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# Judicial Review and Monopoly Power: Some Sceptical Thoughts

Alexander Williams\*

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The issue of which functions are ‘public’ and amenable to judicial review at common law has exercised judges and scholars for decades. Elias L.J. and Mitting J. recently observed that the amenability question “is not always easily answered”, and that the application of the relevant principles “can be problematic”,<sup>1</sup> but these were unusually restrained judicial remarks. Woolf J. has previously declared that “there is no universal test” for a public function;<sup>2</sup> Ognall J. that the matter is “one of overall impression, and one of degree”;<sup>3</sup> and Scott Baker L.J. that it is “often as much a matter of feel, as deciding whether any particular criteria are met”.<sup>4</sup> Lord Diplock once hailed the courts’ efforts in developing our system of administrative law as “the greatest achievement of the English courts in my judicial lifetime”,<sup>5</sup> but their treatment of the crucial threshold issue of when a defendant is caught by that system is notoriously unclear.

In this article I pursue two objectives: one narrow, the other broader. The narrow objective is to mount a considered reply to the arguments of Colin Campbell, who attempts to rationalise the bulk of the courts’ voluminous case-law according to an elegantly clear and simple test: that a public function is the exercise of a monopoly power.<sup>6</sup> I focus on Campbell’s work because it is relatively recent, has yet to receive detailed published scrutiny,<sup>7</sup> and is commendably ambitious. Significantly, he remains the only author to make a concerted attempt to explain the case-law according to a single test, whereas other literature tends to argue that the cases reveal multiple, alternative models at work.<sup>8</sup> Campbell also defends the monopoly model from both doctrinal and normative angles, arguing not just that it *does* underlie the case-law but also that it *should*. This is in contrast to the various works that tend to

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<sup>1</sup> *R (Holmcroft Properties) v K.P.M.G.* [2016] EWHC 323 (Admin); [2016] A.C.D. 67, at [23].

<sup>2</sup> *R v Derbyshire County Council, ex p. Noble* [1990] I.C.R. 808, at 819; [1990] I.R.L.R. 32.

<sup>3</sup> *R v Legal Aid Board, ex p. Donn* [1996] 3 All E.R. 1, at 11.

<sup>4</sup> *R (Tucker) v Director General of the National Crime Squad* [2003] EWCA Civ 57; [2003] I.C.R. 599, at [13].

<sup>5</sup> *R v I.R.C., ex p. National Federation of Self-Employed and Small Businesses* [1982] A.C. 617, at 641; [1981] 2 All E.R. 93.

<sup>6</sup> Colin Campbell, ‘Monopoly Power as Public Power for the Purposes of Judicial Review’ (2009) 125 L.Q.R. 491.

<sup>7</sup> Brief critical analysis can be found in Mark Elliott, ‘Judicial Review’s Scope, Foundations and Purposes: Joining the Dots’ [2012] N.Z.L.R. 75, at 77-78.

<sup>8</sup> These are commonly the ‘but for’ and ‘statutory underpinning’ tests, which have been critiqued elsewhere and are not considered further here: see Colin Campbell, ‘The nature of power as public in English judicial review’ [2009] C.L.J. 90.

concentrate on either theory or doctrine in isolation from the other,<sup>9</sup> scholarly and impressive though the analysis may be. I argue however that Campbell's model is unworkable, being vulnerable to a number of serious problems on both normative and doctrinal planes. In making this point my aim is to clear the way for the advancement of a superior model in future work.

For my second (broader) objective, I join Mark Elliott<sup>10</sup> in questioning the idea that seems to lie at the heart of Campbell's and a great deal of other thinking in the field: that the public-function test should contain little or no reference to the source of the power, focussing on the 'nature' of the power instead. This thinking has been the fashion since *R v Panel of Take-overs and Mergers, ex p. Datafin*,<sup>11</sup> where the Court of Appeal held that the City of London's self-appointed takeover regulator was amenable to judicial review notwithstanding that it operated "without [any] visible means of legal support".<sup>12</sup> It was stressed that source is not necessarily decisive: statutory power is clearly reviewable and contractual power clearly not, but "in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power."<sup>13</sup>

Distinguished commentators widely viewed *Datafin* as effecting a seismic shift from source to nature of power. Christopher Forsyth remarked that "The trend is plainly away from technical issues of form and towards matters of substance."<sup>14</sup> To Murray Hunt, "It was clear... that the thrust of the decision was to move from a 'source of power' test for reviewability to a 'nature of the function' test."<sup>15</sup> Sir William Wade stated that "the Court now stresses that sources are irrelevant, and that all that matters is the exercise of non-contractual power in the public domain."<sup>16</sup> Yet the *normative* case for this shift is seldom made clear, either by judges or scholars. Much of it seems to stem from the belief that a source-based approach is unsuitable following the growth of non-state power in public life in recent decades, particularly in the wake of what is termed the "hollowing-out of the state"<sup>17</sup> that has continued to occur since the Thatcher years. Since public power may be exercised increasingly by private bodies, "political and legal developments... have seriously undermined the institutional understanding of the public/private distinction".<sup>18</sup> Source of power has come to be viewed as an "arbitