexter *Constitutional and administrative law, basic principles*, (1989), 246-247. This is cemented in case law where it was said judicial review 'is confined to reviewing activities of a public nature as opposed to those of a purely private or domestic character'. See *R v BBC ex p Lavelle* [1983] 1 WLR 23 (QB), 31 per Woolf J.

[10] Beatson "'Public' and 'private' in English administrative law" (1987) *LQR* 34-65.

[11] Lewis *Judicial remedies in public law* (2000), 7.

Much as this attempts to draw a boundary between bodies for purposes of entertaining jurisdiction on review, it raises other questions which cannot readily be resolved. For example, it leaves open to interpretation the notion of a 'public body'. There is a suggestion, denoted by the use of the word 'or' that even if the body is not a 'public body', its decisions may still be susceptible to judicial review if the body is performing functions of a public nature.[12] It can be deduced from the statement that these functions of a public nature should not necessarily be the only and exclusive remit of the body but that in making the decision complained of, it was performing functions of a public nature. Further, the concept of functions of a public nature as well does not admit of precise definition. It is not always easy to draw the boundary between a body's public law functions and its private ones. As will be discussed fully below, sometimes these functions shade into one another and it requires a clear touchstone to be able to separate them according to their nature. The last basis of demarcation is that made between claims 'based on public law principles' and those the subject of which is 'the enforcement of private law rights'. This is a whole minefield that both academics and the courts are still grappling with to-date.[13]

It is therefore necessary to determine the nature of the decision-making body whose actions and decisions can be subjected to judicial review and those whose decisions cannot be challenged on review.

4.2 Public body

There is no comprehensive definition in law of a public body. The identification of such a body has generally been anchored in the source of its power.[14] However, the

[12] Oliver "Functions of a public nature under the Human Rights Act" (2004) *PL* 329-351; *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] 3 WLR 283.
[13] Harlow "'Public' and 'private' law: Definition without distinction" (1980) *MLR* 241-265; Woolf "Public law-private law, why the divide? A personal view" (1986) *PL* 220-238, 223; *R v BBC, ex p Lavelle* [1983] 1 WLR 23 (QB), 31 per Woolf J.
[14] Campbell "The nature of power as public in English judicial review" (2009) *CLJ* 90-117.

explanation that comes closest to defining a public body is to be found in one of the most popular legal dictionaries, which defines it as follows:

> "A public authority is a body not necessarily a county council, municipal corporation or other local authority which has public or statutory duties to perform and which performs its duties and carries out its instructions for the benefit of the public and not for private profit. Such an authority is not precluded from making a profit for the general public, but commercial undertakings acting for profit and trading corporations making profits for their corporations are not public authorities even if conducting undertakings of public utility."[15]

Certain critical elements emerge from this broad definition. First, a public body is one with *public* or statutory duties. It is not difficult to envisage statutory duties as this is readily determinable by reference to the statute by which the duties are imposed. The difficulty arises from the use of the word 'public' (which is the word sought to be defined) in an attempt to define 'public duties'. This is not helpful and creates significant uncertainty. Second, it is said the body must carry out its instructions for the benefit of the public. This again does not take the matter any further as many bodies, including those not established by statute, are set up to serve the public. Even private bodies, although established to serve the profit motives of the proprietors, operate principally in the public arena, for the benefit of the greater public. A shop in town, a supermarket, food outlet, a mobile phone operator, a liquor distributer, and many other no – statutory establishments, all exist to serve the public. This incidence of public service is what leads to statutory regulation in many cases, yet this form of regulation does not convert the private bodies to public ones. The public good or benefit is so broad a concept as it covers notions not only of the end product, but may also define the legal parameters of operation. For example, it would not be for the public benefit if a body were to act illegally or contrary to the determined greater public

[15] Saunders *Words and phrases* 217. Greenberg and Millbrook *Stroud's Judicial Dictionary* 2111 defines a public body as 'one, whether elected or created by statute, which functions and performs its duties for the benefit of the public, as opposed to private gain'. This is complemented in large measure in Hailsham *Halsbury's laws of England* (2001) under the section on 'Public bodies and public authorities' thus: 'Broadly speaking, a public authority may be described as a person or administrative body entrusted with functions to perform for the benefit of the public and not for private profit' 12. The definition in Saunders *Words and phrases* was accepted by the Botswana Court of Appeal in *National Development Bank v Thothe* [1994] BLR 98 (CA), 104 as the guiding criteria for determining the nature of a body or authority as public.

good, although some members of the public may benefit from such actions and may even defend or seek to justify them. The requirement of permission to operate in the public arena suggests an *a priori* determination that the operations of the body will be for the benefit of the public. De Smith, Woolf and Jowell, the authors of a leading English textbook on the subject, posit that:

> A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or a section of that public as having authority to do so.[16]

True as this may appear to be, it leaves a number of questions unanswered: (a) How is the collective benefit to be determined? It appears that the determination will be made with reference to whether or not it is a particular section of the public that benefits, or whether the benefits emanating from its operations are accessible to all or a majority of members of the public, (b) What is the position if certain sections of the public accept the authority of the body, but others object, either to its existence or its operations? Statutory bodies are presumed to be acceptable in that they are created by laws made by the legislature, which is accepted as having authority to make law and establish institutions. However, it may not be as easy for bodies other than those established under statute. (c) Finally, it is common today to find private entities run by state institutions which have been permitted the leeway to compete with private or other non-state entities for market opportunities, even if they are not termed public institutions.[17] Consequently, the source of authority, and the mode of operation cannot be regarded as definitive pointers as to the nature of a body. The test for identifying a public function defies precise definition and can be so indeterminate that it is up to the courts to determine the matter on a case-by-case basis, and with no consistent or coherent criteria to guide whether or not a decision may be subjected to judicial review.

[16] De Smith, Woolf and Jowell *Judicial review of administrative action* (1999), 65.
[17] Botswana Railways, a parastatal organisation, owns a company called BR Properties (Pty) Ltd which competes in the property industry and Botswana Postal Services, also a parastatal organisation, owns a company called Botswana Couriers (Pty) Ltd which competes in the courier industry.

On this score, commentators agree that the test based on the performance of a 'public function' is so malleable as to be imprecise or inconclusive.[18]

It is generally accepted, at least in English law, that a body falls to be characterised as a public body if it derives its powers from statute or from a prerogative act.[19] The prerogative is a species of executive power that exists independently of statute and the existence and extent of which falls to be determined by the courts.[20] For present purposes these are powers not expressly conferred by any specific source, but which the executive may draw upon to run the affairs of the state. They are therefore residual in the sense that they may not be exercised in the first instance, but only when there are no express powers for the purposes of discharging the functions of the state. To these may be added, powers exercisable by the various government agencies in the discharge of executive functions or responsibilities. These are the powers described by Bingham MR as 'governmental' in the *Aga Khan* case.[21]

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[18] De Smith, Woolf and Jowell, *Judicial review of administrative action* 65; Sinclair "Judicial review of the exercise of public power" 7; Campbell "The nature of power as public in English judicial review" (2009) *CLJ* 90-117, 90. Thompson "Judicial review and public law: Challenging the preconception of a troubled taxonomy" (2017) *Melbourne University LR* 890-927, 896. A comprehensive account of the debate may be found in Craig "What is public power?" in Corder and Maluwa (eds) *Administrative justice in Southern Africa: Proceedings of the workshop on 'Controlling public power in Southern Africa'* held in Cape Town, South Africa 8-11 March 1996 25-41.

[19] Beatson "'Public and private' in English administrative law," (1987) *LQR* 34-65, 47. This is also accepted as the position in Botswana. See *Patson v The Attorney General* 2008 (2) BLR 66 (HC), 76, where Kirby J (as he then was) interpreting and drawing inspiration from *Council of Civil Service Unions and Others v Minister for the Civil Service* [1984] 3 ALL ER 935 (HL), which accepted reviewability of the exercise of prerogative powers, held: 'Insofar as it deals with the reviewability of prerogative powers, I believe that the *CCSU* case *(supra)* is also good law in Botswana. Where routine administrative prerogative functions such as the issue of passports are performed on behalf of the President by a minister, or on the minister's behalf by public officials in the course of their duties, which affect the rights of a person, their exercise is subject … to the supervision of the court under its common law review powers.'

[20] This is an area of considerable contestation. See the accounts by Craig "The legitimacy of the United States administrative law and the foundations of English administrative law: Setting the historical record straight" 2-4 *University of Oxford Legal Research Series Paper* No 44 (2016), 1-60; Hamburger, "Early prerogative and administrative power: A response to Paul Craig" (2016) *Missouri LR* 940-982.

[21] *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 ALL ER 853 (CA), 867. It is quite evident from a reading of the case that all the three members of the court had in mind that 'governmental business' meant the whole gamut of functions that a government exercises in the discharge of services to the citizens for their livelihood and general wellbeing.

In Botswana, although not definitive, there is some statutory indication of what constitutes a public body. The Public Authorities (Functions) Act,[22] provides for 'the exercise of functions by the President, Ministers, Public Officers, *Public bodies,* and other authorities ...' (my emphasis). It does not however, define public bodies, although it includes a section which provides:

> Where an enactment confers power to establish any board, tribunal, commission, council, committee or other body, corporate or unincorporated (*in this Act referred to as a 'public body'*), then, unless the context otherwise requires, the power includes power, exercisable in the same manner as and subject to the limitations and conditions applicable to the original power.[23]

The identification of a public body under the Act is by way of examples (eg, board, tribunal, commission, council, or committee), and is by no means exhaustive as, in addition to the specified instances, it includes 'other body', signifying the flexibility or non-exhaustiveness and generally the 'openness' of the definition. However, it is contended here that this flexibility is narrowed down by interpretation. Through the application of the *ejusdem generis* rule of statutory interpretation, the phrase 'other body' must mean a body that is closely related to those listed.[24] So by this rule of statutory interpretation, 'other body' must be in reference to a body of the class identified. This limits this 'other body' to a public body. So this is not much of a problem. The difficulty lies in the implicit suggestion that public bodies are synonymous with the structures given under the Act as examples. Apart from a 'council'[25] and

[22] Cap 02:11.
[23] Section 14.
[24] This is a rule of construction of statues which requires that the meaning of general words that follow specific words in a list must be determined by reference to the meaning of the specific words. See Cockram *Interpretation of statutes* (1987) 153 and Fombad and Quansah *The Botswana legal system* (2006), 225. This rule has been given statutory recognition at Section 34 (1) of the Interpretation Act, (Cap 10:04).
[25] The Local Government (District Councils) Act (Cap 40:01), which provides for some form of decentralisation and devolution of power to local authorities in rural areas does not define a 'council'. Neither does its counterpart, the Townships Act Cap 40:02, in respect of towns and cities. The Local Authority (Proceedings) Act (Cap 10:04), which provides a procedure for instituting proceedings against a local authority does not define a local authority. However, to the extent that all these are statutory establishments, they fit the definition of a public body. In many cases, of which the most authoritative is the Court of Appeal decision in *Herbst and Another v Lobatse Town Council* [2014] 1 BLR 538 (CA), 539, it was held that a council is a local authority.

'commission'[26] all the other structures such as a board, tribunal[27] or a committee are also found in the context of private bodies. The use of these structures as examples would not take the matter of identification of a public body any further as these also exist in private bodies. However, what emerges is that the bodies referred to in the section are those established on the basis of powers conferred by an enactment of law. This would refer to statutory bodies and therefore have visible means of legal support such as establishment by statute, the Constitution, or the prerogative.[28] It also includes corporate and unincorporated bodies. Generally, corporate bodies would be those registered in accordance with the company laws of the country. They would not, as a rule be established by statute although the state may hold equity in them, a possibility recognised under the Act.[29] It appears that the use of the word 'corporate' here denotes those entities which enjoy a separate and independent existence and have corporate personality. The difficulty arises in identifying those unincorporated bodies falling to be defined as public bodies. The first indicator would be to align the body's functions with those of bodies that are expressly spelt out. If this does not yield results, the next port of call is to determine whether the body exercises public duties or performs functions of a public nature. This leaves significant room for determination by judicial interpretation. This particular point is discussed more fully in subsequent chapters. It suffices at this stage that there is some guidance through statutory intervention in the form of the rules of court promulgated to regulate procedure for litigation.[30]

[26] The Commissions of Inquiry Act (Cap 05:02) provides for the appointment by the President of 'a commission to inquire into the conduct of any officer in the public service, or of any public or local institution or into any matter in which an inquiry would, in the opinion of the President, be for the public welfare' (s 2). Regard being had to the objects of the commission; this is a matter in the public interest or for the benefit of the greater public. However, the Act does not define a 'commission' and certainly does not exclude private bodies from using the same mechanism of a commission to resolve their own matters.

[27] In fact, in *Autlwetse v Botswana Democratic Party and Others* [2004] 1 BLR 230, a case discussed at some length in chapter 6, the High Court of Botswana did implore members of a political party, in the event of disputes arising within the structures of the organisation, to seek remedies 'before the proper domestic tribunal appointed in terms of that constitution' 237.

[28] As envisaged in *R v Panel on Take-overs and Mergers ex p Datafin plc* [1987] QB 815.

[29] Section 20.

[30] Rules of the High Court of Botswana, Statutory Instrument No 1 of 2011.

The procedure for litigation in the High Court of Botswana is governed by Rules of Court made by the Chief Justice in terms of powers conferred upon him by the High Court Act.[31] The 2011 version of the Rules provides for a specific procedure for instituting judicial review proceedings: The Rules provide as follows:

> Except where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any magistrate's court, and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions, shall be by way of notice of motion.[32]

This provision does not provide a comprehensive list of bodies whose decisions may be challenged on review; it serves simply as a guide and offers no definition of a public body. In this regard it can be said that the decisions of statutory bodies are reviewable even when they are not decisions of 'a magistrate's court', a 'tribunal', 'board', or an 'officer'. They also do not readily fit the mould of 'judicial', 'quasi-judicial' or 'administrative' functions. In the practice of the superior courts of Botswana, this provision has been interpreted to provide only a procedural basis in taking decisions of public bodies and other bodies not created by statute but whose decisions are subject to the court's common law powers of review, on review.[33]

There are other bodies in Botswana which are neither mainstream government departments nor established by statute, but which in their form are state institutions exercising 'public' functions and account to the state for the discharge of their responsibilities. For example, the Botswana Institute for Policy Development Association (BIDPA) is established by a Deed of Trust registered in the Deeds Registry.

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[31] Cap 04:02 s 28.

[32] Statutory Instrument No 1 of 2011 Order 61.

[33] These bodies include societies, religious organizations, sporting associations, and political parties; *Sorinyane v Kanye Brigades Development Trust* [2008] 2 BLR 5, which was about a decision of a Development trust established by deed of trust; *Du Preez v Debswana Diamond Company (Pty) Ltd and Others* [2012] 1 BLR 264 Which was a challenge of a decision of a private company, but in which the ambit of Order 61 was explained; *Tiro v The Attorney General (2)* [2013] 3 BLR 490 which dealt with a decision of an office established by statute and therefore was held to fall squarely within the ambit of Order 61. The cases establish that the High Court has powers under common law to entertain reviews of the organisations spelt out. They negate the old notion that only decisions public bodies *simpliciter* are amenable to judicial review.

It is the government think-tank on matters of economic analysis and review, and advises government on economic policy, and is wholly funded by the government.

The Botswana Innovation Hub was established by Government Directive to be the government wing on general matters of scientific innovation. It has since incorporated two private companies and is tasked to deal with specific interests, such as property development and acquisition, and thus operating in the private space. The Private Enterprises Evaluation and Private Agency (PEEPA) is a fully funded government company limited by guarantee. It was set up as the vehicle through which to implement the Privatisation Policy for Botswana[34] in terms of which certain statutory bodies discharging public functions are to be privatised. The PEEPA advises government on the privatisation drive. In addition, there are certain private entities, incorporated as private companies, but either wholly owned by government or in which government has a significant equity holding. Examples include the Botswana Development Corporation (BDC), the Citizen Entrepreneurial Development Agency (CEDA), Botswana Oil Limited, Okavango Diamonds (OKD), Bamangwato Concession Limited (BCL), Selebi-Phikwe Economic Diversification Development Unit (SPEDU), and the Mineral Development Company Botswana (MDCB).[35] These discharge public functions, and a case made may be made that their decisions are reviewable notwithstanding that they are not constituted as public bodies according to the traditional criteria of statutory establishment.

Then there are private companies in which the government is the majority shareholder, for example, Botswana Telecommunications Limited (BTCL) and Debswana Diamond Mining Company Limited. These bodies discharge public duties but do not fit neatly into the traditional mould of any statutory establishment, or exercise prerogative power. In all these circumstances it appears that the courts would

[34] Government Paper No 1 of 2000.
[35] Information on these establishments is to be found on the Government of Botswana web page, www.gov.bw.

have to look beyond the traditional demarcation lines in determining the reviewability of actions and decisions of the body in question.

Furthermore, even the pure voluntary or domestic bodies whose membership is founded on contract lend themselves to some form of statutory authorisation and support. Many of them are subjected to a complex web of statutory regulation before they can be regarded as legitimate. For example, almost all sporting bodies and religious organisations must conform to the strictures of the Societies Act.[36] Trade Unions must conform to the requirements of the Trade Unions and Employers' Organizations Act.[37] Unlike companies aimed principally at profit making, and which must conform to the Companies Act,[38] these are bodies that have a public dimension relating to the service they provide or the objective for which they were formed. The sporting bodies receive some financial assistance from the government through subventions provided to their parent associations (eg, the Botswana Football Association, Botswana Athletics Association, Botswana Volleyball Association and other associations which are code specific) by the Botswana Sports Commission – statutory body established to develop sport in the country.[39] The question as to whether judicial review should be applied to acts and decisions of these bodies has never been answered satisfactorily, and has led to disparate positions both in England and Botswana.

It is generally accepted that even bodies which satisfy the criteria for classification as 'public' on the basis of the source of their powers, enjoy a wide latitude – similar to that of private bodies – when entering into private relationships with other entities. They can operate in the private sphere where public law issues do not arise which would otherwise attract the processes of judicial review.[40] Thus, public bodies may be treated in some respects as if they were private bodies and therefore outside the

[36] Cap 18:01.
[37] Cap 48:01.
[38] Cap 42:01.
[39] Botswana Sports Commission Act Cap 60:01.
[40] De Smith, Woolf and Jowell *Judicial review of administrative action* 173; Beatson "'Public and private' in English administrative law", 48.

purview of judicial review. In *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd,*[41] which concerned an action for nuisance, it was held that the local authority stood in a position no different from that of a private person in relation to the claim. This means that the source of their power is also not conclusive. The difficulty in the categorisation of bodies as 'public' or 'private' for purposes of ascribing or denying judicial review is evident usually in respect of employment disputes. Some discussion to illustrate this is in order. The question that usually arises is whether the conditions of employment of an employee are governed by public law rules or should be considered purely as a contractual arrangement between the parties. In *R (Tucker) v Director General of the National Crime Squad*,[42] the Court of Appeal in England had to decide whether the termination of a Police Officer's secondment to the Regional Crime Squad was reviewable. The Appellant, a senior officer in the police force had, while on secondment to the Regional Crime Squad, participated in a surveillance operation on drug related crimes. This resulted in arrest of several officers seconded to the National Crime Squad (NCS) who were suspected of committing drug related offences. Some of the secondments terminated immediately and the officers sent back to their home forces for disciplinary investigation. The Appellant's secondment terminated without disciplinary investigation. It was said that the respondent had, 'as a result of information provided to him, lost confidence in his management performance'.[43] His request for the source of the information and its nature was denied, and in consequence he applied to court to set aside the refusal to provide information. The court accepted the criteria laid down in *R (Hopley) v Liverpool Health Authority and Others*[44] in which the court laid down three factors that must be considered in determining whether a public body exercising statutory powers was exercising a public function that was amenable to judicial review on the one hand, or a private one that was not, on the other. Broadly, those factors are (a) whether the respondent was a public body exercising statutory powers (b) whether the function performed pursuant to the statutory powers was a public or private one and (c)

[41] [1953] 1 ALL ER 179.
[42] [2003] EWCA Civ 57.
[43] Para 7.
[44] (Unreported). Judgment delivered on the 30 July 2002 per Pitchford J.

whether the respondent was discharging a public obligation owed to the claimant in the particular circumstances under consideration.

In considering the reviewability of the decision however, the Court of Appeal went beyond the three factors identified above, and traced the matter to the separation between public and private law. The court observed:

> The boundary between public law and private law is not capable of precise definition, and whether a decision has a sufficient public law element to justify the intervention of the Administrative Court by judicial review is often as much a matter of feel, as deciding whether any particular criteria are met. There are some cases that fall at or near the boundary where the court rather than saying the claim is not amenable to judicial review has expressed a reluctance to intervene in the absence of very exceptional circumstances.[45]

The concession by the court that the existence or otherwise of 'a sufficient public law element' to justify the court's intervention by judicial review 'is often a matter of feel' may cause significant discomfort for any lawyer. Yet it signifies a reality that practising public lawyers may reluctantly have to accept. It often happens that a court's determination for or against judicial review does not rest on any principled basis (hence a matter of feel), and there is usually no discernible pattern which concretises into a principle. The same goes for the concession that it is 'as much a matter of feel, as deciding whether any particular criteria are met'.[46] This leaves both litigants and lawyers at the mercy of the courts, without any principled guidance from the latter. The reluctance to dismiss the claim on a non-justiciable basis but withholding of the court's intervention except when exceptional circumstances are shown is another source of frustration to litigants and lawyers. Worse still, there is no guidance from case law what those exceptional circumstances might be. Granted that these would differ from one case to another, some guidance as to general principles or trends might be helpful. In the absence of that, it seems again that whether or not they exist in any particular case would again be a matter of feel, with the attendant weaknesses alluded to above. Questions on jurisdiction should not be left entirely to the whims of

[45] Para 13.
[46] *R (Hopley) v Liverpool Health Authority and Others,* Para 13.

a particular judge in individual cases. In delivering the unanimous judgment, Scott Baker LJ started by accepting that there is no single test or criterion by which to determine the reviewability of a decision.[47] In this, he relied on the words of Woolf LJ in *R v Derbyshire County Council ex parte Noble*,[48] to the effect that:

> Unfortunately in my view there is no universal test which will be applicable to all circumstances which will indicate clearly and beyond peradventure as to when judicial review is or is not available. It is a situation where the courts have, over the years, by decision in individual cases, indicated the approximate divide between those cases which are appropriate to be dealt with judicial review and those cases which are suitable dealt with in ordinary civil proceedings.[49]

That there is no universal test indicating when and when not judicial review is available is now common cause and may be taken to be trite. However, it is not appropriate to suggest that the 'courts have, over the years, by decision in individual cases, indicated the approximate divide between those cases'[50] suitable for judicial review and those suitable for ordinary civil proceedings. The overwhelming evidence is that such divide has not been carved out consistently in case law, hence the view that it is a matter of feel in each case. Scott Baker LJ also relied on the renowned statement by Sir John Donaldson MR in *R v Panel on Take-overs and Mergers ex p Datafin plc* [51] where his Lordship expressed that:

> In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction, but it is a fatal error to regard the presence of all those factors as essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many forms, and the exclusion from jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction.[52]

[47] Para 14.
[48] [1990] ICR 808.
[49] 814 E.
[50] 814 E.
[51] [1987] QB 815(CA).
[52] 838 E.

Applying all the factors above, the court held that the decision of the Director General was not susceptible to judicial review. It arrived at this conclusion on the basis of the following reasons: First, the court said that this was not a dismissal case, as the decision did not affect his rank. While the NCS did perform a public function, 'that does not mean that every decision personal to an individual officer engages public law remedies. There is a line over which the courts cannot go. It is impermissible to trespass into the management of police forces generally or the NCS in particular.'[53] Two features stand out here. That a public body's decisions are not necessarily reviewable if they do not have public law consequences. In other words, public bodies also operate in the realm of private law, in which case they are shielded from judicial review. The other notable observation is the court's apparent deference[54] to the Police in their operational decisions which import no public element.[55] Second, the court held that the third *Hopley* factor had not been met. The court arrived at this conclusion by holding that in sending the applicant back to his substantive position, the respondent was not discharging a public function to the extent that the decision was specific to him, other officers having been dealt with differently. The decision was tailor-made to him and was an operational decision.[56] Third, and tying in with the second, the court gave examples of similar decisions and held that these were:

> run of the mill management decisions involving deployment of staff or running the force. They are decisions that relate to the individual officer personally and have no public element. They are, if you like, the nuts and bolts of operating a police force … It is in my judgment quite inappropriate for the courts to exercise any supervisory jurisdiction over police operational decisions of this kind. There is quite simply, no public law element to them.'[57]

[53] Para 22.
[54] On deference, see the House of Lords decision in *Reg (Prolife Alliance) v British Broadcasting Corporation ex p Profile Alliance* [2003] 2 ALL ER 977. A political party opposed to abortion presented a video to broadcasters which illustrated in graphic detail what was involved in abortion processes with clear images of foetuses in a mangled and mutilated state. It requested that the video be broadcast on television. The broadcasters refused to broadcast the video after studying the content, where upon the party applied to court to challenge that refusal. The House of Lords held that this was a zone in which the court should defer to the judgment of the broadcasters in regard to content of what was sought to be broadcast.
[55] Para 32.
[56] Para 25.
[57] Para 32.

The conclusion therefore was that the decision in question did not have a sufficient public law element to be made the subject of review proceedings and that it was purely of a domestic nature.[58]

That the decision was held to be only of a domestic nature is difficult to accept as the arrangement was not purely a result of the officer's private arrangement with his employer, but was made on the basis of general conditions of employment promulgated by the employer and applicable to all employees. This was a matter dealing with operations of a force in order to achieve the primary object of providing security. This is necessarily a public consideration. That the court accepted that the withholding of reasons for terminating the secondment on security considerations is a further indication of the wider public dimension of the decision. It would be a contradiction in terms to say there is no public element in the decision, yet again hold that the public interest justified withholding of information. This is an indication of the failure of the common law to provide a solution to what the 'public element' of a decision entails.

The decision in *Tucker* is to be contrasted with that in *R (on the application of A) v Chief Constabulary*.[59] A was a sole trader who provided vehicle hire, breakdown and recovery services. For years he had provided those to the respondent, a police authority. In 2010 the respondent decided that A and his employees should submit to a security vetting check. All A's employees were security cleared except A himself. He was informed he would not be granted the security vetting clearance. The reasons were however not disclosed. A challenged the refusal to provide the information on which the decision was based. The court observed that the police powers in seizure, recovery and retention of vehicles fell under general enabling powers which allowed them to enter into contracts with third parties. But the whole operation had a strong statutory underpinning. It was not entirely a private arrangement. The court held that the Police Authority carries out security vetting in the public interest to ensure that those 'non police personnel who are accorded the privilege of working with the police

[58] Paras 38 and 51.
[59] [2012] EWHC 2141 (Admin)

and assisting them with carrying out police functions are fit and proper persons to do so'.[60] Accordingly, the court concluded that the decision to refuse security clearance to A had a sufficient public law element to found a claim for judicial review.[61]

It is submitted this decision is correct, as although the matter concerned a private commercial agreement between the parties, it was meant in the main to implement a general and statutory police function, in which public funds would be used to achieve that objective. It is evident therefore that the common law is still characterised by vacillations in the bases for decisions in individual cases. It is a pity that there is no decision on such matter from the House of Lords or the Supreme Court. This grey area has been experienced elsewhere as well. The Supreme Court of Papua New Guinea had to decide on a similar issue in *Norman Daniel v Air Niugini Ltd*.[62] The Appellants had been employed by the respondents as pilots. They were dismissed from their employment on disciplinary grounds. They instituted proceedings to set aside their dismissal. The preliminary point for determination was whether the decision imported sufficient public law *indicia* to be subject to review. The point turned largely on the nature of the respondent and how the parties related to each other. The court held that in spite of the fact that Air Niugini Ltd was a subsidiary of an entity wholly owned by the state, it was not a public body. This conclusion is remarkable because, although the airline was not the statutory organisation itself, but a subsidiary thereof, it was established, through public funds, to facilitate the fulfilment of the purposes of the statutory organisation itself. The distinction made would appear to be too artificial. Further, the court held that the employment relationship was founded in private law, as each of the Applicants had his own individual contract, and there was no evidence that the contract or any aspects of it, was founded in statute. It held that the decision was not reviewable. This again demonstrates the fluidity of the common law, and the dependence on the attitude of the particular bench or decision-maker in individual cases. Finally, in *National Development Bank v Thothe*,[63] the Court of Appeal of Botswana had to decide whether the decision of a statutory corporation dismissing

[60] Para 35. Per Mr Justice Kenneth Parker.
[61] Para 36.
[62] SCM-3-10 OF 2017.
[63] [1993] BLR 98, 104.

one of its senior employees was reviewable. The court first had to determine if the Appellant bank was a public body or authority. In this exercise, the court accepted the definition of a public authority in *Butterworths, words and phrases legally defined* to the effect that:

> "A public authority is a body not necessarily a county council, municipal corporation or other local authority which has public or statutory duties to perform and which performs its duties and carries out its instructions for the benefit of the public and not for private profit. Such an authority is not precluded from making a profit for the general public, but commercial undertakings acting for profit and trading corporations making profits for their corporations are not public authorities even if conducting undertakings of public utility."[64]

The court held that the decision was reviewable as the body was a public authority, being a creature of statute and whose purposes are overseen by a governing board appointed by the Minister having portfolio responsibilities over the bank, and whose conditions of service are elaborate and of general application.[65] This was perhaps a straight forward decision. There are many cases in which the identification of the body in question as either public or private will not be that clear, and the court would have to engage more on the circumstances to make the demarcation between a decision that is susceptible to judicial review and one that is not. As Himsworth posits, the determination of the question as to which employment decisions of public bodies should be susceptible to judicial review is often clouded in the grey area lying between public and private law.[66]

So, distinguishing public from private bodies, and the demarcation between decisions that import a public law element and those that do not is an area of the law that is always going to be contested in the future.

Having sketched the features of a public body, I now turn to those of a private body.

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[64] (2nd ed), vol 4, p 217 where the Botswana Court of Appeal accepted the criteria set down in the definition as a guide in the determination of which body is to be regarded as a public authority.
[65] 105.
[66] Himsworth "Judicial review of employment decisions of public authorities" (1993) *Industrial Law Journal* 47-50, 47.

4.3 Private body

There have been brief and sporadic attempts to define a private body. The tendency has been to spell out the features of a public body and to classify, through a process of elimination, a body as private if it does not possess the features of a public body. These bodies are variously called 'private body', 'domestic body', 'domestic tribunal' or 'voluntary association'. Bamford defines such a body as follows:

> A voluntary association is a legal relationship which arises from an agreement among three or more persons to achieve a common object, primarily other than the making and division of profits.[67]

In describing the features of private bodies, Wade and Forsyth have laid down that:

> Tribunals whose jurisdiction is confined to the internal affairs of some profession or association, and which are commonly called domestic tribunals … Where a disciplinary body has no statutory powers its jurisdiction will normally be based upon contract. Members of trade unions, business associations and social clubs and also students in universities and colleges have … contractual rights based on their contracts of membership, with implied terms which protect them from unfair expulsion … In these cases declaration and injunction are the appropriate remedies. Quashing and prohibiting orders are quite out of place, since the crown's supervisory powers over public authorities are not concerned with private contracts.[68]

Although these views appear to focus on domestic tribunals, in the context in which they were expressed they apply with equal force to other voluntary organisations. The idea conveyed by Wade and Forsyth is that judicial review is not a remedy for disputes arising within a contractual matrix. These would be bodies that fit neatly under the label 'private'. Because of the principle that judicial review applies to public bodies,[69] and that it is a public law remedy, the courts have generally taken the position that

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[67] Bamford *Law of partnership and voluntary association in South Africa* (1982) 117.
[68] Wade and Forsyth *Administrative law* 537-538.
[69] Costello "When is a decision subject to judicial review? A restatement of the rules" 91; Giusanni *Constitutional and administrative law* 251; Gordon *Judicial review: Law and procedure* 1; Boulle, Harris and Hoexter *Constitutional and administrative law, basic principles* 246-247; *R v Jockey Club, ex p RAM Racecourses Ltd* [1993] 2 ALL ER 225 (QB), 244; *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 ALL ER 853 (CA), 866-877.

they will not extend it to situations involving 'self-made' rules arising from contractual arrangements between private parties. They would rather let an aggrieved party sue in contract on the basis of contractual claims, including an implied duty of fairness,[70] and if successful, obtain contractual remedies. This is the foundation on which the courts have declined to entertain judicial review of decisions by sports associations,[71] religious bodies,[72] trade unions,[73] political parties[74] and other bodies.[75]

There is a common thread running through these bodies which forms the baseline that defines their nature. They exist on the basis of voluntary membership and consensual participation in their operations and activities. In a Botswana High Court decision, *Patle v Botswana Civil Servants Association*, it was said:

> An association such as the respondent is what is commonly referred to as a voluntary or unincorporated association. It comprises a body of members who come together in terms of an agreement normally in the form of a written constitution in terms of which they associate … The constitution of an association together with all the rules and regulations if any, constitutes the agreement entered into by its members. It is an important factor in the existence of the association in that it determines the nature and scope of the association's existence, its activities and prescribes and sets out the parameters of the powers of its governing body and subsidiary bodies. It expresses and regulates the rights

[70] This is a duty that is recognized in many common law jurisdictions. See *McInnes v Onslow-Fane* [1978] 3 ALL ER 211; *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A); *Thothe v National Development Bank* [1993] BLR 193.

[71] *Law v National Greyhound Racing Club* [1983] 1 WLR 1302 (CA); *R v Jockey Club, ex p RAM Racecourses Ltd,* [1993] 2 ALL ER 225 (QB); *R v Disciplinary Committee of the Jockey Club ex p Massingberd-Mundy* [1993] 2 ALL ER 207 (QB); *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 ALL ER 853 (CA); *R v Football Association Ltd, ex parte Football League Ltd* [1993] 2 ALL ER 833 (QB).

[72] *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex p Wachmann* [1993] 2 ALL ER 249 (QB).

[73] *Lee v Showman's Guild* [1952] 1 ALL ER 1175; *Breen v Amalgamated Engineering Union and Others* [1971] 2 QB 175.

[74] *Cameron v Hogan* [1934] 51 CLR 358; *Autlwetse v Botswana Democratic Party and Others* [2004] 1 BLR 230.

[75] *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 ALL ER 770 (QB); *R v Advertising Standards Authority ex p The Insurance Service plc* [1990] COD 42; *R v Lloyds of London, ex p Briggs* [1993] 1 Lloyds Rep 176; *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A); and even *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 (CA) itself.

> of its members and provides for certain procedural aspects, eg, discipline and election of members of the governing body.[76]

There is significant similarity between the statement by Wade and Forsyth and the reasoning of the Botswana High Court in sketching out the features of a body founded on contract. These features revolve around consent of an individual, and epitomise the expression of his freedom of association to be bound, legally, by the rules that those who associate in a group have set for themselves. The opportunity for exit from the operational rules is guaranteed, with limited consequences, in the event a member or members reconsider their continued association with the 'group' or the fundamentals that bind the members together are no longer in place, for example if there is no longer an agreement on the structure of the organisation, the mode of operation, the ideals or some other cause. They may even end their association by dissolving the association and thus bringing an end to its existence. The law regulating all issues involving these bodies is generally contract law, a species of private law rather than of public law.[77] The legal framework that underpins its existence[78] is the agreement between the members, hence the word 'private'. By reason of its characteristic as a private body, the rules applicable to the relations between the members are to be found in private law. And, it is this feature that has been the major reason behind rejecting resolution of disputes within those bodies by means of judicial review. Anderson states in this regard:

> The English courts have held consistently that challenges to the actions of sports governing bodies should be brought in private law proceedings and not by way of judicial review. Put simply, the courts have stressed that because the relationship between a sports' governing body and its members is generally private and contractual in nature, it gives rise to private rights on which effective actions for a declaration, an injunction or damages might be based without resort to judicial review.[79]

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[76] [2002] 1 BLR 466, 472 per Lesetedi J (as he then was).
[77] O'Connor "Actions against voluntary Associations and the legal system" (1977) *Monash University LR* 87-116.
[78] As envisaged by Donaldson MR in *Datafin*.
[79] Anderson "An accident of history: Why the decisions of sports governing bodies are not amenable to judicial review" (2006) *Common Law World Review* 173-196, 173-4.

This was essentially the basis for the decision as well in *Law v National Greyhound Racing Club,*[80] and other decisions involving sporting bodies that followed.[81] These decisions created a division between private and public bodies for purposes of determining jurisdiction in cases of judicial review.

4.4 *Distinguishing between public and private bodies: a brief overview*

To a significant extent the distinction between public and private bodies has cropped up in the process of identifying these two types of bodies above. As was indicated, the distinction between them is to be found by a process of elimination. Once one body is identified as either public or private, any other body not carrying the features that form the basis for the characterisation would in all probability be characteristic of the other. As the above discussion has shown, the basis for determining the revisionary jurisdiction of the court was for a long time narrow but consistent, with the courts insisting on using the type of body concerned to establish amenability to judicial review. The type of body amenable for review – a public body – was identified, in the main, by the source of its power in either statute or prerogative. Deciding what decisions could be reviewed by the courts therefore depended on this narrow approach. However, this approach has been broadened to reduce the strict reliance on the source of power as the sole determinant for review.[82] It currently includes bodies not meeting the traditional criteria provided that their decisions have some 'public' element.[83] The traditional basis for recognising bodies whose decisions may be challenged on review has been diluted by other factors which the courts take into account, and not only on how the body is established. This dilution, or the 'weakening' of the boundary separating public from private bodies will be discussed from Chapter 5 up to the end of the thesis.

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[80] [1983] 1 WLR 1302 (CA), 1307 and 1313.
[81] *R v Jockey Club, ex p RAM Racecourses Ltd* [1993] 2 ALL ER 225 (QB); *R v Disciplinary Committee of the Jockey Club, ex p Massingberd-Mundy* [1993] 2 ALL ER 207 (QB); *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 ALL ER 853 (CA); *R v Football Association Ltd, ex p Football League Ltd* [1993] 2 ALL ER 833 (QB).
[82] Forsyth "The scope of judicial review: 'Public duty' not 'source of power'" (1987) *PL* 360-361.
[83] *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 (CA).

This notwithstanding, the traditional criteria have not been jettisoned as they continue to be the first port of call in establishing the courts' jurisdiction – they are merely no longer conclusive in establishing the court's revisionary jurisdiction. So, traditionally, the first inquiry is whether the body in issue is a public as opposed to a private one. This raises the question of the source of its power. If it derives its power from statute or prerogative, it is presumptively a public body and its decisions are reviewable.[84] Conversely, if it is a voluntary association which binds its members by contract, it is deemed to be a private body and its decisions generally not reviewable. That is the first line of demarcation and is based on a notion that follows a defined syllogistic analysis – judicial review is about the control of public power. And for a long time, public power was deemed only to be exercised by public bodies.[85] Therefore, to the extent that private bodies do not exercise public power, their decisions cannot be reviewed.[86] In *Autlwetse v Botswana Democratic Party and Others,*[87] which concerned a decision of a political party, the High Court of Botswana held that the party was not a public body and that it did not exercise public power, and in any event, 'political parties have never been held to be subject to administrative law principles'[88] and in this instance it was not performing an administrative act.[89] In describing its essential character, the court said: 'Its personality is more akin to members of an extended family than subscribers to or members of an administrative body'.[90] This, as the judge seems to suggest, speaks to the localised environment in which the organisation exists and operates, with limited implications for the greater public. In essence, judicial review was declined because the BDP was not a public body, it did not perform public functions, it did not perform an administrative act and that as a voluntary society, and remedies against it were to be sought in the tribunal established in its constitutive

[84] Forsyth "The scope of judicial review: 'Public duty' not 'source of power'" [1987] *PL* 356-367; *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan* [1993] 2 ALL ER 853.
[85] Beatson "'Public' and 'private' in English administrative law" (1987) *LQR* 34-65, 39; *Pennington v Friedgood and Others* 2002 (1) SA 251(C).
[86] *R v Jockey Club ex p RAM Racecourses Ltd* [1993] 2 ALL ER 225 (QB); *R v Disciplinary Committee of the Jockey Club ex p Massingberd-Mundy* [1993] 2 ALL ER 207 (QB); *R v Disciplinary Committee of the Jockey Club ex p Aga Khan* [1993] 2 ALL ER 853 (CA); *R v Football Association Ltd ex p Football League Ltd* [1993] 2 ALL ER 833 (QB).
[87] [2004] 1 BLR 230.
[88] *Autlwetse v Botswana Democratic Party and Others* 237.
[89] *Autlwetse v Botswana Democratic Party and Others* 237.
[90] *Autlwetse v Botswana Democratic Party and Others* 237.

documents.[91] These considerations are the traditional criteria that determine the reviewability of a body's decisions.

The second line of demarcation does not depend on how the body is established. It proceeds from the premise that private bodies do sometimes perform public functions.[92] The performance of 'public' functions or functions is the reason why the process of review has been extended to private bodies. This will be discussed more fully in chapters 5 and 6.

A useful summary of the discussion above, and how the determination is made to accept or deny judicial review in any one case can be distilled from a commentary by Justice Berna Collier,[93] writing extra-judicially, and paraphrased as follows; First, the mere fact that a body performs a function that has always been performed by government does not mean that the entity is a public body for purposes of review. This would be the case even if the entity whose decision is impugned is owned by the State.[94] Second, the mere performance by an entity of a public function does not, of itself mean that it is a public body for purposes of review.[95] Third, the fact that the body has previously been determined to be of a public or private nature, as the case may be, is helpful but not conclusive. Each case will turn on its own peculiar facts and circumstances.[96] Fourth, the fact that a body has been determined to be public for

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[91] The judge's conclusions have been criticised as being superficial and overlooking other important factors surrounding the BDP in Maripe "Judicial review and the public/private body dichotomy: An appraisal of developing trends" (2006) *UBLJ* 23-55. The judgment has since been expressly over-ruled by the Court of Appeal in *Botswana Democratic Party and Another v Marobela* [2014] 2 BLR 227. This will be discussed in more detail in Chapter 6.

[92] This is accepted in *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 (CA) and *R v Jockey Club, ex p RAM Racecourses Ltd* [1993] 2 ALL ER 225 (QB); *R v Disciplinary Committee of the Jockey Club, ex p Massingberd-Mundy* [1993] 2 ALL ER 207 (QB); *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 ALL ER 853 (CA); *R v Football Association Ltd, ex parte Football League Ltd* [1993] 2 ALL ER 833 (QB) among others, and in literature generally. See in this regard De Smith, Woolf and Jowell *Judicial review of administrative action* 167, 173 and Craig "Public law control over private power" 198.

[93] Collier "Judicial review of public and private employment contracts in Papua New Guinea" (2017) *Supreme Court of Papua New Guinea Underlying Law Conference* 1-10. This is a commentary on decisions on the issue in Papua New Guinea generally, and the *Norman Daniel* case in particular. Justice Collier was a member of the bench of three that delivered the unanimous decision.

[94] Page 3.

[95] Page 3.

[96] Page 3.

one purpose or for the purposes of particular legislation does not mean all its decisions regardless of the context in which they were taken, will be reviewable.[97] Fifth, the decisions of a body established under the Companies Act and not statute are generally of a private nature and not reviewable.[98] Sixth, the mere fact that a body is regulated by statute or otherwise, does not make it a public body.[99] Helpful clarifications are also to be found in the famous legal series, *Halsbury's laws of England* in which the following critical statement is made:

> There is no single test for determining whether a body will be amenable to judicial review. The source of the body's power is a significant factor. As such if the source of the body's power is a statute or subordinate legislation it will usually be amenable to judicial review. Decisions of bodies whose authority is derived solely from contract or from the consent of the parties will usually not be amenable to judicial review. In between these extremes it is helpful to look not only at the source of the power but also the nature of the power.[100]

and in De Smith, Woolf and Jowell, who summarise the position in the following terms;

> The test of whether a body is performing a public function, and is hence amenable to judicial review, may not depend upon the source of its power or whether the body is ostensibly a "public" or "private" body. The principles of judicial review prima facie govern the activities of bodies performing public functions. However, not all decisions taken by public bodies are the subject matter of judicial review.[101]

As these summaries are derived from an analysis of case law, it may be anticipated that these factors will increase or be modified as more cases are brought before the courts. They certainly are not cast in stone.

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[97] Page 4.
[98] Page 4.
[99] Page 4.
[100] Hailsham, *Halsbury's laws of England/judicial review*. *The ambit of judicial review* (2010) 1-17.
[101] *Judicial Review of Administrative Action,* 73-74. And they proceed to state the exceptions which include situations where there is a contract, and that rules of contract other than judicial review should apply.

In England, significant literature and judicial discourse arose after the enactment in that country of the Human Rights Act in 1998.[102] In terms of this Act private entities[103] may be used to dispense an essentially state function of providing services that the state is otherwise under an obligation to render. This is discussed in the next chapter where we consider the extension of review to private bodies. It is useful to sketch out the main pointers on which the distinction between public and private bodies rest in determining the revisionary jurisdiction of the court.

4.5 Essence of the public/private body distinction

The discussion above has highlighted how the characterisation of a body as either public or private is significant in determining amenability of its decisions to judicial review. We have also seen that although the distinction is essential, there is no comprehensive definition for either body. Yet the distinction has wide and significant implications for a person's ability to obtain a remedy following a decision that affects not only him- or her, but at times the public at large. To the extent that the distinction between public and private bodies determines jurisdiction on review, it is too important to be left without determinable indicators as to where the boundary lies. How then, in the absence of a comprehensive definition for each, is the distinction to be made for purposes of determining revisionary jurisdiction? In the absence of definitive criteria, the determination as to the nature of the body has been based on the application of several *indicia*. Having reviewed case law, Maripe posits:

> The traditional tests used would be to inquire into the following (a) the nature of the body (that is how it is created or constituted), (b) the source of its powers (whether they derive from statute or some other source) (c) whether it falls under the control of a recognised public authority (d) whether public money is one of the

[102] In Chapter 7 I will say a bit on the possible implications on the United Kingdom's termination of its membership to the European Union, in what is popularly known as 'Brexit', given that the Act was meant to bring into domestic application in England the obligations of the state under the European on Human Rights. For present purposes the Act is still part of the law of England and the thesis proceeds on that basis.

[103] For example, the private companies to whom the local authorities' statutory duties to provide residential accommodation to residents of the city were contracted in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 and *YL v Birmingham City Council and Others* (2007) UKHL 27.

> body's sources of funding (e) whether it is exercising some "governmental" function and (f) whether its actions, decisions or its field of operation has implications for the public.[104]

Yet these are again not water-tight distinctions as on occasion other factors must be considered in any attempt at categorising bodies as either public or private. The designation of a body under any of these categories is not a sufficient characterisation of that body as either public or private. The source of a body's power as an indication whether a body is public or private has already been discussed. So is that relating to the use of public money as a source of its funding. The position does not have to be belaboured here.

It is appropriate here to consider two characteristics identified upon which the distinction between private and public bodies is based. Those are the manner of establishment of the body and the nature of power it exercises. The characteristic relating to the public implications of the actions of the body will be discussed in the next chapter.

4.5.1 Manner of establishment

One of the factors usually employed to distinguish between a private and public body is the manner in which the body is established. Generally, public bodies derive their existence from deliberate state action evidenced by the exercise of one or other power of the state, be it legislative, prerogative, royal charter, or other similar powers.[105] Private bodies, on the other hand, are voluntary creations of private individuals who, of their own volition, come together in pursuit of a common interest, which may be social, political, economic, religious, or some other purpose. They define their own

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[104] Maripe "Judicial review and the public/private body dichotomy: An appraisal of developing trends" 34-35. These criteria are also discussed in *R v Panel on Take-overs and Mergers ex p Datafin plc* [1987] QB 815 and *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] 3 WLR 283, which shall be discussed fully in chapter 5.

[105] In general authors agree on this point. See, for example, Pannick "'What is a public authority' for the purposes of judicial review?" 27; Elliott "Judicial review's scope, foundations and purposes: Joining the dots" (2012) *NZLR* 75-111, 84-85; Costello "When is a decision subject to judicial review? A restatement of the rules" (1998) *Irish Jurist* 91-119, 92-93.

sphere of operation by rules to which all the members subscribe. It is apt to state that public bodies come into existence at the instance of the state as representative of a collective that is the general populace, whereas private bodies owe their existence to the deliberate actions of private individuals which may be facilitated by the prevailing legal climate. Private companies owe their existence to enabling company laws, societies to legislation, trade unions to labour laws, political parties and religious bodies to laws facilitating their establishment and operations, and so forth.

For purposes of judicial review, however, how an entity is established as either a public or private body is not conclusive in that certain decisions by public bodies do not readily lend themselves to the processes of judicial review. There are many decisions made by bodies which satisfy the general criteria for classification or categorisation as public bodies which may not be subjected to judicial review because they lack some element or feature necessary for judicial review.[106] Other factors come into play in determining whether a decision, be it by a public or private body, is amenable to judicial review. Whether relief by way of review is available depends on the type of power exercised or function discharged be it by a public or a private body.[107] An English jurist, writing extra-judicially has said: "Like public figures, at least in theory, public bodies are entitled to a private life".[108] Examples of this would be pure private commercial relations that the body enters into with other entities.[109] These are regarded as private arrangements which do not serve the aims of public law, and any disputes arising therefrom would be resolved within the parameters of private law. The converse of this is that even decisions by private bodies may be reviewed if they embody a

[106] Since public bodies also operate in the private space, their private decisions may not be subject to judicial review. For example, disputes arising within a purely commercial transaction in which the public body is a party will be resolved through the law of contract and not by way of judicial review. See in this regard Woolf "Public law-private law, why the divide? A personal view" 223.
[107] This is the *ratio decidendi* in *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 (CA) and the position generally acknowledged in literature. See, eg, Craig "Public law and control over private power" in Taggart (ed) *The province of administrative law* (1997) 196-216, 199-200.
[108] Woolf "Public law-private law, why the divide? A personal view" 223.
[109] Craig "Public law control over private power" 198.

sufficient public element.[110] In sum therefore, although the manner of establishment of the body is a strong indicator of its nature or character, it is not conclusive.

4.5.2 Nature of power exercised

A common thread running through case law and literature is that the feature differentiating between public and private bodies for purposes of establishing the court's jurisdiction on review rests on the type of power that the bodies exercise. An assessment of the nature of power exercised helps in categorising a body as either public or private, and by extension determines the jurisdiction of the court on review. There appears to be general agreement that public bodies exercise public power. This position is usually stated as a given in both literature[111] and case law.[112] There has, however, been little attempt at defining 'public' power for purposes of the distinction. Sometimes the line of demarcation sought to be drawn is woven into a description of public functions or functions of a public nature, without delineating the precise meaning of public power. One of the few attempts at defining the concept is to be found in a dictionary and it is to the following effect:

> Public power means the power vested in a person as an agent or instrument of the State in performing the legislative, judicial and executive functions of the State.

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[110] This is a theme that runs through the 'sporting' cases such as *Law v National Greyhound Racing Club* [1983] 1 WLR 1302 (CA); *R v Jockey Club, ex p RAM Racecourses Ltd* [1993] 2 ALL ER 225 (QB); *R v Disciplinary Committee of the Jockey Club, ex p Massingberd-Mundy* [1993] 2 ALL ER 207 (QB); *R v Football Association Ltd, ex p Football League Ltd* [1993] 2 ALL ER 833 (QB); *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 2 ALL ER 853 (CA). See also *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 (CA). See further, Sinclair "Judicial review and the exercise of public power" (1992) *Denning LJ* 193-224, 197.

[111] Examples include Craig "Public law control over private power" 196; Oliver "Is the *ultra vires* rule the basis of judicial review?" [1987] *PL* 543, 566; Thornton "The Constitutional Right to just administrative action – are political parties bound" (1999) *SAJHR* 351-371, Meisel "The *Aston Cantlow* Case, blots on English jurisprudence and the public/private law divide" (2004) *PL* 2-10, 2; Markus "What is public power?: The Courts' approach to the Public Authority Definition under the Human Rights Act" in Jowell and Cooper (eds*) Delivering rights: How the Human Rights Act is working* (2003) 77-114, 85; Campbell "The nature of power as public in English judicial review" (2009) *CLJ* 90-117, 90.

[112] *R v North East Devon Health Authority, ex p Coughlan* [2001] QB 213, 251. This position was accepted and formed the basis for the decisions in *Law v National Greyhound Racing Club* [1983] 1 WLR 1302 (CA); *R v Jockey Club, ex p RAM Racecourses Ltd* [1993] 2 ALL ER 225 (QB); *R v Disciplinary Committee of the Jockey Club, ex p Massingberd-Mundy* [1993] 2 ALL ER 207 (QB); *R v Football Association Ltd, ex p Football League Ltd* [1993] 2 ALL ER 833 (QB).

> It also refers to the not-for-profit utilities that are owned and operated by a municipality, State or Federal Government.[113]

This definition locates public power in the hands of the State and its functionaries. It is generally power the exercise of which affects the public interest.[114] Its exercise produces effects for the general public, and is usually directed towards a general or specific group of people subject to exceptions permitted by law.[115] But it need not be so confined. It is now recognised that some entities which traditionally did not exercise public power have over time developed to a stage where they exercise functions outsourced or contracted out to them by the state,[116] in situations where their decisions have the same effects as those of state functionaries. The decisions of these entities can consequently be challenged on review.[117] The upshot is that amenability to judicial review cannot be established solely on the basis of who exercises public power, but also on the nature of the decision made.[118] But the definition takes matters no further as its focus is on the persons, entities, or state functionaries in whom public power is vested, and not what public power actually is.

Another view of public power is that propounded by Campbell.[119] He has a different approach. He presents a 'monopoly test' as the determinant of whether or not power

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[113] US legal power law and legal definition, USlegal.com (Accessed on 13 November 2019).
[114] *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex p Wachman* [1993] 2 ALL ER 249 (QB).
[115] De Smith, Woolf and Jowell, *Judicial review of administrative action* (1995) 167.
[116] Example is the position under the Human Rights Act 1998 in England in terms of which private entities are engaged to discharge public services. The cases of *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] 3 WLR 283 (HL) and *YL v Birmingham City Council and Others* (2007) UKHL 27 illustrate the contractualisation of a service and how it impacts on matters of judicial review of private bodies.
[117] This position was epitomised in *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 (CA). This is a result of recent trends in modern administrations to share responsibilities with state institutions in what some call the 'contractualisation of government'. See Hunt "Constitutionalism and the contractualisation" 21-40, 30. In *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 2 ALL ER 874 (CA), Hoffmann LJ described this as the 'privatisation of government business' 874; Craig "Contracting out, the Human Rights Act and the scope of judicial review" (2002) 118 *LQR* 551-568 posits that: 'There has been marked contractualisation of government in many countries over the last two decades' and that this has implications for judicial review. Giusanni *Constitutional and administrative law* 252 also discusses the extension of judicial review to decisions of bodies that were hitherto considered private and outside the scope of judicial review.
[118] Giusanni *Constitutional and administrative law* 252.
[119] Campbell "Monopoly power as public power for the purposes of judicial review" (2009) *LQR* 491-521.

is public. He posits that "power that is exercised by a person or body in the carrying out of a function, where only that person or body performs the function, should be regarded as public for the purposes of judicial review".[120] This is what he refers to as the monopoly power and he says it may also be exercised by non-statutory bodies.[121] According to Campbell, 'power will be monopolistic ... if the power is exercised pursuant to the carrying out of a particular function, in circumstances where only a specific body or person can carry out that function'.[122] In terms of this approach, any monopolistic power is necessarily public and its exercise is open to judicial review. The type of body exercising authority is irrelevant. Thus, the source of that power is also irrelevant. So, for our purposes, the nature of the power, according to the monopoly thesis, is not conclusive as to whether a body whose decision is impugned, is a public or private body. It must be pointed out that Campbell's theory has received trenchant criticism from certain quarters. The most notable critic is Williams, who argues that it is a fallacy to postulate that the source of power is irrelevant in determining whether or not a decision follows the exercise of public power, and by extension, can be reviewed.[123] Thus, the concept of public power is still a very much contested terrain, more especially that its true nature, scope, and limits of its reviewability have never been generally accepted. Judicial intervention has not helped in locating the true nature of public power. Perhaps the clearest judicial exposition of the concept of public power is found in *Forbes v New South Wales Trotting Club Ltd,* [124] a case from Australia which determined the reviewability of the decision of a body set up as a limited liability company which owned properties used as trotting courses in circumstances comparable to those arising in the Jockey Club cases in England. The appellant challenged the respondent's decision to exclude him from admission to two courses owned by the respondent. The basis for his challenge was, *inter alia*, that due process had not been observed. The question before the court was whether that decision could be reviewed. The answer depended in part on whether the respondent, which had a

[120] Campbell "Monopoly power as public power for the purposes of judicial review" 491.
[121] Campbell "Monopoly power as public power for the purposes of judicial review" 491.
[122] Campbell "Monopoly power as public power for the purposes of judicial review" 494.
[123] Williams "Judicial review and monopoly power: Some sceptical thoughts" (2017) *LQR* 656-682. Other attacks on the monopoly concept are launched by Elliott "Judicial review's scope, foundations and purposes: Joining the dots" 77-78.
[124] (1979) 143 CLR 242.

virtual monopoly over the sporting activity, was exercising public power. By reason of its significance in delineating the nature of public power, it merits significant highlighting. The High Court stated as follows:

> When rights are so aggregated that their exercise affects members of the public to a significant degree, they may often be described as public rights and their exercise as that of public power. Such public power must be exercised bona fide, for the purpose for which it is conferred and with due regard to the persons affected by its exercise. There is a difference between public and private power but, of course, one may shade into the other. When rights are exercised directly by the government or by some agency or body vested with statutory authority, public power is obviously being exercised, but it may be exercised in ways which are not so obvious. In my opinion, a body, such as the respondent, which conducts a public racecourse at which betting is permitted under statutory authority, to which it admits members of the public on payment of a fee, is exercising public power. … The question is where the line is to be drawn between public power which requires observance of due process and private power which does not … the exercise of power to exclude a person indefinitely from a public racecourse should be treated as public power subject to due process.[125]

Although this could be appreciated to the extent that it focuses on a particular type of decision, there are a few points stemming from the statement that need to be addressed. First, the judge stated that power will be 'public' if it affects the public to a significant degree. However, what constitutes a 'significant degree' is uncertain and imprecise. This begs the question as to the level of intensity required to render the exercise of power 'public'. Unfortunately, the judge offers no answer to that inquiry. This criterion, on its own, is therefore inconclusive. Second, the definition links public power to the exercise of public rights. This calls again for a delineation of public rights as against private rights – concepts which do not readily lend themselves to easy demarcation.[126] But this distinction is to be expected as it follows on the one usually drawn between public law on the one hand and private law on the other for purposes of locating the boundaries of judicial review.[127] Third, the claim that '[w]hen rights are exercised directly by the government or by some agency or body vested with statutory

[125] *Forbes v New South Wales Trotting Club Ltd* 275–276.
[126] *Boyce v Paddington BC* [1930] 1 Ch 109; *Gouriet v Union of Post Office Workers* [1978] AC 435.
[127] See the articles by Woolf "Public law-private law, why the divide? A personal view" 227 and Harlow "'Public' and 'private' law: Definition without distinction" (1980) *MLR* 241-265, 250.

authority, public power is obviously being exercised, but it may be exercised in ways which are not so obvious', is a re-statement of the dominant pre-*Datafin* position which emphasises the source of power as the determinant of amenability to judicial review.[128] This is the orthodox categorisation of the types of body that wield public power and whose decisions can be judicially reviewed. The qualification that public power may be exercised in ways that are not 'so obvious' again implicitly accepts the possibility that not every exercise of public power can fit comfortably in a simple formula based on the type of body whose decisions are being impugned. It is possible that public power may be exercised by a body other than 'the government or by some agency or body vested with statutory authority'.[129] Fourth, and crucially, the statement concedes that public power and private power may shade into one another, effectively acknowledging the difficulty that sometimes arises in any attempt to draw a distinction between the two in general, and particularly for purposes of determining amenability to judicial review. This is particularly so in that private bodies may at times exercise public powers or render themselves amenable to review by the exercise of functions of a public nature.[130] Equally, public bodies also on occasion operate in the private sphere.[131] Public bodies do enter into a myriad of relationships that do not have public ramifications. For example, a local authority buying stationery from a bookstore, purchasing of fuel, leasing out its property to third parties and hiring property from the local market would not readily be classified as the exercise of public power. In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC*[132] an organ of state (a public body) had statutory functions to collect levies. It floated a tender to get third parties to collect levies on its behalf. On a review of the cancellation of a tender previously awarded to the applicant, the Supreme Court of Appeal held that the organ of state had contractual and common law powers to cancel the contract, but in so doing, it was not performing a public function but acting in terms of its contractual

[128] On a review of the authorities many scholars agree on this position. For example, see Forsyth "The scope of judicial review: "Public duty" not "source of power"' [1987] *PL* 356, 360-361; Wade "New vistas of judicial review" (1987) *LQR* 323, 326; Hunt "Constitutionalism and the contractualisation of government in the United Kingdom" in M Taggart (ed), *The province of administrative law*, 28, among many.
[129] *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 (HC), 275.
[130] The "*Datafin* principle".
[131] Woolf, "Public law-private law: why the divide? A personal view" 223.
[132] 2001 3 SA 1013 (SCA).

rights. In essence the court recognised the private space in which private bodies may operate without being subjected to the processes of judicial review. De Smith, Woolf and Jowell[133] take the view that not all decisions of public bodies are subject to judicial review. They say judicial review will not be appropriate in the following situation concerning a public body. In particular, they write:

> Where there is a contract between the litigants. In such a case the express or implied terms of the agreement should normally govern the matter. This reflects the normal approach of English law, namely, that the terms of a contract will normally govern the transaction, or other relationship between the parties, rather than the general law. Thus, where a special method of resolving disputes (such as arbitration or resolution by private or domestic tribunals) has been agreed by the parties (expressly or by necessary implication), that regime, and not judicial review, will normally govern the dispute.[134]

The *Cape Metropolitan Council* case will be discussed again in Chapter 6. Fifth, to say that when 'rights are so aggregated that their exercise affects members of the public to a significant degree' is to import a value judgment which requires a determination of the degree of the effect that the exercise of the power has on the public. The notion of 'significant degree' depends on the circumstances of each case, and would differ from one situation to another. It can only be ascertained on an analysis of the evidence. So, much as the statement seems to lay down parameters for determining public power, it leaves the issue as a factual inquiry.

The concept of public power is, therefore, neither readily identifiable nor easily distinguishable from private power for purposes of determining the availability of remedies on review. This difficulty is exacerbated by the connection drawn between the exercise of public power and the performance of public functions. In the final analysis, the test for amenability to judicial review is left to judges in individual cases, who have themselves acknowledged the difficulty,[135] not succeeded in laying down a coherent test, and concede that at the end of the day the decision rests on an 'overall

[133] *Judicial review of administrative action* (1995).
[134] At 73-74.
[135] For example, *R (Holmcroft Properties) v KPMG* [2016] EWHC 323 (Admin); *R v Derbyshire County Council, ex p Noble [*1990] ICR 808 (CA).

impression'[136] which is 'often as much a matter of feel, as deciding whether any particular criteria are met'.[137] The exercise of public power is thus just one of the factors – albeit a strong indicator – as to whether the decision impugned is that of a public body and so may be challenged on review.

The discussion above shows that power which is not public – generally termed 'private power' – is generally not reviewable. *Black's Law Dictionary* defines private power as: 'A power vested in a person to be exercised for personal ends and not as an agent for the state'.[138] In this sense it is the direct antithesis of public power. Such power is what private bodies generally exercise, and if exercised as such cannot be challenged on review. It is when the private body exercises the type of power in the manner envisaged by Campbell and in the *Forbes* case, that the purpose of judicial review is implicated and, in fact, triggered. But what is a public body?

4.6 Conclusion

In summary, it is necessary to establish the basis for the distinction drawn between public and private bodies for the purposes of determining availability of remedies on review. It has been shown that with all the limitations arising from the classification, the distinction was based primarily on the source of a body's power or the legal basis for its establishment. Bodies established by statute or prerogative were the traditional public bodies whose decisions and acts were subject to judicial review. Conversely, bodies founded on contract or some voluntary scheme or self-made rules based on the consent of the participants, would usually fall to be described as private bodies and generally not to be subjected to the process of review. This is inconclusive, and indeed unsatisfactory, as there clearly are bodies founded on neither statute nor the prerogative but whose actions hold significant implications for the public. These bodies clearly operate in the same space as mainstream public bodies, and in certain cases,

[136] *R v Legal Aid Board, ex p Donn and Co* [1996] 3 ALL E R 1 (QB), 11 per Ognall J.
[137] *R (Tucker) v Director General of the National Crime Squad* [2003] ICR 599 para 13, per Scott Baker LJ.
[138] Garner (ed) *Black's Law Dictionary* (2009*)* 1289.

with some measure of support from the state or government. It has also been shown that the further demarcation – an extrapolation of the first – is that review is only possible where public power has been exercised in contradistinction to private power. In certain instances, it is said bodies must have acted in a manner that gives rise to implications for the public. It is said only public bodies fit this classification. This also is neither conclusive nor satisfactory for purposes of determining the courts' supervisory power on review. As Elliot succinctly states, '"publicness" is such an inherently imprecise notion that it is unsurprising that courts find it difficult to apply in a coherent manner'.[139] It is something of a minefield to establish the precise boundaries between decisions that have public implications and so could be challenged on review, and those that do not.

The following chapter examines how principles of judicial review have been extended to decisions or actions of what are traditionally private bodies in England.

[139] Elliott "Judicial review's scope, foundations and purposes: joining the dots" 76-77.

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5.1 Introduction

As was explained in Chapter 3, judicial review was for a long time limited to public bodies. These bodies were characterised by the exercise of some governmental or public power or function. This issue was further pursued in Chapter 4. However, with time, this view became a contested terrain. It had become apparent that limiting judicial review to decisions of public bodies sometimes caused injustice to victims of actions or decisions of private bodies, who had similar grievances, and whose circumstances were similar to those in respect of which a public law remedy was available, and who would otherwise get the same relief, but for the fact that the body in question was a private body. They were denied a remedy simply by reason of the characterisation of the entity in question as a private body. This is illustrated by the decision in *Breen v Amalgamated Engineering Unions and Others* (hereinafter '*Breen*')[1] which concerned the review of a decision made by a trade union in circumstances demonstrating the worst excesses and abuse of power in the decision-making processes of a private body. A district committee of a trade union had refused to approve Mr Breen's election as a shop steward. The refusal was based on trumped up charges and allegations of misappropriation of funds, all of which had no merit and had subsequently been withdrawn. The court declined review on the only basis that the union was a private body whose decisions could not be challenged on review. This categorisation of bodies for purposes of judicial review had so restricted courts that they were unable to find appropriate remedies in deserving cases. This is clear from the majority judgment in *Breen* where the judges expressed their discontent with their own decision as they believed it was unjust, and that they had been forced into it by considerations based on the public/private body divide. In opening the majority judgment, Edmund Davis LJ said:

[1] [1971] 2 QB 175.

> I entertain substantial doubts that the judgment I am about to deliver will serve the ends of justice. That is to say the least, a most regrettable situation for any judge, but I see no escape from it. Its effect is to throw away empty-handed from this court an appellant who, on any view, has been grossly abused. It is therefore a judgment which gives me no satisfaction to deliver.[2]

Such was the extent to which dogma was engrained in the judiciary at the time. Regard being had to the fact that judicial review is essentially a common-law principle developed by the courts over time, one would expect the judiciary to be able to shrug off some of the bottlenecks which evidently occasioned injustice, and craft or adopt new ones or even adapt existing ones, but this was not to be. Following on this case and others in which similar verdicts were delivered,[3] the non-applicability of judicial review to private bodies became a subject of copious academic writing.[4] Although following the public/private divide in deciding whether or not to entertain applications for review seemed to be the dominant view, it was by no means universal. The fact that many cases were brought to court with the belief that appropriate orders would be made is an indication that some people believed that judicial review should not be so confined. This is evident both in case law[5] and literature.[6] It was clear that at some point the practice of deciding on the basis of the type of the body, and not the substance of the decision, would require reform. The legislature was not intent on intervening and the process of transforming the legal position would be left to the

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[2] 194; see also the views of Stuart-Smith LJ in *R* v *Jockey Club ex parte RAM Racecourses Ltd,* [1993] 2 ALL ER 225 (QB), 244 where the judge said he was only bound by preponderance of authority in denying review remedies in a case in which he felt it was appropriate to entertain judicial review.

[3] *R* v *Jockey Club ex parte RAM Racecourses Ltd,* [1993] 2 ALL ER 225 (QB) and the various other Jockey Club cases discussed at Chapter 4.

[4] Some of the works include Boulle, Harris and Hoexter *Constitutional and administrative law, basic principles* (1989) 241-247; Wade and Forsyth *Administrative law* (2009), 540 who wrote 'Judicial Review is designed to prevent the excess and abuse of power and the neglect of duty by public authorities', and Bridges, Meszaros and Sunkin, *Judicial review in perspective* (1995), 1 who wrote 'Judicial review is the principal means by which the courts in this country exercise supervision over the conduct of central and local government and other public authorities'.

[5] Lord Denning MR was always prepared to extend judicial review remedies to the so-called private bodies as evidenced by his decisions in *Lee v Showman's Guild* [1952] 1 ALL ER 1175, *Nagle v Feilden* [1966] 1 ALL ER 689 and in *Breen*.

[6] Wiechers *Administrative law* (1985), 266 opines that the

> 'inherent power of review of courts hold good for the proceedings and actions of voluntary associations and bodies as well; it is in this very sphere that some of the rules of administrative law find application in these private law associations'.

courts themselves. The major breakthrough came in 1986,[7] when a shift from the original paradigm of confining judicial review to public bodies, to the exclusion of private bodies, occurred. This was brought about largely by developments in the global economic environment in which private bodies began to influence growth in state and general world economic outlook.

5.2 The global context

Since the Second World War, the world has encountered various economic reforms at different levels. Some of these innovations were a result of prevailing peculiar circumstances in individual countries, while others were influenced by theorists. Many controlled economies transformed to free-market oriented systems in which the role of the private sector as an engine of economic growth intensified. This entailed that government had to rid itself of some essential governmental responsibilities, and hive them off to other bodies which were different in shape and form from the traditional government departments. This system was influenced in part by the prophecies of neo-liberals such as Michael Friedman,[8] who advocated little governmental involvement in the market place if any state were to achieve economic prosperity. Many countries and economic blocs have modelled their economies around Friedman's views. His views have also influenced the policies of the Bretton-Woods Institutions of the World Bank and the International Monetary Fund, with their prescriptions such as the Structural Adjustment Programme, which demands the privatisation of certain public enterprises and which have virtually been imposed on a significant number of developing countries. The result of this was that certain essential public functions were to be performed by bodies which were not regarded as public bodies,[9] and that the distinction drawn between public and private bodies for purposes of determining the

[7] This was brought about by the case of *R v Panel on Take-Overs and Mergers, ex parte Datafin plc* [1987] QB 815 (CA), which shall be discussed more below. For convenience the case is referred to simply as *Datafin*.

[8] Friedman *Capitalism and freedom* (1962).

[9] Some of these services have been hived off to private enterprises of the same status as witnessed in the *Norman Daniel v Air Niugini Ltd* case at Chapter 4. Others are non-incorporated entities as was the position in *Datafin* to be discussed more fully below. In Botswana there are now public bodies established as companies limited by guarantee and others established by Presidential Directives. This will be discussed more fully at Chapter 6.

jurisdictional basis for judicial review would be constricted. Indeed there are in existence certain powerful private organisations[10] that wield so much power relative to an individual, and which operate within the public arena, and make decisions with consequences for the public generally, that they should attract judicial review remedies. The boundary separating public from private bodies would weaken with time with respect to certain bodies that performed significant public functions in certain circumstances.

As said above, the prevailing socio-politico-economic order must of necessity influence judicial attitudes, for law usually reflects and follows policy. This ushered in a system in which the private sector would begin to discharge functions which were previously performed by mainstream government department. This would expectedly lead to a change in judicial approaches in line with this new development. In the discharge of their responsibility to dispense justice, the courts take into account, and indeed are influenced by the prevailing social, economic and political environments, for these determine and shape the various policies from which legal rules emerge.[11] The various positions taken in individual cases must therefore be viewed in this context, where there was evidence of a shift, albeit with discernible reluctance.[12]

5.3 Moves towards the shift

With the increasing incidence of decision-making by private bodies in matters that had a public element, the question whether those decisions could be challenged on review would also intensify. The denial of remedies to deserving litigants on the basis of the characterisation of the nature of the body in question gave way over time to a new concern; whether the determination was to be on the basis of the decision made rather than on the type of body that made the decision. There were calls in literature[13] that

[10] British Airways is one such company, and the Panel on Take-Over and Mergers is another, the Jockey Club and the British Boxing Control Board, see *McInnes v Onslow-Fane* [1978] 1 WLR 1520.
[11] See Maripe "Judicial review and the public/private body dichotomy: An appraisal of developing trends" (2006) *UBLJ* 23-55, 41.
[12] This is illustrated by the views of Stuart-Smith LJ in *R v Jockey Club ex parte RAM Racecourses Ltd,* [1993] 2 ALL ER 225 (QB), 244 and the lamentations of Edmund-Davis LJ in *Breen* 194.
[13] Harlow ""Public" and "private law: Definition without distinction" (1980) *MLR* 241-265, 258-9; Woolf "Public law-private law: why the divide? A personal view" (1986) *PL* 220-238.

a paradigm shift should occur as the determination based on the type of body was clearly producing unsatisfactory results, leading to injustice. Lord Denning had for a long time been influential in advocating the extension of judicial review to what were traditionally private bodies, especially where they enjoyed a monopoly in important matters of human activity. His position is discernible in several cases. In *Lee v Showman's Guild,*[14] he held that although such bodies were governed by rules of contract, their decision-making process was subject to public policy limitations. In reference to the powers wielded by private bodies and underscoring the need to bring them under legal control, he said:

> These committees are domestic bodies which control the destinies of thousands. They wield powers as great as, if not greater than, any exercised by the courts of law. They can deprive a man of his livelihood. They can ban him from the trade in which he has spent his life and which is the only trade he knows.[15]

He maintained the same stance in *Faramus v Film Artists Association*,[16] *Nagle v Feilden,*[17] *Enderby Town Football Club v Football Association*[18] and in *Breen*. In *Nagle v Feilden*, a trainer of horses was denied a horse trainer's licence, ostensibly on grounds of her gender. She applied to have the decision reviewed. In demonstrating the need to extend redress to victims of decisions of these bodies, he said:

> If a man applies to join a social club and is black-balled, he has no cause of action. … They (the members) can do as they like. … But we are not considering a social club. We are considering an association which exercises a virtual monopoly in an important field of human activity. By refusing or withdrawing a licence the stewards can put a man out of business. ... The common law of England has for centuries recognised that a man has a right to work in his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having the governance of it.[19]

[14] [1952] 1 ALL ER 1175.
[15] 1181.
[16] [1963] 2 QB 527.
[17] [1966] 2 QB 633.
[18] [1971] 1 ALL ER 215.
[19] 644.

He was to apply the reasoning in *Enderby* in which he compared the rules of associations to a legislative code necessitating court intervention and control.[20] He again underscored that although they are said to be a contract, they are subject to the control of the courts and that 'if they unreasonably shut out a man from his right to work, they are invalid.'[21] Following shortly after *Enderby*, and noting the effect that decisions of private bodies may have on the public in general, he said in *Breen*:

> These committees are domestic bodies which control the destinies of thousands. They have quite as much power as the statutory bodies. ... They can make or mar a man by their decisions. Not only by expelling him from membership, but also by refusing to grant him a license or to give their approval.[22]

In dealing with the argument that the court had no jurisdiction because the relations between the trade union and its members were governed by contract, he said:

> Their rules are said to be a contract between the members and the union. So be it. If they are a contract, then it is an implied term that the discretion should be exercised fairly. But the rules are in reality more than a contract. They are a legislative code laid down by the council of the union to be obeyed by the members. This code should be subject to control by the courts just as much as a code laid down by Parliament itself. If the rules set up a domestic body and give it a discretion, it is to be implied that that body must exercise its discretion fairly. Even though its functions are not judicial or quasi-judicial, but only administrative, still it must act fairly. Should it not do so, the courts can review its decision, just as it can review the decision of a statutory body.[23]

Lord Denning MR was concerned more with the effect of decisions of private bodies on the general public, and what unrestrained exercise of power may do to a person directly affected thereby. He was concerned less with the badge attached to the body in question, because such decisions, whether of public or private bodies, would have

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[20] 219.
[21] 219.
[22] 190.
[23] 190. He developed his thesis in *Enderby Town Football Club v Football Association* 219 thus:

> 'Putting the fiction aside the truth is that the rules are nothing more or less than a legislative code – a set of regulations laid down by the governing body to be observed by all who are, or become, members of the association. Such regulations, though said to be a contract, are subject to the control of the court'. ...

been made in the same circumstances and with similar effect. Procedural rules of fair decision-making had to be applied to both. It is critical to underscore the premise from which he departed; that the rules of the associations are in effect a legislative code which may have disastrous consequences for a member's livelihood, if misapplied.[24] It is not sufficient to leave the affected member to remedies in contract, for those would in many cases be inadequate for his or her protection. Public policy considerations necessitate the intervention of the courts to ensure fairness in the application of rules of private bodies. It does not seem that there is any principled objection to applying review to decisions of private bodies. Lord Denning MR's approach in *Breen* is truly revolutionary, to the extent of drawing an analogy between legislation and contract, for this was all along the dividing line determining amenability to judicial review. To compress them into a framework where the same principles governing review would apply was a far-reaching development both in policy and doctrine. It is commendable as it reflects the reality on the ground, especially to those affected by the decisions of the bodies founded in contract. It is amazing that this approach has never been acknowledged as a basis for breaking down the frontier that so often placed litigants in different categories according to type of body for purposes of according remedies on review to litigants who had suffered similar treatment. Such innovation was acknowledged by a prominent writer on administrative as being an approach to control abuses of power and 'a technique for controlling exercises of power on both sides of the public/private divide'.[25] These were the attempts of one, or one of a few, who made bold statements within a jurisdiction that was so clingingly beholden to precedent and dogma. Even in cases where his position seemed to draw support, that support was clouded with a fixation on the divide between private and public bodies, and a reluctance to extend judicial review remedies to private bodies. An example is to be found in Megarry VC's vacillation to some degree in *McInnes v Onslow-Fane.*[26] The applicant applied for the grant of a boxing licence by a non-statutory body controlling professional boxing in the United Kingdom. He was unsuccessful, but was not given reasons. He applied to court to review the decision refusing him a licence.

[24] *Enderby,* 219.
[25] Oliver "Lord Denning and the public/private divide" (1999) *Denning LJ* 71-80, 79.
[26] [1978] 1 WLR 1520.

Megarry VC took the view that the court had the right to entertain the matter in order to ensure that the requirements of natural justice and fairness had been observed.[27] He also expressed the hope that the decision had been made honestly and that even without a duty to give reasons, the Board should have been in a position to provide reasons for the honest exercise of its discretion. He held that rules of natural justice apply to forfeiture and expectation cases, and not to application cases which he held the matter to be. Accordingly, he dismissed the application on that basis. It seems therefore that he was not totally excluding the possibility of setting aside the decision on review, notwithstanding that it was one made by a private body. However, towards the end of his judgment, he made the following critical remarks:

> I think that the courts must be slow to allow any implied obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts. This is so even where those bodies are concerned with the means of livelihood of those who take part in those activities. The concepts of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burdens on bodies such as the board which promote a public interest by seeking to maintain high standards in a field of activity which might otherwise become degraded and corrupt ought not to be hampered in their work without good cause. Such bodies should not be tempted or coerced into granting licences that otherwise they would refuse by reason of the courts having imposed on them procedure for refusal which facilitates litigation against them …[28]

Two comments must be made in respect of this statement. First, the objection to the application of the principles of natural justice and fairness to decisions of private bodies is not sufficiently motivated. If it is accepted, as it should, that these are standards of fair and good decision-making, it is not easily fathomable why they would not be demanded of private bodies, whose decisions may well have more serious consequences for an individual, even the greater public, than those of public bodies to which they apply. Indeed, there has never been any suggestion in principle, doctrine or authority, that membership to a private or voluntary association has the effect of waiver of fair decision-making demands against the membership. From the statement,

[27] At 1528.
[28] 1535.

there is a subtle suggestion that these requirements are burdensome on those bodies. Yet to leave those decision-makers at large to make any decision seems to encourage absolute discretion which is not desirable, and which the law shuns.[29]

Secondly, the objection to the observance of the requirements of natural justice and fairness is based on the assumption that those bodies would have made 'honest' decisions. To say a body has made an 'honest' decision is to make a value judgment in respect of a particular decision. Yet this is what must be tested by the courts in each individual case, and on the basis of the evidence available. Otherwise the statement seems to make an *a priori* judgment that decisions of private bodies would necessarily be honest. This is highly objectionable. It further illustrates the resistance with which the need to allow judicial review in respect of private bodies has been met.

It appears that Lord Denning MR's persistence on his standpoint received only token support within his jurisdiction, with no court pronouncing definitively on the issues. Some support for his position is derived from a decision of the Judicial Committee of the Privy Council in *Annamunthodo v Oilfields Workers Union*,[30] which was an appeal from Trinidad and Tobago. The appellant had been expelled from a trade union and was seeking an order of *certiorari* setting aside his expulsion. In upholding his appeal, with the concurrence of other members of the committee, Lord Denning MR said:

> If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the courts … he can always ask for the decision to be set aside.[31]

To the extent that in the context of this thesis a trade union is a domestic tribunal or private body, this was clearly an acceptance of the court's revisionary jurisdiction over decisions of private bodies. However, it could be argued that this was not properly an English case as it arose from a different jurisdiction, albeit with all English law

[29] *Padfield v Minister of Agriculture, Fisheries and Food* 1968 AC 997.
[30] (1961) 3 ALL ER 621.
[31] 625. See a brief discussion in Forsyth "The scope of judicial review: 'Public duty' not 'source of power'" (1987) *PL* 356-367, 363 in which the author commends the decision for opening up judicial review of any decision taken by any body as long as that body is performing a public duty.

traditions.[32] The first breakthrough in English law was realised in *R v Criminal Injuries Compensation Board, ex parte Lain*,[33] which was strictly speaking not a review of a decision of a private body but one set up by royal prerogative. One of the arguments marshalled in the case was that a decision of a board of the kind in question was not reviewable as it was not exercising public powers, not having been established by statute. This argument was not accepted, with Lord Parker CJ, taking the position that:

> I can see no reason either in principle or in authority why a board set up as this board was set up is not a body of persons amenable to the jurisdiction of this court … it is under a duty to act judicially.[34]

And in a show of disapproval of the test based on the source of the body's power, and the attendant limitation of judicial review based on the type of body, Lord Parker CJ went on to say:

> It is a truism to say that the law has to adjust itself to meet changing circumstances and although a tribunal, constituted as the board, has not been the subject of consideration or decision by this court in relation to an order of certiorari, I do not think that this court should shrink from entertaining this application merely because the board had no statutory origin.[35]

This was a call to extend the reach of judicial review. It was the judiciary itself that would respond to the call, if the legislature did not.

In English law, the duty to act judicially is imposed on anybody empowered to make decisions that impact other people negatively. This is illustrated by the case of *Ridge v Baldwin*,[36] which put to bed the debate as to the type of decision to which natural

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[32] Trinidad and Tobago is a member of the Commonwealth of Nations and applies English common law. Decisions of her highest courts are still appealable to the Judicial Committee of the Privy Council in England.

[33] [1967] 2 QB 864.

[34] 882. This position was approved of by Sir John Donaldson in *Datafin*, at 836.

[35] 891-892.

[36] [1963] 2 ALL ER 66, 77-80, per Lord Reid and at 113 per Lord Hodson. A fuller account of the review of authorities on this point is provided by Wade and Forsyth *Administrative law* 414-416 who, in supporting Lord Hodson's position have said at 114:

> The mere fact that the power affects rights or interests is what makes it "judicial", and so subject to the procedures required by natural justice. In other words, a power which affects rights must be

justice principles are applicable. If acting judicially, in the sense described in the *Criminal Injuries Board* and *Ridge* cases, is the condition for the imposition of rules of natural justice, admitting of the application of *certiorari* if violated, then the statement is general enough to include bodies which are not public bodies and not ordinarily subject to public law. The Court of Appeal of Botswana has, relying on a popular English text,[37] has explained the application of the fairness requirement imported by the rules of natural justice as follows:

> An adverse decision affecting a person in his liberty or other rights must not be taken by an authority until the person affected by it has been given an opportunity to state his case on the contemplated action. This rule, often expressed by its Latin *nom*, *audi alteram partem*, is of venerable antiquity common to many societies and forms one of the bedrocks of any civilised legal systems.[38]

However, this principle did not take root in English law, in spite of the growing groundswell in cases involving decisions of private bodies. Lord Denning's stance on the issue was complemented by commentators and judicial standpoints in other jurisdictions, especially in South Africa.[39] Writing on the boundary usually drawn between public and private bodies for purposes of assigning judicial review, Baxter[40] says:

> Even if it is decided that an institution is private and not public the result might not be substantially different. As a general principle, any private institution which exercises powers over individuals is obliged to observe common law requirements which do not differ in principle from those applied to public bodies.

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exercised "judicially", ie fairly, and the fact that the power is administrative does not make it any less "judicial" for this purpose.

[37] Jackson (ed), *O Hood Phillips' Constitutional and administrative law* (1987), 670-670.

[38] *Ngwato Land Board v Makwati* [2012] 1 BLR 236 (CA), 242-243, per Lesetedi JA.

[39] The decisions of the Appellate Division of the Supreme Court of South Africa (then the apex court) in *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A); *Theron en Andere v Ring van Wellington van die N.G. Sending Kerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A) held that decisions of private bodies could be reviewed under the common law review. This prompted some South African authors Boulle, Harris and Hoexter (in *Constitutional and aAdministrative Law: Basic principles*), 335 to opine that 'Thus public or private bodies which are contractually entitled to take disciplinary or coercive decisions should ensure that these be preceded by a hearing either on the basis of an implied term which incorporates natural justice into the contract or on the simple and obvious ground that the decision is a quasi-judicial one'.

[40] Baxter *Administrative law* (1985).

> Thus the courts have always been prepared to review the decisions of private or 'domestic' bodies such as the disciplinary tribunals of churches, trade unions or clubs and even the decisions of arbitrators.
>
> Although the basis upon which the powers of these bodies rest is contractual and not statutory, such bodies are often in a position to act just as coercively as public authorities and their decisions often have far-reaching effects. Many of the principles of administrative law are designed to protect individuals from abuse of power. For this reason they are applied in almost identical form to these private bodies, and administrative law has itself drawn from decisions involving 'domestic tribunals', cases involving the exercise of power by both public and private institutions are often cited interchangeably in the courts.[41]

There is no direct evidence that the position in South Africa, or academic opinion in that country has had a direct impact on the position as it developed in England towards recognising the necessity of allowing review in certain cases involving decisions of private bodies. Even so, it is not immediately clear if Lord Denning MR's inclination towards review of decisions of private bodies in the various cases referred to above ultimately led to a solid position evincing a shift. However, his position would ultimately prevail as there was a demonstrable shift in judicial attitudes as will be demonstrated below.

5.4 The shift

The seminal judgment of the Court of Appeal of England in *R v Panel on Take-overs and Mergers, ex parte Datafin plc* (hereinafter '*Datafin*')[42] is generally acknowledged to have heralded a shift in English law on the reviewability of decisions of private bodies and is in fact a watershed breaking the boundary of the public /private body divide in terms of reviewability of decisions of private bodies.[43] It whittled down the

[41] Baxter *Administrative law* 101. This finds support in Boulle, Harris and Hoexter *Constitutional and administrative law: Basic principles* 335.
[42] [1987] QB 815.
[43] Some of the commentators who recognise this expansion of review include Beloff "Pitch, pool, rink … court? Judicial review in the sporting world" (1989) *PL* 95-110, 108; Pannick "Who is subject to judicial review and in respect of what?" (1992) *PL* 1-7, 6; Forsyth "The scope of judicial review: 'Public duty' not 'source of power'" 366; Maripe "Judicial review and the public/private body dichotomy: An appraisal of developing trends" 43-44; Craig 'Public law and control over private power' 199-200; Hunt 'Constitutionalism and the contractualisation of government in the United Kingdom' in Taggart (ed) *The province of administrative law,* (1997) 21-40, 30; Wade "New vistas of judicial review" (1987) *LQR* 323-

traditional attitudes and recognised the possibility of review of decisions of private bodies. The Panel on Take-Overs and Mergers, is a non-statutory body regulating take-overs and mergers. It operates on the basis of a code on take-overs and mergers to which many important associations representing a wide cross-section of the British financial market subscribe. In 1986, both Norton Opax plc and Datafin plc sought to take over a company called McCorquodale plc, and therefore made rival bids. Datafin plc suspected Norton Opax plc to be acting in concert with another organisation to gain an advantage in the purchase of the shares, something which, it was alleged, infringed the code. In terms of the code rules, Datafin plc complained to the Panel, which dismissed the complaint. Datafin plc and another company then instituted proceedings to review the Panel's decision dismissing the complaint. The court accepted that the Panel is a private body, but one regulating critical public affairs, and had to act in the public interest, although 'it operated without visible means of legal support'.[44] Its decisions had significant implications and it was required to act fairly. It was therefore susceptible to an application for review. The case is thus authority for the proposition that in applications for judicial review, it is the decision and its implications, rather than the nature of the body and the source of its power, that determines the basis for the courts' intervention. In *Datafin,* although the court dismissed the application on the merits, it accepted that it had power to entertain proceedings for the review of the panel's decision. But the significance of the court's decision lies in the basis upon which the court found revisionary jurisdiction. At various aspects of the judgment, the court located the court's jurisdictional basis by reason that although the Panel was a non-statutory body, it exercised a public duty with consequences for the greater public. In considering that the Panel was a special creature, Sir John Donaldson MR said:

327, 323; De Smith, Woolf and Jowell *Judicial review of administrative action* (1995) 169-178; Hillard "The Take-over Panel and the courts" (1987) *MLR* 372-379, 372; Weedon "Judicial review and city regulators" (1989) *MLR* 640-648, 648; Cranston 'Reviewing judicial review' in Richardson and Glenn (eds) *Administrative law and government action* (1994) 45-80, 48, to mention but a few.

[44] Sir John Donaldson MR at 824 and 834. Given the context, it is quite apparent that he meant that the Panel on Take-overs and Mergers was not established by statute. Neither did it exercise prerogative powers. This is implicit from his position that 'It has no statutory, prerogative or common law powers' (825). Weedon "Judicial review and city regulators" 648. On the same score, Aronson "A public lawyer's response to privatisation and outsourcing" in Taggart (ed) *The province of administrative law* (1997) 40-70, 45 says, 'Lord Donaldson's reference to its lack of "legal support" was a reference to the fact no charter, warrant, Act or Statutory Instrument underpinned the body's existence or functions'.

> Consistently with its character as the controlling body for the self-regulation of take-overs and mergers, the panel combines the functions of legislator, court interpreting the panel's legislation, consultant, and court investigating and imposing penalties in respect of alleged breaches of the code.[45]

It has to be mentioned here that *Datafin* did not jettison the 'source of power' test as a determinant for judicial review. It is still relevant but it is just one of, and not the only consideration. In fact, as Lewis lucidly summarised:

> … the judgment in *Datafin* proceeded on the basis that judicial review is not available in relation to bodies whose sole source of power was consensual submission to their jurisdiction.[46]

What *Datafin* introduced as another important consideration is the issue of the public element.[47] This is underscored by Lloyd LJ, who, in driving the jurisdictional basis for judicial review in respect of non-statutory bodies, delivered himself thus:

> I do not agree that the source of the power is the sole test whether a body is subject to judicial review. ... Of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review. ... But in between these extremes there is an area in which it is helpful to look not just at the source of power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may … be sufficient to bring the body within the reach of judicial review.[48]

He followed on this by rejecting outright the argument that the source of the body's power is the only factor determining its reviewability.[49] The public element or 'publicness' of the decision, on which the court found jurisdiction, was anchored on a number of factors; (a) that the panel performs an important public duty in regulating

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[45] 841.
[46] Lewis *Judicial remedies in public law* (2000) 28. See the opinions of Sir John Donaldson MR, 838, Lloyd LJ, 847 and Nicholls LJ, 850 in *Datafin*.
[47] Sir John Donaldson MR, 838.
[48] 847.
[49] At 848.

issues of take-overs and mergers, (b) its decisions impact the general public, some of whom have technically assented to its activities, (c) the panel's *raison d'être* is to achieve equity between shareholders, and so is required to act judicially in some respects, and (d) the bottom line of its source of power was the exercise by the Department of Trade and Industry and the Bank of England of certain statutory powers and the fact that the Secretary of State had expressed a desire to limit legislation in the field of take-overs and mergers and allow the panel to be the main vehicle by which to regulate the market.[50]

Notwithstanding the 'revolutionary' impact of *Datafin*, the case is deficient in one respect; the absence of guidance as to what a 'public element' entails. None of the three concurring opinions made any attempt at providing a general guideline to be relied on by lower courts in the future. The formulation by Lloyd LJ, that

> [I]f the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may … be sufficient to bring the body within the reach of judicial review[51]

is too open-textured and malleable to provide guidance on the parameters by which to ascertain the reach of judicial review. The latter requirement is the essence of Lord Denning MR's exposition in the various cases discussed and its building blocks are located in the various effects such as bodies exercising a monopoly over an important aspect of public life, where the decision affects a person's livelihood,[52] or where the decision amounts to a restraint in trade or where it affected a person's right to work[53] or where considerations of public policy dictated the intervention of the court[54] or that the rules that govern the private bodies are in effect a legislative code and as such must be subject to supervision by the courts.[55] *Datafin* seems to follow on these but

[50] 838, Per John Donaldson MR.
[51] 847.
[52] In *Breen*, Lord Denning MR said 'These committees are domestic bodies which control the destinies of thousands. They have quite as much power as the statutory bodies. ...' 190.
[53] *Nagle v Feilden,* 694.
[54] *Lee v Showman's Guild*, 1180.
[55] *Enderby Town Football Club v Football Association*, 219. The same reasoning was applied in *Breen* 1154.

now expands the criteria for determining suitability for judicial review beyond mere source of power to the nature of the function exercised or decision made and its implications. Herein lies the shift. The case marks a departure from the traditional, often unsatisfactory source of power determinant in the law regarding reviewability of decisions of private bodies.

Datafin has, however received mixed reactions. It has been followed in a few cases concerning the review of decisions of non-statutory and sometimes self-regulatory bodies.[56] However, despite the impactful statement sounded by the Court of Appeal, there was still discernible reluctance to extend push the horizons of judicial review in the manner it prescribed. There was still glaring affinity to the source of power as the determining factor for revisionary jurisdiction, even in the lower courts. This defiance could be seen in the cases decided after *Datafin* involving especially sporting[57] and stand-alone voluntary religious bodies.[58] Commentators have recognised the stagnation of *Datafin* and the apparent insistence on the source of power test in subsequent cases.[59] Aronson states emphatically that

> ... despite the enthusiasm of its proponents, the *Datafin* project has not made much of an inroad into the realms of self-regulatory bodies, no matter how powerful they might be ... *Datafin* has failed to dent the common law's refusal to

[56] *R v Advertising Standards Authority, ex parte The Insurance Service plc* (1990) 2 Admin LR 77; *R v British Pharmaceutical Industry Association Code of Practice Committee, ex parte Professional Counselling Aids Ltd* [1991] COD 228; *R v General Council of the Bar, ex parte Percival* [1991] 1 QB 212; *R v Visitors to the Inns of Court ex parte Calder, ex parte Persaud* [1993] 2 ALL ER 876; *Stevenage Borough Football Club Ltd v The Football League Ltd,* CH 1996 S No 3043 (unreported, judgment delivered on the 23rd July 1996), in which Carnwath J drew inspiration from *Enderby* and *Breen*, and said he would have exercised jurisdiction to grant supervisory declaratory relief but for the delay in bringing proceedings and the prejudice that third parties stood to suffer.

[57] *R v Disciplinary Committee of the Jockey Club ex parte Massingberd-Mundy* [1993] 2 ALL ER 207 (QB); *R* v *Jockey Club ex parte RAM Racecourses Ltd,* [1993] 2 ALL ER 225 (QB); *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan* [1993] 2 ALL ER 853 (CA); *R v Football Association Ltd, ex parte Football League Ltd,* [1993] 2 ALL ER 833 (QB); *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC Admin 2197.

[58] *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1993] 2 ALL ER 249 (QB).

[59] See in this regard Hunt "Constitutionalism and the contractualisation of government in the United Kingdom" 30 and the various sporting cases like *R v Disciplinary Committee of the Jockey Club ex parte Massingberd-Mundy* [1993] 2 ALL ER 207 (QB); *R v Jockey Club ex parte RAM Racecourses Ltd,* [1993] 2 ALL ER 225 (QB); *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan* [1993] 2 ALL ER 853 (CA); *R v Football Association Ltd, ex parte Football League Ltd,* [1993] 2 ALL ER 833 (QB); *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC Admin 2197.

> treat contractual power as public power, with the result that contractual power is usually not amenable to the common law of judicial review.[60]

Judicial opinion post *Datafin* shows an inclination towards a reversion to or an aversion to break from the source of power test as a determinant for revisionary jurisdiction. Notwithstanding reference to *Datafin*, judges would either create new bases for the *Datafin* 'publicness' criterion of the decision or simply find the public test not satisfied. In *Massingberd-Mundy* both Neill LJ and Roch J, although recognising that operations of the Jockey club had public consequences as its functions were partly public or quasi-public, felt bound by the decision in *Law v National Greyhound Racing Club Ltd*[61] in which it was held that decisions of the Jockey Club were not amenable to judicial review. In *RAM Racecourses*, Simon Brown J disagreed with the decision in *Massingberd-Mundy* but found nonetheless that the decision was taken within an essentially domestic context lacking any significant public dimension and therefore not reviewable.[62]

In *The Aga Khan* decision, while acknowledging that a private body could also exercise public powers, the Court of Appeal created a new criterion by which it ultimately declined supervisory jurisdiction; the 'but for' test. In its application, the courts would hold a decision to have a sufficient public dimension if in the absence of the body, government would have intervened, by creating a statutory body to regulate the industry in question. On the facts, the court found the test not satisfied. This will be discussed further below. Both the *R v Football Association* and *Rabbi* cases also did not follow the *Datafin* test despite the significant presence of the public dimension on the facts.[63]

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[60] Aronson "A public lawyer's response to privatisation and outsourcing" 46.
[61] [1983] 3 ALL ER 300.
[62] 245.
[63] A review of these cases is to be found in Sinclair "Judicial review of the exercise of public power" (1992) *Denning LJ* 193-224. Another author who is pessimistic about the impact of *Datafin* on the parameters of judicial review given the tendency of the courts in the sporting bodies cases to revert to the traditional criteria based on the public/private divide is Hunt "Constitutionalism and the contractualisation of government in the United Kingdom" 30 who says that despite the *Datafin* case, the courts continue to place reliance on the 'source of power' consideration and the fact that a particular power has its source in contract or some consensual submission in order to justify not assuming a public law jurisdiction over those bodies.

In summary, the basis on which the court entertains judicial review of decisions of private bodies is founded on several factors ranging from the source of their power to the impact of their decisions on public life. It is evident from the discussion above that there has been an inconsistent development in jurisprudence, although there has been some discernible relaxation of judicial attitudes since the decision in *Law.* The trajectory begins with a total prohibition of jurisdiction by reference only to the nature of the body as being private or domestic. Then follows cases where the courts have intervened to protect an individual's right to work or to earn a livelihood, or those which import a restraint of trade. These would be the *Breen* and *Nagle* cases. Thereafter there is the *Datafin* formula which emphasises the public law element especially in the case of monopolies, and lastly, the restrictive cases where although the body in question does operate in public law, the implications might not have a sufficiently public dimension. In the end the position remains that the question of jurisdiction to entertain review has not been definitively determined, and would be decided on a case by case basis. Following *Datafin*, and given the elasticity and malleability of the element of 'publicness', the question is: what are the criteria to be employed in order to bring a decision of a private body within the purview of judicial review?

5.5 Criteria for establishing the public element in decisions of private bodies

The criteria that have been developed by the courts post-*Datafin* to trigger the broad-based functional approach to a 'publicness' element for purposes of determining the reviewability of decisions of private bodies can be condensed into the following:

- whether the aggrieved person has consensually submitted to be bound by the decision-maker;
- the 'but for' test;
- acquiescence or encouragement of the vocation by government;
- whether the body in question is exercising wide powers evincing a monopoly;
- the absence or lack of an alternative remedy; and

- the floodgates argument.[64]

These factors do overlap significantly and are not necessarily mutually exclusive, and may shade into each other, a position recognised in *Datafin* where it was held that:

> In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction, but it is a fatal error to regard the presence of all those factors as essential or exclusive of other factors.[65]

These have never been stated to be exhaustive. Having been developed by the common law, one would imagine that these factors will be further developed, honed and re-shaped by the courts in future cases. One may also envisage a possibility of the factors increasing or diminishing as the case may be. It now remains to discuss these factors individually.

5.5.1 Whether the aggrieved person has consensually submitted to be bound by the decision-maker

This is what one may describe as the traditional criterion, the effect of which, in the absence of any statutory basis for the existence of the body, or the exercise of prerogative power, was dispositive of the issue of amenability to judicial review. It proceeded from a premise that if there are no public powers or functions involved, but merely private ones based on voluntary consent to the arrangement by the individual, then judicial review of any decisions taken in those circumstances was inappropriate.[66] On the flipside, this derived from the 'source of power' test, which determined amenability to judicial review by reference to whether or not the decision was exercising statutory or prerogative powers, or that it had a public duty.[67] If the source

[64] These are discussed in De Smith, Woolf and Jowell *Judicial review of administrative action*, 170-175, by Beloff and Kerr "Why Aga Khan is wrong" (1996) *JR* 30-33 and Williams "Public functions and amenability: Recent trends" (2017) JR 15-26.
[65] 838 per John Donaldson MR.
[66] *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864 where Lord Parker CJ held that the functions of such bodies would be outside the scope of judicial review if 'their authority is derived solely from contract, that is the agreement of the parties concerned' at 882.
[67] Forsyth "The scope of judicial review: "public duty" not "source of power" 356.

of power was the contractual scheme in terms of which the parties were bound together, judicial review would most likely not be applicable. The thrust of *Datafin* was to jettison the 'source of power' as the only test for determining the reviewability of decisions of private bodies to a 'nature of function' test[68] and effectively brought in the other factors mentioned into the equation for purposes of determining the suitability of decisions of private bodies for review. While the new approach has been hailed by many,[69] there is case law indicating the reluctance of the judiciary to abandon the traditional criterion which insisted on the 'source of power' test to determine revisionary jurisdiction in respect of decisions of private bodies. As Hunt puts it:

> … courts have continued to rely on the fact that a particular power has its 'source' in contract, or some other consensual submission, in order to justify *not* assuming a public law jurisdiction over such powers.[70]

Aronson takes the view that

> *Datafin* has failed to dent the common law's refusal to treat contractual power as public power, with the result that contractual power is usually not amenable to the common law of judicial review.[71]

This dim view of the impact of *Datafin* is not contrived, but is borne out by the reaction of the courts following its delivery. The failure of *Datafin* is especially evident in the sporting cases involving disciplinary adjudications although this has been extended to other private bodies outside sport. A brief discussion of this development is apposite here, for it provides a dimension as to the extension or whittling down of the parameters of judicial review that was thought to have been heralded by *Datafin.* It is worth noting the inconsistency in the positions taken by the courts, although by and large they arrive at the same conclusion. The first such case was *R v Disciplinary*

[68] Hunt "Constitutionalism and the contractualisation of government in the United Kingdom" 29; Forsyth "The scope of judicial review: 'Public duty' not 'source of power'" 356.
[69] Forsyth "The scope of judicial review: 'Public duty' not 'source of power'" 356; De Smith, Woolf and Jowell *Judicial review of administrative action* 182; Beloff "Pitch, pool, rink … court? Judicial review in the sporting world" 108; Sinclair "Judicial review of the exercise of public power" 193 to mention but a few.
[70] Hunt "Constitutionalism and the contractualisation of government in the United Kingdom" 30.
[71] Aronson "A public lawyer's response to Privatisation and Outsourcing" 46.

Committee of the Jockey Club ex parte Massingberd-Mundy[72] in which Neill LJ concluded that the authorities indicated that a voluntary submission to a body's powers did not conduce to review.[73] He pointedly said:

> … if the matter were free from authority I might have been disposed to conclude that some decisions at any rate of the Jockey Club were capable of being reviewed by the process of judicial review.[74]

Surprisingly, although *Datafin* was referred to in these decisions, it seems it was not considered authority enough to influence the conclusions reached. And this was in spite of the fact that both judges found some public element in the activities of the Jockey Club.[75] This point shall be explored more extensively below. Suffice it to state here that the judges were so beholden to old positions that even where they felt the need to shift, they could not – in spite of the impetus provided by *Datafin* and the approach taken by Lord Denning in the earlier cases discussed above,[76] which were, except for *Nagle v Feilden*, never referred to. There appears to be a deliberate stranglehold not to break with the past. This casts doubt on the impact of *Datafin.*

The second Jockey Club case was *R* v *Jockey Club ex parte RAM Racecourses Ltd.*[77] Stuart-Smith LJ held:

> Quite clearly the majority of cases involving disciplinary disputes or adjudications between participants in the sport, will be of an entirely domestic character and based upon the contractual relationship between the parties. Such disputes have never been amenable to judicial review.[78]

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[72] [1993] 2 ALL ER 207.
[73] 219-220. In this he placed reliance on *Law v National Greyhound Racing Club Ltd* [1983] 3 ALL ER 300 and *Calvin v Carr* [1980] AC 573.
[74] 219. See also the opinion of Roch J in the same case where he said: 'If the matter were free from authority, I would have reached the conclusion that the Jockey Club was a body susceptible to judicial review' 222.
[75] Neill LJ held that '… an examination of the charter and of the powers conferred on the Jockey Club strongly suggest that in some aspects of its work it operates in the public domain and that its functions are at least in part public or quasi-public functions' at 219. Roch J said 'Thus the Jockey Club holds a position of major national importance. Further, it has near monopolistic powers in an area in which the public generally have an interest and in which many persons earn their livelihoods'. (222)
[76] *Lee v Showman's Guild*; *Breen*; *Enderby Town Football Club v Football Association*; *Faramus v Film Artists Association.*
[77] [1993] 2 ALL ER 225.
[78] 244.

This is evidence of dependence on the 'source of power' test despite the broad-based test propounded in *Datafin*. That 'such disputes have never been amenable to judicial review'[79] demonstrates the existence of dogma and a fixation with the source of power test, to the exclusion of others. As if this was not enough, the judge was not entirely convinced about the position taken in *ex parte Massingberd-Mundy* either but was not prepared to say it was wrong. Instead he took the position that:

> But for this authority I should have held that the decisions of the Jockey Club in this case were amenable to judicial review.[80]

The same attitude of judges tying their hands to previous authority when they were always at large to depart therefrom is again displayed here, in spite of authority to the contrary such as *Datafin*. The other judge, Simon Brown J, expressly disagreed with the approach taken in *ex parte Massingberd-Mundy* and expressed himself as follows:

> I find myself, I confess, much attracted by Mr Beloff's submissions that the nature of the power being exercised by the Jockey Club in discharging its functions of regulating racecourses and allocating fixtures is strikingly akin to the exercise of a statutory licensing power. I have no difficulty in regarding this function as one of a public law body, giving rise to public law consequences. On any view it seems to have strikingly close affinities with those sorts of decision-making that commonly are accepted as reviewable by the courts. And at the same time I certainly cannot identify this particular exercise of power with that of an arbitrator or other domestic body such as would clearly be outside the supervisory jurisdiction.[81]

By likening the exercise of the Jockey Club's power to a statutory licensing power, he was in effect approving of and adopting Lord Denning's approach in *Lee v Showman's Guild* and in *Breen*.[82] He flatly refused to be bound by a submission that no decision of a sporting body had hitherto been found to be amenable to judicial review.[83] Instead, relying on authorities[84] that adopted the broad based approach to extend

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[79] 244.
[80] 244.
[81] 247.
[82] 247.
[83] 248.
[84] *Datafin*; *Thomas v University of Bradford* [1987] 1 ALL ER 834; *R v Advertising Standards Authority Ltd, ex parte Insurance Service plc* (1989) 9 Tr LR 169 and *R v General Council of the Bar, ex parte Percival* [1990] 3 ALL ER 137.

amenability to review, said '[w]e are here in a dynamic area of law, well able to embrace new situations as justice requires'.[85] He concluded by holding that, to the extent that the Jockey Club was exercising quasi-licensing powers, its decisions would be reviewable.[86]

It is quite apparent that the two judges adopted two diametrically opposed approaches in the same case. Notwithstanding *Datafin*, it appears that the 'source of power' test still rings large for many judges, and this test is used effectively to trump the other factors much against the *Datafin* approach which requires them to be considered together without undue emphasis on one as against the others. This leaves great uncertainty as to the exact position.

The third Jockey Club case is *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan,*[87] a decision of the Court of Appeal delivered after the judgments of the Divisional Court in *ex parte Massingberd-Mundy* and *ex parte RAM Racecourses Ltd*. Bingham MR adopted the following position:

> I have little hesitation in accepting the applicant's contention that the Jockey Club effectively regulates a significant national activity, exercising powers which affect the public and are exercised in the interest of the public. I am willing to accept that if the Jockey Club did not regulate this activity the government would probably determine to create a public body to do so.[88]

This statement will be discussed again in the context of the 'but for' test. Having recognised the public element in the activities and functions of the Jockey Club, he went on to limit jurisdiction by relying on the 'source of power' test, as if that was the quintessential determinant for amenability to review. He said immediately thereafter:

> But the Jockey Club is not in its origin, its history, its constitution or (least of all) its membership a public body. While the grant of a royal charter was no doubt a

[85] 248.
[86] 248.
[87] [1993] 2 ALL ER 853 (CA).
[88] 866.

> mark of official approval, this did not in any way alter its essential nature, functions or standing. … This has the result that while the Jockey Club's powers may be described as, in many ways, public they are in no sense governmental.[89]

The determination here was based on the nature of the body, that it has never been a public body and therefore remains outside the reach of judicial review. This is evidence of a resistance to change, even in the face of authority to the contrary. He proceeded to accept that in the absence of the rules of a regulatory mechanism enforceable by the club, there would probably be formal state regulation enforceable by a public body.[90] In concluding that the court should not entertain revisionary jurisdiction, he made a telling statement to the following effect:

> But this does not, as it seems to me, alter the fact, however anomalous it may be, that the powers which the Jockey Club exercises over those who (like the applicant) agree to be bound by the Rules of Racing derive from the agreement of the parties and give rise to private rights on which effective action for a declaration, an injunction and damages can be based without resort to judicial review. It would in my opinion be contrary to sound and long-standing principle to extend the remedy of judicial review to such a case.[91]

Several observations need to be made here. First, this is a rather conservative position, relying more on the traditional public/private divide, which modern thinking has jettisoned.[92] Second, there seems to be some acceptance that determining jurisdiction by reason only of the fact that the applicant's relationship with the body whose decision he is complaining against, is contractual, is possibly 'anomalous'. Many cases have moved beyond this dogma.[93] Thirdly, the position that 'it would in my opinion be contrary to sound and long-standing principle to extend the remedy of judicial review to such a case'[94] only demonstrates a fixation with the old position without reference

[89] 867.
[90] 867.
[91] 867.
[92] Cases on the application of the Human Rights Act 1998 discussed briefly below demonstrate.
[93] *Datafin*; *Thomas v University of Bradford* [1987] 1 ALL ER 834; *R v Advertising Standards Authority Ltd, ex parte Insurance Service plc* (1989) 9 Tr LR 169 and *R v Council of the Bar, ex parte Percival* [1990] 3 ALL ER 137. See also the powerful exhortations of Lord Denning MR in *Lee v Showman's Guild*; *Breen v Amalgamated Engineering Union*; *Enderby Town Football Club v Football Association*; *Faramus v Film Artists Association*.
[94] 867.

to developing situations[95] and is in fact wrong as some modern authorities indicate otherwise.[96] Again the consensual submission to jurisdiction carried the day, ahead of the other important factors.

In the same matter, Farquharson LJ, in response to the applicant's submission on the lack of reality in describing the applicant's relationship with the Jockey Club as consensual, said:

> The fact is that if the applicant wished to race his horses in this country he had no choice but to submit to the club's jurisdiction. This may be true but nobody is obliged to race his horses in this country and it does not destroy the element of consensuality.[97]

Thus the consensual nature of the relationship is what led to the conclusion that the decision was not reviewable. Hoffmann LJ, while recognising the power of the Jockey Club held:

> But the mere fact of power, even over a substantial area of economic activity, is not enough. In a mixed economy, power may be private as well as public. Private power may affect the public interest and the livelihoods of many individuals. But that does not subject it to the rules of public law. If control is needed, it must be found in the law of contract, the doctrine of restraint of trade … and all other instruments available in law for curbing the excesses of private power.[98]

This was resort to the old public /private law divide which is unhelpful, and reliance on the 'source of power' test hinging on the contractual foundation of the relationship of the parties and without regard to other important, if not compelling, factors. He concluded that the Aga Khan should find remedies in contract and not 'try to patch up the remedies available against domestic bodies by pretending that they are organs of

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[95] As observed by Simon Brown J in *ex parte Racecourses Ltd* at 248 where he said 'We are here in a dynamic area of the law, well able to embrace new situations as justice requires'.
[96] *Datafin*; *Thomas v University of Bradford* [1987] 1 ALL ER 834; *R v Advertising Standards Authority Ltd, ex parte Insurance Service plc* (1989) 9 Tr LR 169 and *R v Council of the Bar, ex parte Percival* [1990] 3 ALL ER 137; *Lee v Showman's Guild*; *Breen v Amalgamated Engineering Union*; *Enderby Town Football Club v Football Association*; *Faramus v Film Artists Association.*
[97] 871. And he was steadfast that '[b]y entering into those agreements the applicant was expressly submitting to the Rules of Racing and acknowledging that he was governed by the disciplinary powers of the Jockey Club'. 871.
[98] 875.

government'.[99] The upshot of these positions shows an inclination towards determining amenability to judicial review by looking principally at the consent to jurisdiction and to down play all other factors demonstrating the 'publicness' of the decision. This is regressive given the pathways laid out in *Datafin*. The decision in *Aga Khan* has been criticised because:

> … sufficient of the indicia of a public law right were present – both as to the functions exercised and the body which exercised them …[100]

and that it

> … gave too much emphasis to the contractual relationship between the parties, and too little to the absence of real choice but to submit to the Jockey Club's jurisdiction.[101]

It has also been criticised for failing to acknowledge 'the reality of where power resides in our society, and the need for effective legal mechanisms to control abuses of it'.[102] As demonstrated above, I associate myself with these standpoints.

Before concluding this part, three other decisions merit brief discussion. The first is *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann*[103] which concerned an application to review the decision of the spiritual head of a Jewish religious organisation. Contrary to the Jockey Club cases, a submission on the ouster of jurisdiction based on the consensual submission to the jurisdiction was rejected.[104] Judicial review was denied on the basis that the Chief Rabbi was not exercising public functions nor was there a public element in his decisions. *R v Football Association Ltd ex parte Football League Ltd* [105] involved a challenge by the Football League of certain regulations promulgated by the Football

[99] 876.
[100] Beloff and Kerr "Why Aga Khan is wrong" 30.
[101] Beloff and Kerr "Why Aga Khan is wrong" 30.
[102] Pannick "Judicial review of sports bodies" 153.
[103] [1993] 2 ALL ER 249 (QB).
[104] 253.
[105] [1993] 2 ALL ER 833 (QB).

Association. The issue was whether the decision of the association could be challenged on review. The association was established by a constitution. It was held that the decisions of the association were generally not reviewable and in respect of the particular challenge by the league, it could not be reviewed as the league only had a contractual relationship despite the virtually monopolistic powers the association had and the importance of its decisions to many members of the public. Rose J pertinently held that:

> Despite its virtually monopolistic powers and the importance of its decisions to many members of the public who are not contractually bound to it, it is, in my judgment, a domestic body whose powers arise from and duties exist in private law only.[106]

Again the 'source of power' test prevailed over all other considerations. Rose J at least did recognise the presence of authority, the Court of Appeal decisions in *Law v National Greyhound Racing Club Ltd*[107] and *Datafin,* by which he felt bound, and which he implicitly considered conflicting. What was interesting was the choice of which of the two to rely on. The distinguishing mark was found as follows:

> ... although *Datafin* is a landmark decision, it has not appeared as the only guide in an otherwise barren landscape. *Law'*s case seems to me to be a more pertinent guide, at least for a judge at first instance, in relation to a body whose powers are, prima facie, derived from contract.[108]

There is no principled basis provided for the preference of *Law* as against *Datafin.* There is no basis at all provided as to why *Law* is a more pertinent guide for a judge at first instance in these matters. What is clear is that *Datafin* was decided long after *Law,* and certainly took account of what *Law* decided. It was the same court changing its previous position. This is perfectly allowed in terms of the doctrine of precedent and *stare decisis* which is one of the hallmarks of the English common-law tradition.[109]

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[106] 848.
[107] [1983] 3 ALL ER 300.
[108] 847.
[109] Fombad "Highest Courts departing from precedents: The Botswana Court of Appeal in *Kweneng Land Board v Mpofu and Nonong*" (2005) *University of Botswana Law Journal* 128-139, 130-131.

It is submitted Rose J's decision on this score is wrong. In all the circumstances Rose J was only moved by considerations of traditions arising from the 'source of power' to which many in the judiciary were wedded and from which they were not prepared to depart. The same can be gleaned in *R (Mullins) v Appeal Board of the Jockey Club*[110] which preferred to follow the decision in *Aga Khan.* So it seems on the basis of the discussion above that the 'source of power' test is still employed in many cases. And it remains the dominant consideration in any debate on amenability to judicial review.[111] There are nevertheless a few cases that have followed *Datafin* and found jurisdiction on review.[112]

5.5.2 The 'but for' test

This method of determining amenability to judicial review of decisions of private bodies departs from a hypothetical premise. It enquires into the question whether, but for the existence of the private body, government, or the state generally, would have intervened to regulate the activity itself.[113] Put differently, it is said that the decisions of the body in question would be judicially reviewable, if in the absence of the private body, the body's powers and functions would inevitably be exercised by government or that government would have established a public body to exercise those powers and functions. The body would then be exercising public functions and its decisions reviewable. It implies some sort of devolution of governmental power to the body in question.[114] The judicial expression of this test is *R v Chief Rabbi of the United Hebrew*

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[110] [2005] EWHC Admin 2197.
[111] Williams, "Public functions and amenability: Recent trends," 26.
[112] *R v Advertising Standards Authority, ex parte The Insurance Service plc* (1990) 2 Admin LR 77; *R v British Pharmaceutical Industry Association Code of Practice Committee, ex parte Professional Counselling Aids Ltd* [1991] COD 228; *R v General Council of the Bar, ex parte Percival* [1991] 1 Q.B. 212; *R v Visitors to the Inns of Court ex parte Calder, ex parte Persaud* [1993] 2 ALL ER 876; *Stevenage Borough Football Club Ltd v The Football League Ltd,* CH 1996 S No. 3043 (unreported, judgment delivered on the 23rd July 1996), in which Carnwath J drew inspiration from *Enderby* and *Breen*, and said he would have exercised jurisdiction to grant supervisory declaratory relief but for the delay in bringing proceedings and the prejudice that third parties stood to suffer.
[113] Woolf *et al*, *De Smith's judicial review* 137; Sinclair, "Judicial review of the exercise of public power" 203; Elliot "Judicial review's scope, foundations and purposes: Joining the dots," (2012) *NZLR* 75-111, 88; Pannick 1992 *PL* "Who is subject to judicial review and in respect of what?" 5-6; Cranston 'Reviewing judicial review' 49; Beloff and Kerr "*Why Aga Khan is wrong"* 31.
[114] *Datafin*, 849 per Lloyd LJ.

Congregations of Great Britain and the Commonwealth, ex parte Wachmann[115] where it was said that:

> It cannot be suggested … that the Chief Rabbi performs public functions in the sense that he is regulating a field of public life and but for his offices the government would impose a statutory regime.[116]

Although this is a guide that can be useful in certain circumstances, it imports a difficulty in that it hinges on guesswork, as it depends on the particular judge's perception of what government might or might not do, or what the agenda of the political party in power would be. The difficulty with this test is presented by Pannick[117] as follows:

> Why should the jurisdiction of the court depend on a hypothesis as to what government would do but for the existence of the body in question?

To second-guess Parliament as a basis for assigning jurisdiction is not only artificial[118] but is contrary to judicial policy and process which insists on a factual and legal establishment by a litigant of a basis upon which a court should entertain his claim. Besides, it contravenes the separation of power principle as it requires the judge to place himself in the shoes of politicians and determine matters of political convenience at particular times. What Parliament could have done or not done depends also on the ever-changing policies of the governing party at a given time. It is undesirable to have a standard that changes depending on the exigencies of the political climate at any one time. The judiciary depends for its legitimacy on the confidence that the public reposes in it, and this in turn will usually come about when the application of the law

[115] [1993] 2 ALL ER 249 (QB).
[116] 254 per Simon Brown J.
[117] Pannick "Who is subject to judicial review and in respect of what?" 5-6.
[118] Hunt 'Constitutionalism and the contractualisation of government in the United Kingdom' 32. Elliot "Judicial review's scope, foundations and purposes: Joining the dots" 89 takes the view that whether government intervenes or not is essentially a decision with political undertones, and is unsuitable terrain for judges.

is open, stable, certain and predictable.[119] This test can only therefore present more difficulties than solutions.

How has this test been treated by the courts? It was applied positively, and was a basis for establishing jurisdiction in *R v Advertising Standards Authority, ex parte The Insurance Service plc*[120] in which it was held that the advertising industry's self-regulatory authority was reviewable because it was 'clearly exercising a public law function which, if the authority did not exist, would no doubt be exercised by the Director General of Fair Trading'.[121] Similar reasoning was employed in *R v British Pharmaceutical Industry Association Code of Practice Committee, ex parte Professional Counselling Aids Ltd*.[122] However, in other cases, although the principle was accepted, the decision turned on the facts. For example, in *R v Jockey Club ex parte RAM Racecourses Ltd*[123] Simon Brown J recognised the national importance attached by government to the Jockey Club's position, and said it held 'monopolistic powers in an important field of public life, a position which could as well have been enshrined in legislation.'[124] The same judge recognised the test in *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann*[125] when he pronounced:

> It cannot be suggested … that the Chief Rabbi performs public functions in the sense that he is regulating a field of public life and but for his offices the government would impose a statutory regime. On the contrary, his functions are essentially intimate, spiritual and religious functions which government could not and would not seek to discharge in his place were he to abdicate his regulatory responsibility.[126]

In secular states the government takes minimal or no involvement in matters of religion. It would be difficult to say that, but for the existence of a body set up to

[119] Raz "The rule of law and its virtue" (1977) *LQR* 195-211.
[120] (1990) 2 *Admin LR* 77.
[121] At 86 per Glidewell LJ.
[122] [1991] COD 228.
[123] [1993] 2 ALL ER 225 (QB).
[124] 247.
[125] [1993] 2 ALL ER 249 (QB).
[126] 254.

conduct religious activities, the government would have established one in its stead. Even then, even when the court seized jurisdiction, it would be difficult for it to pronounce on the moral uprightness of any person to discharge religious functions. As one author puts it, such activities are 'inherently private'[127] and unsuitable for judicial review.

In dismissing the 'but for' argument in *R v Football Association Ltd ex parte Football League Ltd*[128] Rose J held:

> I find no sign of underpinning directly or indirectly by any organ or agency of the state or any potential government interest, as Simon Brown J put it in *Wachmann,* nor is there any evidence to suggest that if the FA did not exist the state would intervene to create a public body to perform its functions. On the contrary, the evidence of commercial interest in the professional game is such as to suggest that a far more likely intervener to run football would be a television or similar company rooted in the entertainment business or a commercial company seeking advertising benefits such as presently provides sponsorship in one form or another.[129]

This position seems to be oblivious to realities on the ground regarding sport. In all states there is usually a ministry or department, publicly funded from the national *fiscus*, with portfolio responsibilities over all manner of sport. That there are other entities allowed to participate, on a commercial basis, in matters of sport does not detract from the significant state interest in the vocation. It is an implied devolvement of government business. It cannot be equated to or be left to the vagaries of demand and supply as perhaps would happen with the supply of non-essential services such as alcohol or other luxuries available in the market. Further, all national teams are the responsibility of the state, and the state takes glory when those succeed. Again Rose J, it is submitted, was in error.

In the *Aga Khan* case, Bingham MR did accept that the Jockey Club controlled and discharged an important activity nationally, and exercised powers which affected the

[127] Craig "Public law and control over private power" 205.
[128] [1993] 2 ALL ER 833.
[129] 848-849.

public, and critically that 'if the Jockey Club did not regulate the activity the government would probably be driven to create a public body to do so'.[130] In terms of this formulation this would have satisfied the 'but for' test. But he went on to hold:

> But the Jockey Club is not in its origin, its history, its constitution or (least of all) its membership a public body. While the grant of a royal charter was no doubt a mark of official approval, this did not in any way alter its essential nature, functions or standing. … This has the result that while the Jockey Club's powers may be described as, in many ways, public they are in no sense governmental.[131]

Two observations arise from this position. First, its effect is to drift to the 'source of power' test in order to qualify the 'but for' test. The qualifier is evident in the use of the word 'but' immediately after his discussion of the 'but for' test, followed by his reference to the 'origin, history and constitution' of the Jockey Club. In the *Datafin* formulation the two tests are guidelines that should be considered together and none was held necessarily to be superior to the other. This is an indication of judicial conservatism and a fixation on the 'source of power' test. Secondly, he disqualifies the functions of the Jockey Club from judicial review for the reason that they are not governmental. This is wholly unsatisfactory because if they are, then the Club becomes a public body, with the result that its decisions would necessarily be reviewable. The tests are employed in order to bring decisions of private bodies under review, and not to determine if they are public bodies whose decisions are reviewable. The test is whether a decision of an admittedly private body can be reviewed. To proceed the way he did is to proceed from a faulty premise.

In sum, therefore, the basis for declining jurisdiction is tenuous by reason of a fixation on the 'source of power' test or a misunderstanding of the effect of *Datafin*.

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[130] 866. This position was not shared by other members of the court. Farquharson LJ said (at 872) '… I do not detect in the material available to us any grounds for supposing that, if the Jockey Club were dissolved, any governmental body would assume control of racing. Neither in its framework nor its rules nor its function does the Jockey Club fulfil a governmental role.' This position was shared by Hoffmann LJ at 875.

[131] 867.

5.5.3 Acquiescence or encouragement of the vocation by government

This guideline dovetails closely with the 'but for' test for it hinges on the attitude of government towards the functions and activities of the particular body. The difference is that in relation to this one, government is not passive but plays some role either in encouraging the body in question or lending some means of support of one kind or another in its activities. Where that is the case, the assumption would be that the body is performing a public function capable of review. *Datafin* itself provided the framework for the use of this guideline in determining jurisdiction on review. First, the government was willing to limit legislation in the area regulated by the panel, and to use it as part of its regulatory mechanism.[132] This is both acquiescence and encouragement by government in what Lloyd LJ referred to as 'implied devolution of power by the government to the panel'.[133] In the circumstances Lloyd LJ was 'persuaded that the panel was established under the "authority of the government."[134] It was performing a significant public function. Secondly, the Director General, Chairman and Deputy Chairman of the panel were appointed by the Governor of the Bank of England, a public institution, and therefore the footprint of governmental involvement was evident, and its source of power is what one author calls 'moral persuasion'.[135] These factors would perfectly fit into Bingham MR's mould in *Aga Khan* in the sense of the panel having been 'woven into a system of governmental control'[136] to bring it within the purview of judicial review. This factor was also decisive in *R v Advertising Standards Authority Ltd, ex parte The Insurance Service plc.*[137] The European Community had promulgated a directive requiring member states to make provision for the control of advertising. In the United Kingdom such regulation was not provided for directly by the state, but through regulations which empowered the Director General of Fair Trading to investigate complaints of misleading advertising. In terms of those regulations, the Director General would only take action against an erring firm if the matter had not satisfactorily been resolved through the Advertising Standards

[132] 838. Craig "Public law and control over private power" 201.
[133] 849.
[134] 849.
[135] Craig 'Public law control over private power' 201.
[136] *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan,* 867.
[137] (1990) 2 Admin LR 77.

Authority. Thus there was encouragement of the Authority by government fitting into the mould of Lloyd LJ's 'devolution of power by the government'[138] to the Authority or in Bingham MR's mould of being 'woven into a system of governmental control'[139] or that the function is 'enmeshed in or underpinned by statute.'[140] Government had actively acquiesced in the functions of the authority which was performing public functions and the decision was therefore reviewable. In *R (Beer) v Hampshire Farmers Markets Ltd*,[141] a local authority incorporated a company to run a series of farmers' markets, a function that had hitherto been the responsibility the local authority. The claimant applied for permission to join in the scheme and participate in its market activities, and allowing him to trade his goods in the market. This was rejected. The claimant applied to set aside the rejection on review. It was argued that the company's decision rejecting the claimant's application was not reviewable to the extent that the company was a private body. The Court of Appeal rejected the argument and held that the company's decision was reviewable since it was exercising a public function. This conclusion was based on the fact that the company had effectively replaced the local authority, although the latter provided logistical support in the form of office space, funding and staff. In the view of the court, these factors rendered the function public and the decision susceptible to judicial review. In a short opinion supporting the unanimous judgment of Dyson LJ, Longmore LJ held that 'First, the market cases show that if a trader is denied the right to sell his goods in a place to which the public normally has access that decision is a decision of public law and is amenable to judicial review.'[142] This decision is correct because otherwise it would have denied the applicant a means to a livelihood, a result with serious public ramifications.

[138] *Datafin* 849.
[139] *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan,* 867, in which Sir Thomas Bingham accepted that judicial review would 'extend to a body whose birth and constitution owed nothing to any exercise of governmental power but which had been woven into the fabric of public regulation'.
[140] *R (Baker Tilly UK Audit LLP) v Financial Reporting Council* [2015] EWHC 1398 (Admin).
[141] [2004] 1 WLR 232.
[142] 250.

5.5.4 Whether the body in question is exercising extensive or monopolistic powers

This was partly discussed under Chapter 4. It only requires highlighting here to the extent that it is apposite for the immediate issue under discussion. The greatest proponent of the monopoly power test is Campbell[143] who presents it as the determinant of whether power is private or not. He posits that

> … power that is exercised by a person or body in the carrying out of a function, where only that person or body performs the function, should be regarded as public for the purposes of judicial review ....[144]

This is what he refers to as the monopoly of power and which may also be exercised by non-statutory bodies.[145] According to him:

> power will be monopolistic … if the power is exercised pursuant to the carrying out of a particular function, in circumstances where only a specific body or person can carry out that function.[146]

In terms of this conception, any monopolistic power is necessarily public, the exercise of which will be reviewable. It matters not the nature of the body that exercises it. Thus the source of that power is not relevant. If a private body exercises what Campbell terms a monopoly, it must, according to him, be amenable to judicial review. The logical conclusion that arises from this schema is that a body having a monopoly is in effect exercising public power, and there has not been any objection to the review of public power.

Case law is inconsistent in its reliance on this factor as a determinant for amenability to judicial review. In *R v Jockey Club, ex parte Massingberd-Mundy* Roch J did accept the monopoly enjoyed by the Jockey Club, the interest which the general public had

[143] Campbell "Monopoly power as public power for the purposes of judicial review" (2009) *LQR* 491-521.
[144] Campbell "Monopoly power as public power for the purposes of judicial review" 491.
[145] Campbell "Monopoly power as public power for the purposes of judicial review" 491.
[146] Campbell "Monopoly power as public power for the purposes of judicial review" 494.

in its activities and that many people earned a living from the activities of the club,[147] but this did not sway him in finding jurisdiction on review. The same result was witnessed in other cases.[148] In all these cases discussed above, the prevailing factor was consensual submission to jurisdiction. The monopoly test was however decisive in *Datafin* itself and in *R v Advertising Standards Authority Ltd, ex parte The Insurance Service plc* in which the Advertising Standards Authority had *de facto* control of the industry, having secured agreement with the significant industry stakeholders.[149] The same can be said of *R v British Pharmaceutical Industry Association Code of Practice Committee, ex parte Professional Counselling Aids Ltd* which regulated advertisements of medicinal products which was the only one recognised by government, and whose controls the government recognised and supported. The cases decided by Lord Denning seem also to have taken account of the bodies' monopolistic position over the individuals who applied for judicial review.[150] In *Aga Khan*, it was accepted that anybody who desired participating in horse racing in Britain had no alternative but to enlist with the Jockey Club.[151] It is submitted this satisfies the monopoly test. However, the decision of the Jockey Club was found to lack the necessary 'publicness' make its decisions capable of review. The 'source of power' test prevailed over any other relevant considerations which marked out the decision with all the ingredients of a public-law decision. The decision has been criticised, and it is submitted rightly so.[152] On the pointed issue of monopoly powers, Beloff, who has always expressed misgivings about the decision, has said:

> I consider that where a body enjoys monopoly or near monopoly powers over an important section of national life – and the court can discern either that it exercises devolved governmental powers or acts in partnership with Government, or acts as

[147] 222.
[148] The same stance was adopted by Stuart-Smith LJ in *R v Jockey Club ex parte RM Racecourses Ltd* 243 (QB); by Rose J in *R v Football Association, ex parte Football Association* 848; by Bingham MR and Farquharson LJ in the *Aga Khan* 862 and 867 and 872-873 respectively and by Stanley Burnton J in *R (Mullins) v The Appeal Board of the Jockey Club* para 31.
[149] Campbell "Monopoly power as public power for the purposes of judicial review" 502.
[150] *Enderby Town Football Club v Football Association; Breen, Nagle v Feilden, Lee v Showman's Guild and Faramus v Film Artists Association.*
[151] Farquharson LJ at 871.
[152] Beloff and Kerr "Why Aga Khan is wrong" (1996) *JR* 30-33.

> a substitute for Government with Government's leave and licence – judicial review should be available.[153]

In summary therefore, we see an environment in which this factor is admitted to be relevant but not necessarily decisive. There cannot be much quibble with this, at least at the level of principle, as *Datafin* held that the factors must be considered as a whole. But where the function is based on a monopoly, it should be held that those who exercise the power should submit to the control of the courts by judicial review on the basis of the power being public. After all judicial review is a means of control of public power.[154] Once it is established that a body, whether public or private, exercises public power, that should be the end of the enquiry. But as we have seen before, case law does not necessarily follow this logic.

5.5.5 The absence of an alternative remedy

As has been said over time, 'judicial review is a regulatory regime with the overarching aim of ensuring that public power is exercised fairly towards those who are subject to it'.[155] Remedies in judicial review are circumscribed, and serve a particular function with particular outcomes. They are not the same as in other legal circumstances, for example the law of contract. In many cases a remedy on review cannot be equated to a remedy in contract. For this reason, the judicial standpoint that kept decisions of private bodies outside the reach of judicial review, and requiring them to seek remedies from their contractual arrangements proceeded from a fundamentally flawed premise. The premise of equating the utility of remedies in judicial review with those in contract is faulty. They are different in nature, scope, remit and reach. That would not be adequate for the remedies in judicial review. For this reason, there is authority, in both

[153] Beloff "Judicial Review – 2001: A prophetic Odyssey" (1995) *Mod Law Rev* 143-159, 147.
[154] Williams "Public functions and amenability: Recent trends" 17.
[155] Williams, "Public functions and amenability: Recent trends" 17.

literature[156] and case law,[157] that in considering whether a function is public to attract the reach of judicial review, the absence or otherwise of an alternative remedy is a relevant consideration. Yet in many other cases there is resistance and in others outright rejection of this factor.[158] So the law is uncertain in this regard. It is urged that the courts should be sensitive to the policy consideration that where there is a right, or a wrong, there should be a remedy. And it is urged that the remedy should be an effective one and not merely a theoretical presence. It is an area in which the law is expected to continue developing as novel situations emerge in which the remedy of judicial review is sought.

The last segment discusses the limiting factors upon the extension of judicial review to bodies that are considered private. Quite often judges have expressed the fear that extending remedies under public law to decisions of non-public bodies is not accurate. They invoke the flood gates argument to express the 'disadvantage' of extending review.

5.5.6 The floodgates argument

This factor does not arise from *Datafin.* It is discussed here because it is a matter that is usually raised by both counsel and judicial officers as a basis to exclude judicial review in particular cases. In the present context, it is raised as a defensive mechanism to deny jurisdiction on the basis that to accept it would open up the process to too many litigants, with the result that the courts would be overwhelmed and choked with business. This was evident in *R v Football Association Ltd ex parte Football League Ltd*, where Rose J took the position that to accept jurisdiction would be a misapplication

[156] Williams, "Public functions and amenability: Recent trends" 20; Maripe "Judicial review and the public/private body dichotomy: An appraisal of developing trends" 29; Markus "What is public power: The courts' approach to the public authority definition under the Human Rights Act" in Jowell and Cooper (eds) *Delivering rights: How the Human Rights Act is Working* (2003) 77-114, 110; Beloff and Kerr "Why Aga Khan is wrong" 30.
[157] *Datafin*, 827; *Leech v Deputy Governor of Parkhurst Prison and Others* [1988] AC 533.
[158] Hoffmann LJ in *Aga Khan*, 933. In *R v Eurotunnel Developments ex parte Stephens* (1997) 73 P & CR 1, Collins J categorically stated that 'the absence of any obvious remedy does not translate what … is a clear private law matter to a public law matter' 7.

of increasingly scarce judicial resources. It will become impossible to provide a swift remedy … if the courts become even more swamped with such applications than they are already.[159]

He did acknowledge though that this was not a 'jurisprudential reason for refusing judicial review...'.[160] This last statement is an indication of the judiciary now intruding on matters belonging to other organs of state. Concern with 'judicial resources' is a matter to be handled through the political channels through the ministry responsible for the judiciary. The judiciary should not be usurping the functions of the executive branch in the discharge of its functions, but must determine cases in terms of the law and evidence presented in each case.

In response to a floodgate argument made to exclude a review of the decision of prison authorities meting out a punishment against him in respect of a disciplinary charge by a prisoner in *Leech v Deputy Governor of Parkhurst Prison and Others,*[161] Lord Bridge said:

> In a matter of jurisdiction it cannot be right to draw lines on a purely defensive basis and determine that the court has no jurisdiction over one matter which it ought properly to entertain for fear that acceptance of jurisdiction may set a precedent which will make it difficult to decline jurisdiction over other matters which it ought not to entertain.[162]

This puts paid to the floodgates basis for declining revisionary jurisdictions. Incidentally this argument would have no place in applications by litigants challenging decisions of public bodies, whose numbers may far eclipse those of applicants challenging decisions of private bodies. Besides, it is a way of shunning responsibility by the courts as they have inbuilt mechanisms of controlling access, especially in matters of judicial review. First, only those with recognisable causes of action will be entertained. This is a control measure that keeps away many would be litigants. Second, a litigant must have *locus standi*, which performs a '"gate-keeping function" as providing the means to exclude

[159] 849.
[160] 849.
[161] [1988] AC 533.
[162] 566.

vexatious litigants or unworthy cases'.[163] Third, vexatious cases by 'busybodies' may be kept at bay by an appropriate award of costs. And finally, those matters brought after long delays may be dismissed as the very essence of judicial review is to provide a swift remedy.[164] This was the basis for declining jurisdiction by Carnwath J in *Stevenage Borough Football Club Ltd v Football League Ltd*,[165] when all the other requirements for review were in place. So there are many available controls against the floodgate argument.

The next segment of this chapter discusses the extension of judicial review to decisions of private entities against the backdrop of global structural changes to economic development models in terms of which governments have enlisted the participation of private entities in the delivery of public services. In the last two decades governments have sought to entrust the delivery of essential services to private bodies by contracting out those services to them. The question is whether the decisions of private entities to whom public services have been hived, should be the subject of judicial review notwithstanding that their source of power is derived from private law.

6 Contractualisation of governmental business

The discussion above has touched on the possibility of extending judicial review processes and remedies to decisions of entities that do not quite satisfy the traditional criteria for categorisation as public bodies, but on the basis that their decisions import a public element or that they satisfy the *Datafin* test that in the absence of such a body, government would have established a body to run its affairs. In this scenario, government does not merely acquiesce or provide some support to a private body performing what would otherwise be a governmental or general public function as in *Datafin*, but deliberately hives off some function to a private entity under some

[163] McEldowney *Public law* (1998) 558.
[164] *R v Football Association Ltd ex p Football League Ltd,* 848 per Rose J.
[165] CH 1996 S No 3043.

contractual arrangements, hence the privatisation or what Craig[166] and Hunt[167] call the 'contractualisation of government', what Boughey and Weeks[168] call 'outsourcing and mixed administration,'[169] what Aronson calls 'privatisation and outsourcing',[170] and what Hoffmann LJ referred to as 'the privatisation of the business of government itself'[171] In *R (on the application of Heather) v Leonard Cheshire Foundation,*[172] Stanley Burnton J *at first instance* said:

> Privatisation means, in general, that functions formerly exercised by public authorities are now carried out by non-public entities, often for profit. It has inevitable consequences for the applicability of judicial review, which the courts are not free to avoid.[173]

Whatever description one prefers does not alter the essential character of the arrangement, which is that a private entity exercises a governmental function. Writing in the context of South Africa, Burns posits that 'Contracting out or the "outsourcing" of government functions relates to the process whereby a government agency secures another person, group or organisation, to provide goods or services directly to the public…'[174] There are several reasons why and how this state of affairs came about. The policy reasons underpinning the development are not properly the subject of this thesis, but it has to do variously with restructuring of government for various reasons such as downsizing the workforce, to achieve efficiencies,[175] to promote the private sector as an engine of economic growth and compliance with the demands and recommendations of the World Bank and the International Monetary Fund as briefly

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[166] Craig "Contracting out, the Human Rights Act and the scope of judicial review" (2002) *LQR* 551-568, 551.
[167] Hunt "Constitutionalism and the contractualisation of government in the United Kingdom" 22.
[168] Boughey and Weeks "'Officers of the Commonwealth' in the private sector: Can the High Court review outsourced exercises of power?" (2013) *UNSW LJ* 316-357.
[169] At 316.
[170] Aronson "A public lawyer's response to privatisation and outsourcing" 41.
[171] In *Aga Khan*, at 931H.
[172] (2001) 4 CCLR 211
[173] 237.
[174] Government contracts and the public/private law divide, (1998) *SAPR/PL*, 234-255, 236.
[175] Freedland "Government by contract and public law" (1994) *PL* 86-104 posits that this efficiency was to be achieved by introducing the discipline of market forces in the provision of services through privatisation and contracting, 86. Burns, Government contracts and the public/private law divide, (1998) *SAPR/PL*, 234-255 argues that this is 'another method of achieving a more market-driven public service..' 236.

outlined at Chapter 4. For the most part, the traditional remit of administrative law and its remedies, especially judicial review, is based on the designation of exercises of power as either public or private. And this, as Free observes, 'is fundamental to the legitimation of administrative law controls'.[176] The privatisation of government business, or its corporatisation, challenges the very basis for administrative law and its boundaries, and implicates the reach of judicial review. As Taggart argues, the categorisation of activities and institutions as either public or private forms the normative basis for the narratives on the proper function of the law, the delineation of individual rights and obligations, and the application of the law to particular circumstances.[177] This implicates the function of law as an instrument of state control over all manner of general engagement, be it social, cultural, political, economic or otherwise. It has been argued that:

> the prevailing socio-politico-economic order must of necessity influence judicial attitudes, for law usually reflects and follows policy. With the private sector now playing a leading role in providing services and performing functions that hitherto were performed by mainstream government departments, and this becoming general policy in many instances, it is to be expected that judicial attitudes would mutate and transform in line with general policy. In the discharge of their responsibility to dispense justice, the courts take into account, and indeed are influenced by the prevailing social, economic and political environments, for these determine and shape the various policies from which legal rules emerge. The mutating socio-politico economic order must of necessity influence judicial policy.[178]

The expanded role of the private sector and how it relates with the public sector is best explained by Vincent-Jones as follows:

> Public services in advanced economies are increasingly provided through a hybrid combination of mechanisms of public and private ordering. The general expansion in the role of the private sector has not been accompanied by a corresponding "retreat" of the state, nor has there occurred any simple shift in the mode of governance from public to private. Again, most modern privatization initiatives fall

[176] Free "Across the public/private divide: Accountability and administrative justice in the telecommunications industry" (1999) *AIAL Forum*, 1-26, 8.
[177] Taggart "Corporatisation, privatisation and public law" (1991) *Public Law Review* 77, 94.
[178] Maripe "Judicial review and the public/private body dichotomy: An appraisal of developing trends" 41.

> far short of the whole transfer of responsibilities from the public sector into the domain of the market.[179]

The fact that the state does not sever links completely with the outsourced service, and its continued link with the service provider, is borne out of the realisation that in reality this is a form of implied devolution of power from government[180] or delegation of power of some sort from government,[181] where the principal retains an interest in the service. There is thus a convergence of interests, a public and a private one. It is therefore expected that with this major development, the courts will begin to re-assess the source of power argument and determine whether in light of current trends it is still judicially sound. As Beloff[182] poignantly observes that 'the processes of privatisation and contracting out pose conceptual problems.'[183] These processes implicate the traditional bases for judicial control. The major question is whether a private person has any remedy in judicial review in respect of the governmental function now being discharged by a 'private body'. This calls for a policy shift in that the source of power argument has to be re-considered against the type of function exercised, and sometimes be disregarded altogether as inadequate to determine the availability or otherwise of judicial review. This challenges the judges to adapt to the development that threatens the public/private divide, on which the demarcation for the application of judicial review was based. This challenge is best explained by Free as follows:

> In the face of such administrative innovation, it is evident that the ability of administrative law to respond to executive power in the post-modern state will depend in large part on the extent to which administrative law can overcome the theoretical limitations imposed by the public/private dichotomy. As governments increasingly transgress the boundary between public and private, so too administrative lawyers must develop the conceptual confidence to follow the extending state across the public/private divide. … Therefore if a sophisticated approach is to be developed for the recognition of public power within what is

[179] Vincent-Jones "The new public contracting: Public versus private ordering?" (2007) *Indiana Journal of Global Legal Studies*, 259-278, 259-260.
[180] Per Lloyd LJ in *Datafin*, 829. See also Sinclair "Judicial review of the exercise of public power" 202 on the principle of devolution of power.
[181] Hoffmann LJ in *Aga Khan*, at 931H.
[182] Beloff "Judicial Review – 2001: A prophetic Odyssey" (1995) *MLR* 143-159, 147.
[183] Beloff "Judicial Review – 2001: A prophetic Odyssey" (1995) *MLR* 143, 147.

> notionally the private sector, administrative lawyers must develop a more flexible approach to the very concepts of public and private.[184]

Further, any decision to deny judicial review in respect of a decision of a private entity to which the performance of public functions has been contracted is fundamentally unfair to an aggrieved individual who has no say in the decisions by public authorities to rid themselves of services in favour of private bodies. As Markus argues:

> … the fact that a function is performed by a private body under arrangements made with a state body is itself a consequence of the exercise of state power. The service user … has no say in the decision by the public provider to contract out its services nor any choice as to their dependency on those services. It is the existence of the public function in the hands of the public authority and that authority's decision (pursuant to statutory powers) to contract out the function to a private body, which results in the service user's relationship with the contractor.[185]

Beloff argues that as:

> nationalisation makes it easier for administrative lawyers to identify an emanation of the state…. and it would, in my view, be perverse if such rearrangement could make the new bodies impervious to judicial control. In public law, particularly, substance is surely more important than form.'[186]

It is submitted that insistence by the courts on the 'source of power' test in respect of a service contracted out would be to ignore the essential nature of the power exercised but to rely on the label attaching to the body that has exercised it, an appeal to form at the expense of substance, which is totally undesirable. It is therefore urged that the question of jurisdiction, especially on review, should not be left to the contractual choices of public bodies and the private entities they chose to do business with to the

[184]Free "Across the public/private divide: Accountability and administrative justice in the telecommunications industry" 9.
[185] Markus "What is public power: The courts' approach to the public authority definition under the Human Rights Act" in Jowell and Cooper (eds) *Delivering rights: How the Human Rights Act is Working* (2003) 77-114, 110.
[186] Beloff "Judicial Review – 2001: A prophetic Odyssey" 147.

detriment of an innocent recipient of a public service. It is in this regard that Hunt[187] strongly contends that:

> The very existence of institutional power capable of affecting rights and interests should itself be sufficient reason for subjecting exercises of that power to the supervisory jurisdiction of the High Court, regardless of its actual or would be source.[188]

Hunt drew support from Lord Steyn, who, writing extra-judicially, and in an apparent endorsement of *Datafin* and deprecation of *Aga Khan*, expressed himself as follows:

> In my view this is the true basis of the court's jurisdiction over the exercise of non-statutory powers. If this reasoning is correct, it calls into question the decision of the Court of Appeal that the Jockey Club is not amenable to judicial review. After all, those wanting to race horses had no alternative but to be bound by the rules of the Jockey Club. There is however, an even more important dimension. In an era when government policy is to provide public services, to contract out activities formerly carried out by public bodies and to put its faith in self-regulation, it is essential that the courts should apply a functional test of reviewability.[189]

There are some critical observations to make of this statement. First, reference to 'the decision of the Court of Appeal' was to the *Aga Khan* case. This is clear indication that there is some judicial sentiment in the higher courts that breaks ranks with the Court of Appeal decision in *Aga Khan*. Apart from the apparent self-destructing and contradictory standpoints taken by the Court of Appeal as indicated above, this pronouncement adds to the literature[190] that is critical of the correctness of the decision. Second, by recognising that those who wanted to race horses had no option but to abide by the prescriptions of the Jockey Club, is an acceptance that the Jockey

[187] Hunt "Constitutionalism and the contractualisation of government in the United Kingdom" 32-33.
[188] Hunt "Constitutionalism and the contractualisation of government in the United Kingdom" 32-33.
[189] Steyn "The constitutionalisation of public law" (1999) 1-14, 8.
[190] Sinclair "Judicial review of the exercise of public power" 197; Beloff, Judicial review – 2001: A prophetic Odyssey (1995) *Mod Law Rev* 143-159; Beloff and Kerr "Why Aga Khan is wrong" (1996) *JR* 30-33; Pannick "Judicial review of sports bodies" (1997) *JR* 150-153; Lewis *Judicial remedies in public law* 31; and more recently Cisneros "Challenging the call: Should sports governing bodies be subject to judicial review?" (2020) *The International Sports Law Journal* 18-35.

Club wielded monopolistic powers[191] and that decisions made in such circumstances should be amenable to judicial review. Third, his Lordship gave his imprimatur to the functional test propounded in *Datafin*, especially in situations of outsourcing or contracting out of public services, for purposes of finding amenability to judicial review. In all the circumstances, the judge stopped short of expressly denigrating the Court of Appeal for the narrow approach it adopted in *Aga Khan.*

In the United Kingdom especially, such outsourcing or contractualisation has been encountered in the context of the Human Rights Act of 1998. As discussed above contractualisation means simply the process by which essential services, which the government has an obligation to provide, are hived off, or contracted out to private bodies. As Craig puts it, a situation of the 'applicability of the HRA to those situations where a public authority has contracted out the provision of services'.[192] This segment of the chapter discusses the amenability to judicial review of decisions of the entities to which services envisaged under the HRA have been contracted. The question of whether the entities to which services have been outsourced should be subjected to judicial review has generated mixed reactions both in case law and academic commentary. It is thought the court has been too rigid and tending to rely on the source of power test when the circumstances cried out for a liberal application of the determining factors for judicial review. Just to bring the Act into proper perspective, the Act was enacted to bring into domestic application in England, the provisions of the European Convention on Human Rights (ECHR). This had to happen since in England, being a dualist state, international conventions to which the State is a signatory do not automatically become part of the domestic law unless incorporated

[191] In the mould formulated by Campbell "Monopoly power as public power for the purposes of judicial review" (2009) *LQR* 491-521. That the Jockey Club was exercised monopolistic powers was actually accepted by the Court of Appeal. See the opinion of Farquharson LJ at 871.

[192] 551. This position has received judicial imprimatur in *R (on the application of Heather) v Leonard Cheshire Foundation,* where it was held that: 'Privatisation means, in general, that functions formerly exercised by public authorities are now carried out by non-public entities, often for profit'. Per Stanley Burnton J, at 237.

by an Act of Parliament.[193] Having enacted the Act, the benefits under the Convention would now have to be delivered to deserving citizens. The Act requires public authorities to act in a way that is compatible with any Convention right.[194] 'Public authority' is not defined. However, the Act provides that

> In this section "public authority" includes –
>
> (a) a court or tribunal, and
> (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.[195]
>
> In relation to a particular act, a person is not a public authority by virtue only of subsection 3 (b) if the nature of the act is private.[196]

The Act does envisage that certain non-public bodies will provide essential services when they 'perform functions of a public nature.' In order to bring proceedings under review, an applicant would have to establish that the service provider is a 'public authority' or a person performing 'functions of a public nature'. These questions, arising from the privatisation and contractualisation of the state have been said to be of 'the most important questions in public law today'.[197] It remains now to see how the courts have not only responded to this privatisation of a public service, but also how they have interpreted the phrases 'public authority' and 'functions of a public nature' for the purposes of determining jurisdiction.

It is not necessary to discuss the individual cases that came before the courts for determination. The volume of case law has been rising overtime, but there is hardly a coherent test that has emerged on the definition of a public authority or of a function of a public nature. Even then, there is a tendency in some cases to treat a 'function of public nature' and a 'public function' as if the same were interchangeable for purposes

[193] *British Railways Board v Pickin [*1974] AC 765(HL). See also Higgins 'United Kingdom' in Jacobs and Roberts (eds) *United Kingdom National Committee of Comparative Law, The effect of treaties in Domestic Law* (1987).
[194] Section 6(1).
[195] Section 6(3)
[196] Section 6(5).
[197] Per Moses J in *R v Servite Houses and Another ex p Goldsmith and Another* [2001] LGR 55, 67.

of the Act. This has compounded the difficulty in ascribing meaning to section 6 of the Act, because, although the two are closely related to one another, they may differ in nature and scope.[198] That said, the quartet[199] of the first cases illustrates the challenges encountered in determining whether or not to accept revisionary jurisdiction in individual cases and the inconsistency attendant upon reliance on the common law for definitions. The disparate standpoints in the cases identified is similarly reflected in differing accounts in literature interpreting those decisions.[200] There seems to be some agreement, that section 6 introduces two types of public authorities; the 'standard public authority'[201] and 'functional public authorities'[202] There is less controversy with the former, because once identified as such, judicial review is necessarily available in respect of their decisions. The only difficulty lies in identifying them as such. The question will have to be resolved by the common law. For example, in *Aston Cantlow*, Lord Nicholls, accepting that the expression 'public function'[203] in section 6(3)(b) of the Human Rights Act was given a generously wide scope, and in an attempt to establish functions of a public nature, proceeded as follows:

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[198] The distinction is spelt out by Oliver "Functions of a public nature under the Human Rights Act" (2004) *PL* 329-351, 335-338.

[199] In the order of occurrence these are *Poplar Housing and Regeneration Community Association v Donoghue* [2002] QB 48 (hereinafter '*Donoghue*'); *R (on the application of Heather) v Leonard Cheshire Foundation* [2002] 2 ALL ER 936 9 (hereinafter '*Leonard Cheshire*'); *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] 3 WLR 283 (hereinafter '*Aston Cantlow*') and *YL v Birmingham City Council and Others* [2007] UKHL 27 (hereinafter '*YL*').

[200] There is, understandably, significant literature on this issue. As the first piece of legislation seeming to import the public/private law divide in determining jurisdiction, it is not surprising that such academic interest would have been generating following the discussion in common law, culminating in *Datafin*. Some of the works include Oliver "The frontiers of the state: Public authorities and public functions under the Human Rights Act" (2000) *PL* 476-493; Craig "Contracting out, the Human Rights Act and the scope of judicial review" (2002) *LQR* 551-568; Markus "What is public power: The court's approach to the public authority definition under the Human Rights Act" in Jowell and Cooper (eds) *Delivering rights: How the Human Rights Act is working* (2003) 77-114; Oliver "Functions of a public nature under the Human Rights Act" 329-351; Sunkin "Pushing the frontiers of Human Rights protection: The meaning of public authority under Human Rights Act" (2004) *PL* 643-658; Meisel "The *Aston Cantlow* Case, blots on English jurisprudence and the public/private law divide" (2004) *PL* 2-10; McDermont "The elusive nature of the 'public function': *Poplar housing and regeneration Community Association Ltd v Donoghue"* (2003) *MLR* 113-123 to mention a few.

[201] As per section 6(5).

[202] As per section 6(3)(b). The difference has been laid down thus: 'True public authorities have been referred to as standard or core public authorities, whereas private bodies certain of whose functions are functions of a public nature are commonly referred to as functional or hybrid authorities'. See Oliver, "Functions of a public nature under the Human Rights Act" 330. This is supported by Clayton and Tomlinson *The law of human rights* (2000) 189.

[203] This is not entirely accurate as the expression used is 'functions of a public nature'. See Oliver, "Functions of a public nature under the Human Rights Act" 335-338.

> What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors 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.[204]

In *YL*, after citing Lord Nicholls' statement above with approval, Baroness Hale underscored that:

> While there cannot be a single litmus test of what is a function of a public nature, the underlying rationale must be that it is a task for which the public, in the shape of the state, have assumed responsibility, at public expense if need be, and in the public interest.[205]

Just like the common law before the enactment of the HRA, the criteria to be applied in determining the features of a 'functional public authority' are wide, and uncertain. It is not surprising that the courts have adopted inconsistent standpoints in cases where they reach the same decisions.[206] This is evidenced by the views of a clearly divided panel in *YL*. The commentators also differ in their interpretation of the case law and what the position should be.[207] Although there was very little reference[208] to *Datafin* in two House of Lords decisions in *Aston Cantlow* and *YL*, the factors on which they rely in arriving at their decisions are not far removed from those laid down in *Datafin,* in particular the element of 'publicness' of a decision of a body that is not otherwise a traditional public body for purposes of finding revisionary jurisdiction. To the extent that *Datafin* recognised that some private bodies could perform public functions and be amenable to judicial review, it is submitted that those private bodies

[204] Para 12.
[205] Para 65.
[206] As in *Aston Cantlow* (Lord Scott was an outright dissentient).
[207] Oliver "Functions of a public nature under the Human Rights Act" 329-351 differs with the position taken by Craig "Contracting out, the Human Rights Act and the scope of judicial review" 551-568 in several respects. Craig, at 556 takes the view that if a private body does the same thing as a public body might do, it would be performing a public function. Oliver, at 340, differs and argues that not everything that public authorities do is a function of a public nature.
[208] There was no reference to *Datafin* at all in *Aston Cantlow*. However, in *YL,* only Lord Mance dealt with some of the postulates in *Datafin* and seemed (with some equivocation it is submitted) to approve of the bases for identifying the 'publicness' of a decision. See paras 101-102.

identified fit very well with those 'functional public authorities' envisaged at section 6(3)(b) of the HRA. The decisions interpreting section 6(3)(b) are therefore implicitly premised on and have *Datafin* as the springboard, although no reference to *Datafin* was made. However, as one reads through the decisions, even submissions of counsel, the *Datafin* spirit, with all its attendant imperfections, looms large. With the House of Lords not providing consistent guidelines on the basis of which to identify a functional public authority, it may be anticipated that decisions will in the future rest on the attitude of a particular bench, and at worst be a matter of feel for the particular presiding officer.[209] This is generally the problem that inheres in reliance on the common law in terms of which decisions of courts are only binding on lower ones but not on themselves, and courts may even decide to overturn their own decisions.[210] From the cases surveyed, it is difficult to extract a coherent pattern or guiding standard in identifying a functional public authority. That said, Markus has crystallised general factors which she suggests are general propositions to be derived from case law. She says:

> 'There will be a public function where there is:
> - statutory authority for what is done;
> - statutory responsibility imposed on the body in question in respect of the body's core functions;
> - true delegation or sharing of powers or functions by the public body;
> - close proximity between the body in question and the public body including a degree of control over the functions of the body in question by the public body;
> - public funding for the activity in question.'[211]

[209] *R (on the application of Tucker) v Director General of the National Crime Squad* [2003] EWCA Civ 57 para 14.

[210] In *Kweneng Land Board v Mpofu and Another* [2005] 1 BLR 3, the Court of Appeal of Botswana overturned its own previous decision in *Kweneng Land Board v Kabelo Matlho* [1992] BLR 292; See Fombad "Highest Courts departing from precedents: The Botswana Court of Appeal in *Kweneng Land Board v Mpofu and Nonong*" (2005) *University of Botswana Law Journal*, 128-139. In *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119, the House of Lords invoked the *nemo judex in re sua* principle to overturn its own previous decision in *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No 1)* [2000] 1 AC 61.

[211] Markus "What is public power: The court's approach to the public authority definition under the Human Rights Act" 98-99.

She concludes by adding that 'The fact that a body is subject to statutory regulation in the performance of its functions does not necessarily indicate a public function and may, in some circumstances militate against it'.[212] Circumstances in individual cases will of course determine the application or non-application of one or more or all of the factors, and indeed the consideration of novel factors in addition to those specified. It will be an ever developing field of law.

7 Conclusion

This chapter has sought to demonstrate that although traditionally, decisions of private bodies were outside the scope of judicial review, they are or may be reviewable following the Court of Appeal decision in *Datafin* in which it was held that if a decision of a private body had some public ramifications, it would be reviewable. This would in turn depend on the function that the body exercises. The test for reviewability shifted from the nature of the body, which depended largely on the source of power of the body in question, to a functionality test based on the function performed. Thus a shift occurred in *Datafin*. It has to be stated though, that even before *Datafin*, there had been certain judicial inclinations, notably those of Lord Denning, to extend judicial review to decisions of private bodies. *Datafin* was therefore the Court of Appeal's imprimatur to ideas that had hitherto been developing. In this regard, *Datafin* did extend the scope of judicial review to bodies which were outside the reach of review by reason of the application of the source of power test.

However, it would appear that *Datafin* did not completely alter the direction of the law as many courts, even lower ones, although recognising the determining factors it laid down, still relied on the pre-*Datafin* position that was anchored on the consensual submission to jurisdiction test in order to exclude judicial review. Some seemed, without being express or emphatic, to reject *Datafin*. Yet many others have followed

[212] Markus "What is public power: The court's approach to the public authority definition under the Human Rights Act" 99. If regulation exists to ensure the delivery of a service, it may be an indication that the function is public. But if it is merely to enforce minimum standards upon private activities, it is likely not to be considered public.

Datafin. The position then is that it is possible to have decisions of private bodies judicially reviewed depending on the inclinations of the judge presiding. This leads to uncertainty. Unfortunately there is no decision from the House of Lords or Supreme Court on the point. But one may take comfort in the fact that the reasoning in *Datafin* was approved of by Lord Mance in *YL,* a case which was decided in the context of determining a public authority under the Human Rights Act of 1998. It is hoped this will provide some impetus for solidifying the applicability of judicial review of decisions of private bodies. This would be the case with the surge in situations in which governmental or general public functions are now being delegated to private bodies. This is what is described as 'privatisation' or 'contractualisation' of public functions. It would be unjust to deny judicial review in cases where it previously existed on the basis only that the function is now being performed by a different entity. Contractualisation is another space in which the courts have been prepared to extend the reach of judicial review by reason that the bodies to whom public powers have been contracted, although they are private in nature, are nevertheless exercising public functions and therefore reviewable.

The Human Rights Act can be seen as the deliberate statutory extension of judicial review to bodies beyond the traditional public authorities. For convenience, these have been described in both literature and case law as functional public authorities. It has been demonstrated that the determination of a functional public authority takes on much the same principles arising from the common law. It is not feasible to lay down a comprehensive test on the range of factors to be taken into account. This is a position that must necessarily obtain when the legislature leaves the question of definitions to the courts. That said, it would be helpful if the courts issued coherent guidelines in that regard, which they have unfortunately not done so far. But there is no doubt that the scope for judicial review has definitely expanded with the acceptance that even private bodies may now be subject to judicial review.

The next chapter discusses the position of the law in Botswana and how it has developed in relation to the issue of judicial review of decisions of private bodies.

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CHAPTER 6

EXTENSION OF JUDICIAL REVIEW TO DECISIONS OF PRIVATE BODIES IN BOTSWANA

6.1 Introduction

The objective of this chapter is to investigate how decisions of private bodies are treated in Botswana in relation to the question of judicial review. The legal position in Botswana is to some extent discussed in Chapter Two. What emerged from that discussion is that the general legal position in Botswana has been shaped by the country's colonial and political history. Therefore, the law has been influenced and continues to be influenced by both English law and Roman-Dutch law. This influence is evident both at the procedural and substantive levels.[1] It is not necessary for purposes of the present discussion to traverse the various permutations on matters of procedure – the purpose being to discuss the reviewability or otherwise of decisions of private bodies. However, the general framework for the application of the process of judicial review will be discussed in order to set the scene and context of the narrow question on amenability to judicial review of decisions of private bodies. It will be evident that even at the substantive level, both English law and Roman Dutch law have been relied upon and applied in Botswana.

6.2 The legal framework for judicial review in Botswana

The state of Botswana was established by a constitution adopted on the 30th September 1966, which is Botswana's Independence Day. The Constitution establishes the High Court for Botswana and clothes it with jurisdiction in the following terms:

[1] The case of *Tiro v The Attorney General* (2) [2013] 3 BLR 490 sought to harmonise certain conflicting decisions in Botswana as to the proper procedure in mounting judicial review.

> There shall be for Botswana a High Court which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.[2]
>
> -
>
> -
>
> The High Court shall have jurisdiction to supervise any civil or criminal proceedings before any subordinate court or any court-martial and may such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court.[3]

On the basis of the above provision, the High Court clearly has jurisdiction to entertain reviews. This scope of the jurisdiction is quite wide. The conferment of powers to issue *writs* reflects the colonial heritage of the Constitution as it is modelled around the High Court in England which has always had powers to issue the prerogative writs discussed in the earlier chapters. The jurisdiction to '*ensure that justice is duly administered*' seems to confer, without expressing it, the inherent jurisdiction which both the High Court in England and the Supreme Court in South Africa, always had as discussed in the previous chapters. Subject to what will be said about the Industrial Court below, it is the only court with jurisdiction to entertain reviews, with appeals lying to the Court of Appeal. Unlike South Africa, there is no direct statutory framework for the exercise of revisionary jurisdiction in Botswana. The exercise of revisionary jurisdiction is however facilitated by subordinate legislation in the form of Rules of Court promulgated by the Chief Justice in the exercise of statutory powers conferred by the High Court Act.[4] The latest set of Rules was promulgated in 2011.[5] Of particular relevance is Order 61 which is in the following terms:

> Except where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any magistrates court and of any tribunal, board or

[2] Section 95(1) of the Constitution.
[3] Section 95(5) of the Constitution.
[4] Cap (04:02). Section 28 thereof provides that the Chief Justice may make rules for the pleading, practice and procedure in the High Court, including matters incidental thereto.
[5] Statutory Instrument No 1 of 2011.

> officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion.[6]

The import of this order was explained briefly in *Nyoni v The Chairman, Air Botswana Disciplinary Committee and Another*[7] as merely regulating the procedure to be followed, and not to exclude an applicant's common law right to review. In further extrapolation of the rule, Maripe[8] has said:

> The phrase 'except where any law otherwise provides', in Order 61 rule 1 appears to suggest that proceedings to review the decisions of the bodies mentioned therein may be brought in more ways than one, provided that in addition to the procedure under the order, some other law makes provision for the same purpose. Secondly, the fact that a procedure for challenging on review the proceedings as stipulated means only that in order to review the described proceedings, compliance with the order will be necessary. It does not suggest that review of proceedings of bodies not described is necessarily excluded. It cannot therefore be construed as an ouster, for it could only suggest that proceedings to review decisions of private bodies do not have to be in terms of Order 61 rule 1. Hence any procedure competent under a different law (and this is what is contemplated by the phrase ('except where any law otherwise provides')) is still recognised and legally competent. In this regard, it is submitted that the common law would still be applicable as the promulgation of Order 61, was not meant to herald a complete break with the past but was meant to complement an already existing system. This would therefore mean that Order 61 does not exclude review of decisions of private bodies.

To the extent that Order 61 recognises reviews under the common law, it is perfectly in line with Section 95(1) of the Constitution as the latter accepts jurisdiction of the High Court in civil proceedings '*under any law*'. The High Court does recognise its revisionary jurisdiction arising from the common law. Interpreting Order 61 in *Sorinyane v Kanye Brigades Development Trust and Another*[9] (hereinafter '*Sorinyane*')

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[6] Order 61 Rule 1 of the High Court Rules.
[7] [1999] 2 BLR 15.
[8] Maripe "Judicial review and the public/private body dichotomy: An appraisal of developing trends" (2006) *UBLJ* 23-56, 49-50.
[9] [2008] 2 BLR 5. The High Court's common law jurisdiction was also recognised by Kirby J (as he then was) in *Patson v The Attorney General* [2008] 2 BLR 66 (HC) in respect of a challenge of the prerogative power to revoke a passport.

Kirby J (as he then was) held that 'In my judgment the expressions used in rule 1 must be widely interpreted to cover all bodies susceptible to common law review as well as public law cases'.[10] Within the context of the circumstances of *Sorinyane,* and as will be discussed more fully later, 'all bodies' included some private bodies.

The origins of judicial review in Botswana are traceable to the common law. The decision of the Appellate Division of the Supreme Court of South Africa in *Johannesburg Consolidated Investment Co v Johannesburg Town Council* (hereinafter '*JCI'*)[11] is often cited as having laid the platform for judicial review in Botswana. This is a case that was decided during the time when Botswana was still a British Protectorate. It is still relevant today, as it is in South Africa. It was said in that case:

> Whenever a public body has a duty imposed upon it by statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature. It is a right inherent in the court.[12]

This statement has been held to be a correct statement of the law in Botswana.[13] The case spells out the foundation of the court's jurisdiction on review; the inherent jurisdiction of the court. Such jurisdiction is a necessary adjunct of the Court by the very and only reason of its existence. 'This is a jurisdiction that the High Court has by reason of it being a superior court of record which it exercises in certain circumstances without the need to point out to the particular source of the power.'[14] It inheres in the court. Writing on the inherent jurisdiction of the court, Taitz says;

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[10] 11.
[11] 1903 TS 111.
[12] 114 per Innes CJ.
[13] *State v Moyo and Others* [1988] BLR 113; *Sorinyane*, *Bergstan (Pty) Ltd v Botswana Development Corporation Limited and Others* [2012] 1 BLR 858 just to mention a few. In *Moyo*, in adopting the words of Innes CJ in the *JCI* case, Hallchurch J, at 117 said '…the High Court of Botswana has inherent powers to review any matter which arises in proceedings in a subordinate court. Inherent powers mean those powers reasonably necessary for the administration of justice and are powers over and beyond those explicitly granted in the Constitution.'
[14] Maripe "Contempt of court in *facie curiae*: Problems of justification, application and control with reference to the situation in Botswana" (2016) *Criminal Law Forum* 291-329, 307.

> ... [it exists] as a separate and independent basis for jurisdiction, apart from statute or Rules of court. … it stands upon its own foundation and the basis for its exercise is ... to prevent oppression or injustice in the process of litigation and to enable the court to control and regulate its own proceedings ... [it] is a necessary part of the armoury of the courts to enable them to administer justice according to the law. The inherent jurisdiction of the court is a virile and viable doctrine which in the very nature of things is bound to be claimed by superior courts of law as an indispensable adjunct to all other powers ... it operates as a valuable weapon in the hands of court to prevent any clogging or obstruction of the stream of justice.[15]

There is authority to the effect that the High Court in Botswana, as a superior court of record,[16] has inherent jurisdiction which it exercises in the absence of any specifically conferred jurisdiction to dispense justice.[17] It is some kind of default power exercisable only when no other options exist to ensure the making of appropriate orders as the circumstances dictate. This power is recognised in England[18] and was adopted as part of the common law at the Cape of Good Hope.[19] It would, therefore, have been an aspect of the law received in Botswana as discussed at Chapter 3.[20] This makes the common law a source of the High Court's power to entertain judicial review.

Commenting on the statement in the *JCI* case, Wiechers has said that the

> … inherent power of review of courts hold good for the proceedings and actions of voluntary associations and bodies as well; it is in this very sphere that some of the rules of administrative law find application in these private law associations.[21]

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[15] Taitz *The inherent jurisdiction of the Supreme Court* (1985) 47. See also the pioneering work on the subject by Jacob "The inherent jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23-52.
[16] S 95(3) of the Constitution.
[17] Kakuli *Civil procedure and practice in the High Court of Botswana* (2005) 25-26 citing Taitz *The inherent jurisdiction of the Supreme Court* 9-10; Pistorius *Pollak on jurisdiction* 26-31.
[18] Jacob (1970) *CLP* 23-52.
[19] *Chunguete v Minister of Home Affairs* 1990 2 SA 836(W).
[20] Sanders (1985) *Lesotho LJ* 47- 67 discusses the reception of law in Botswana at some length.
[21] Wiechers *Administrative law* (1985) 266.

At this level, at least in South Africa, there is some acceptance by the academic community that judicial review is not limited to decisions of public bodies but extends to decisions of private bodies.[22] Taitz does not exclude it in respect of decisions of private bodies, while Wiechers expressly says decisions of private bodies, dubbed voluntary associations, are reviewable in the exercise of the court's inherent jurisdiction. We have seen more direct support for this standpoint by other South African authors in Chapter 5.[23] The position is succinctly spelt out by Devenish, Govender and Hulme,[24] who after spelling out that judicial review applies to administrative action, proceeded to define administrative action thus:

> Administrative action' is the conduct of public authorities and indeed private entities when they exercise public powers, perform public functions or are obliged to exercise authority in the public interest. This means that common-law review now only applies in a very narrow field in relation to private entities that are required in their domestic arrangements to observe the common law principles of administrative law. This applies to voluntary associations, such as sporting clubs and religious organisations.[25]

Later on in this chapter the reaction of the South African courts will be discussed briefly to establish its possible impact on the law of Botswana on judicial review.

In Botswana, however, while the courts accept the existence of the inherent jurisdiction, the statement in *JCI* has been interpreted in some cases to mean that only

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[22] Boulle, Harris and Hoexter *Constitutional and administrative law: Basic principles* (1989) 335. Baxter *Administrative law* (1985), Wiechers *Administrative law* (1985) 266, Taitz *The inherent jurisdiction of the Supreme Court* (1985) 47 to cite a few.

[23] Boulle, Harris and Hoexter *Constitutional and administrative law: Basic principles* (1989) 335. Baxter *Administrative law* (1985) 101 says:

> 'Even if it is decided that an institution is private and not public the result might not be substantially different. As a general principle, any private institution which exercises power over individuals is obliged to observe common law requirements which do not differ in principle from those applied to public bodies. Thus the courts have always been prepared to review the decisions of private or 'domestic' bodies such as the disciplinary tribunals of churches, trade unions or clubs and even the decisions of arbitrators.'

This is further supported by De Ville *Judicial review of administrative action in South* Africa (2005) 49-50 who posits that actions of voluntary associations of a coercive nature (with a potential for negative consequences) like disciplinary proceedings should be subject to the common law principles of review.

[24] *Administrative law and justice in South Africa* (2001).

[25] 25.

public bodies are subject to judicial review.[26] However, this is unduly limiting the reach of the statement. Jurisdiction should not be limited only to the review of decisions of inferior courts but should extend to all cases in which review is the appropriate remedy, where a body 'exercises authority over a person or body in such a manner as to cause material prejudice to that person or body'.[27] This, it is submitted, should and does include decisions of private bodies. This was accepted in *Sorinyane*, where Kirby J (as he then was) stated that whereas in England review was seen as a public law remedy, and ameliorated by some decisions, citing *R v Panel on Take-overs and Mergers, ex parte Datafin plc*,[28] in South Africa and Botswana where the Roman-Dutch common law applies, the position is different.[29] In this he relied on a statement from *The Law of South Africa*[30] (*LAWSA*) to the effect that:

> … where statutory bodies, such as road transportation boards, rent boards and valuation courts, as well as domestic tribunals, such as the committee of a voluntary association, fail to conduct their proceedings in a fair and just manner, the Supreme Court will intervene to ensure that the rules of natural justice are observed. This is an inherent (or common law) right which is not dependent upon the creation of review machinery by the legislature.[31]

With this, the tone would be set for the reviewability of decisions of private bodies on the basis of the court's inherent jurisdiction or the exercise of common law jurisdiction. However, this has not been followed consistently as the discussion below will demonstrate.

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[26] *Mogana and Another v Botswana Meat Commission* [1995] BLR 353; *Autlwetse v Botswana Democratic Party and Others* [2004] 1 BLR 230.
[27] Woolf "Judicial review. A possible program for reform" (1992) *PL* 221-237, 235. In expressing his support for the extension of judicial review to decisions of private bodies if the complainant has no alternative remedy, Lord Woolf, at 235 asks rhetorically 'Why should a policeman be in a better position than a sportsman or a Minister of religion?'
[28] (1987) 1 QB 815.
[29] 8.
[30] This is perhaps the South African equivalent of *Halsbury's Laws of England*.
[31] *LAWSA* (1985) 435. Cited in *Sorinyane* at 8.

6.3 The type of decisions subject to judicial review in Botswana

The position in Botswana, like in England and South Africa, for a long time leaned towards accepting jurisdiction in respect of decisions of public bodies by reason that they exercise public power. A statement in the South African case of *Pennington v Friedgood and Others*[32] to the effect that '"judicial review" is a remedy to curb improper or inappropriate exercise of public power'[33] is often cited in the courts of Botswana in support of this position.[34] What is glossed over or sometimes not referred to for reasons perhaps that it would not be an issue in particular cases, is the recognition by Hodes AJ of a narrow field under the common law which permits judicial review of decisions of private entities.[35]

This statement is a judicial expression for the reviewability of decisions of private bodies may in certain circumstances. It is also consonant with the position adopted by publicists as demonstrated above. In so far as the discussion now is in respect of the dominant position regarding review of decisions of public bodies, the case of *National Development Bank v Thothe*[36] is instructive. The respondent had challenged his dismissal, on review, from the employ of the appellant on grounds, *inter alia*, that he had not been afforded a hearing. The appellant is a bank established by statute[37] 'for the purpose of promoting the economic development of Botswana'[38] and in this regard provides a service to the general public. One of the issues before the court was whether or not the appellant was a 'public authority' for purposes of the suit before court. It would seem from a reading of the case that reference to 'public authority' actually meant 'public body' for purposes of review, as the proceedings had been

[32] 2002 1 SA 251 (C).
[33] 262, per Hodes AJ.
[34] *Autlwetse v Botswana Democratic Party and Others* [2004] 1 BLR 230, 236; *Mogare v Chairman, Public Service Commission and Another* [2007] 2 BLR 90, 96; *Botswana Association of Tribal Land Authorities v The Attorney General* [2007] 3 BLR 93, 98; *Du Preez v Debswana Diamond Company (Pty) Ltd and Others* [2012] 1 BLR 264 (CA), 267; *Gobusamang and Another v Botswana Police Service and Another* [2015] BLR 387, 389.
[35] 262.
[36] [1994] BLR 98.
[37] National Development Bank Act Cap 74:05.
[38] S 3(1).

commenced by a Notice of Motion as envisaged under Order 61. Counsel for the appellant had submitted, and the court accepted, that there is no definition of a public authority in any statute in Botswana.[39] In this, both counsel and the court were in error, or at least oblivious of the Public Authorities (Functions) Act[40] which sets out its objectives thus:

> An Act to provide for the exercise of functions by the President, Ministers, public officers, *public bodies*, and other authorities and for matters connected therewith[41] (my emphasis).

This Act is the only piece of legislation where public bodies or authorities are listed and thus provides a guide as to what public bodies or authorities are. It proceeds to provide:

> Where an enactment confers power to establish any board, tribunal, commission, council, committee or other body, corporate or unincorporated (in this Act referred to as '*Public body*') … [42] (my emphasis).

It was an omission not to have regard to this legislation as it was relevant and would have provided guidance on whether the appellant bank was a public body or authority for the purpose of determining revisionary jurisdiction. Clearly, it is a body set up with corporate status[43] and to serve a public function. That it is a statutory body would alone have determined its status as a public body amenable to judicial review.[44] This notwithstanding, in deciding on this issue, the court adopted the definition of a public

[39] 104.
[40] Cap 02:11 (1984)
[41] The Long Title of the Act.
[42] S 14.
[43] S 3(2).
[44] Generally, authors converge on this point. Some of those are Beatson "'Public' and 'private' in English administrative law (1987) *LQR* 34-65, 47; Pannick "What is a public authority for the purposes of judicial review?" in Jowell and Oliver (eds) *New directions in judicial review, current legal problems* (1988) 23-36, 27; Elliott "Judicial review's scope, foundations and purposes: Joining the dots" (2012) *NZLR* 75-111, 84-85; Costello, "When is a decision subject to judicial review? A restatement of the rules" (1998) *Irish Jurist* 91-119, 92-93.

authority in a leading dictionary as the guiding criteria in determining a public authority. It is to the following effect:

> A public authority is a body not necessarily a county council, municipal corporation or other local authority which has public or statutory duties to perform and which performs its duties and carries out its instructions for the benefit of the public and not for private profit. Such an authority is not precluded from making a profit for the general public, but commercial undertakings acting for profit and trading corporations making profits for their corporations are not public authorities even if conducting undertakings of public utility.[45]

In finding that the bank was a public authority, the court had regard to the purpose for which the bank was established,[46] that the governing board of the bank and the General Manager were appointed by the responsible minister and that all other officers of the bank were appointed by the board.[47] These are criteria that are usually employed in establishing whether an entity is a public body.[48] Since then the trend has been to first establish in any proceedings for review, whether the decision impugned is that of a public body.[49] In this regard, the position regarding amenability to judicial review was similar to that in England before the position shifted in that country. This position was laid down explicitly in *Autlwetse v Botswana Democratic Party and Others*.[50] By reason of the significance of this decision, a fuller discussion will follow. But first it is necessary to interrogate the earlier position regarding the review of decisions of private bodies.

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[45] Saunders *Words and phrases legally defined* (1969-70), 217. Another dictionary, Greenberg and Millbrook *Stroud's Judicial Dictionary of words and phrases* (2000), 2111 defines a public body as 'one, whether elected or created by statute, which functions and performs its duties for the benefit of the public, as opposed to private gain'. This is complemented in large measure in *Halsbury's Laws of England* (2001) under a section on Public bodies and Public authorities, thus:

> 'Broadly speaking, a public authority may be described as a person or administrative body entrusted with functions to perform for the benefit of the public and not for private profit' (12).

This position was accepted in *National Development Bank v Thothe* [1994] BLR 98, 104.

[46] '… promoting the economic development of Botswana.' 104.

[47] 104-105.

[48] De Smith, Woolf and Jowell, *Judicial review of administrative action* (1995) 170-172.

[49] *Mogana and Another v Botswana Meat Commission* [1995] BLR 353, 359.

[50] [2004] 1 BLR 230.

6.4 Decisions of private bodies in Botswana

It should be stated from the outset that although *Autlwetse* was the first case in which the reviewability of a decision of a private body was an issue raised for determination, and on which the court decided the matter, it was however, not the first case in which a decision of a private body was brought before a court on review. There are several decisions that were brought on review concerning decisions of private bodies.[51] In many of them the jurisdiction of the court on review was not raised, either by the parties or by the court itself. In some cases, the court made passing reference to the issue but in none of them was a party non-suited for want of revisionary jurisdiction. It is therefore important to survey the case law before *Autlwetse* to establish how the courts handled the matter.

6.4.1 Case law before Autlwetse

Before the *Autlwetse* decision, there were not many cases in which respondents sought to oust the revisionary jurisdiction of the court on the basis of the public/private body divide. In many of such cases which sought to challenge decisions of private or voluntary bodies on review, the proceedings went on as if the court were properly seized of the matter. The one significant case where this issue was raised is that of *Botswana Football Association v PG Notwane Football Club and Others*[52] which concerned a dispute between a football club (Notwane) on the one hand and another club and the umbrella association (Botswana Football Association (BFA)) charged with administering football matters on the other. Notwane had gone to court to challenge certain decisions of the association. It obtained an order in the High Court staying certain activities of the association, in particular, a prize-giving ceremony. The association nonetheless proceeded with the ceremony. In the main, the proceedings involved an application for contempt of court against the association. Of relevance was a point taken by the respondents that Notwane was not supposed to have instituted legal proceedings as it was bound by a clause in the constitution of the BFA that not

[51] These are discussed at Chapter 6.4.1 below.
[52] [1994] BLR 37.

only sought to oust the court's jurisdiction but also pronounced a renunciation by the association and members of the right to take disputes to court.[53] In response, the court said:

> The relationship between the association and the club is contractual. However, in so far as the provision may be interpreted to mean that the jurisdiction of the court is ousted and that it cannot enquire as to whether or not the principles of natural justice have been complied with, it is not binding on the member on the wording of Article XIX …. The article is not a direct ouster clause purporting to exclude the jurisdiction of the court. It merely records a renunciation of a right to go to court in sub article (b). ... Although a club has agreed to be bound by the terms of the Constitution and the rules relating to the settlement of disputes, it is entitled to approach the court if it feels aggrieved by the rules not having been applied in accordance with the principles of natural justice.[54]

What is interesting is that the challenge against the court's intervention was not presented in terms that the court had no jurisdiction to entertain the matter, but that the club was not entitled to approach the court for relief as it had bound itself in terms of its constitution. However, viewed in its entirety, regard being had to the clause relied on, it does appear that the objection was against the court entertaining the matter. However, the position of the court as quoted above is that the jurisdiction of the court on review is not excluded by the terms of the contract. Thus the submission to jurisdiction on contractual terms is not a basis for non-suit. To the extent that this concerned matters involving a voluntary association, this contrasts sharply with the position taken in the Jockey Club cases in England.[55] In context, the court assumed revisionary jurisdiction over a dispute arising from a contractual scheme entered into

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[53] Clause XIX of the BFA Constitution read in part:
'(a) Committees, members, clubs, or members of a club(s) shall not bring any dispute with another of the committee, another member, club or member(s) of club(s) before a court of law; such disputes shall be referred to arbitration ...
(b) The association and members hereby renounce the right to take a dispute before the courts.'

[54] Per Bizos JA at 59. He found support for this position in the South African decision in *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A).

[55] Such as *R v Disciplinary Committee of the Jockey Club ex parte Massingberd-Mundy* [1993] 2 ALL ER 207 (QB); *R* v *Jockey Club ex parte RAM Racecourses Ltd,* [1993] 2 ALL ER 225 (QB); *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan* [1993] 2 ALL ER 853 (CA); *R v Football Association Ltd ex parte Football League Ltd* [1993] 2 ALL ER 833 (QB); *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC Admin 2197.

voluntarily by the parties, even against express provisions prohibiting its intervention. Thus the affairs of a private body were subjected to judicial review.

In another matter, *Saleshando and Others v Botswana National Front and Another*[56] proceedings were brought to review the decision of the 2nd respondent (the President of the first respondent, a political party) dissolving the Central Committee of the 1st respondent to which the appellants belonged in what was perhaps the most ferocious factional dispute in a political party. The challenge was mounted on several grounds, including that the 2nd respondent had no power to dissolve the committee (*ultra vires* action) and that the decision violated the rules of natural justice as the appellants had not been given a hearing prior to the decision to dissolve the Committee. Both the High Court and the Court of Appeal ruled against the appellants. In both it was accepted that the rules of natural justice would have been applicable if the decision had not been taken in a situation of emergency. It was also held that on a proper construction of the party's constitution, the 2nd respondent's powers were sufficiently wide to include a dissolution of the Central Committee in appropriate circumstances. No point on the Court's revisionary jurisdiction was taken and the matter proceeded as if the court was properly seized of the matter. To the extent that the apex court entertained a challenge on review of decisions made by a political party, it is submitted, indicates acceptance of jurisdiction over decisions of private bodies.

In *Mabotseng and Others v National Amalgamated Local and Central Government and Parastatal Manual Workers Union*[57] the applicants had been expelled from the respondent union. They challenged, on review, that decision as unlawful and wanted it declared invalid or unlawful as they alleged it infringed the rules of natural justice, that the expulsion be set aside and that their membership to the respondent union be restored. There was no challenge to the jurisdiction of the court, it being conceded that a hearing was required to precede the expulsion, although it was argued that they

[56] [1998] BLR 457.
[57] [2002] 2 BLR 467.

should have exhausted local remedies before approaching the High Court. The matter came before Kirby J (as he then was) who proceeded as follows:

> It is now well established in our law that a domestic tribunal or body must act fairly in this way before taking an action which infringes upon or diminishes the rights or interests of a subject … It is true that members of the respondent union bound themselves to adhere to and to be governed by its constitution. But in the constitution of a friendly society or a trade union, as in a statute, where a power is given to make decisions adverse to the rights or interests of a person the court will imply a duty to hear the other side unless it appears from the express words used, or by necessary implication that this duty is excluded.[58]

He found that the expulsions were a nullity as they had been made without the applicants having been given an opportunity to meet the charges, upheld the application and granted the relief they sought. An appeal against the decision did not challenge the High Court's decision on the jurisdictional point and was dismissed by the Court of Appeal as it found that the process by which the respondents were expelled was totally flawed.[59] Thus the court's revisionary jurisdiction in matters involving voluntary associations or private bodies was recognised, and such decisions were in fact reviewed and in many cases set aside. Almost invariably, in cases where the court determined it had jurisdiction and set aside the decision impugned, it was on the basis of procedural impropriety (violation of rules of natural justice) or illegality (that the decision was *ultra vires* the powers of the decision-maker).[60] This is

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[58] 470.

[59] *National Amalgamated Local and Central Government and Parastatal Manual Workers Union v Mabotseng and Others* [2004] 1 BLR 58.

[60] The other grounds for review were never the basis for impugning a decision. In *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, the House of Lords provided a list of grounds upon which a decision would be set aside on review. Lord Reid said that a decision would be set aside if the tribunal

(a) has done something or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity,
(b) gave its decision in bad faith,
(c) made a decision which it had no power to make,
(d) failed to comply with the requirements of natural justice,
(e) misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some other question not remitted to it,
(f) refused to take into account something which it was required to take into account and
(g) based its decision on some matter which, under the provisions setting up, it had no right to take into account. At 171.

His Lordship did emphasise that the list was not intended to be exhaustive.

consistent with the position in England. So it appears that the court did exercise powers on review in respect of decisions of private bodies before *Autlwetse.*

6.5 The decision in *Autlwetse v Botswana Democratic Party and Others* and its impact on the private/public body divide

This was perhaps the first case in Botswana in which the public/private body distinction for purposes of determining amenability to judicial review fell for determination by the court.

6.5.1. The factual background

The case concerned a challenge on review of a decision of a political party, the Botswana Democratic Party (BDP). It was a challenge on the party's internal process of selecting its candidates for the 2004 general elections. The selection system was provided for under the party's 'Primary Elections Rules and Regulations', adopted in terms of the BDP Constitution (hereinafter 'regulations') which were approved at the party's congress in 2001. The selection criterion was through secret ballot elections. The victorious candidate would then stand at the general election as the party's Parliamentary candidate. As this is a contest, and being alive to the possibility of grievances and disputes arising, the party provided a mechanism for redress in the regulations, which was to the following effect:

> Any person who believes he or she has been prejudiced by any alleged irregularities or improper conduct, has a right of appeal first to the Regional Committee, and from there to the Central Committee, and in some instances may appeal directly to the Central Committee.[61]

[61] Regulation 10.

Regulation 11 is to the effect that 'any decision on an appeal by the Central Committee shall be final and binding'.

Mr Autlwetse, together with four others, was a candidate at the primary elections held on the 6th December 2003. He polled the highest number of votes and was declared the winner. Aggrieved by the results, the other candidates complained about the conduct of elections at one of the wards (Tshimoyapula), challenging the authenticity of the results. In addressing the complaint, the Central Committee appointed a technical team to consider the complaints and make recommendations. The report of technical team recommended that the Tshimoyapula ward result be nullified set aside and that there be a re-election. The effect of this would be to keep the overall constituency result in abeyance until the results of the re-run were in. The Central Committee accepted the recommendation and the necessary directions were made. Mr Autlwetse participated in the re-run. At the end of the process Mr Seretse was declared the winner in the ward and the overall winner in the constituency. Aggrieved by the outcome, Mr Autlwetse appealed through the party's appeal machinery to have the re-run results overturned to no avail. He then launched review proceedings in the High Court seeking *inter alia,* a review and setting aside as unlawful the decision of the BDP Central Committee refusing to annul the Tshimoyapula results, setting aside the results of the whole constituency, and directing and ordering the BDP (through the Central Committee) to hold elections afresh in the whole constituency. He contended that the BDP'S refusal to annul the results was 'arbitrary', 'capricious', 'grossly unreasonable' and 'irrational'. In essence he was seeking a review of the decision of a political party.

6.5.2 The points of contestation in the High Court

The matter came before Collins J, before whom a preliminary point was taken in terms that, in as much as the decision impugned was that of a political party, a voluntary association, it was not amenable to review. It was further submitted for the

respondents that even if decisions of political parties could be reviewed, 'the BDP would have to have performed an administrative act'[62] for its decision (refusing to annul the results) to be properly the subject of judicial review. Mr Autlwetse on the other hand argued that the court 'has inherent power to intervene on review and prevent injustice in connection with the proceedings of non-statutory quasi-judicial bodies because they fall within the purview of the bodies referred to in Order 61 Rule 1.'[63]

Thus in essence the parties' contestations centred on a ouster of revisionary jurisdiction on the one hand, and a justification for accepting and seizing revisionary jurisdiction of the other.

6.5.3 The Court's determination

Collins J's point of departure was the statement in *Pennington* to the effect that 'Judicial review is a remedy to curb improper or inappropriate exercise of public power,'[64] which he regarded not only as a 'general principle' but also as a 're-statement of something trite'.[65] Then he had regard to the provisions of Order 61 Rule 1, which he said the applicant must satisfy, as follows:

> In terms of the common law, and as part of Autlwetse's requirement to establish grounds for review, he must show that the decision of which he complains and which he seeks to review is a decision of … any tribunal, board or officer performing judicial, quasi-judicial or administrative functions …[66]

But then he went on to hold that: 'A political party is not a public body and does not perform administrative acts'.[67] Having removed the BDP from the ambit of Order 61 Rule 1, the judge held further that the BDP as a political party could not exercise public

[62] 237.
[63] 235-236. Order 61 Rule 1 provides: 'Except where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any magistrates court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion'.
[64] 262.
[65] 236.
[66] 235. The judge indicated this would be required under Order 61 Rule 1.
[67] 236.

power, and that in any event 'political parties have never been held to be subject of administrative law principles ...'[68] and that the:

> BDP when deciding on Autlwetse's appeal, acted in terms of its powers under regulations i.e. within the constraints of its own internal mechanisms which cannot, in my view, be regarded as exercising public power ...[69]

and in excluding the decision of the BDP from the purview of judicial review, he said:

> We must remember that we are dealing here with a political party whose requirement for membership is voluntary on the basis of adherence to the party's policies and programmes. The question which arises is whether such an organization (or more accurately its officers) performs quasi-judicial or administrative functions in such a way as to render it subject to judicial review at the hands of this court. In the case of a voluntary society, such as a political party, the members of the society are bound by the constitution thereof which is another way of saying that they are contractually bound by the terms of that constitution and in particular they are bound to bring any complaint which any member may have before the proper domestic tribunal appointed in terms of that constitution.[70]

In conclusion on the jurisdictional point, the judge said:

> … I take the view that the decision of the BDP refusing to annul the outcome of the Tshimoyapula ward re-run primary election held on the 3 April 2004 is not properly the subject of a review application precisely because of the nature of the BDP as a political party.[71]

6.5.4 Analysis

The judge made no attempt to unpack the elements of 'judicial, quasi-judicial or administrative functions' but nonetheless accepted that the impugned decision was a

[68] 237.
[69] 238.
[70] 236.
[71] 238.

quasi-judicial one.[72] Given that the decision prejudicially affected the applicant as it denied him the opportunity to stand as a candidate for his party and by extension erasing chances of potentially becoming a Member of Parliament, the categorisation of the decision as quasi-judicial was apt in the circumstances.

The upshot of this was to say that disputes arising from decisions of voluntary societies, whose members are bound together by contract, are ill-suited for resolution by the courts, and in particular by the process of judicial review. Although not stated as such, this was implicit reliance on and following the reasoning in *R v Criminal Injuries Compensation Board ex parte Lain*[73] where Lord Parker CJ said:

> Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is from the agreement of the parties concerned.[74]

Although not referred to, this would be the same reasoning employed in the several jockey club cases in England in denying judicial review.[75] The judge referred to and apparently disregarded South African cases which accepted revisionary jurisdiction of decisions in jockey club cases.[76] This preference was never explained. Thus the decision of the BDP, and of political parties in general, was excluded from the purview of judicial review, on four bases; first, that the BDP was a voluntary association whose membership is bound by agreement and therefore its decisions could not be challenged on review; second, that political parties are not public bodies; third, that political

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[72] 235.
[73] [1967] 2 ALL ER 770.
[74] 778.
[75] *Law v National Greyhound Racing Club* [1983] 1 WLR 1302 (CA); *R v Jockey Club ex parte RAM Racecourses Ltd* [1993] 2 ALL ER 225 (QB), 244; *R v Disciplinary Committee of the Jockey Club ex parte Massingberd-Mundy* [1993] 2 ALL ER 207 (QB); *R v Football Association Ltd ex parte Football League Ltd,* [1993] 2 ALL ER 833 (QB); *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan* [1993] 2 ALL ER 853 (CA); *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC Admin 2197.
[76] *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A); *Forbes v Jockey Club of South Africa* 1993 (1) SA 649 (A). Instead, the judge placed reliance on decisions which disavowed jurisdiction in respect of decisions of political parties such as *Bushbuck Ridge Border Committee and Another v Government of the Northern Province and Others* 1999 (2) BCLR 193(T); *Marais v Democratic Alliance* 2002 (2) BCLR 171 (C); *Van Zyl v New National Party and Others* 2003 [1] BCLR 1167 (C), although the judge was alive to the view taken in the latter case that 'it is not an absolute rule that the court is precluded from applying the rules of natural justice to decisions of a political party' (1185 G).

parties do not perform administrative acts, and fourth, that they do not exercise public power. These are the bases that were used traditionally to exclude decisions of private bodies from the reach of judicial review in England and which have since been jettisoned in that country as was discussed at Chapters 3, 4 and 5. The only basis not discussed previously would be the judge's view that 'A political party… does not perform administrative acts'.[77]

The *Autlwetse* case was decided on the basis of the old categorisation of public and private bodies, and the resultant reasoning that judicial review does not apply to private bodies. From the traditional criteria for establishing the 'publicness' of a decision of a private body for the purpose of determining its reviewability, as discussed at Chapter 5, (that is, whether the aggrieved person has consensually submitted to be bound by the decision-maker; the 'but for' test; acquiescence or encouragement of the vocation by government; whether the body in question is exercising extensive or monopolistic powers; and the floodgates argument) reliance was placed on the first one, which was decisive.

It is submitted that the BDP imports some 'publicness' in its decisions to attract the revisionary jurisdiction of the court having regard to the nature of its functions and the space in which it operates. Its regulations were adopted by the Party Congress in terms of its constitution, which anticipates complaints regarding its proceedings and vests power (quasi-judicial) on the Central Committee to make decisions which either confer or take away a privilege. In all the circumstances, these are similar in operation and effect to what Lord Denning MR had in mind when, in describing the rules of a trade union, another private body, he held in *Breen v Amalgamated Engineering Union*[78] that:

> These committees are domestic bodies which control the destinies of thousands. They have quite as much power as the statutory bodies … They can make or mar

[77] 236.
[78] [1971] 2 QB 175.

> a man by their decisions. Not only by expelling him from membership, but also by refusing to grant him a license or to give their approval[79]

So in the case of the BDP, any misapplication of the rules would shatter a member's ambition to rise on the political ladder to eventually occupy a seat in the legislature. In their operation and effect, as between the membership of the party, the rules fit neatly into Lord Denning MR's mould in *Breen* when he said:

> Their rules are said to be a contract between the members and the union. So be it. If they are a contract, then it is an implied term that the discretion should be exercised fairly. But the rules are in reality more than a contract. They are a legislative code laid down by the council of the union to be obeyed by the members. This code should be subject to control by the courts just as much as a code laid down by parliament itself.[80]

The party in *Autlwetse* made a decision which denied a member the right to contest elections, and to become a member of the country's Parliament, a body which has under the country's Constitution, supreme legislative powers.[81] This submission is made with full appreciation that anybody who wishes to be a Member of Parliament does not have to go through the processes of the BDP. They can join other political formations, or form their own, or stand as an independent candidate. But this ignores the fact that membership to political organisations is based on one's adherence to the policies and programmes that a particular party propagates, and which would in most cases be diametrically opposed to those of other political formations. So choice may be limited in this regard. Maripe argues thus:

> Since the *raison d'être* for a political party is the assumption of state power, and in the case of the BDP, it has enjoyed state power since independence in 1966, the party's sphere of operation is to all intents and purposes in the public arena,

[79] 190.
[80] 190.
[81] Section 86 of the Constitution of Botswana.

> and therefore its affairs cannot entirely be classified as purely private arrangements.[82]

It is the policies and programmes of the party that drive the country or national developmental agenda. As Maripe again opines:

> In this regard, it is clear that the functions of the party, its objectives, and the sphere of its operation, should suggest that it is a private body of a special kind, or at least in the circumstances should be accorded *sui generis* status in the sense that its *raison d'être* is the assumption of governmental (public) power and therefore its activities import a sufficient public-law element,…. to permit of judicial review.[83]

Although the election result was of interest to the individual member (in this case Mr Autlwetse) personally, it is in a sense a representative interest as constituents elect their own representatives after an assessment as to who can best represent them, a process that begins at the primary elections level. Mr Autlwetse was standing at the behest of a large number of people who wanted him to represent them. Although it is a private body, the decisions of the Central Committee (and by extension the party) impact a wide spectrum of public life. Thus, regard must then be had to the effect, implications and consequences of the decision. In the particular case, denial of review remedies would have meant that the applicant's relief would have been an action, instituted by way of a writ of summons, which would then entail enrolling the matter for trial, which would only be heard long after the general elections, and thus at a time when there would be no effective relief[84] or the relief sought would largely be academic. Viewed in this light, allegations that the domestic tribunal (or in this case the BDP through its Central Committee) has disregarded or violated fundamental

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[82] Maripe "Judicial review and the public/private body dichotomy: An appraisal of developing trends" 51. The judge seemed to accept this when he acknowledged that: 'having held the reins of political power in free and democratic elections ever since our independence nearly 40 years ago. This track record has earned it almost iconic status in the modern era of parliamentary-style democracy. That status may appear to some sufficiently daunting that the BDP has acquired attributes of a public body. That would not be surprising but it would be completely wrong' 236.

[83] Maripe "Judicial review and the public/private body dichotomy: An appraisal of developing trends" 51.

[84] This principle was applied in *R v Secretary of State for the Home Department, ex parte Benwell* [1984] 3 ALL ER 854.

principles of fairness ought to be entertained on review.[85] Unfortunately this analysis was not undertaken in the case, with the judge applying old labels to dismiss the case as unsuitable for judicial review. What remains however, is that even without referring to a single English case, the approach taken and the basis for denying jurisdiction to review decisions of private bodies is the same as that which was used by the English courts for a long time. It can therefore be said that the two jurisdictions applied the same rules at some point, although the periods are not synchronised.

I have somewhat prolonged the discussion of the *Autlwetse* case for the reason that it was the first case in Botswana in which the distinction between a public and private body, and that between the exercise of public and private power, and the categorisation of the decision-maker was made for purposes of determining amenability to judicial review. The case therefore merited a more comprehensive discussion. It has not, however, impacted subsequent jurisprudence and was disregarded until it was effectively overruled, as shall appear more fully below.

6.6 Case law after Autlwetse

Case law after the decision in *Autlwetse* indicates that the case did not have much impact on local jurisprudence. There is no decision in which the *ratio decidendi* or the reasoning in that case was followed. On the contrary, there is a marked departure from it, and in many cases without adverse comment, until it was finally overruled in *Botswana Democratic Party and Another v Marobela.*[86] It is necessary at this stage to discuss the trend as it developed since the *Autlwetse* decision. The first decision, made shortly after *Autlwetse* is *Sorinyane* [87] which concerned a decision of a trust expelling the applicant from the Board of Trustees to which he had previously been elected. The trust was described as 'a voluntary association governed by a deed of trust.'[88] The

[85] Some of these submissions will be found in Maripe "Judicial review and the public/private body dichotomy: An appraisal of developing trends" 51-52.
[86] [2014] 2 BLR 227.
[87] Although the decision was delivered on 17 August 2004, it only found its way into the Law Reports in 2008 and is reported as [2008] 2 BLR 5.
[88] 12.

applicant launched proceedings in the High Court for the review of the decision to expel him on the basis *inter alia* that it contravened the rules of natural justice, and that 'it was made in want of jurisdiction with error of law *ex facie* the record'.[89] The proceedings were stated to be in terms of Order 61. Right from the beginning, the court stated that:

> [t]he first issue for determination is whether the proceedings of a voluntary association, established in this case by means of a registered trust deed, is susceptible to review ... [90]

Citing the position in England as modified, and relying on the statement from *LAWSA*,[91] Kirby J (as he then was) held that they were:

> In my judgment the expressions used in rule 1 must be widely interpreted to cover all bodies susceptible to common law review as well as public law cases.[92]

Thus the court's common-law power to review was applicable to decisions of public as well as private bodies. In summarising the law as he perceived it and after a review of authorities in Botswana, England and South Africa, the judge held that:

> (a) Where their officers, structures, boards or committees are required to perform quasi-judicial functions, voluntary associations, including sporting and recreational clubs, charitable associations, educational institutions, professional bodies, political parties, trade unions, and others, are subject to common law review of the exercise of such functions.[93]

Although the judge referred to *Autlwetse*, he did not comment on it, except to 'contrast'[94] it very tersely when enumerating cases in which decisions of private bodies had been subjected to review. In the context of the judgment, it is quite clear that he

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[89] 8.
[90] 8.
[91] *LAWSA* (1985) 435 cited in *Sorinyane* at 8.
[92] 9.
[93] 12.
[94] 10.
[81][2008] 2 BLR 5.

did not agree with the reasoning in *Autlwetse* on the question of revisionary jurisdiction.

Kirby J's position in *Sorinyane*[81] was to find favour with other High Court judges in subsequent cases. In *Mokotedi v Morebodi and Others*[95]which concerned a decision of a religious organisation suspending the applicant from his position as archbishop and member of the church, the respondents, relying on *Autlwetse*, raised a point *in limine* to the effect that:

> [t]he decision to suspend the applicant from membership of the 5th respondent is not a decision of a public body and is therefore not subject to judicial review.[96]

Makhwade J (as he then was) relied on the statement by Kirby J in *Sorinyane*[97] which he associated himself with, and dismissed the point *in limine* and held that the decision of the church as a voluntary association was subject to judicial review.[98] In *Ngakaetsile v Botswana Congress Party and Others* [99] which concerned the review of a decision of a political party disqualifying the applicant from contesting in the party's primary elections, the same legal point was raised, relying on *Autlwetse,* that it was 'not competent for this court to review the decisions of a political party'.[100] Makhwade J (as he then was) indicated that he had previously expressed the same views about voluntary associations in *Mokotedi*, that he agreed with and relied on the same statement by Kirby J in *Sorinyane* and that he had not changed his views[101] and dismissed the point *in limine*. *Molatlhwe and Others v The Diocese of Botswana of the Church of the Province of Central Africa and Another* [102] (hereinafter the '*Anglican Church* case') concerned a challenge on review of the decision of the Anglican Church

[95] Unreported case number MAHFT-000064-06 of 13 December 2007.
[96] 3.
[97] 'Where their officers, structures, boards or committees are required to perform quasi-judicial functions, voluntary associations, including sporting and recreational clubs, charitable associations, educational institutions, professional bodies, political parties, trade unions, and others, are subject to common law review of the exercise of such functions' (4).
[98] 4.
[99] Unreported case number MAHFT-000158-07 of 13 March 2008.
[100] 3.
[101] 4.
[102] [2008] 3 BLR 317.

revoking the applicants' licences to practice as priests of the church on the basis that the decision violated the rules of natural justice. The respondents submitted *inter alia* that 'the rules of natural justice do not apply to the 1st respondent because it is not a public body, it being common cause that it is a voluntary organization.'[103] Dingake J comprehensively reviewed and analysed case law, both within[104] and outside Botswana,[105] in deciding on the matter. He expressed support for the views and conclusions of Kirby J in *Sorinyane* and held that principles of natural justice, unless expressly excluded, apply to decisions of voluntary associations, which he described as 'the modern trend' which he said is supported by modern academic literature.[106] In support of his views he cited and relied on excerpts from two articles by Maripe and Oliver who opined as follows:

> … a procedural irregularity in private law relationship may very well resemble an irregularity in the decision making process in a public law relationship. To the extent therefore that judicial review is a process of regularizing the manner of decision making, great caution should be taken before a case is thrown out on the basis that it seeks to impugn a decision of a private body as against that of a public body. This is especially important as the criteria for classifying a body as private or public are not settled ...[107]

as well as

> There is a sound basis in case law and in principle for the proposition that in certain circumstances private bodies exercising private functions owe duties of fairness and rationality in private law to those affected by their acts or decisions independently of contracts or trusts – in other words, that the common law imposes such duties.[108]

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[103] 335.
[104] Some of the cases he referred to were *Autlwetse, Sorinyane, Saleshando, Ngakaetsile, Botswana Football Association v Notwane* at 337-8.
[105] *Breen, Datafin* among others.
[106] 339.
[107] Maripe "Judicial review and the public/private body dichotomy: An appraisal of developing trends" 31.
[108] Oliver "Common values in public and private law and the public/private divide" (1997) *PL* 630-646, 632. Similar sentiments were expressed by Pannick "Who is subject to judicial review and for what?" (1992) *PL* 1-7 and Wolffe "The Scope of Judicial Review in Scots Law" (1992) *PL* 625-637, 633 among others.

He approved of the reasoning of Kirby J in *Sorinyane*, and the minority decision of Lord Denning MR in *Breen* and without saying more about *Autlwetse,* dismissed the jurisdictional point and went on to set aside the decisions of the church. The *Autlwetse* case was the subject of discussion in more cases that followed, in which judges without expressly differing with the reasoning therefor, clearly took a different path altogether. In *Magama v Khan and Others*[109] (hereinafter '*Magama* case'), a decision of certain structures of the Botswana National Front (BNF), a political party, the BNF itself disqualifying the applicant's candidature in the ensuing general elections after he had won the internal selection contest, was taken on review. The respondents did not raise the jurisdictional issue as a point *in limine.* This notwithstanding, certain aspects of the judgment are apposite here as they lend credence to the application of common-law rules in an area importing administrative law principles. Lesetedi J (as he then was), after outlining that the constitution and other rules properly adopted by the party form the contract between members and between the party and its members, outlined the legal position around voluntary societies as follows:

> Although the court applies the law of contract in interpreting or construing the constitution and other instruments of the society, the court must also have regard to the fact that where such instruments provided for quasi-judicial processes the rules of natural justice and fair play must be observed. In dealing with voluntary associations, the court cannot lose sight of the fact that the office bearers of the association may wield substantial power and the resources of the association at their disposal. Such power if abused to the detriment of a party or member, may destroy livelihoods or careers. It is that the court would, where there is such abuse, intervene at the instance of a party whose rights have been adversely affected to curb or check such abuse of power. The court will also do so where domestic tribunals of such an association have disregarded their own rules or the fundamental principles of justice and a party has been prejudiced as a consequence.[110]

The court implicitly approved of Lord Denning MR's standpoint in *Breen* and *Lee v Showman's Guild*[111] in relation to the possible prejudice to a member as a result of the

[109] Unreported case number MAHLB-000403-08 of 11 December 2008.
[110] Para 42.
[111] [1952] 1 ALL ER 1175.

exercise of the immense powers wielded by the executive committees of voluntary or private bodies. The court should intervene by entertaining review, to curb such untoward exercise of power. One of the tools to use was to apply the principles of natural justice. In the particular case the judge held that the Elections Committee and the party had misconstrued their powers under their constitution and election instruments, set aside the decision disqualifying the applicant and confirmed him as the rightful party candidate. The judge did not refer to *Autlwetse*, but the import of the decision was to further isolate *Autlwetse*. In *Charles v Botswana National Front and Another,*[112] the preliminary point relating to whether decisions of a political party could be subject to review was not taken, and no reference was made to *Autlwetse.* The matter proceeded as if it were acceptable that the decisions of the party were reviewable. Regard being had to the chain of authority, this would probably have been the fate of the preliminary point had it been raised. The case is important however in one respect, which was outlined by Nganunu CJ, as follows:

> The BNF has provided, within its code of discipline and in its constitution, various mechanisms by which disputes between members and the party can be resolved. Generally, it is not for the court to make decisions for such organs when they try a member. It is those organs – the structures that have been empowered under the constitution – to make decisions or recommendations, without the court taking over their functions. As I see it, where the constitution and the disciplinary code provide for appeals to various structures of the party then a court of law in this country should not unduly interfere with what the party has provided in its constitution for settlement of disputes in their own manner, within their own organisation. In such a situation the court's intervention may be limited to certain defined principles of judicial review, and these should be mentioned in the papers to give each side an opportunity to respond.[113]

This position actually echoes a position of deference to bodies empowered by several instruments, to make decisions. It advocates less judicial interference in decisions made by functionaries empowered by the decision-making processes of particular bodies, including private bodies. But it does not disavow revisionary jurisdiction altogether, it being accepted that on limited stated grounds the court is at large to

[112] [2009] 2 BLR 36.
[113] 51-52.

intervene.[114] In the particular case, which concerned a challenge to the decision of a political party, the court dismissed the application on the basis of procedural defects in the affidavit rather than on a preliminary jurisdictional point.

In Mogorosi and Others v Botswana National Front and Another[115] the applicants challenged as unlawful the decision of the 1st respondent's Central Committee allowing the 2nd respondent's to stand as candidate for the position of presidency of the 1st respondent, a political party. They also sought other consequential relief, *inter alia*, a declaration that the 2nd respondent was not eligible to contest for the position of president of the 1st respondent. Again, the issue was raised that as a voluntary association, the proceedings and decisions of the Botswana National Front (hereinafter 'BNF') were not susceptible to judicial review. The judge, Chinengo J, taking his cue from Lesetedi J in the *Magama* case, started off by outlining the nature and character of the BNF. To the extent relevant, he said:

> … the BNF is governed by a constitution and by rules and regulations made pursuant to its constitution. These instruments constitute the contract between the members of the party and the BNF and between the members *inter se*. BNF therefore has its origins in contract and not in statute law. Its powers are contractual and not statutory. *It is not a public body and its functions are private. It has not statutory responsibility for conducting politics in Botswana. Because it does not exercise public power, it is ordinarily governed by private law and therefore not subject to public law.*[116] (my emphasis).

On this score, the judge's approach was similar to that adopted in *Autlwetse* and in the English cases[117] in which the nature of the body in question was determinative of

[114] These are usually failure to observe the twin principles of natural justice, the twin principles of natural justice are *audi alteram partem* ('to hear the other side') and *nemo iudex in sua causa* ('no one should be judge in his/her own cause'. Wade and Forsyth *Administrative law* (2009) 371-468.
[115] Unreported case number MAFHT-000134-10 of 15 July 2010.
[116] Para 9.
[117] Such as *R* v *Jockey Club ex parte RAM Racecourses Ltd.* Stuart-Smith LJ held that: '[q]uite clearly the majority of cases involving disciplinary disputes or adjudications between participants in the sport, will be of an entirely domestic character and based upon the contractual relationship between the parties. Such disputes have never been amenable to judicial review'. Similar sentiments were expressed in *Aga Khan* at 875 per Hoffmann LJ.

the remedies that could be available against decisions of private bodies.[118] It is quite apparent that he was presenting the idea that the availability or otherwise of judicial review remedies depends to a large extent on the nature and character of the body in question. This is the traditional position which was departed from by the English Court of Appeal in *Datafin*.

Furthermore, the italicised words in the quoted statement belie the true position in regard to the operations of the BNF as an opposition political party in Botswana as it is founded on a very narrow characterisation of the party based only on the fact that it is a voluntary association. It has been submitted above in relation to the *Autlwetse* case that the BDP's *raison d'être* and field of operation import a sufficiently public element to bring its decisions within the scope of judicial review. I do the same in respect of the BNF. The *raison d'être* of the existence of the BNF, as a political party, is the same as that of the BDP, which is to assume political power over the whole country. The difference lies only in the fact that it does not hold state power. But it exists to attain state power. As the majority opposition party in Parliament at the time, it was the Official Opposition, a status that is not accorded other minority parties. Its leader, or the most senior member of the party in Parliament, held the position of Leader of the Opposition (LOO), an official position that comes with national responsibilities and perks.[119] The LOO is allocated more speaking time in Parliament as against other ordinary members. He also has statutory roles.[120] So there is a number of public *indicia* that attach to the BNF rather than its narrow characterisation as a voluntary society, an analysis that neither Chinengo J in *Mogorosi* nor Collins J in *Autlwetse* embarked upon. Chinengo's position thus far was, however, not determinative of the matter.

[118] This is evident in the sentence immediately following the quoted statement wherein he said: 'This legal character of the BNF has consequences for the way the court will approach the issues arising between it and its members or between its members as amongst themselves. It also has consequences for the kind of orders which the court can make in regard to those issues' (para 9).
[119] He gets a salary equivalent to that of an Assistant Minister and is accorded an official vehicle and residence different from other ordinary members.
[120] For example, under the Ombudsman Act Cap 02:12, the President can only appoint the Ombudsman after consulting with the Leader of the Opposition (s 2(2)).

The judge proceeded to consider local jurisprudence on the point which he indicated stood against *Autlwetse*.[121] He quoted extensively from *Autlwetse*[122] and indicated that it (*Autlwetse*) 'occupies a solitary position in our jurisprudence'.[123] He referred to Kirby J's position in *Sorinyane* as a 'very persuasive, well researched and reasoned judgment'.[124] Curiously, he did not list the *Anglican Church* case as standing against *Autlwetse*, although he did later comment on it in the following terms:

> In *Molatlhwe's* case, Dingake J has ably shown that, as a general principle and a modern trend, judicial review of or intervention in, decisions of voluntary associations has been accepted in many jurisdictions, Botswana in particular. *I have no doubt that this is a correct exposition of the approach taken by our courts*[125] (my emphasis).

So in the end, Chinengo J joined the other judges on the jurisdiction point, although he did caution that the court's intervention would have to be guided by different considerations like the remedy required and efficacy of that remedy depending on the circumstances surrounding each case.[126] He dismissed the application on these other considerations.[127] So there was still no express support for *Autlwetse*.

J and T Decorators (Pty) Ltd v North West District Council and Another[128] concerned the review of a decision of a local authority in cancelling a tender previously awarded to the applicant. The 1st respondent is a local authority established by statute and the 2nd respondent, a statutory authority also established by statute (the national tax authority). Both respondents are therefore public bodies. However, the case is relevant for the remarks made by the court in response to a submission by the 2nd respondent

[121] *Sorinyane; Ngakaetsile* and *Charles.*
[122] He devoted pp 12-15 to it, reproducing pages 235-238 of *Autlwetse*.
[123] Para 18.
[124] Para 21.
[125] Para 23.
[126] Para 23.
[127] An appeal noted against the decision, in *Mogorosi and Others v Botswana National Front and Another* unreported case number CACLB-055-10 of 27 January 2011 was not proceeded with, as the issues had become moot or academic following the decision of the BNF Congress endorsing the second respondent's candidature for the position of president of the party.
[128] [2010] 3 BLR 820.

that the review was a wrong procedure as the matter concerned contractual rights and entitlements of the parties. The 1st respondent's argument was:

> that a distinction ought to be drawn between the process of considering tenders and making recommendations, on the other hand, which is a reviewable administrative action and cancellation following the award of the tender which is not an administrative action but a private contractual matter between the parties.[129]

It was submitted that 'the cancellation of the tender was an exercise of contractual right falling under the law of contract or common law and was therefore not amenable to judicial review.'[130] Reliance for this submission was placed on a decision of the Supreme Court of Appeal of South Africa in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC*[131] whose facts were significantly similar to those in *J and T Decorators* in that it concerned cancellation of a tender by an organ of state, the appellant, exercising statutory functions to receive duties, which it could do by authorising third parties to do it through a tendering system. On a review of the cancellation of a tender previously awarded to the applicant, the Supreme Court of Appeal held that the appellant was empowered to cancel the contract by the terms of the contract itself and the common law, and in cancelling the contract it was enforcing a term thereof and not performing a public duty.

Dingake J was not impressed with this reasoning, which he believed glossed over the realities around 'the functioning of the modern state and the role of local government entities in the larger scheme of governmental functions.'[132] In his view, local government entities like those in the *J and T Decorators* and the *Western Cape* cases must be taken to be machineries through which governments roll out public services in the discharge of their public affairs.[133] The premise of his standpoint deserves to be

[129] 851.
[130] 834.
[131] 2001 3 SA 1013 (SCA).
[132] 852.
[133] 852.

quoted extensively for the reason that it brings a new dimension to the debate around public versus private power in matters of judicial review. He set out his position as follows:

> In a developmental state such as we have in this republic, the task of developing the country is carried out by both the central and local government through a public tendering system that ensures that public facilities such as schools, hospitals and roads are built by those who have won tenders. At no stage can the relationship be purely contractual when these local government entities, not only operate in the public sphere, but their functions are regulated by statute and are funded by taxpayers.
>
> In other words, local governments, as part of the State machinery are in the business of providing public services. Put differently, local governments, as part of the State machinery are simply an administrative device in order to implement and enforce government policies. This much is clear from a close reading of the Act that establishes entities such as the first respondent and allied legislation and regulations. It is this dimension that the courts should never lose sight of in interrogating the applicability of the rules of natural justice to the entire rubric of the public procurement system.
>
> If the courts are not vigilant, the use of contractual mechanism in the performance of governmental functions and the resultant 'privatisation of the State' may lead to the erosion of fair play in the procurement of goods and services, if the argument that the post-tender phase is simply a private arena succeeds. If the court succumbs to the argument that the post-tender stage is governed purely by contract and that the principles of natural justice do not apply, there is a danger that the procurement of goods and services and the distribution thereof, in the form of allocation and termination of contracts, may be susceptible to abuse and corruption.[134]

In this he relied on the decision in *AV Communications (Pty) Ltd v The Attorney General and Others,*[135] a case to like effect where the same principles regarding fairness in the state procurement processes was an issue. He observed that the schema of the legislation in terms of which the 1st respondent operates did not exclude the principles of natural justice, and held that in that event the common law would have to apply.[136]

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[134] 852-853.
[135] [1995] BLR 739.
[136] 854.

He rejected outright the reasoning in the *Western Cape* case, holding that to his mind it did not represent good law and he would not follow it.[137] In all this, it is submitted, Dingake J was correct, as his focus was on the nature of the decision and not necessarily the kind of power exercised. This finds support in *Datafin* and academic literature.[138] The application of the rules of natural justice to the tendering system was to receive the imprimatur of the Court of Appeal in *Public Procurement and Asset Disposal Board v Zac Construction (Pty) Ltd and Another*[139] in which the court laid down that the Board has a responsibility for openness, fairness and transparency and that absent any statutory exclusion of any judicial review at common law, the legislature intended it to apply.[140]

It is submitted that Dingake J correctly dismissed the submission anchored on contract, the source of power argument, and correctly disregarded the *Western Cape* case. To follow that decision would be to close one's eyes to modern realities of public delivery of services. Even without modern categorisation of outsourcing of services in terms of nomenclature like 'contractualisation' or 'privatisation', this has always happened from time immemorial. The outsourcing of a service does not convert a public authority to a private body that is immune to challenge by judicial review. If there is a 'public law element' the decision should be reviewable.[141] In the context of *J and T Decorators*, the matter concerned the cancellation of a tender for the construction of houses[142] for a disadvantaged group of people living within the area of operation of the local authority, which service the authority was statutorily obliged and funded to provide. This imports a sufficient public law element as it was not only a matter of contract between the local authority and the contracted entity, it was a matter of furtherance

[137] 854.
[138] Forsyth "The scope of judicial review: 'Public duty' not 'source of power'" [1987] *PL* 356-367, 360-361.
[139] [2014] 3 BLR 381.
[140] An appeal noted challenging the decision on the correctness of holding that the matter fell within the realm of administrative law and not purely on contract was determined not necessary by the Court of Appeal as the matter could and was disposed of on whether in the first place there was a contract, and the Court of Appeal held there was none. The case is reported as *North West District Council v J and T Decorators (Pty) Ltd and Another* [2011] 2 BLR 488.
[141] See in this regard Arrowsmith, "Judicial review and contractual powers of public authorities" (1990) *LQR* 277-292; Bailey "Judicial review of contracting decisions" (2007) *PL* 444-463.
[142] 823.

of the authority's statutory and wider public obligations, with significant public implications. Further, the decision that was sought to be reviewed was not that of the contracted entity but of the local authority itself. It could hardly be narrowed to pure contractual disagreements between the parties.

The reasoning on public procurement of goods and services and the privatisation of government business resonates very well with the principles emanating from the Human Rights Act in England[143] in terms of which non-traditional public authorities are allowed to provide public services and are to be considered public authorities amenable to judicial review.[144] How the determination is to be made as to which authority in any given circumstances is to be accorded the status of a public authority is a vexing question which has given rise to significant case law[145] and academic literature.[146] This point need not be belaboured here. Suffice it to say that the criteria set out by Lord Nicholls in *Aston Cantlow* are the same as those set out by Dingake J in *J and T Decorators*.

In summary, the principles set out in *J and T Decorators* were held to apply to private bodies. It was in his examination of the applicability or otherwise of the principles of natural justice to the dispute before him that the judge made reference to, among

[143] Human Rights Act 1998.
[144] Section 6(3)(b) of the Act provides that a public authority includes 'any person certain of whose functions are functions of a public nature'.
[145] For example, *Poplar Housing and Regeneration Community Association Ltd* v *Donoghue* [2002] QB 48; *R v Leonard Cheshire Foundation* [2002] 2 ALL ER 936; *R (on the application of Heather) v Leornard Cheshire Foundation* [2002] 2 ALL ER 936; *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley* v *Wallbank* [2003] 3 WLR 283 and *YL v Birmingham City Council and Others* [2003] 3 WLR 283.
[146] Articles by Oliver, including "The frontiers of the state: Public authorities and public functions under the Human Rights Act" (2000) *PL* 476-493 and "Functions of a public nature under the Human Rights Act" (2004) *PL* 329-351; Craig "Contracting out, the Human Rights Act and the scope of judicial review" (2002) *LQR* 551-568; Markus "What is public power: The court's approach to the public authority definition under the Human Rights Act" in Jowell and Cooper (eds) *Delivering rights: How the Human Rights Act is working* (2003) 77-114; Sunkin "Pushing forward the frontiers of human rights protection; The meaning of public authority under the Human Rights Act" (2004) *PL* 643-658 to mention just a few, as well as the Seventh Report of the Joint Committee on Human Rights, HL 39/HC 382 2003-2004. In the *Aston Cantlow* case, Lord Nicholls identified the following as criteria for identifying functions of a public nature; that the body is publicly funded in the carrying out of its functions; that it exercises statutory powers; and, that it takes the place of central government or local authorities or it provides a public service.

others, *Breen, Autlwetse, Sorinyane, Mogorosi,* the *Anglican Church* case*, Ngakaetsile* and *Datafin,* all of which, except *Autlwetse*, he embraced. He disapproved of *Autlwetse* on the grounds that the judge '"gave primacy to the nature of the decision-maker in determining whether the respondent's decisions were susceptible to judicial review and not the subject matter and its consequences'.[147] As argued above, this approach was clearly wrong. Dingake J expressed his view of the matter as follows:

> The underlying rationale for subjecting decisions, more especially disciplinary proceedings of churches, trade unions and other voluntary associations to the principles of natural justice, although not often clearly articulated, appears to be that these voluntary associations wield immense powers relative to their members; which powers are often exercised oppressively or arbitrarily. The logic being that these voluntary associations can deprive their members of their livelihood; they can ride rough-shod over their interests and/or legitimate expectations. In theory their powers are based on contract, for the individual member is supposed to have contracted to give them these great powers, although, in practice, these members have little control over the exercise of these great powers over them.[148]

This is the same reasoning that was espoused by Lord Denning MR in *Breen* and in *Lee.*[149] It is submitted this is the correct approach as it recognises the peculiar positions of the parties even where they are consensually bound together. The parties' bargaining positions are different, and resort to the law of contract, which proceeds from a premise of equality of the parties, is not realistic and may in some cases be a facade. Also in this matter, *Autlwetse* did not receive approval.

The decision in *J and T Decorators* was followed in *Bolele v Botswana Council of Non-Governmental Organisations* (*BOCONGO*)[150] which concerned a challenge on review of

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[147] 846.

[148] 847-848. This enjoys support from De Ville *Judicial review of administrative action in South Africa,* 49-50 who says: 'Insofar as voluntary associations or domestic tribunals are concerned, their actions (insofar as these actions were of a coercive nature, for example, disciplinary proceedings) have in the past been held to be subject to administrative law principles. Whereas some commentators have taken the view that the (coercive) actions of these associations would qualify as administrative action, others have argued that the actions of these bodies will generally not so qualify as they do not exercise public powers or perform public functions. If the latter approach is adopted, the coercive actions of voluntary associations would nevertheless still be subject to review on the basis of common law administrative principles ...'

[149] [1952] 1 ALL ER 1175, 1181.

[150] Unreported case number MAHLB-000779-10 of 7 September 2011.

the respondent's termination of the applicant's employment as its Executive Secretary. The respondent is a non-governmental organisation established by a deed of trust. A point *in limine* challenging the court's jurisdiction on review was taken in the following terms:

> *Ex facie* the Applicant's papers, she seeks to review the decision of the Respondent. In so far as the respondent is a voluntary association/society and therefore a private body, the Honourable Court has no jurisdiction to review its decision.[151]

The matter came before Leburu J who, in deciding on the point, referred to local jurisprudence, in particular *Autlwetse, Sorinyane, Ngakaetsile, Mogorosi,* the *Anglican Church* case and *J and T Decorators.* Having outlined the effect of *Autlwetse*,[152] he expressed his entire association with all the other decisions which he said gave primacy to legality of a decision rather than the dichotomy between private and or public/governmental bodies.[153] In this he was expressing his disapproval of *Autlwetse*. In particular, and quoting Dingake J's statement in *J and T Decorators*,[154] he reasoned that:

> In my view, what is of fundamental importance is not the nature or form of a juristic body that has rendered a decision that has been challenged, but it is the subject matter or procedural content of the decision in question. If primacy was accorded to the nature or form of a juristic body, such attitude may have the effect of denying the subjects of such bodies redress to legality, which in my view forms the bedrock of judicial review.[155]

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[151] Para 6.
[152] Which was that in so far as the decision that was challenged was that of a political party, being a non-public body, its decision was not susceptible to judicial review. Para 10.
[153] Para 11.
[154] Where the judge held in *J and T Decorators* para 12 (847-848): 'The underlying rationale for subjecting decisions, more especially disciplinary proceedings of churches, trade unions and other voluntary associations to the principles of natural justice, although not often clearly articulated, appears to be that these voluntary associations wield immense powers relative to their members; which powers are often exercised oppressively or arbitrarily. The logic being that these voluntary associations can deprive their members of their livelihood; they can ride rough-shod over their interests and or legitimate expectations. In theory their powers are based on contract; for the individual member).is supposed to have contracted to give them these great powers, although in practice these members have little control over the exercise of these great powers over them'.
[155] Para 12.

This is in line with the decision in *Datafin*, which focuses on the nature and effect of the decision and not the nature of the body. Leburu J opined that the dichotomy between private and public bodies 'has had the effect of retarding the development of administrative law, with adverse repercussions occasioned to the individuals affected by such decisions or omissions thereof'.[156] He therefore dismissed the jurisdictional point but dismissed the application on different considerations.[157] Here, too, the trend of isolating *Autlwetse* continued.

The last four cases are interesting in that the body in question was either an incorporated entity partly owned by the government, or wholly owned by the government, a political party and a pension scheme established under Pension Fund Rules. In the many cases in which the jurisdictional point was raised, the body in question was either a society or one formed on the basis of a contract to which members subscribe. This would have implications for jurisdiction on review. *Du Preez v Debswana Diamond Company (Pty) Ltd and Others*[158] is one of the only two cases after *Autlwetse* in which the jurisdictional point was upheld by the Court of Appeal.[159] The applicant was dismissed from his employ following a finding of guilt in a disciplinary hearing instituted by the 1st respondent through its internal disciplinary structures and processes. He challenged, on review, both the finding of guilt, and his dismissal. A point *in limine* was taken by the respondents to the effect that the employer's decision was not properly a matter of judicial review.[160] In determining the point, Gaongalelwe J (as he then was) first presented the question as to whether the 1st respondent is a body performing judicial, quasi-judicial or administrative functions and whether its operations involve the exercise of public power.[161] He held that the 1st respondent is a private company which does not perform any judicial, quasi-judicial or administrative

[156] Para 13.
[157] On appeal, in *Bolele v Council of Non-Governmental Organisations* [2013] 1 BLR 196, the jurisdictional issue was not raised and so was not considered by the Court of Appeal.
[158] [2012] 1 BLR 264
[159] The case came at first in the High Court in *Du Preez v Debswana Diamond Company (Pty) Ltd and Others* unreported case number MAHLB-000720-09 of 7 February 2011.
[160] Order 61 specifies the decisions which may be reviewable as those of any Magistrate, tribunal, board or officer performing judicial, quasi-judicial or administrative functions.
[161] Para 5.

functions.[162] He further held that to the extent that judicial review is a remedy designed to curb improper exercise of public power, such review is generally applicable to 'government agents and statutory bodies'.[163] Applying the principles to the facts, he observed that the applicant's complaints involved the interpretation of the terms of the contract between the applicant and the 1st respondent and documents embodying his qualifications.[164] He held that in dismissing the applicant, the 1st respondent was acting in terms of powers under its conditions of service and the contract between the parties and that the invocation and interpretation of such conditions cannot be equal to exercising public power.[165] He therefore upheld the point *in limine* and dismissed the application. The applicant appealed. He (now as appellant) maintained that:

> 4.3 The agreement between the parties recorded their consensus that in matters of discipline the first respondent would be guided by principles of natural justice, namely:
>
> 4.3.1 fairness and equity
>
> and
>
> 4.3.2 transparency and consistency.[166]

The court was asked to determine, 'whether the High Court is competent to review the decisions of domestic tribunals created by contract, where as part of the agreement, the principles of natural justice are included.'[167] In delivering the unanimous judgment, Legwaila JA delivered a warning blow in saying:

> One shudders at the prospect of employees in their thousands being told that they need not follow the available avenues for dispute resolution including applications to the Industrial Court or the High Court alleging unfair dismissal, but that they could simply come to the High Court for review.[168]

[162] Para 6.
[163] Para 7.
[164] Para 8.
[165] Para 9.
[166] 265.
[167] 265.
[168] 266.

This was clearly an indication of his mind-set that in employment related disputes review was not desirable. It also implicitly raises the floodgates argument that review is not desirable given the number of employees who may possibly want to institute it. He held that Order 61 of the High Court Rules is not a procedure to be used by employees of private company,[169] that the parties arrangement was a private affair[170] that the respondent exercised neither administrative functions nor public power to bring it within the purview of judicial review. In dismissing the appeal, he wondered 'why the appellant and his legal advisors opted for the dubious procedure, as far as private employees are concerned, of review when other obvious avenues were available to the appellant'.[171]

It is submitted that both the High Court and the Court of Appeal misdirected themselves fundamentally in denying themselves revisionary jurisdiction in the *Du Preez* case. First, the reasoning based on the absence of judicial, quasi-judicial and administrative functions was a very narrow appreciation of quasi-judicial functions. It has been held that a quasi-judicial decision is one which affects the rights, entitlements or other interests of a party against whom the decision is made.[172] In *Botswana Association of Tribal Land Authorities v The Attorney General*:[173]

> In my mind the test to be applied is whether the body whose decision is being challenged is performing a public function and, therefore amenable to judicial review and not necessarily upon the source of power as to whether it is purely executive or administrative.[174]

Since the decision in *Du Preez* affected the appellant employment's status with attendant loss of perks or benefits of that position, it was clearly a quasi-judicial decision.[175] Second, the decision was made after a disciplinary process. One cannot imagine a decision that qualifies more for description as a quasi-judicial decision that

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[169] 266.
[170] 268.
[171] 267.
[172] *Ridge v Baldwin* [1963] 2 ALL ER 66. In *Botswana Association of Tribal Land Authorities v The Attorney General* [2007]3 BLR 93, Dingake J said (99)
[173] [2007]3 BLR 93.
[174] At 99.
[175] This was also accepted in *Autlwetse* 235 and *Sorinyane* 13.

approximates a judicial determination. Third, in holding that the 1st respondent did not exercise public power was a gloss on the true nature of the respondent company. Although set up as a private company, the state holds majority shares in the company, and is entitled to select half of the members of the board. The significant governmental interest in the matter should have been a factor to consider. It does not quite enjoy a monopoly over diamond mining, but has special concessions that make its operations the backbone of the country's economy. Its position is close to that in *Datafin*. It seems that in all the circumstances, the fact of incorporation as a private company was the basis for the decision. There is no authority, nor principled objection in doctrine against applying judicial review to entities incorporated as such in certain permitting circumstances. Fourth, to say judicial review only applies to 'government agents and statutory bodies' is to insist on the old categorisation of public power. The law has now moved beyond that as evidenced by the numerous cases which did not concern government agents nor statutory bodies.[176] Fifth, it represents a narrow reading of Order 61 and disregards the position that has been laid down that Order 61 does not exclude the High Court's common-law power of review.[177] Sixth, the finding that in dismissing the appellant, the respondent was exercising its contractual and commercial rights is to rely on the old classification of reviewable decisions based on source of power which has become obsolete.[178] On the basis of the above, the court was too quick to adopt a position without an interrogation of legal principle and case law.

Tlhomelang v Rural Industries Promotions Company (Botswana) and Another,[179] decided after *Du Preez*, concerned a decision of the respondent which had dismissed the applicant from its employ, following an internal disciplinary process on a charge of theft. The 1st respondent raised a preliminary jurisdictional point that as a private entity the decisions of the 1st respondent were not subject to judicial review. Moroka J, in making a determination on the point, started by investigating the nature of the 1st respondent, and said:

[176] *Sorinyane, Mokotedi, Ngakaetsile, Charles, Mogorosi, Anglican Church case, Bolele,* etc.
[177] *Sorinyane.*
[178] *Datafin*.
[179] [2012] 2 BLR 345.

> The first respondent goes by the nomenclature Rural Industries Promotion Company (Botswana). It is a company wholly owned by the government of Botswana. It is for this reason a public company ... The entity is governed by a board which is wholly appointed by the Minister and answers to the Minister of Science and Technology.'[180]

He referred to local jurisprudence on the point, in particular *Autlwetse, Ngakaetsile, Mogorosi, Bolele*, the *Anglican Church* case*, Sorinyane*, and *Du Preez*. In relation to *Du Preez*, which was the only decision of the Court of Appeal and by which, in terms of the principle of *stare decisis,* he was bound, he found that the authority would be useful if he held that the 1st respondent was a private company.[181] He held that to the extent that the 1st respondent was entirely owned by the government of Botswana, was a public body.[182] Having so held, he concluded that '[t]he *sterile debate* on public-private dichotomy thus falls away'[183] (my emphasis). He held, relying on *Mogana and Another v Botswana Meat Commission*[184] that the decisions of the 1st respondent were reviewable. He went on to uphold the application for the reason that the impugned decision was taken in violation of the *nemo judex* principle, as the 2nd respondent had acted as 'judge, jury and executioner',[185] set aside the dismissal and ordered reinstatement of the applicant. Moroka J is to be applauded for not relying solely on the nature of the entity as was the case in *Du Preez*, but focused on establishing the true nature of the entity whose decision was under review. This approach accords with that in *Datafin*. By referring to the 'sterile debate' on the dichotomy drawn between bodies for purposes of review, he was probably showing his disdain for the issue, and indicating a preference that the badge of the body should not be a determining factor, but the nature of the decision made. This decision, too, isolated *Autlwetse*.

[180] 349.
[181] 349.
[182] 349.
[183] 349.
[184] [1995] BLR 353 where Horwitz J said: 'Since the defendant is a public body in the sense that it is wholly owned by the government of Botswana and its executive officers are appointed by the government the plaintiffs would have the right to bring an action on the ground that there had been an irregularity in their dismissal such as a failure to give them a hearing …' (359).
[185] 355.

The next significant decision to consider briefly is that of *Botswana Democratic Party and Others v Marobela*.[186] Initially, a point against jurisdiction was raised against the review of a decision of a political party. The point was dismissed by the High Court and not pursued on appeal. This notwithstanding, the Court of Appeal was requested to lay down the law in respect of the reviewability of political parties seeing that the point was always raised whenever proceedings against political parties and other private bodies were instituted. After briefly reiterating the principles applying to voluntary associations on review, Kirby JP said that '… *Autlwetse*'s case must now be accepted as having been wrongly decided since the parties' rights of common law review were overlooked'.[187] This was the first authoritative statement by the country's apex court on the reviewability of decisions of private bodies and on the place of *Autlwetse* in Botswana jurisprudence. It effectively overruled *Autlwetse*. And effectively confirmed that certain decisions of private bodies may be susceptible to judicial review. While the field for the review of decisions of private bodies seemed to have been determined in *Marobela,* then came *Odisang v Debswana Pension Fund and Another*.[188] The First respondent was a private pension fund created for the benefit of employees of Debswana Diamond Mining Company (Pty) Ltd. It was described in the founding affidavit as 'a body corporate capable of suing and being sued in its own name established by the Debswana Pension Fund Rules'.[189] The second respondent was a Pension Administrator. The Applicant was the only surviving sibling of the late Keamogetse Odisang, who had been an active member of the first respondent in good standing. After the demise of Keamogetse, the second respondent, with the concurrence of the first, determined to distribute the deceased's pension among six beneficiaries, including the Applicant. The applicant sought to challenge this determination on review. The respondents took a point *in limine* and argued that the actions of the respondents did not fall within the auspices of administrative law and as such were not reviewable.[190] In upholding the point *in limine*, Tafa J made some telling observations: In describing the first respondent he said:

[186] [2014] 2 BLR 227.
[187] 234.
[188] [2016] 3 BLR 260.
[189] 261.
[190] 261.

> It is not a public body and/or state organ exercising any public power. I am not aware of any governmental authority or obligations imposed on it in the manner in which it conducts its affairs.[191]

This evinces a three-stage enquiry into (a) the nature of the body, (b) the kind of power exercised and (c) the 'publicness' of the functions and its operations. To the extent that he did not, at this stage, consider the source of power, it is submitted the judge was on the right path in determining criteria for the reviewability of the decision. The only misgiving about this pronunciation is the visible absence of emphasis of the nature of the function exercised and its implications on public life. Matters of pensions are themselves public concerns, and attract public consequences of immense proportions if not properly handled. They can send a great number of people into unemployment and poverty, concerns that each government on the globe wishes to eradicate. And this is even more so in an environment such as that in which the first respondent operates, the mining industry which is the mainstay of the economy and is considered a high security employment environment. These are *indicia* of 'publicness' of its operations.

Immediately thereafter, the judge said:

> 'In my judgment, generally only administrative acts can be the subject of review proceedings such as those that have been instituted by the applicant'.[192]

In this, the judge had reverted to very old classifications of determining suitability for judicial review on the basis of the label or badge of function exercised, such as 'administrative', 'quasi-judicial' and 'judicial'.[193] This categorisation of functions has long held not to be useful, and consequently obsolete, for purposes of determining suitable remedies in *Ridge v Baldwin*[194] which held that the emphasis is now on the

[191] 261.
[192] 261.
[193] *Nakkuda Ali v Jayaratne* [1951] AC 66, 78.
[194] [1963] 2 ALL ER 66

implications of the decision made, and not the label on the decision. The undue emphasis on 'administrative act' in *Autlwetse* was long deprecated by the Court of Appeal in *Marobela*, which development the judge was presumptively aware of. To the extent that he sought to rely on the classification of the function, it is submitted this was a regressive step.

Lastly, in making the final determination, the judge said:

> The decisions of a private pension fund are taken in accordance with, and as agreed to, between the member and the pension fund. To that end, I agree with counsel for the respondents that in giving effect to its decisions and/or acting in a particular direction, the trustees of the pension fund do so in accordance with a set of rules which form the basis of the relationship between the fund and the member. In that regard, the pension fund is not exercising a public power. It is therefore not subject to having its decisions reviewed.[195]

To the extent that the emphasis was placed on what the fund and member had agreed, this was an appeal to the source of power test, which has now been jettisoned in favour of the nature of function exercised and its implications.[196] The premise from which the judge proceeded was therefore faulty, and evinces a retrograde step and a penchant for clinging to the past. Further, the fact that people are bound together by contract does not necessarily exclude the application of public power. Some contractual arrangements have public law implications. There is a line of authority to this effect.[197] So the basis for declining jurisdiction in the matter was on very narrow considerations, and ostensibly on the wrong application of law and principle.

The *Odisang* case is to be contrasted with *Joina v Barclays Bank of Botswana Staff Pension Fund and Other*s[198] which raised the same issues and was also an application

[195] 262.
[196] *Datafin.*
[197] These are the cases of *Sorinyane, Marobela, Anglican Church Case, J and T Decorators, Datafin* already discussed above.
[198] [2019] 1 BLR 567.

for the review of the decision of a pension fund. The application failed on the merits and not on the jurisdictional point. On the jurisdictional point, Moroka J held as follows:

> In law, the decision of the board of trustees is reviewable under one of the many grounds of judicial review known at law. These include whether it considered all the relevant factors to the exclusion of irrelevant factors and that it did not fetter its discretion….The decision is also reviewable on legality, reasonableness and rationality.[199]

Two points emerge here. First, the judge stated the position relating to the reviewability of decisions of a pension as if it were settled law. Although this echoes my submissions above in relation to the *Odisang* case, his position was not motivated, and taken as if it were a given. There was neither reference to the *Odisang* case nor the *Du Preez* case, both of which point in the opposite direction. It is not clear if the judge was aware of these prior decisions or not, or whether he was referred to them or not. Whatever the case, it would have been helpful had he shown the basis on which he departed from them, given that *Du Preez* is a Court of Appeal decision. Second, the judge treated the pension as if it were a normal tradition public body whose decisions are ordinarily reviewable, and the basis of the ordinary grounds as propounded in the *GCHQ* case. This is different from the approach of maintain a difference between public and private bodies, and then extending review principles to the latter. In this case, the judge seems to have conflated the two.

From these decisions, no firm principles may be drawn. But it appears to safe say the following: First, that Botswana law does to a significant extent allow, subject to the fulfilment of conditions, relating to the impact of those decisions on public life, judicial review of decisions of private bodies. Second, that not all decisions of private bodies are reviewable, especially those of purely corporate bodies evincing private arrangements between the parties. Third, the courts, however, have not developed a

[199] Page 573.

coherent "blue-print" as to indicate which decisions will be reviewable. The High Court still takes disparate positions even where the body whose decision is impugned is the same or constituted in the same manner.[200] In this the position is akin to that existing in England and South Africa, to some extent.

This is perhaps the appropriate stage to briefly survey the position in South Africa with respect to decisions of private bodies and how it may in future impact on the jurisprudence in Botswana.

6.7 Judicial review of decisions of private bodies in South Africa

This segment has been added to the discussion because of two factors. First, as was spelt out in Chapter 2, both Botswana and South Africa apply Roman-Dutch common law, and Botswana courts place significant reliance on South African authorities. This is in view of the fact that the South African legal system developed long before that of Botswana. For this reason, it is to be expected that developments in South Africa would influence those in Botswana. The extent of academic support for the extension of judicial review to decisions of private bodies was discussed at the beginning of the chapter.[201] The objective here is to establish how the courts in South Africa have influenced those in Botswana or how they may potentially do so in the future. Second, although the South African landscape has been changed radically by the adoption of the 1996 Constitution (Constitution of the Republic of South Africa, 1996) and the promulgation of the Promotion of Administrative Justice Act (PAJA)[202] in pursuance of prescripts of the Constitution, the application of common law has not been excluded

[200] This is evidenced by the disparate positions in *Odisang* and *Joina.*
[201] Baxter *Administrative law* (1985); Wiechers *Administrative law* (1985); Boulle, Harris and Hoexter *Constitutional and administrative law: Basic principles* (1989); Devenish, Govender and Hulme *Administrative law and justice in South Africa* (2001); De Ville *Judicial review of administrative action in South Africa* (2005).
[202] 3 of 2000.

and continues to be relevant.[203] This is especially relevant as PAJA defines 'administrative action' partly as

> any decision taken, or failure to take a decision, by a natural or juristic person … when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.[204]

The phrase 'empowering provision' is defined as

> a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken[205]

while the phrases 'exercising a public power' and 'performing a public function' are not defined. These have been deliberately left open to be honed and shaped by the courts. In *Van Zyl v The New National Party and Others*,[206] the court had to resort to the dictionary meanings of the phrases. The court held that 'exercising a public power' conveys the ability to act in a manner that `affects or concerns the public'.[207] To this extent, PAJA does recognise the space for the application of the common law in the fulfilment of its objectives. And the definition of 'exercising public power' in terms of the common law makes it applicable as well in Botswana to the extent that it is part of Roman-Dutch law. This makes it important that the South African position be studied as it is a significant potential source of law for Botswana.

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[203] *Batostar Fishing (Pty) Ltd* v *Minister of Environmental Affairs and Tourism and Others* 2004 4 SA 490 (CC) para 22.
[204] S 1(b).
[205] S 1.
[206] 2003 1 BCLR 1167 (C).
[207] Para 74. This reasoning was followed by Yekiso J in *Tirfu Raiders Rugby Club v South African Rugby Union and Others* 2006 2 ALL SA 549 (C) paras 19 and 25. This was a review of the decision of a sports organisation to change rules and fixtures of club championship games without consulting the participating clubs. At para 28 the judge held that there was significant public interest in the operations of the respondents to require them to be concerned by the effect of their decisions on the public. Accordingly, it was held that the first respondent's conduct constituted administrative action within the meaning of the term in PAJA.

South African courts have grappled with the issue of the reviewability of decisions of private bodies long before the adoption of the 1996 Constitution and PAJA. As in England, the majority of the cases concerns decisions of sporting bodies,[208] although there are a few which do not.[209] In all these no coherent formula has been laid down to determine the possible intervention of the court to review and disparate conclusions were reached. Even with the adoption of the 1996 Constitution and PAJA, the question as to which decisions of private bodies are amenable to judicial review is still a contested terrain. Just like in England, the source of power test is still regarded as the first port of call in determining whether a decision should be subjected to judicial review. A useful illustration of this position is *Cronje v United Cricket Board of South Africa*.[210] The applicant had been the captain of the national cricket team. He had been withdrawn from the team because he had become involved in corrupt activities. The respondent, which regulates all activities involving cricket in the country, passed a resolution banning him for life from all its activities and those of its affiliates. Thereafter the applicant launched proceedings in court to annul the respondent's decision. The main question was whether the decisions of the respondent were susceptible to review. After a thorough analysis of case law, Kirk-Cohen J concluded that that the decision was not reviewable as it did not involve performing a public function. His reasons were as follows:

> The respondent is not a public body. It is a voluntary association wholly unconnected to the state. It has its origin in contract and not in statute. Its powers are contractual and not statutory. Its functions are private and not public. It is privately and not publicly funded. The applicant, indeed makes the point that it "has no statutory recognition" or any "official" responsibility for the game of cricket in South Africa. The conduct of private bodies such as the respondent is ordinarily governed by private law and not public law. It does not exercise public power and its conduct is accordingly not subject to the public law rules of natural justice.[211]

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[208] *Jockey Club of South Africa v Feldman* 1942 AD 340; *Turner v Jockey Club of South Africa* 1974 3 SA 633 (A); *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A).

[209] *Jamille v African Congregational Church* 1971 (3) SA 836 (D & CLD); *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A); *Dawnlaan Beleggings (Edms) BPK v Johannesburg Stock Exchange and others* 1983 (3) SA 344 (W).

[210] 2001 (4) SA 1361 (T).

[211] At 1375D-E. This reasoning was followed in *Hare v The President of the National Court of Appeal No 140* Unreported Case No 09/2058 (Johannesburg)(4 November 2009) which proceedings were to annul the decision of a tribunal set up in terms of an agreement between the applicant and the second

The decision was arrived at after an extensive review of existing case law and represents the original dominant position in South Africa. However, just as in Botswana and England, the rigid position in terms of which only public bodies were amenable to the supervisory jurisdiction of the court on review has long started to give way to a more flexible approach which allows, in certain instances, review of private bodies when their decisions have public ramifications. This is illustrated by *Klein v Dainfern College and Another*[212] in which the applicant, a teacher employed by the 1st respondent, a private educational institution, was found guilty after a disciplinary process conducted at the instance of the 1st respondent and had a sanction of 'formal written warning' imposed on her. The disciplinary process was conducted in terms of the 'Disciplinary Procedure and Code' that was incorporated in the contract of employment. She brought proceedings in the High Court on review challenging the guilty finding and the sanction and seeking relief that they be set aside. The 1st respondent was a company established and registered in terms of the Companies Act 61 of 1973. It was therefore a private company. A jurisdictional point *in limine* challenging the court's jurisdiction was taken by the 1st respondent. It was in the following terms:

> … the application is fatally flawed in that the applicant is not entitled to a judicial review of a decision taken by a domestic tribunal which has been created by contract nor does the decision constitute an administrative action entitling applicant to a judicial review in terms of the provisions of PAJA … that the 1st respondent is a privately owned school and that the disciplinary hearing did not exercise any public function entitling the applicant to a review thereof … that the floodgates would be opened if the remedy of judicial review was to be extended to all spheres of private contractual relationships. Since the advent of constitutionalism after 1994 … the right to judicial review has been limited to decisions made by organs of State or institutions established in contract which perform a public function in making decisions. Mere master and servant relationships are not subject to judicial review. The applicant's remedies lay in the law of contract not administrative law.[213]

respondent (Motorsport South Africa) and in which Blieden J distinguished *Klein v Dainfern College* on the facts (para 16).
[212] 2006 3 SA 73 (T).
[213] Para 13.

This submission was dismissed. While the court accepted that there is now a single system of law based on the Constitution, it also accepted that there are other laws, such as the common law, which derive their force from the Constitution.[214] Claassen J also held that neither the Constitution nor the Promotion of Administrative Justice Act (hereinafter 'PAJA'),[215] excluded the application of common-law principles of administrative law applicable to domestic tribunals established in terms of private contracts and agreements.[216] With reference to the Constitution and PAJA, he held that:

> The extension of judicial review to domestic tribunals exercising public powers, does not, however, mean that judicial review is now limited to such instances. Such extension did not, in my view, extinguish the courts' powers of judicial review in instances where coercive actions of domestic tribunals not exercising public powers, are at stake … No rational reason exists to exclude individuals from the protection of judicial review in the case of coercive actions by private tribunals not exercising any public power.[217]

> I am therefore of the view that the principles of natural justice have not been excluded by the Constitution as far as the coercive actions are concerned of domestic tribunals established by contract which impliedly or expressly include such principles of justice.[218]

The upshot of this decision is to emphasise that judicial review of decisions of private bodies was in existence before the advent of constitutionalism in 1994, and that the basis for such jurisdiction was and remains the common law. The Constitution has not abrogated the common law, which still applies subject to the Constitution. Neither has PAJA done away with the court's common law power of review. Rules of natural justice are required to be observed in the decision-making processes of private bodies especially where they are of a coercive nature such as disciplinary proceedings with the potential of the deprivation of a right, an interest or other entitlement. He relied

[214] Para 23.
[215] Act 3 of 2000. Especially s 1 which defines 'administrative action' with an emphasis on the exercise of power in terms of the Constitution (or provincial constitution) or the exercise of a public power or the performance of a public function in terms of any legislation by an organ of state.
[216] Para 23.
[217] Para 24.
[218] Para 25.

on a number of cases[219] and academic commentary[220] in support of this view. Interestingly, there was no reference to *Cronje.* It would have been interesting how the judge would indicate the basis upon which he departed from it, or whether he would be persuaded to follow the same line.

This decision is quite clearly a departure from the traditional view, but being a decision of a High Court, it is by no means universally authoritative. It requires express endorsement by superior courts. The opportunity to lay down a definite coherent formula by the Constitutional Court arose in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another*,[221] which involved a challenge by a micro-lender of certain rules made by the regulator as being unconstitutional. The High Court (per Du Plessis J) held that the making of rules represents an exercise of public power and that the rules offended against the Constitution. The Supreme Court of Appeal held that the rules operated only in the private sphere by reason of a contractual relationship between the Council and the micro-lenders. There was therefore no basis to impugn them. The Supreme Court of Appeal then reversed the High Court judgment. The matter came before the Constitutional Court, which reversed the judgment of the Supreme Court of Appeal and restored the High Court judgment. Yacoob J held that:

> In the pre-constitutional era in South Africa, the nature of institutions and the way in which they exercised their power became relevant in the context of determining whether particular decisions were subject to judicial review.[222]

He relied for this view on the *Dawnlaan* case, which concerned the question whether the decision of an unincorporated stock exchange could be subject to judicial review, which question was answered in the affirmative. The court held that to regard the Johannesburg Stock Exchange as a pure private entity would be to ignore the

[219] The judge relied on *Turner v Jockey Club of South Africa* 1974 3 SA 633 (A); *Jockey Club of South Africa v Feldman* 1942 AD 340; *Jamille v African Congregational Church* 1971 3 SA 836 (D & CLD) among others.
[220] Some of the works cited are Bamford *Judicial review of domestic tribunals* (1957) Butterworths 12-23 and De Ville *Judicial* Review of Administrative Actio*n in South Africa*.
[221] 2007 1 SA 343 (CC).
[222] Para 31.

commercial reality and the very public interest ramifications around its existence and operations.[223] The *Dawnlaan* decision was confirmed by the then Appellate Division in *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another.*[224] The more pointed observation was made by O'Regan J in *AAA Investments* who, in a concurring judgment held:

> As Du Plessis J noted in his judgment, in analysing the character of the rules and the Council, one should not focus merely on the fact that it is a private company. The question that needs to be answered is whether the rules are relevant to the performance of a public function or are merely a form of private ordering. It is true that no bright line can be drawn between "public" functions and private ordering. Courts in South Africa and England have long recognised that non-governmental agencies may be tasked with a regulatory function which is public in character. In determining whether rules are public in character, although made and implemented by a non-governmental agency, several criteria are relevant: whether the rules apply generally to the public or a section of the public; whether they are coercive in character and effect; and whether they are related to a clear legislative framework and purpose. The list is not exhaustive, nor are any of the criteria listed necessarily determinative.[225]

In identifying the body whose decision was challenged, O'Regan J held that:

> … it emerges that where a body or person that does not constitute a department of state or administration in the national, provincial or local sphere of government but nevertheless performs public functions in terms of legislation, it will be bound by the provisions of the Bill of Rights in relation to the performance of those tasks. The Council is such a body.[226]

The court held that in promulgating the rules, the Council was exercising a public power with immense public implications and the rules were not only reviewable but were in fact inconsistent with the Constitution and were struck out. This was in essence an extension of the supervisory jurisdiction of the court of decisions of private bodies. It is submitted this is a welcome development.

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[223] At 365A per Goldstone J.
[224] 1988 3 SA 132 (A).
[225] Para 119.
[226] Para 152.

The next decision of note following the *AAA Investments* decision is *Calibre Clinical Consultants (Pty) Ltd and Another v The National Bargaining Council for the Road Freight Industry and Another.*[227] The first respondent is a structure formed by trade unions and employers' organisations as a forum for collective bargaining between the parties.[228] This arrangement is made at the option of the parties, and is sanctioned by statute, in this case the Labour Relations Act.[229] The first respondent called for entities interested in managing one of its projects to submit tenders. After considering the tenders submitted by, among others, the appellants, the first respondent decided not to appoint any of the bidders. Instead, it engaged an accounting firm to help it find an appropriate service provider, culminating in the appointment of the second respondent. The appellants challenged the decision not to appoint them on review. The issue was whether the decision of the first respondent constituted administrative action in terms of PAJA for it to be susceptible to review. In narrowing the issue, Nugent JA said that

> the enquiry in the present case really comes down to whether the council, in making the decisions that are sought to be impugned, was 'exercising a public power or performing a public function'.[230]

The judge then set out to survey the position in other jurisdictions, in particular Canada, the United States of America, England and South Africa and provided a helpful summary of what the courts generally consider in determining whether the decision can be reviewed. It is considered appropriate to reproduce his summary. He observed as follows:

> Thus in cases concerning the scope of public law judicial review in other countries – and most often in this country as well – courts have consistently looked to the presence or absence of features of the conduct concerned that is governmental in nature. What has been considered to be relevant is the extent to which the functions concerned are 'woven into a system of governmental control', or 'integrated into a system of statutory regulation', or the government 'regulates, supervises and inspects the performance of the function', or it is 'a task for which

[227] 2010 5 SA 457 (SCA).
[228] Its exact nature is described at para 4 of the judgment.
[229] 66 of 1995.
[230] Para 21.

> the public, in the shape of the state, have assumed responsibility', or it is 'linked to the functions and powers of government', or it constitutes 'a privatisation of the business of government itself', or it is publicly funded, or there is 'potentially a governmental interest in the decision-making power in question', or the body concerned is 'taking the place of central government or local authorities', and so on.[231]

It is quite evident that the sub-elements sketched out by the judge are derived mainly from the English cases of *Datafin*, *Aga Khan*, *Football League* and *Chief Rabbi* and the Constitutional Court decision in *AAA Investments*. So, the 'publicness' of a decision is determinable primarily by reference to the presence or otherwise of a 'governmental function'. Relying on the dictionary meaning, as in in *Van Zyl*, he held that powers or functions that are 'public' in nature, in the ordinary meaning of the word

> contemplates that they pertain to the people as a whole or that they are exercised or performed on behalf of the community as a whole (or at least a group or class of the public as a whole), which is pre-eminently the terrain of government.[232]

He held critically, that the extent to which a power or function might or might not be described as 'governmental' in nature, even if it is not definitive,

> directs the enquiry to whether the exercise of the power or the performance of the function might properly be said to entail public accountability and it seems to me that accountability to the public is what judicial review has always been about. It is about accountability to those with whom the functionary or body has no special relationship other than that they are adversely affected by its conduct and the question in each case will be whether it can properly be said to be accountable notwithstanding the absence of any such special relationship.[233]

Applying all the above criteria to the matter before him, he held that a bargaining council was a voluntary association created by agreement to perform functions in the interests of and for the benefit of its members. It was not publicly accountable for the procurement of services for a project that is implemented for the benefit of its

[231] Para 38.
[232] Para 39.
[233] Para 40.

members.[234] In the implementation of the project there was none of the features spelt out[235] that brought it within the purview of judicial review. In the circumstances of the case, it is easy to agree with the conclusion reached disavowing jurisdiction. The conclusion was made even easier by the concession made by the appellants that the council would have been perfectly entitled to find a service provider and appoint it without going through a tendering process.[236] The facts did not demonstrate the presence of the necessary 'publicness' of the decision.

One can hardly quarrel with the legal position and the elements necessary for purposes of enabling a court to assume jurisdiction on review. The position was reached after a thorough survey and careful consideration of relevant authority. What is interesting though, is the recognition that the courts in South Africa had now ameliorated the situation to accommodate review of decisions of bodies other than the traditional public bodies. A survey of the case law, especially that concerning specific voluntary associations, like political parties, indicates an inclination towards the historical divide between public and private law. To the extent that political parties are voluntary associations on a large scale, the courts were reluctant to apply principles of public law, such as judicial review, in their decisions. In *Bushbuck Ridge Border Committee v Government of Northern Province*[237] it was held that political parties are not subject to the rules of administrative justice. In *Marais v Democratic Alliance,*[238] the Mayor of Cape Town had been stripped of his mayoral position and had his membership to the respondent terminated by the respondent. He challenged both decisions on review. The court held that the decision terminating his membership of the party was not an exercise of public power or performance of a public function in terms of an empowering provision.[239] However, in relation to the mayoral office, the court observed that in terms of the Local Government: Municipal Structures Act,[240] only the relevant

[234] Para 41.
[235] Para 38.
[236] Para 45.
[237] 1999 2 BCLR 193 (T).
[238] 2002 2 ALL SA 424 (C).
[239] Para 51.
[240] 117 of 1998 s 58.

municipal council has the power to remove an executive mayor from office. The court held that once elected to the position of mayor,

> he was no longer a Ward candidate of the respondent, but a duly elected municipal official whose powers and functions, and indeed his retention of office, were subject to the provisions of the said Act.[241]

The respondent had therefore acted *ultra vires* in removing him from his mayoral position. This was interesting, for although the court seemed to review the decisions of the respondent, and did set them aside, it specifically disavowed the label of 'administrative action' or the 'exercise of public power' or the 'performance of a public function'.[242] However, the applicant would succeed on grounds of procedural fairness. It is submitted that the court conflated issues by declaring on the one hand the absence of judicial review and on the other deciding the matter on the basis of a consideration that is an aspect of judicial review. The *Van Zyl* case was decided shortly after *Marais.* It involved the recall of a Provincial Minister by his own party. The court concluded that such recall constituted an exercise of a public power in terms of an empowering provision and was therefore reviewable. The same conclusion was reached in *Max v Independent Democrats.*[243] The Constitutional Court had the opportunity to provide guidance in *Ramakatsa and Others v Magashule and Others,*[244] which involved an application by members challenging the propriety of a Provincial Conference of the African National Congress (ANC), the governing political party. The purpose of the application was to set aside as invalid the Free State provincial conference and all its outcomes on the basis that there were irregularities in many of the branch meetings that elected delegates to the conference.[245] The court did not directly address the issue of reviewability of decisions of private bodies. However, some of the standpoints taken give a hint as to the general attitude of the court. The court, per Moseneke and Jafta JJ, held that political parties may not adopt constitutions which are inconsistent with

[241] Para 54.
[242] Para 58.
[243] 2006 3 SA 112 (C).
[244] 2013 2 BCLR 202 (CC).
[245] Para 6.

section 19 of the Constitution,[246] and if they do, their constitutions may be susceptible to a challenge of constitutional validity.[247] This provision assumed relevance to the extent that the applicants were alleging that irregularities in the branch meetings interfered with their right to determine who to send to the provincial conference as a delegate. In the circumstances of the case, the pronouncement was *obiter* as the court noted that the validity of the ANC constitution was not under attack.[248] The court proceeded to define the relationship that arises from membership of a voluntary association such as the ANC as contractual. It went further to say:

> As in the case of an ordinary contract, if the constitution and rules of a political party, like the ANC, are breached to the prejudice of certain members, they are entitled to approach a court of law for relief.[249]

The court did not spell out what the relief would be in the circumstances. Given the result of the *lis* in the case, where the court set aside the branch meetings as irregular, it can be inferred that the relief includes remedies on judicial review. The court did not send the parties back on account of the inappropriateness of the relief sought. The court did not rely on the old basis for non-suit in matters of review of decisions of private bodies, and in terms of which it was insisted that any party aggrieved by the actions of private bodies must seek remedies in contract. It is submitted this is a welcome development.

In *De Lille v Democratic Alliance and Others*[250] the parties agreed, and the court accepted, that notwithstanding whether or not the actions and decisions of political parties were reviewable on the basis that they constituted administrative action in terms of PAJA, 'they were certainly reviewable on the basis of the principle of legality,

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[246] Section 19(1)(b) provides that 'Every citizen is free to make political choices, which includes the right to participate in the activities of, or recruit members of, a political party'.
[247] Para 74.
[248] Para 74.
[249] Para 80. In this the court relied on a similar pronouncement in *Saunders v Committee of the Johannesburg Stock Exchange* 1914 WLD 112 where the court said at 115:

> There is no doubt that the rules and regulations of a body like the Stock Exchange, just like the rules and regulations of an ordinary club, or the Articles of Association of a Company constitute a contract between its members and that is the reason why any particular member, if the contract is broken to his disadvantage, has the right to come to the Court for the appropriate remedy.

[250] 2018 3 ALL SA 684 (C).

which requires that the party can only act in terms of its constitution and rules'.[251] And in the circumstances, the decision of the first respondent terminating the applicant's membership violated the party constitution and was set aside. The failure to adhere to its own internal rules was the basis for review of the decision.

The dividing line between decisions with public law ramifications and those that are purely of a private nature arose again in *Ndoro and Another v South African Football Association and Others.*[252] some factual background is necessary in order to provide the context. The matter involved the eligibility of a football player (Ndoro) to play for a South African Football Club (Ajax Cape Town Football Club, the 1st Applicant (hereinafter 'Ajax') on his return from a brief sojourn in Saudi Arabia, where he played for a club called Al Faissaly. Before his transfer to Saudi Arabia, he had been registered and had played for another South African Football Club (Orlando Pirates Football Club, the 5th respondent). Thus in one football season, he had played for three clubs. The National Soccer League (NSL), an affiliate of the 1st respondent (hereinafter 'SAFA') which governs and regulates football in South Africa, became aware that Ndoro had played two official games for Ajax. It advised Ajax to stop fielding Ndoro in its official games, pending confirmation by senior counsel, of their understanding of a rule by the Federation Internationale de Football Association (FIFA) (the governing body of world football to which SAFA is an associate), which prohibits a player from playing for more than two clubs in one season.

Ndoro and Ajax brought urgent proceedings before the Dispute Resolution Chamber of the NSL('DRC'), and sought an order that Ndoro was eligible to play in all Ajax's official matches for the entire season. The NSL challenged the jurisdiction of the DRC, contending that the matter fell within the jurisdiction of a different structure called the Players' Status Committee ('PSC'). Determining that it had jurisdiction because in its view the issue was an employment dispute concerning Ndoro and the three clubs he had played for in that season, the DRC held in favour of Ndoro and Ajax, and granted

[251] Para 30.
[252] 2018 (5) SA 630 (GJ).

the orders sought. The NSL appealed, as it was entitled to, to the SAFA Arbitration Panel (the 'Arbitration Panel') which is constituted by a Senior Counsel appointed by SAFA from its Arbitration Panel.

Mr Cassim SC was appointed to determine the appeal, which he did and rendered an award in which he found that the dispute was not an employment related issue as the DRC had found, but rather a matter of status concerning Ndoro's eligibility to play for Ajax for the balance of the season and therefore a matter for the PSC and not the DRC.[253] The NSL then sought to refer the matter to the PSC, whereupon Ndoro and Ajax brought proceedings before the High Court seeking interim relief interdicting the NSL from preventing Ndoro from playing, pending final relief to review and set aside the award made by Mr Cassim. The application for interim relief was dismissed. The review came before Unterhalter J, before whom a preliminary point was taken by the NSL that the arbitration before Mr Cassim was a private arbitration and not susceptible to judicial review. Ndoro and Ajax contended that the decision was reviewable at common law as a private power exercised by a voluntary association, alternatively under PAJA.[254]

Unterhalter J crafted the issue thus:

> The issue that I must determine is whether Mr Cassim's exercise of powers as the Arbitration Tribunal is indeed an award in a private arbitration or whether such powers are either public powers susceptible of review as a matter of public law or at least subject to discipline by a Court as the exercise of powers by a voluntary association.[255]

This formulation of the issue resonates very neatly with the very issue that this entire thesis seeks or has sought to pursue. However certain assumptions in its formulation need to be cleared. The underlying assumption is that any decision from a private

[253] Page 632, Para 9.
[254] Page 633, Para 15.
[255] Page 633, Para 17.

arbitration is not reviewable. This would not necessarily be correct under various Arbitration Acts and the South African Arbitration Act[256] in particular. The Act provides various bases upon which a decision of the Arbitration Panel can be set aside by a court. Those are (a) where the arbitration panel has misconducted itself in its duties as such (b) where it has committed gross irregularity in the conduct of the proceedings (c) where it has exceeded its powers and (d) where the award has been improperly obtained. The setting aside procedure is a species of review as these are the same bases upon which a decision is reviewable at common law. So this is a form of statutorily prescribed review as in the case of Botswana under the Trades Disputes Act. It is submitted further that in fact the award may also be set aside under common law for example where the arbitration panel did not exhibit the level of impartiality required on the application of the *nemo judex* principle or the rule against bias.[257]

The second limb of the test propounded by Unterhalter J, namely 'whether such powers are public powers susceptible of review as a matter of public law' is an expression of the traditional and dominant view that judicial review is a process in public law in terms of which decisions of bodies exercising public powers ('public bodies') can be set aside on one or other of the grounds of irrationality, illegality or procedural impropriety.[258] The third limb 'whether such powers are subject to discipline by a Court as the exercise of powers by a voluntary association' is the very theme of the thesis as it speaks to the reviewability of decisions of voluntary associations or more broadly 'private bodies.' It is this last segment that is to be considered here and is certainly on that footing that the court proceeded in its determination.

In his determination, Unterhalter J recognised that the South African courts have not been consistent in the determination on whether sporting bodies that regulate sport

[256] No. 42 of 1965.
[257] *Appel v Leo* 1947 (4) SA 766 (W); *Orange Free State Provincial Administration v Ahier and Another and Another; Parys Municipality v Ahier and Another* 1991 (2) SA 608 (W).
[258] This is the position in England (*Council of Civil Service Unions and Others v Minister for the Civil Service* [1984] 3 ALER 935), and in South Africa (*Johannesburg Stock Exchange v Witwatersrand Nigel* Ltd 1988 (3) SA 132 (A) and Botswana (*Attorney General and Another v Kgalagadi Resources Development Company (Pty) Ltd* [1995] BLR 234 (CA)).

without statutory authority may be characterised as private bodies that exercise public power and therefore capable of review under PAJA.[259] But he did also recognise, citing *Dawnlaan Beleggings,* that at common law the decisions of certain private non-statutory institutions the powers of which concern the exercise of public regulatory competence were subject to judicial review.[260] This is also the position in Botswana[261] and in England.[262] Unterhalter J recognised the disparate positions taken by the courts, with some emphasizing the primacy of the contract and the consensual assumption of obligations, and determining that such bodies do not exercise public functions[263] and others taking the view that those non-statutory bodies enjoying monopoly powers of a coercive kind and which are of general application and exercised in the public interest and could have been subject to statutory regulation, are to be taken to exercise public functions.[264] While the former is based on the traditional view, the latter is a signification of the extension of judicial review remedies to decisions of traditional non-public bodies on certain considerations. According to Unterhalter J, and summarising the decisions in the latter category, this would happen in the following instances. First, where such a body exercises monopoly power of a coercive kind. This is judicial imprimatur for the notion of monopoly power as a species of public power as propounded by Campbell.[265] Second, where such a body regulates matters in the public interest and could have been the subject of statutory regulation to ensure public accountability.[266] This is an appeal to the 'but for' test, which stipulates that but for the existence of the body in question, government would have enacted legislation to regulate the matters over which it has competence.[267] It is critical here to quote from the judge's summary of the principles he distils from the cases. He said:

[259] Page 633, Para 18.
[260] Page 633, Para 19.
[261] As per *Sorinyane*.
[262] As per *Datafin.*
[263] Page 633, Para 20.
[264] Page 633, Para 21.
[265] Campbell, "Monopoly power as public power for the purposes of judicial review" (2009) *LQR* 491-521
[266] Pages 633-634, Para 21.
[267] *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1993] 2 ALL ER 249 (QB).

> The following principles emerge from this body of cases. First, private entities may discharge public functions by recourse to powers that do not have a statutory source. Powers of this kind may be characterized as public powers. So characterized, actions that issue from their exercise may constitute administrative action. Second, a private entity may exercise public powers, but this does not entail that all its conduct issues from the exercise of a public power or the performing of a public function – all depends on the relevant power or function. Finally, while there are broad criteria for making an evaluation as to whether a competence enjoyed by a private entity is a public power or public function, there is no warrant to conclude that simply because a private entity is powerful and may do things that are of great interest to the public that it discharges a public power or function. Rather, it is the assumption of exclusive, compulsory, coercive regulatory competence to secure public goods that reach beyond mere private advancement that attract the supervisory disciplines of public law.[268]

This neatly summarises the position as discussed in the chapters on Botswana and England that the fact that an entity is private does not necessarily mean its decisions may not be reviewed. Yet again, it does not follow that any action or decision of an entity exercising public power is necessarily reviewable. It will depend on the circumstances of each case. Having laid down the legal principles, the judge next turned to a determination of the powers exercised by Mr Cassim to determine whether they were public powers and consequently reviewable.

He observed that FIFA, SAFA and the NSL are all private entities, and constitute an institutional framework with a comprehensive set of enforceable regulations not derived from public statutes. Their relationships with their members are founded on contract.[269] This notwithstanding, he observed that their objects and operations are public in nature.[270] This is how the judge came to this conclusion:

> First, the regulatory scheme constituted by the statutes and regulations is exclusive, comprehensive, compulsory and coercive. There is no other way to conduct professional football, save in compliance with this regulatory scheme. FIFA and its progeny are the singular source of professional football regulation. Second, compliance is not optional and the rules are backed by coercive sanctions. Third,

[268] Page 634, Para 23.
[269] Page 635, Para 29.
[270] Page 635, Para 30.

> although many actors participate in football for great private reward, football is not the sum of these private actions. Rather it is a sport so widely enjoyed and passionately engaged by large sections of the public that the flourishing of the game is a public good, and one that is often understood to be bound up with the well-being of the nation.
> Once this is so, private associations that regulate football exercise public functions because they oversee a public good, and do not simply regulate private interests.[271]

He concluded although FIFA, SAFA and the NSL are private associations, they enjoy regulatory powers and discharge public functions and their actions amount to administrative action and subject to judicial review under PAJA.[272] It is submitted that this conclusion is correct. It is in essence a judicial acceptance of all the criticisms levelled against the decision in *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan*[273] to the effect that the activities and decision of the Disciplinary Committee of the Jockey Club had all the trappings and indicia of the requisite 'publicness' to be susceptible to judicial review.[274]

It had also been submitted that the appeal to the Arbitration Tribunal was a private arbitration and therefore outside the supervisory jurisdiction of the court on review. The judge dismissed this submission because in his view the whole process lacked the essential attributes of a private arbitration. In summary he enunciated those as follows; (a) private arbitration is a voluntary agreement between parties to refer a dispute to arbitration, but this one was not, (b) in a private arbitration the parties frame the dispute, decide on the powers to be conferred on the arbitrator and choose the arbitrator or the mechanism of appointment, and this was not the case.[275] In analysing the features of the dispute resolution mechanism in the case, he noted that both Ndoro and Ajax referred their dispute to the DRC not because they chose to but because they considered they were required to do so. This was pursuant to the compulsory rule making function by FIFA, SAFA and the NSL. Second, the constitution of the DRC and

[271] Pages 635-636, Paras 30-31.
[272] Page 636, Para 33.
[273] [1993] 2 ALL ER 853.
[274] Beloff and Kerr "Why Aga Khan is wrong" (1996) *JR* 30-33.
[275] Page 637, Para 39.

its powers are not chosen by the parties but are constituted by the regulatory machinery of the scheme in which matters of football are run. Third, the possibility of an appeal against a DRC decision, to which body and the powers of the appellate body are not matters for the parties to determine but determined by the rules created by FIFA, SAFA and the NSL. Fourth, the parties do not chose the arbitrator. SAFA does. So all these point away from the dispute resolution machinery being a private arbitration.[276] Ultimately he held that Mr Cassim's decision constituted administration action and because FIFA, SAFA and the NSL have assumed sweeping regulatory powers they need to be subject to the public law disciplines of PAJA.[277] Consequently, he entertained the review but dismissed the submission that Mr Cassim had committed an error law in holding that the matter was not an employment issue but one concerning the player's status.

It is submitted that in all his findings and conclusions, Unterhalter J was correct. On the particular issue of reviewability of the decisions of the DRC and the Arbitrator on appeal, the judge's methodical approach and incisiveness in sifting out the elements that demonstrate the publicness of the process is to be commended, particularly for moving away from the strictly traditional approach that denied many a litigant remedies in public law through the process of judicial review. This approach should now be firmly ensconced in any legal system.

Finally, there is *President of the Republic of South Africa and Another v Public Protector and Others*[278] (hereinafter '*CR17 Campaign* case') which did not concern a review of a decision of a political party, but with activities within a political party that may impact on the public/private body divide, and more particularly, the finding of the Public Protector regarding these activities. The issues involved and the decision of the court

[276] Page 637, Paras 40 and 41.
[277] Page 638, Para 48.
[278] 2020 (2) ALL SA 865 (GP).

are relevant to our discussion as they bring the subject of the thesis into some perspective.

The case has its origins in a parliamentary question that was put to President Ramaphosa in the National Assembly by the then leader of the official opposition, Mr Mmusi Maimane. The question required the President to explain a payment that was allegedly paid to the President's son (Andile Ramaphosa) by a certain Gavin Watson, then Chief Executive Officer of Africa Global Operations (AGO) formerly Bosasa. Answering the question on the spot, the President confirmed such payment was made and indicated that it was payment for services rendered by Andile to AGO. A week later, the President wrote to the Speaker of the National Assembly indicating that he had 'inadvertently provided incorrect information in reply to a supplementary question'[279] and that he had since been informed that the payment 'was made on behalf of Mr Gavin Watson into a trust account that was used to raise funds for a campaign established to support my candidature for the Presidency of the African National Congress'.[280] The campaign was dubbed the CR17 Campaign and was initiated during the run-up to the next ANC elective congress. At the time, Mr Ramaphosa was the Deputy President of both the ANC and South Africa.

Subsequent to the President's letter of 'correction' Mr Maimane filed a complaint with the Public Protector, the first respondent, requesting her to investigate the developments surrounding the payment in terms of her powers under the Constitution[281] and the Public Protector Act.[282] His complaint was in the following terms:

> It is my concern that the set of facts related above reveal that there is possibly an improper relationship existing between the President and his family on the one side, and the company African Global Operations (formerly Bosasa) on the other side. The nature of the payment, passing through several intermediaries, does not accord with a straight forward donation and raises the suspicion of money

[279] The text of the letter is reproduced at para 11 of the judgment.
[280] Para 11.
[281] Section 182.
[282] Act 23 of 1994. Ss 6 and 7.

> laundering. The alleged donor is further widely reported to have received billions of Rands in state tenders, often in irregular fashion.
>
> It is further my concern that the President may have lied to the National Assembly in his reply to my question on 6 November 2018.[283]

The Public Protector opened an investigation, which culminated in a report. The crucial aspects, for our purposes, were, that the President deliberately and inadvertently misled Parliament and that the receipt of the donations towards the CR 17 Campaign were in violation of the Executive Ethics Code. She then prescribed certain remedial measures.

The President launched review proceedings to set aside both the findings of the Public Protector and the remedial measures prescribed. At issue was whether the Public Protector had jurisdiction to investigate the CR 17 Campaign. The legislative framework giving her power reads, in part, as follows:

> (1) The Public Protector has the power, as regulated by national legislation –
> (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
> (b) to report on that conduct; and
> (c) to take appropriate remedial action.

The President's position was, to the extent relevant here, that the Public Protector had no jurisdiction to investigate issues around the CR 17 Campaign as it was a private matter, not involving public power. His position was foreshadowed in a response to

[283] Para 14 of the judgment. There was a parallel complaint, based on s 4(1) of the Executive Ethics Code, made in terms of the Executive Members Ethics Act 92 of 1998, by Mr Floyd Shivambu, a member of Parliament for the Economic Freedom Front (EFF), which required the Public Protector to investigate (a) whether the statement made by the President in the National Assembly on 6 November 2018 that he saw a contract between his son's company and African Global Operations is true, and that a contract indeed does exist; and (b) whether President Ramaphosa deliberately misled Parliament in violation of the Executive Ethics Code. The complaint is reproduced at Para 16 of the judgment.

the Public Protector's notice of investigation.[284] It is apt here to quote the letter issued to the Public Protector by the President's attorneys. It reads:

> In our client's response, we indicate that we do not accept that you have jurisdiction to investigate the CR17 campaign and to make any findings in relation to it. Specifically, we point out that section 6 of the Public Protector Act, 23 of 1994, limits the powers of the Public Protector to investigate matters which concern public administration and the improper exercise of public or statutory powers. The CR17 campaign and its fundraising operations do not concern public administration or the exercise of public or statutory power. Therefore, the Public Protector has no jurisdiction in terms of the Public Protector Act to investigate the matter at all.[285]

This contention is a familiar one. Its essence is that the powers of the Public Protector exist only in the public space, and concern matters of *public administration* and where there are allegations of the improper exercise of *public* or *statutory* power (emphasis added). Beyond that the Public Protector has no jurisdiction. This is in essence an invocation of the public/private divide. Stretched to its logical end, the argument is that what happens within the private sphere is of no concern to the coercive powers of state functionaries and in particular the Public Protector. It is a field of operation where the dealings of the participants are regulated by private law rules. In this sense, the President was alleging *inter alia* that the Public Protector had acted beyond her powers. In response to the President's attorneys' position, the Public Protector maintained that she had jurisdiction to investigate the CR17 campaign as:

> The conduct of President Ramaphosa amounts to conduct in state affairs and therefore, the matters falls within the ambit of the Public Protector's mandate.[286]

The court noted that the CR 17 campaign was a private and internal party political activity funded from private sources.[287] It held that the activities of the CR17 campaign

[284] Issued in terms of s 7(9)(c) of the Public Protector Act.
[285] Reproduced at para 86 of the judgment.
[286] Para 87.
[287] Para 100.

were an exercise of the participants' rights in terms of Section 19(1) of the Constitution.[288] The court then described the nature of the relationship between political parties and their members within the context of section 19. In this the court relied on two passages in the judgment of the Constitutional Court in *Ramakatsa* where it was said:

> Section 19 of the Constitution does not spell out how members of a political party should exercise the right to participate in the activities of their party. For good reason this is left to political parties themselves to regulate. These activities are internal matters of each political party. Therefore, it is these parties which are best placed to determine how members would participate in internal activities. The constitutions of political parties are the instruments which facilitate and regulate participation by members in the activities of a political party.[289]

and

> At common law, a voluntary association like the ANC is taken to have been created by agreement as it is not a body established by statute. The ANC's constitution together with the audit guidelines and any other rules collectively constitute the agreement entered into by its members. Thus the relationship between the party and its members is contractual.[290]

Following on these observations, the court concluded that the conduct of political activities, within their party structures, and in furtherance of their own personal party ambitions is a matter falling squarely within the private domain.[291] It therefore followed, as the court held, that the conduct of members of the ANC who came

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[288] Section 19(1) provides:

> Every citizen is free to make political choices, which includes the right
> (a) to form a political party;
> (b) to participate in the activities of, or recruit members for, a political party; and
> (c) to campaign for a political party or cause.

[289] Para 73 of *Ramakatsa,* quoted at para 102 of the *CR 17 Campaign* case.

[290] Para 79 of *Ramakatsa*, quoted at para 103 of the *CR 17 Campaign* judgment. The courts in Botswana had already pronounced on this issue. In *Mhale v Boko and Others* [2014] 2 BLR 134 at 140 the Court of appeal said:

> The BNF as a political party, is a voluntary association governed by the constitution and regulations. It is now well established that the constitution and regulations of a voluntary association represent the contract between the association and its members and between the members *inter se.*

The same position was laid down in *Botswana National Front v Magama* [2009] 2 BLR 188, and in *Patle and Another v Botswana Civil Servants Association* [2002] 1 BLR 466. It is a Roman-Dutch common law position.

[291] Para 104.

together under the banner of the CR17 campaign was not conduct in state affairs.[292] Further, that their activities were those of a private group of people, not a statutory body, in furtherance of a matter concerning their relationship with the party.[293] Dismissing the Public Protector's appeal, and confirming the High Court judgment on the point in *Public Protector and Others v President of the Republic of South Africa and Others,*[294] the Constitutional Court said:

> ..what turns an otherwise private entity into an organ of state is the exercise of a public power or the performance of a public function. This is vital in determining whether a particular conduct amounts to a state affair. There can be no state affair without the exercise of public power or the performance of a public function. This is the dividing line between state affairs and private affairs. When a political party holds internal elections, it does not exercise a public power. Nor does it perform a public function in terms in terms of the Constitution or legislation. Instead it acts in terms of its constitution which constitutes a contract between it and its members. Therefore its affairs do not fall within the scope of matters to be investigated by the Public Protector under Section 182 (1) of the Constitution.[295]

Although this case was not about judicial review of a decision of a political party, a private body, the principles laid down in the passages quoted, and some of the conclusions outlined above, give an insight into the extent to which the courts are willing to go if approached to intervene in matters involving those bodies. The court thus recognises some space for the operation of political activity which is not within the ambit of judicial intervention, and implicitly gives imprimatur to the political question doctrine the essence of which is that there are certain matters and issues that are best handled through the political process and the courts, being apolitical institutions, are less equipped to interrogate those matters.[296] But the court did not say it cannot review decisions of a political party. It only sought to delineate the

[292] Para 104.
[293] Para 104.
[294] 2021(9) BCLR 929 (CC).
[295] Para 107, per Jafta J.
[296] This doctrine is discussed to some depth by Mhango *Justiciability of political questions in South Africa: A comparative analysis* (2019).

jurisdictional remit of the Public Protector in matters involving political parties. And the court did not say the Public Protector does not have jurisdiction over political parties at all.

From the above it is abundantly clear that the decisions of private bodies in South Africa are susceptible to judicial review. This would be on the basis that they violate the Constitution, or that they violate the internal rules of the organisation or offend against procedural rules of fairness, or they are *ultra vires* the powers of the decision-maker. and lastly, when they import a sufficient public element. Otherwise, it echoes the same reasoning adopted by the High Court of Botswana in *Autlwetse.* The difference is that the CR 17 Campaign case was not dealing with the common law powers of review over decisions of private bodies but the Public Protector's constitutional and legislative powers to investigate the operations of a private body in the conduct of its private affairs. The other difference lies in that in South Africa and in Botswana post *Autlwetse*, the courts' common law power of review over private bodies is recognised.

6.8 The likely impact of South African decisions on Botswana jurisprudence

Throughout the discussion in this chapter, there has been significant indication of reliance on South African jurisprudence by the courts of Botswana. This is not surprising, as at Chapter 2, it was established that the legal system in the Bechuanaland Protectorate, and later Botswana, was anchored on reception clauses that 'imported' the law of the Cape of Good Hope into Botswana. This was the beginning of a process that would make the common law in Botswana the same as that in South Africa. Reliance on South African authorities has that historical context.

Just like in many other areas of the law, Botswana law has had its fair share of South African influence from decisions on judicial review, and that of private bodies in particular. The position that voluntary bodies are governed by rules of contract founded on the constitutive documents of particular associations is now a settled position.[297] In the *PG Notwane v BFA* case, decided before *Autlwetse*, the Court of Appeal rejected a plea which sought to non-suit the club of the basis of source of power test, and partly relied for that conclusion on the South African cases of *Turner v Jockey Club of SA*[298] and *Barnard v Jockey Club of SA*[299] in setting aside the decision of the association. The *Barnard* case was the basis for the finding against the association for its violation of the *nemo judex* principle. The Court, per Bizos JA also drew inspiration from an old South African text by Rose-Innes[300] for the proposition that decisions of quasi-judicial bodies are required to observe the procedural requirements of fair decision-making. It is not necessary here to sketch out which South African decision was considered in which case. But the general observation is that South African law,[301] to the extent that it is also informed by principles of Roman-Dutch law, is of strong persuasive authority in Botswana. The case of *Tiro v Attorney General*[302] recognises both English[303] and South African law as persuasive sources of authority in matters of judicial review. However, the judge did urge cautionary reliance on South African authorities since the adoption of the 1996 Constitution of South Africa and the promulgation of PAJA as that altered the landscape for reviews in that country.[304] Notwithstanding this position, it is submitted that even after PAJA, South African cases will still be relevant in Botswana to the extent that the phrases 'exercise

[297] The High court in *Patle v Botswana Civil Servants Association and Another* [2002] 1 BLR 466 and the Court of Appeal decision in *Botswana National Front v Magama* [2009] 2 BLR 188, there was reliance on a South African textbook, Bamford *The law of partnership and voluntary association in South Africa* (1982) and South African decisions like *Govender v Textile Workers Industrial Union SA Durban Branch and Others* 1961 3 SA 88 (N).

[298] 1974 3 SA 633 (A).

[299] 1984 2 SA 35 (W).

[300] *Judicial review of administrative tribunals in South Africa* (1963).

[301] The *JCI* case, and *Jockey Club of SA v Forbes* were cited to support the common law basis for judicial review.

[302] [2013] 3 BLR 490.

[303] *Datafin*, *Aga Khan* were relied upon.

[304] 497-498. He repeated the same exhortation in *Bergstan (Pty) Ltd v Botswana Development Corporation Limited and Others* [2012] 1 BLR 858, 865-867.

of public power' or 'performance of a public function'[305] still have to be interpreted under the common law. Since the common law allows for reviews of private bodies if they exercise a public power or perform a public function, any such interpretation of the concepts will provide useful guidance even in a jurisdiction like Botswana where such statutory provision does not exist.

So it is submitted that South African cases will continue to influence Botswana jurisprudence.[306]

6.9 Possible extension of judicial review on account of 'contractualisation'

At Chapter 5, we have seen how the process of contractualisation has resulted in an expansion of the application of public law principles of judicial review to private bodies in England. The South African courts have had to engage with the issue of contractualisation and privatisation of government business in the *Cape Metropolitan Council* case. The Botswana courts have also engaged with the same issue as illustrated by the *J & T Decorators* case in which Dingake J spoke of '… the use of contractual mechanism in the performance of governmental functions and the resultant 'privatisation of the State'.[307] In *AV Communications (Pty) Ltd v The Attorney General and Others*[308] Nganunu J (as he then was) laid down the public utility consideration for contractualisation as follows:

> The fact is that the Government has now selected and established a well-known procedure for contracting. It has established a public tender procedure for inviting members of the public to qualify to be chosen for various contracts. … It is firstly a procedure intended to use public funds in an economic way by calling for

[305] Section 1 of PAJA.
[306] To this end the reasoning in the *Ramakatsa* and *CR17 Campaign* cases, to the extent that they interpret the phrases 'public power' and 'functions of a public nature' will most likely be adopted in Botswana when the occasion arises.
[307] 853.
[308] [1995] BLR 739.

> competitive bids. It is also designed to give the commercial public an opportunity to obtain government contracts. It is a well-known fact that in countries such as Botswana, government contracts of various types account for substantial business, especially in the Botswana economy. … Above all, the Government by adopting the open tender system not only wanted to give an opportunity to all qualified business people but also to make an open system that by itself will demonstrate to the public in a democratic state how the money is used and that contracting partners are chosen on verifiable objective standards. The tender process is very important as it deals with very large public funds. … A court would in my opinion protect the procedure and actions resulting in one, some or most of the tenders not being dealt with fairly would be reviewable.[309]

Having been so recognised by the courts, this has the potential, as it has done in England, to expand the contours of judicial review beyond decisions of public bodies and to apply to those of private bodies. The contractualisation process has now been placed on a policy and legislative foundation in Botswana. At the policy level, in 2000 Government adopted a Privatisation Policy for Botswana.[310] The policy deliberately adopts a broad definition of privatisation as one that 'encompasses all the measures and policies aimed at strengthening the role of the private sector in the economy'.[311] Government has though the policy undertaken to pursue issues of contracting out to the private sector the production and supply of goods or services.[312] For some unexplained reasons, government never promulgated a law on privatisation. The implementation wing of the policy is a company limited by guarantee, the Public Enterprises Evaluation and Privatisation Agency (PEEPA). It is wholly owned by government. This provides opportunity for the courts to pronounce on possible questions on review around decisions of the entities to which services have been contracted. There is so far no case directly on the point. But with the growing competition for the meagre resources available in a relatively small economy like that of Botswana, those can be anticipated in the future.

[309] 745E.
[310] Government Paper No 1 of 2000.
[311] Para 23.
[312] 111.

At the legislative level, Parliament enacted two pieces of legislation. The Public Procurement and Asset Disposal Act[313] was promulgated to regulate the process which the central government engages private bodies for the purpose of provision of services. The implementation of the Act is driven primarily by a Public Procurement and Asset Disposal Board (PPADB)[314] which is conferred with huge and onerous responsibilities of a public nature. Of moment is the obligation to ensure that in making their decisions, all procurement entities take into account the principles of open and competitive economy, competition among contractors by using the most efficient and competitive methods of procurement to achieve best value for money, fair and equitable treatment of all contractors in the interest of efficiency and the maintenance of a level playing field, accountability and transparency in the management of public procurement and integrity, fairness of and public confidence in the procurement process, among others.[315] In *Researched Solutions Integrators (Pty) Ltd v The Public Procurement and Asset Disposal Board and Others* [316] it was held that the PPADB was given the role of guardian of the public interest in the area of public procurement with momentous fiduciary duties.[317] While the responsibilities seem to expressly oversee the conduct of public authorities in the procurement process, under the Act, even the conduct of the contracted entities also falls under the PPADB's regulatory responsibilities. There is no case so far in which a decision of a contractor within the scheme of the PPAD Act has been subjected to judicial review. But that may also be anticipated as competition for jobs eventuates.

The other piece of legislation is the Local Authorities Procurement and Asset Disposal Act (LAPAD)[318] which regulates matters of public procurement within local authorities.[319] Local authorities are public institutions which operate under delegated

[313] Cap 42:08. The Act was passed in 2002.
[314] The Preamble of the Act and s 10.
[315] Section 26.
[316] [2005] 2 BLR 493.
[317] 502.
[318] Cap 42:11. The Act was passed in 2008.
[319] Those are a city council, a town council, a township authority, a district council, a sub-district council or an administrative authority. These are authorities created by statute, the Local Government (District Councils) Act Cap 40:01 and the Townships Act Cap 40:02.

authority from the central government. The local authorities themselves are the implementing agencies of the Act and also provide oversight roles. LAPAD operates on the same principles as the PPAD Act to the extent that it requires a local authority to conduct its procurement activities in a manner which (a) promotes transparency, accountability and fairness (b) maximises competition and (c) promotes economy, efficiency and value for money.[320] Just as in the case of the PPAD Act, there is no case which has implicated a review of a decision of a body contracted by the local authority.

The purpose here was to demonstrate that there is a field of contractualisation that exists in the Botswana economic environment which has legal support, and is an area in which the issue of review of decisions of private bodies has a potential to eventuate.

In summary, although there is still some resistance, decisions of private bodies are now reviewable in Botswana in the same way as those of public bodies in the exercise of the High Court's inherent and common law powers. The court will entertain reviews of private bodies if they have taken decisions, whether they are administrative or quasi-judicial and will in appropriate circumstances set those aside. Thus the position in Botswana is now the same as that obtaining in England. It is neatly summarised by Lesetedi J in *Segwabe v Botswana Defence Force,*[321] a case that concerned a review of a decision of the Botswana Defence Force discharging the applicant from the army as follows:

> I think it is well established that judicial review is a remedy to afford relief against abuse of power by functionaries or organisations in which the decision-maker holds some public law powers or in some cases private law powers (for example, voluntary associations) over certain parts of the applicant's life and that Order 61 of the Rules of the High Court was crafted and fashioned particularly to deal with and to accommodate legal proceedings under that class of actions.[322]

[320] Section 34. These are the same principles laid down at S 26 of the PPAD Act.
[321] [2010] 2 BLR 449.
[322] 456.

This case, together with all those discussed above,[323] presents the position that decisions of private bodies are reviewable if they meet certain conditions. This is generally that the bodies should have been acting in a quasi-judicial and even administrative manner and should affect a person's rights, interests or legitimate expectations, and that there is some public element in the body making the decision. This requirement has to be demonstrated in the case of private bodies while in the case of public bodies it is presumed. But this is not dispositive of the matter, as at common law the public element is not required. The procedure for mounting a review is the same for public and private bodies. The amenability of decisions of private bodies is neatly summarised by Quinot[324] as follows:

> Under common law certain decisions of private bodies, notably disciplinary action, which did not amount to the exercise of public power or a public function were nevertheless subject to administrative law principles and judicial review. In relation to decisions of disciplinary tribunals of bodies such as unions, universities, (sport) clubs and churches the courts mostly read these principles into the relevant contracts that governed the parties' relationships … These matters thus did not fall within administrative law strictly speaking, but only applied administrative law-like principles via contract law.[325]

This applies with equal force to the position in Botswana, which applies the same common law as South Africa. The principle applies beyond decisions in disciplinary proceedings as evidenced in Botswana by the extension of the principle to cases such as *Ngakaetsile* and *Mogorosi*. The overruling of *Autlwetse* is testimony to the extension of the principle to decisions of private bodies with negative implications for members. The decisions in *Du Preez* and *Odisang* are therefore, it is submitted, an aberration.

Before concluding this chapter, as earlier indicated, it is necessary to introduce a brief discussion of the processes of the Industrial Court as some form of review of decisions of private bodies occurs in that court.

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[323] Such as *Sorinyane.*
[324] Quinot *Administrative law, cases and materials* (2008).
[325] Quinot *Administrative law, cases and materials* 56.

6.10 Judicial review of decisions of private bodies in the Industrial Court

The place of the Industrial Court in the dispute resolution machinery in Botswana is a rather complex one. This complexity is borne out of the fact that it has concurrent jurisdiction with the High Court in labour matters allowing parties to choose the forum[326] for having their disputes resolved at their own convenience. This has generated a debate as to the proper remit of the court, its powers and the extent of the relief it can grant. This complexity also arises from the manner of establishment of the two courts. While the High Court is established by the Constitution, which is the supreme law of the country, with unlimited original jurisdiction to determine any civil proceedings under any law,[327] the Industrial Court is established by statute,[328] and as such can only exercise jurisdiction expressly conferred by the Act.[329] Of importance is the provision of the Act conferring jurisdiction on the court. It provides:

> The court or any division of the court shall have exclusive jurisdiction in every matter properly before it under this Act, and without prejudice to the generality of the foregoing, such jurisdiction shall include power –
>
> (a) ….
>
> (b) ….
>
> (c) to hear appeals and *reviews* of decisions of mediators and arbitrators.[330] (emphasis added).

[326] *Khoemacau Copper Mining (Pty) Ltd v Wallace* [2019] 2 BLR 565 (CA) at 571; *Botswana Railways Organization v Setsogo and Others* (1996) BLR 763.
[327] Section 95(1).
[328] The Trade Disputes Act Cap 48: 02. The latest version is Act 6 of 2016 s 14.
[329] *Botswana Mining Workers Union and Another v Debswana Diamond Company (Pty) Ltd* [1997] BLR 228, 243.
[330] Section 18(1).

The exclusivity of the court's jurisdiction has been held not to dilute the High Court's original unlimited jurisdiction as it only applies to matters 'properly before the Industrial Court under the Act' and no more.[331]

In the formative legislative machinery leading to the enactment of the Act, the court was empowered only to deal with disputes concerning employees (who were then defined to exclude persons employed in the public service). That meant Government was correspondingly not an employer for purposes of the Act. This definition has now been widened to include various employment relationships except what could be described generically as the 'security services' and 'employer' includes a 'public authority'.[332] The jurisdiction was also limited, and did not mention 'reviews' prompting the court to hold then, as follows:

> The High Court has inherent powers to review. The Industrial Court on the other hand does not have any inherent powers and therefore has no inherent powers to review. The Industrial Court is a creature of statute and all powers it has, can only be derived from the empowering statute, which is the Trade Disputes Act and to be more specific section 18(1) of the said Act. Section 18(1) does not give this court the power to review and therefore this court has no jurisdiction to review.[333]

The amendment of the Act in 2004[334] to include powers of review meant that the court is now empowered to review decisions of mediators and arbitrators to whom industrial disputes may be referred under the Act. This power to review was confirmed by the court in *Modise v The Attorney General*[335] in which the court dismissed a point *in limine* challenging the revisionary jurisdiction of the court. The court's revisionary jurisdiction is however circumscribed under the Act. In terms of section 20(1) as outlined above, review is available in respect of decisions of mediators and arbitrators. In respect of mediators, such review is available only in circumstances set out as follows:

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[331] *Botswana Railways Organization v Setsogo and Others* 800.
[332] Section 2.
[333] *Botswana Mining Workers Union and Another v Debswana Diamond Company (Pty) Ltd,* 243 per De Villiers J. Section 18(1) did not provide for any power of review.
[334] Through Act 15 of 2004.
[335] [2010] 3 BLR 589.

(a) where the mediator acted contrary to provisions of this Act and procedures established under this Act;
(b) where the decision making process was unfair; or
(c) where the mediator failed to explain in detail to the parties, the implications of referring a dispute to arbitration …[336]

And in respect of arbitrators, review is available to the court:

(a) where the arbitrator acted contrary to provisions of this Act and procedures established under this Act;
(b) where the arbitrator failed to apply his or her mind to the relevant issues which resulted in the decision being arrived at arbitrarily, irrationally or in bad faith.[337]

Given that this is a review of a decision of a mediator and an arbitrator to a dispute between an employer and an employee, the question arises as to whether a decision of an employer who is a private body is reviewable within the scheme of the Act. It is submitted that the review of a decision of a mediator or arbitrator where they ruled in favour of an employer, if successful, would by implication be a review of the decision of the employer, for then the employer would cease to have any rights in respect of the decision of the mediator or arbitrator as the case may be. Further, even forgetting for a moment about review, the way the court works is to determine decisions of employers, as to whether they were both procedurally and substantively fair on the basis of the Employment Act[338] and the Trade Disputes Act to the extent that it enjoins the court, and mediator or arbitrator, to take into account any Code of Good Practices, policy, guideline or model agreement in making any decision under the Act.[339] At present the prevailing code is the National Industrial Relations Code of Good Practice, Model Procedures and Agreements.[340] At various clauses of the code there is provision for termination of employment as follows:

(a) Termination of employment is one of the primary concerns of employees and no contract of employment may be terminated:
    (i) arbitrarily

[336] S 21(1).
[337] S 21(2).
[338] Cap 47:01.
[339] Section 53(2).
[340] Government Notice No 483 of 2008.

(ii) without due process; and
(iii) without just cause[341]

(b) An agreement for an unspecified period of time … continues until it is lawfully terminated. This means that it must be terminated for just cause and on proper notice by either of the parties or for other reasons …[342]

(c) In a contract for an unspecified period, a dismissal is not wrongful if it is effected for a fair reason and in accordance with a fair procedure, in addition to complying with any notice period required in a contract of employment or by legislation.[343]

(d) The onus of proving the fairness of a dismissal lies with the employer.[344]

These are now statutory requirements to be taken into account by the court. In their nature and form, these are grounds of review at common law which require observance of the *audi alteram partem* principle, and that there must be a reason or basis for taking negative action or decision against a person.[345] As will be shown shortly, even the *Wednesbury* [346] requirements of reasonableness, if established, are a basis for offsetting a dismissal. It has to be stated that the Code is not the origin of basic protections accorded to employees against dismissals or any form of negative action by the employer against the employee. The Industrial Court has long laid down the requirements for a lawful termination of employment, even from the time when it had jurisdiction only in respect of employers and employees outside the public sector. The leading case for both substantive and procedural fairness in termination of a contract of employment is *Phirinyane v Spie Batignolles*[347] in which De Villiers J laid down the requirements thus:

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[341] Clause 14.1.
[342] Clause 2.1.2.
[343] Clause 3.6.2.
[344] Clause 3.6.5.
[345] *Ridge v Baldwin* [1963] 2 ALL ER 66; *Raphethela v AG* [2003] 1 BLR 591.
[346] This is a principle the case *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 which holds that a decision will be set aside if it is so unreasonable that no reasonable authority properly directing itself would have arrived at it. For example, if the decision maker took into account irrelevant considerations, or disregarded relevant ones. Writing about the test in the *GCHQ* case, Lord Diplock said, 'It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person, who had applied his mind to the question to be decided could have arrived at it' 951. This is part of the law in Botswana, having been expressly adopted in the *Raphethela* case, at 598. The Industrial Court has adopted these common law grounds of review in relation to decisions of arbitrators *African Tourism Group v Modibedi* [2009] 1 BLR 262, *Boiteko Chibuku Distributors v Motlhose* [2011] 1 BLR 94 and *Mosweu v Ministry of Education and Skills Development and Another* [2017] 2 BLR 565.
[347] (1995) BLR 1.

> In disciplinary dismissals there must therefore firstly be a valid reason for the dismissal. This means that there must be sufficient proof, judged objectively, that the employee has in fact committed the alleged misconduct. In the absence of such proof the reason for the dismissal cannot be said to be valid. When an employee denies the alleged misconduct, the employer must place sufficient facts before the chairman of the disciplinary enquiry to establish, not only that the alleged misconduct has been committed and that it has in fact been committed by the employee so charged. Secondly, the reason for the dismissal must also be fair. This means that the dismissal must be justified according to the requirements of natural justice or of equity, as it is sometimes put; and in particular the requirement of reasonableness.[348]

The code mirrors these requirements in a significant respect, and has reduced their application from a position of mere precedent but to confer upon them a solid statutory requirement.[349] The Court of Appeal has recently, in the *Khoemacau* case, confirmed them as the requirements to be applied by the Industrial Court in determining the lawfulness or otherwise of a decision.[350]

The purpose of this somewhat lengthy discussion is to demonstrate that while the debate on the review of decisions of private bodies has been raging on, the Industrial Court has since inception been reviewing decisions of private bodies on the basis of statutorily conferred powers. This jurisdiction of the Industrial Court, as appears from the discussion above, is, however, limited to cases of termination of employment. In that exercise, the court relies on grounds of review available at common law, such as principles of natural justice, both the *audi alteram partem* principle[351]and the *nemo judex*[352] principle and reasonableness. So, in essence, decisions of private bodies are reviewable in the Industrial Court subject to the statutory limitations described.

[348] 4.
[349] Section 53(2) of the Trade Disputes Act.
[350] Unreported case number CACGB -102-18 of 26 July 2019 Para 29 per Kirby JP.
[351] As in *Phirinyane*.
[352] *Mupane Gold Mine v Daniel Makuku* unreported case number CACGB-109-16 of 31 October 2017.

6.11 Conclusion

This chapter has attempted to demonstrate that decisions of private bodies in Botswana have always been amenable to the court's revisionary jurisdiction. The courts claimed this jurisdiction on the basis of the common law, and in the exercise of the High Court's inherent jurisdiction. The common law does not insist on any principle that the decision impugned must have been made by a body exercising public power or performing public functions. It is sufficient if the decision affects a person materially negatively. The fact that the body in question is a voluntary association in terms of which members bind themselves in contract does not exclude judicial review, it being the underlying rationale that rules of natural justice and the exercise of power will be implied or read into the contract.

In the cases in which decisions of private bodies were set aside, it was mostly on the basis of procedural impropriety, that is violation of the rules of natural justice especially the *audi* principle and rarely the *nemo judex* principle, illegality, and that the decision-maker had acted *ultra vires* its powers. We are still to encounter a case in which a decision of a private body was set aside on the basis of the other grounds of review as enumerated in *Anisminic*.

What the chapter has done is to answer the major question as to whether decisions of private bodies are reviewable within the legal context of Botswana, and it was answered in the affirmative.

In the Industrial Court, the question of review of private bodies does not arise as that court is statutorily empowered to engage in that exercise. It exercises its jurisdiction

by making the same enquiries that a common-law court would do in review proceedings, and on basically the same grounds.

The next chapter, which will be the final one, will provide a summary as to what has been written thus far, conclusions to be drawn, – a synthesis of the material – to be followed by relevant recommendations. In short, in the final chapter I will draw attention to and set out the main findings, especially the comparisons between English law and the law of Botswana on judicial review of decisions of private bodies. This will synthesise the entire study and propose recommendations for future guidance to the courts and the legislatures.

CHAPTER 7

CHAPTER 7

CONCLUSIONS, SYNTHESIS AND RECOMMENDATIONS

7.1 Introduction

One of the cornerstones of the rule of law is the idea that a person complaining of any action or decision by a body that affects him or her negatively must be allowed the means of redress in the courts of law. Judicial review is one of the means provided by the law for this purpose. Its function is corrective in nature and effect and is primarily to set aside the decision complained of, or to command action in a particular direction in order to redress the wrong committed. Yet, it is not the only means of legal redress available in respect of complaints or grievances arising from the consequences of decision-makers. It only applies within certain broadly defined parameters and in respect of certain types of decisions made by particular bodies. This thesis has set out to contribute to an understanding of the types of bodies to which judicial review applies, and its scope and limits. In particular, it has established the parameters for the application of the process of judicial review to decisions of private bodies. Although it is limited to two jurisdictions, Botswana and England, it was deemed necessary to also survey the position in South Africa as it is demonstrably connected to the position in both Botswana and England.

The choice of private bodies as the main focus of the study was motivated by a realisation that for a long time the remedy of judicial review was limited to decisions of public bodies to the exclusion of decisions of private bodies. This exclusion-based view arose from a conception that review was a public-law remedy, applying only to bodies that operated in the public law arena. The implication of this was that private bodies operated in the private-law arena, applying private law and their decisions had no public law consequences. As was shown in chapters 3 and 4, this classification of bodies, and the resultant ascription of the applicable law was based on a fundamental misconception which proceeded from a flawed premise that it was impossible for private bodies to act in the public-law arena, and that their decisions could never have

public-law consequences. It was also oblivious of the reality that public bodies are capacitated and do often exercise private law rights and enter into private relations. The denial of judicial review in respect of decisions of private bodies on the basis of the type of law was not satisfactory and caused injustice to those against whom their decisions applied.

7.2 Findings

7.2.1 Judicial review – a conceptual analysis

As discussed in chapter 3, the origins of the process of judicial review in England can be located in the monarchical administration of society as a whole, in terms of which the monarchy exercised all governmental powers, including critically, by way of what became known as the prerogative writs. These were to transform into orders of court upon the transfer of royal powers to the courts. This charted the path for the process of development of judicial review as a public remedy by the courts. To this extent, it was a public process, occurring in public law, hence judicial review was conceived as a public-law remedy. The prerogative orders were directed at state officials and other public institutions who were to comply with the demands contained in those orders. Hence, in its later development, and with the transfer of jurisdiction in respect of the orders from the monarch to the Court of Kings Bench, it applied to public bodies as these had similarly inherited the position of state bodies during the King's reign. Beyond the seventeenth century the Court of Kings Bench had firmly assumed and exercised supervisory powers over the actions of government bodies, and in particular, those created by statute. Thus, the modern-day conception of judicial review as a public law remedy, applying to public bodies, is a feature with strong historical foundations.

The study has established that at a general level, the process of judicial review takes on a regulatory function; to ensure legality in the decision-making process, which it does by having the court quash and set aside a decision made contrary to law, or to

prohibit the doing of an act that is illegal, or to compel a body to act in terms of the law through the orders of *certiorari*, *prohibition* and *mandamus,* respectively.

Judicial review is a circumscribed process, in the sense that it is not open to any prospective litigant and in any circumstances whatsoever. It is hemmed and hedged in by conditions and limitations that have a bearing, first, on the applicable law in terms of which the body operates, that is whether it is governed by public or private law; second, whether the decision complained of is that of a public or a private body; and third, eligibility or suitability of the act or decision to judicial review depending on whether or not the decision was made within the context of the exercise of public power or functions, or has public-law consequences. These features, as established in chapters 3 and 4, in turn impact on the court's jurisdiction to entertain judicial review. Thus, the study has established three layers or levels of the restriction brought to bear on the application of judicial review: the public/private law dimension, the public/private body and the public/private law consequences dichotomies. The application of these is what would result in the exclusion of decisions of private bodies from the reach of judicial review remedies.

7.2.2 The public/private law dimension

English law was for a long time steeped in the separation of public and private law for several purposes including the amenability of decisions to judicial review. The most authoritative statement of this position is to be found in the House of Lords' decision in *O'Reilly and Others v Mackman and Others*[1] which laid down that judicial review is a public law remedy, available where there is application of public law as against the application of private law. Thus, the public/private law dichotomy determines the availability of, and the court's jurisdiction in respect of, judicial review. Although at the beginning this position enjoyed academic justification,[2] and was supported in case

[1] [1983] 2 AC 237.

[2] For example, Gordon *Judicial review: Law and procedure* (1996) said:

> Judicial review is the means by which the High Court exercises a supervisory jurisdiction over inferior courts, tribunals or *other public bodies* (including individuals charged with public law functions) 1;

law,[3] the justification for the divide is contested by others.[4] The practical application of this distinction is to separate the entities to which the public law and private law apply, with public law applying to public bodies, and private law applying to private bodies. This had the effect of precluding decisions of private bodies from the purview of judicial review. Thus the public/private law divide has implications for the revisionary jurisdiction of the court. This is not desirable for it results in disparate treatment of different people affected by similar decisions by reason only of the rules that are determined by law to apply to each of them. It is submitted that this inequality should be resolved by making judicial review applicable to decisions of both public and private bodies if the conditions for review exist.

7.2.3 The public/private body distinction

The public/private law dichotomy has a domino effect in that it necessarily gives birth to another dichotomy; that of the public/private body. In this regard, the thesis sought to establish the nature of public and private bodies and the basis for their distinction. For a long time this distinction, as established in chapter 4, determined the eligibility of particular decisions to judicial review. The categorisation of entities into public and private bodies, apart from lacking any coherent basis, is very often devoid of certainty. This presented a challenge as to the normative basis for separate treatment of litigants who found themselves in separate situations based solely on the type of body against whose decisions they complained.[5] This separation implicated possibilities for obtaining relief by way of judicial review, and by extension, access to justice generally. In sum, it has emerged that the availability of judicial review is dependent on a resolution of the public/private law and the public/private body dichotomies, with a bias towards the 'public' assessment of either the law or the body itself. It has been argued that

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and Beatson '"Public' and 'private' in English administrative law" (1987) *LQR* 34-65 who said 'it is only public law rights that must be vindicated by the application for judicial review' 39.

[3] *R v Criminal Injuries Compensation Board exparte Lain* [1967] 2 ALL ER 770 (England*); Pennington v Friedgood and Others* 2002 (1) SA 251 (C) (South Africa) and *Autlwetse v Botswana Democratic Party and Others* [2004] 1 BLR 230 (Botswana).

[4] Woolf 'Public Law-private law, why the divide? A personal view' (1986) *PL* 220-238; Harlow '"Public' and 'private' law: Definition without distinction' (1980) *MLR* 241-265; Jolowicz "The forms of action disinterred" (1983) *CLJ* 15-18.

[5] Woolf "Public Law-private law, why the divide? A personal view" (1986) *PL* 220-238.

there is no principled basis for the categorisation and the acceptance or otherwise of jurisdiction on review in respect of some decisions and not others. The separate treatment of the bodies only leads to disparate treatment of people who are affected by decisions of either body in the same way, and who would otherwise benefit from a similar remedy but for the badge or label carried by the body. While those complaining of decisions of public bodies can get a remedy through the judicial review process, those complaining of decisions of private bodies may not, and have to find other possible remedies which are not usually effective depending on their circumstances. Therein lies the injustice resulting from the separation in jurisdiction. This injustice is recognised by the courts themselves.[6] It is the position of this thesis that this distinction does not conduce to justice and should be jettisoned.

7.2.4 The characteristics of public and private bodies: a summary

Having established the qualification for judicial review based on the nature of the body whose decision is the subject of complaint, the thesis set out to establish the criteria for determining the label given to a particular body. It was established that the criteria used for separating the types of bodies are, taken collectively, rather fluid. While some of them are straightforward, for example the determination based on the manner of establishment (by statute or prerogative in the case of public bodies, and contract in the case of private bodies), this does not conclude the inquiry as to reviewability of their decisions. And this is where the demarcation yields dissatisfaction as the characterisation of bodies does not automatically determine the basis for the court's revisionary jurisdiction. It still has to be determined if the decision complained of was made in the context of the exercise of public power or function, and whether it has public-law consequences. This is where problems arise. The initial criterion (of determining the type of body in question) tends to create a presumption in favour of reviewability in respect of public bodies, and against reviewability in respect of private

[6] This was the basis of Edmund-Davis LJ's lamentations in *Breen v Amalgamated Engineering Union and Others* [1971] 2 QB 175, 194 when he said

> I entertain substantial doubts that the judgment I am about to deliver will serve the ends of justice. That is to say the least, a most regrettable situation for any judge, but I see no escape from it. Its effect is to throw away empty-handed from this court an appellant who, on any view, has been grossly abused. It is therefore a judgment which gives me no satisfaction to deliver.

bodies. The requirement of the exercise of a public power or function would, to the extent that it is applied to both types of bodies, seem to render the first criterion less important. The additional criterion of having to determine reviewability of a decision on the basis of the nature of implications or consequences it has (that is whether they are public) raises more questions as to the importance of the first two. To the extent that the criteria applied for determining the revisionary jurisdiction of the court are not settled, it is submitted that separating bodies according to type or nature is dangerous and may lead to undue exclusion of some decisions from the purview of judicial review, with the result that deserving parties could be left without a remedy.

7.2.5 The public power/function dimension

The determination of the amenability of a decision to judicial review on the basis of whether it was made in the context of the body's exercise of public power or functions is premised on the recognition that either body, public or private, is capable of making decisions with public law implications. However, it is another grey area with great potential for exclusion of decisions of private bodies from judicial review because historically, private bodies were deemed to act outside the public-law arena. That has not changed much, although there has over time been some gradual acceptance of the reality of their public law effects.[7] The thesis has established though, that this criterion creates a window allowing for the review of decisions of private bodies, provided they meet the 'public power or function test' or generally the 'publicness' threshold. The difficulty with this characterisation is the absence of a consistent and coherent definition of public power or 'publicness' of a decision.

Many attempts at defining public power, as established under chapter 4, locate the state as the repository of public power and that such power exercised by the state or any of its functionaries is presumptively public power. In extrapolation, it was established that the exercise of public power affects the public interest in that its exercise produces effects for the general public and is usually directed towards a

[7] This is the dimension introduced in *R v Panel on Take-overs and Mergers ex parte Datafin plc* [1987] QB 815.

general or specific group of people. This, however, is contestable by reason that some entities that traditionally did not exercise public power have over time developed to a stage where they exercise functions hived off or outsourced or contracted out to them by the state, in situations where their decisions have the same effect as those of state functionaries.[8] This 'privatisation of government business' has the effect of diluting the criterion for determining the exercise of public power on the basis of the entity that exercises it, and must certainly implicate the reviewability of decisions. As previously expressed, the preferred view is that amenability to judicial review must not depend entirely on the type of body that makes the decision but on the nature of the decision made.[9] Over the years, the inconclusiveness of the exact parameters of public power has given rise to various postulates as to its scope of judicial review. Rejecting the 'source of power' test, which is that public power is that arising from the exercise of either statutory or prerogative powers, Campbell[10] propounds a monopoly test as the determinant of whether power is public or private. The parameters he presents are set out in chapter 4.[11] This postulation, it is submitted, should be credited for not focusing unduly on the type of body and includes decisions of private bodies as importing a sufficient public element for purposes of review. However, its weakness is that it suggests that the source of power is irrelevant.[12] It is submitted that to determine the nature of power exercised by reference to the source of that power is not necessarily objectionable as one of the factors, together with others, to be considered. It may well be that in many cases the source of power concludes the inquiry, for purposes of determining amenability to review. But this would not be the position in all cases owing to the malleable and expansive reach of the concept of monopoly itself. Thus the conception of public power still engages debate as to its true nature, scope and limits. Judicial efforts to shape the true nature of public power have not succeeded in any attempt to establish a definitive delineation of the kind of power that warrants intervention by way of judicial review. The Australian case of *Forbes v*

[8] Hunt "Constitutionalism and the contractualisation of government in the United Kingdom" in M Taggart (ed) *The province of administrative law* (1997) 21-40, 30.
[9] Giusanni *Constitutional and administrative law* (2008) 252.
[10] Campbell "'Monopoly power as public power for the purposes of judicial review" (2009) *LQR* 491-521.
[11] He posits that 'power that is exercised by a person or body in the carrying out of a function, where only that person or body performs the function, should be regarded as public for the purposes of judicial review …' at 491.
[12] Williams "Judicial review and monopoly power: Some sceptical thoughts" (2017) *LQR* 656-682.

New South Wales Trotting Club Ltd [13] which attempted to delineate the nature of public power also raised several questions in its ascription of public power by reference to (a) effect on members of the public to a significant degree, (b) acceptance of fees for its services from members of the public, (c) power to exclude members of the public from its services subject to due process. These are also open-textured considerations, as the determination of 'significant effect' on members of the public imports a value judgment on the number of people qualifying to be described as 'significant', and acceptance of fees for services rendered is so wide as to include the operations of private bodies which charge fees for their services, and the power to exclude is not exclusively that of public bodies. In fact, private bodies often exclude members for any number of reasons. The qualifier of due process would not necessarily make a private body a public one, as private bodies may equally determine to follow this procedure. The significant factor to extrapolate from the case is the concession that the exercise of public power is not so obvious and that public and private power may shade into one another.[14] This was always going to be difficult, given the accepted reality that private bodies may sometimes exercise what to all intents and purposes is public power with public law consequences or carry out functions of a public nature, and that public bodies also operate in the private sphere. This difficulty is what has in the final analysis left the test for amenability to judicial review to judges in individual cases who, acknowledging the difficulty,[15] have in some instances relied on their 'overall impression'[16] and that it is 'often as much a matter of feel, deciding whether any particular criteria are met'.[17] To ease matters, it has been held in *Datafin* that the determination should be based on the nature of the decision and the effect it has on the public without undue fixation with the type of body in question. I agree with this position as it emphasises the nature of the function exercised and the nature of the decision to determine jurisdiction. The imposition of several qualifiers has clearly not borne fruit, and it results only in unnecessary

[13] (1979) 143 *CLR* 242.
[14] 275-276.
[15] For example, in *R (Holmcroft Properties) v KPMG* [2016] EWHC 323 (Admin); *R v Derbyshire County Council exparte Noble [*1990] ICR 808.
[16] *R v Legal Aid Board ex parte Donn and Co* [1996] 3 ALL E R 1 at 11 per Ognall J.
[17] *R (Tucker) v Director General of the National Crime Squad* [2003] ICR 599 para 13 per Scott Baker LJ.

exclusion of some decisions from the court's reach by judicial review, frustrating what would otherwise be deserving litigants. Unfortunately, the source of power, although admittedly not conclusive, was to remain for a long time the dominant factor in determining amenability of decisions of private bodies to judicial review. And this was in spite of academic calls for reform and limited attempts by some in the judiciary to expand the horizons.[18] However, there has been a discernible shift in judicial attitudes, which has brought in new perspectives and dimensions on the determination of amenability of decisions of private bodies to judicial review.

7.3 Shifting the paradigm

The development of the law governing judicial review, in particular whether decisions of private bodies should properly be subject to judicial review, coincided with a period of global economic transformation, in terms of which many states were, and still are, re-engineering their economic development models. In many states the development agenda entailed the recognition of the private sector as an important partner in economic development. Many states are warming up to the reality that governments should retreat from the business space and play a facilitative role by providing a conducive business environment. This entails that government has to rid itself of some essential governmental functions, by way of a deliberate policy of decentralisation, deregulation and privatisation,[19] and hive them off to other bodies which are different in shape and form from the traditional government departments. Some of these bodies that perform important public functions do not satisfy the 'source of power' test, yet they are recognised as usefulness entities in the roll-out of important public services. Some of the criteria employed to distinguish between public and private bodies, such as the nature of the function exercised would then be significantly compromised. This has seen the emergence of certain powerful private organisations[20] that wield a great

[18] For example, Lord Denning MR's positions in *Lee v Showman's Guild* [1952] 1 ALL ER 1175 and *Breen v Amalgamated Engineering Union and Others* [1971] 2 QB 175.
[19] Aronson "A public lawyer's response to privatisation and outsourcing" in M Taggart (ed) *The province of administrative law* (1997) 40-70.
[20] For example, a pension fund as the one in *Odisang v Debswana Pension Fund and Another* [2016] 3 BLR 260 and in *Joina v Barclays Bank of Botswana Staff Pension Fund and Other*s [2019] 1 BLR 567and

deal of power relative to an individual, and which operate within the public arena, and make decisions with consequences for the public generally. This has implications for the traditional divide between public and private bodies for purposes of judicial review. The distinction drawn between public and private bodies would weaken with time with respect to certain bodies that perform significant public functions in certain circumstances. This would then extend the reach of judicial review to decisions of private bodies in certain circumstances. This development is to be welcomed as it is in line with the precepts of justice.

The argument was made that the prevailing socio-politico-economic order must necessarily influence judicial attitudes, for law is a product of the prevailing socio-politico-economic order. For purposes of this thesis, this opened up a window for the review of decisions of private bodies which was not shackled by traditional criteria based mainly on the type of body and function exercised. The mutating socio-politico economic order must of necessity influence judicial policy across all aspects of the law including the extent to which it impacts on matters of judicial review. Given this development, it was only a matter of time before a shift in judicial policy in matters of review would occur.

7.3.1 The changing position in England

7.3.1.1 Change by judicial fiat

In England, the shift came through the decision in *Datafin*, which is perhaps the best illustration of government's deliberate retreat from the marketplace and the empowerment of private bodies to run important public affairs. Further, the case is a clear demonstration of how high policy issues provide direction in judicial operations. On the specific subject of the thesis, it is a radical watershed that expanded the contours of judicial review of decisions of private bodies. Without necessarily

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a big mining company like Debswana Diamond company (Pty) Ltd in *Du Preez v Debswana Diamond Company (Pty) Ltd and Others* [2012] 1 BLR 264.

jettisoning the 'source of power' test, *Datafin* expanded the parameters of determining amenability of decisions of private bodies to judicial review from the predominant 'source of power' test, to one resting predominantly on the nature of the function that the body was exercising which gave rise to the decision.[21] Such decision would be reviewable if it was taken in the context of the exercise of a public power or function or such function had public-law consequences, notwithstanding that it was a decision of a private body. This opened up the scope for the review of the decisions of private bodies. While the shift was applauded by many,[22] and the *Datafin* parameters were applied in some cases,[23] it was met with a fair amount of reluctance, almost approximating dissent, by many in the judiciary who still exhibited a fixation with the old order which insisted largely on the 'source of power' test.[24] In their interpretation of *Datafin*, they tended to create conditions for establishing the 'public element,' the satisfaction of which would in most cases be difficult. This, it is submitted, is regressive and fails to recognise 'the reality of where power resides in our society, and the need for effective legal mechanisms to control abuses of it'.[25] Those conditions were discussed extensively in chapter 5.[26] The net effect of this is that the position in England remains in limbo, especially having regard to the fact that there is no authoritative decision from the House of Lords or the Supreme Court, although there is some *obiter dictum* support for *Datafin* in the House of Lords decision of *YL v Birmingham City Council* [27] a case which was decided in the context of determining a public authority under the Human Rights Act of 1998.

[21] Hillard "The Take-Over Panel and the courts" (1987) *MLR* 372-379, 372.
[22] Forsyth "The scope of judicial review: 'Public duty' not 'source of power'" (1987) *PL* 356-367; Wade "New vistas of judicial review" (1987) *LQR* 323-327.
[23] *R v Advertising Standards Authority exparte The Insurance Service plc* (1990) 2 Admin LR 77; *R v British Pharmaceutical Industry Association Code of Practice Committee exparte Professional Counselling Aids Ltd* [1991] COD 228; *R v General Council of the Bar ex parte Percival* [1991] 1 QB 212.
[24] This is particularly evident in decisions of sports bodies decided after *Datafin*.
[25] Pannick "Judicial review of sports bodies" (1997) *JR* 150-153, 153.
[26] These are discussed in De Smith, Woolf and Jowell *Judicial review of administrative action* (1995) 170-175 and by Beloff and Kerr "Why Aga Khan is wrong" (1996) *JR* 30-33.
[27] (2007) UKHL 27. See the judgments of Lords Mance para 102 and Neuberger para 167.

7.3.1.2 The position under the Human Rights Act 1998

Like *Datafin*, the Human Rights Act also evidences a shift in the policy direction relating to the provision of public services. It is a mark of recognition of the importance of the decentralisation and contracting out of the provision of public services as it allows for the participation of the private sector in public affairs.[28] The enactment of the Act was a response to the demands of the jurisprudence of the European Court of Human Rights in Strasbourg in terms of which a member state is responsible for the acts (and omissions) and decisions of both public and private bodies operating in its territory.[29] The Act was therefore a way of formalising the direct effect of European law jurisprudence in the domestic environment of England. A private body engaged in the provision of essential public services established under the European Convention of Human Rights, described under the Act as 'functions of a public nature'[30] qualifies to be described as a public authority under the Act, and its decisions will be amenable to judicial review. The Act heralded a new legislative intervention in matters of judicial review, and in particular, judicial review of decisions of private bodies.

Although the jurisprudence around section 6 has not been consistent,[31] the principle has at least been laid down that private bodies do perform public functions and their decisions are reviewable in the same way as those of public bodies. The precise limits and parameters of the courts' revisionary jurisdiction have been left to the courts to shape and delineate.

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[28]Some call it the 'contractualisation of government'. See Hunt "Constitutionalism and the contractualisation of government in the United Kingdom" 21-40; Craig "Contracting out, the Human Rights Act and the scope of judicial review" (2002) *LQR* 551-568, 551.

[29] The factors underpinning the legislative development are briefly outlined in the Home Secretary's address to Parliament, captured in Markus "What is public power: The court's approach to the public authority definition under the Human Rights Act" in Jowell and Cooper (eds) *Delivering rights: How the Human Rights Act is working* (2003) 77-114, 77-78.

[30] Section 6(3)(b) of the Human Rights Act 1998.

[31] The divergence of opinions of the judges in the *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] 3 WLR 283, *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 and *R (on the application of Heather) v Leonard Cheshire Foundation (A Charity)* [2002] 2 ALL ER 93 bear testimony to this.

The recognition of the possible extension of judicial review based on the *Datafin* test, and the fact that the Human Rights Act in fact allows for the review of private bodies is a welcome development in the law. It is recommended that the principles embodied in the HR Act should be extended to other fields in addition to the dispensation of rights under the European Convention on Human Rights.

7.3.2 The position in Botswana

The thesis has established that as in England, decisions of private bodies are reviewable by the courts in Botswana. Until 2004, the issue of whether decisions of private bodies were reviewable never arose for determination, with the court seeming to accept jurisdiction when such decisions were challenged on review and without having to justify that stance.[32] An attempt to exclude the court's jurisdiction in the *Botswana Football Association v Notwane FC Club* case on the basis of clauses in the Botswana Football Association and FIFA Constitution was excoriated by the court as being unduly restrictive. However, in 1998, in *Mabotseng v National Amalgamated Local and Central Government and Parastatal Manual Workers Union*[33] the court founded its revisionary jurisdiction in respect of a decision of a trade union (a private body) on the common law in terms of which domestic bodies must act fairly in their decision-making processes, otherwise their decisions would be set aside.[34] It could properly be said that the common law always allowed judicial review of decisions of private bodies in Botswana.

The first case in which the issue of the revisionary jurisdiction of the court over decisions of private bodies was expressly presented for determination was *Autlwetse v Botswana Democratic Party and Others.*[35] The private body whose decision was impugned on review was a political party. In upholding a preliminary objection against

[32] Some of the cases in which this position is illustrated are *Botswana Football Association v PG Notwane Football Club and Others* [1994] BLR 37 and *Saleshando and Others v Botswana National Front and Another* [1998] BLR 457.
[33] [2002] 2 BLR 467.
[34] 470.
[35] [2004] 1 BLR 230.

the reviewability of the decision, the court based its decision on considerations *inter alia* that 'a political party is not a public body and does not perform administrative acts',[36] that the party was acting 'within the constraints of its own internal mechanisms which cannot … be regarded as exercising public power',[37] and that the decision of the party 'is not properly the subject of a review application because of the nature of the BDP as a political party'.[38] These are the very same bases upon which decisions of private bodies were excluded from the purview of judicial review in England.[39] Although the court relied on a South African decision to similar effect,[40] one can discern the strong English law influence on the decision. Now that there was a definitive pronouncement by the High Court, it is interesting that, except for one case,[41] the decision did not enjoy any following by other High Court judges, who, without expressly disapproving of it, reached contrary decisions and entertained judicial review of decisions of private bodies.[42] And this position gained so much traction that *Autlwetse* was ultimately overruled by the Court of Appeal in *Botswana Democratic Party and Another v Marobela*.[43] The *Du Preez* case, though, was different in that it involved a decision of a private company, an entity constituted differently from the ordinary voluntary associations whose existence is derived from the voluntary subscription to a set of rules created by the members themselves and it certainly did not decide that decisions of private bodies are not reviewable.

It also emerged that in Botswana there is a species of review of decisions of private bodies in the Industrial Court, but it is limited to cases of termination of employment contracts, and is specifically sanctioned by legislation. The Trade Disputes Act[44]

[36] 236.
[37] 237.
[38] 238.
[39] *R v Criminal Injuries Compensation Board exparte Lain* [1967] 2 ALL ER 770; *Law v National Greyhound Racing Club* [1983] 1 WLR 1302 (CA) and the various Jockey Club cases such as *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan* [1993] 2 ALL ER 225 (CA).
[40] *Pennington v Friedgood and Others* 2002 (1) SA 251 (C).
[41] *Du Preez v Debswana Diamond Company (Pty) Ltd and Others* [2012] 1 BLR 26.
[42] For example, *Sorinyane v Kanye Brigades Development Trust and Another* [2008] 2 BLR 5.
[43] [2014] 2 BLR 227.
[44] Cap 48: 02.

requires due process to be observed in terminating a contract of employment. Such due process consists in the main in the application of the rules of natural justice.[45]

What is disheartening now is that the position which seemed to have been placed on firm judicial ground in *Sorinyane*, and the overruling of *Autlwetse* in *Marobela,* has seen a re-emergence of the debate of the kind of private body amenable to judicial review. This is evident in the cases of *Odisang* and *Joina* in which two diametrically opposed approaches by two different judges in spite of the fact that the respondents were a similar kind of body, pension funds, constituted in the same manner. Yet in one the court accepted judicial review and declined it in the other. This can only mean that the debate will continue for some time until the happening of the uncertain event that the Court of Appeal will settle it. In the meanwhile, some deserving litigants may continue to be disadvantaged by this indeterminate state of the law, a regrettable situation.

It is hoped that the path laid out in *Sorinyane* and *Marobela* should continue to guide the courts in carefully analysing the nature of the decision taken and its impact on the society generally, rather than to look just at the nature of the body as it happened in *Du Preez* and *Odisang*. There is no disadvantage at all in extending the reach of judicial review to some of these decisions which evidently have a significant public dimension.

7.4 Summary

In summary, in England, decisions of private bodies are reviewable on the application of the common law depending on whether they have public law consequences or have been made in the exercise of a public function or the discharge of a public duty. They are also reviewable within the context of the Human Rights Act if they are performing functions of a public nature. In Botswana decisions of private bodies are reviewable by reason of the application of the common law and on the basis of the exercise of the court's common law and inherent jurisdiction. There is also some statutorily prescribed

[45] *Phirinyane v Spie Batignolles* [1995] BLR 1; *Mupane Gold Mine v Makuku* [2017] 2 BLR 543 (CA).

review of decisions of private bodies under the Trade Disputes Act in respect of decisions of employers terminating an employee's contract of employment. This process occurs in the Industrial Court.

On a final note, an observation of the trend in judicial treatment of the issue of judicial review of decisions of private bodies must be made. It emerged that in England, an attempt to open up the process of judicial review of decisions of private bodies through the decision in *R v Panel on Take-overs and Mergers, ex parte Datafin plc* (hereinafter *Datafin*)[46] was not readily accepted in subsequent cases as the discussion demonstrated. However, the reverse happened in Botswana, where an attempt to limit and exclude decisions of private bodies from the purview of judicial review, through the *Autlwetse* decision, did not get the support of other courts, and ultimately collapsed with the overruling of the case. Thus judicial intervention and development of legal principle in the two countries has been in opposite directions. In Botswana it has been towards opening up access while in England, notwithstanding the platform or window created by *Datafin*, it has been towards limiting it. It is a matter of relief that *Datafin* has not been overruled and in fact enjoys the imprimatur of the House of Lords. One can only hope that the Supreme Court will make a definitive statement on this issue sooner rather than later.

7.5 Recommendations

Judicial review has from time immemorial been a process shaped, regulated and controlled exclusively by the common law. Although the legislature has intervened in some cases, such as in terms of Order 61 of the High Court Rules in Botswana, the Human Rights Act, the Supreme Court Act of 1981 and Rules made thereunder in England as well under the 1996 Constitution of the Republic of South Africa, the Promotion of Administrative Justice Act 3 of 2000 and the Superior Courts Act 10 of 2013 and rules made thereunder in South Africa, the precise limits, scope and parameters of judicial review generally have been delineated, shaped and honed by

[46][1987] QB 815.

the courts. Unfortunately, as happens with other branches of the law, there are sometimes conflicting decisions relating to scope, parameters and application. Although there is the possibility of legislative remedial action, there will always be grey areas where the courts would be best placed to fill up the position. In Botswana, there is little controversy, if at all, regarding the position in the Industrial Court. It seemed the position regarding common law review in the High Court had now been settled that decisions of private bodies can properly be the subject of judicial review, and the conditions therefor have been laid out, until the decisions in *Odisang* and *Joina*. There is no reason for legislative intervention at this stage. However, the *Du Preez* case seems to have taken a different path, ostensibly on the basis that the decision being impugned was that of a private company. *Odisang* and *Joina* have compounded the matter further. This requires the intervention of the apex court which unfortunately has no 'own motion' jurisdiction but only appellate jurisdiction in the event of an appeal being launched in that court. But the consequences to an aggrieved person are the same as those arising from decisions in respect of which judicial review was permitted. With the Privatisation Policy in force, and some hitherto purely public bodies being packaged and transformed into private companies, it is necessary to allow their decisions to be subjected to judicial review because of the wide powers these bodies wield and the grave consequences their decisions may bring upon a person's livelihood. This can be done by widening the scope of Order 61, without having to engage the full processes of Parliament. This would significantly constrict the public/private law and the resultant public/private body dichotomy and ultimately equalise the opportunity for justice in related circumstances.

7.6 Way forward

7.6.1 England

The position in England would have been improved significantly by the adoption of the principle laid down in *Datafin,* because it settled an area of significant contestation about the acceptance of judicial review on the basis of a narrow consideration based on the body's source of power and expanded the application of judicial review

depending on the nature of the function exercised. In view of the apparent resistance to the 'liberalisation' wrought by *Datafin*, it is recommended that the courts expand the scope of protection to many by adopting the 'publicness' criteria. Any resistance to that principle results in a denial of justice. To insist that litigants aggrieved by decisions of private bodies must seek redress in contract is not always helpful owing to the inadequacy of contractual remedies in certain circumstances. The prejudice suffered by people who are denied a review are real, as illustrated by Lord Denning MR in the *Lee*, *Breen* and *Enderby* cases. So, it is recommended that the *Datafin* formula be adopted as the basic standard in determining amenability to judicial review.

The position regarding the Human Rights Act, and the Convention rights it is supposed to deliver will become a subject of debate with the termination of the United Kingdom's membership to the European Union in what is popularly called *'Brexit'*. Does *Brexit* necessarily mean that the United Kingdom will terminate its membership to the European Convention on Human Rights (ECHR)? And if it does, would it necessarily mean that the English Parliament will have to repeal the Human Rights Act? These are questions to be answered at the political level and in the exercise of the state's sovereignty. But purely on the legal front, it is recommended that the application of the principles of judicial review should be widened to apply to the acts of private bodies in discharging functions that the state has an obligation to provide. Those bodies perform a necessary function in the mould of a 'governmental function' to borrow the language of the *Aga Khan* case. Thus, the scope for review must be expanded. And to propose a radical solution, it is recommended that the HRA be amended by inserting a clause which in essence indicates that such private bodies will be treated as state entities for the purpose of legal process. This will have the incidental positive spinoffs of efficiency as those bodies will discharge their functions with the knowledge that they will be subject to judicial review for any inappropriate decision they make.

7.6.2 Botswana

Botswana courts have always entertained judicial review in certain cases involving decisions of private bodies. They found this jurisdiction on the common law. Until the turn of the millennium, the issue of reviewability of decisions of private bodies was never made an express issue for determination as a preliminary issue. The first time it cropped up as such was in the *Autlwetse* case. Fortunately, the decision was overruled in the *Marobela* case. The cases *Sorinyane* and *Marobela* have demonstrated a willingness on the part of the courts of Botswana to extend the processes of judicial review to decisions of private bodies. Unfortunately, and in a trend reminiscent of that witnessed in England in the aftermath of the *Datafin* case, the denial of judicial review on the classification of the type of body has reared its head again in the *Du Preez* and *Odisang* cases. This is a regressive step, seemingly reversing the gains attained after the *Autlwetse* case. These decisions fail to recognise the significant 'publicness' character around the bodies in question, being a private company in which the government holds more than half of the shares, a pension fund, in both cases. It is hoped that this exclusion will not be held to be absolute and that on future occasions the court will revisit its position. Otherwise a reform of Order 61 is necessary to expand the space in which judicial review occurs. So it is recommended that Order 61 be amended to reflect the expansion of judicial review to other non-traditional public bodies which exhibit the requisite 'publicness' as described throughout this thesis. This will be a statutory recognition of the principle laid down in *Sorinyane* and *Marobela.*

7.7 Conclusion

Finally, it is urged that the widening of the scope for judicial review has only advantages and no side effects. The denial of remedies for judicial review on the basis of the mechanical application of the public/private body divide does not advance the course of justice but only results in frustration. The 'flood gates' argument that is usually flaunted against any expansion of remedies has now been sufficiently debunked and its validity has been nullified. The courts must now move away from seeming to pay lip service to the hallowed *ubi jus ibi remedium* principle which means

'where there is a right there is a remedy'. This is how the courts in both Botswana and England should approach matters in which decisions of private bodies are at issue in the future.

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V

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11 CONSTITUTIONS AND NATIONAL LEGISLATION

11.1 Botswana

A

Administration of Justice (Miscellanous Provisions) Act 1938

B

Bechuanaland Order in Council of 1891

Bills of Exchange Act 1882

Botswana Sports Commission Act (Cap 60:01)

C

Commissions of Inquiry Act (Cap 05:02)

Common and Customary Law Act (Cap 16: 01)

Companies Act (Cap 42:01)

Constitution of the Republic of Botswana

Court of Appeal Act (Cap 04:01)

Customary Courts Act (Cap 04:05)

Customary Law Act (Cap 16:01)

E

Employment Act (Cap 47:01)

G

General Proclamation of the 10th June 1891

General Proclamation No 36 of 1909

General Proclamation No 39 of 1909 of the 22nd December 1909
General Proclamation No 50 of 1938
General Law Act (Cap 14:04)
General Law (Cape Statutes) Revision Proclamation No 2 in 1959

H
High Court Act (Cap 04: 02)

I
Interpretation Act (Cap 01: 04)

J
Judicial Committee (Abolition of Appeals) Act No 19 of 1973

L
Local Authorities Procurement and Asset Disposal Act (Cap 42:11)
Local Authority (Proceedings) Act (Cap 10:04)
Local Government (District Councils) Act (Cap 40:01)

N
National Development Bank Act (Cap 74:05)

O
Ombudsman Act (Cap 02:12)
Order in Council of the 9th May 1891

P
Penal Code (Cap 08:01)
Public Authorities (Functions) Act (Cap 02:11)
Public Procurement and Asset Disposal Act (Cap 42:08) 2002
Public Service Act No 8 of 2008

S
Societies Act (Cap 18:01)
Statutory Instruments Act (Cap 04:02)
Statutory Instrument No 1 of 2011
Statutory Instrument No 1977 of 1955
Statutory Instrument No 1 of 2011, Rules of the High Court of Botswana

T
Townships Act Cap (40:02)
Trade Disputes Act Cap (48: 02)

Trade Unions and Employers Organisations Act (Cap 48:01)

11.2 England

F
Foreign Jurisdictions Act of 1890

H
Human Rights Act 1998

S
Sale of Goods Act 1994
Statutory Instrument 2000 No 2092 (Schedule 1)(Part 54)
Supreme Court Act of 1981
Supreme Court Rule 53

11.3 Namibia

N
Constitution of the Republic of Namibia

11.4 South Africa

C
Companies Act of South Africa No 61 of 1973
Constitution of the Republic of South Africa 1996

E
Executive Members Ethics Act 92 of 1998
Executive Ethics Code

L
Local Government: Municipal Structures Act 117 of 1998

P
Promotion of Administrative Justice Act 3 of 2000
Public Protector Act 23 of 1994

S
Superior Courts Act No 10 of 2013

11.4 Uganda

U
Constitution of Uganda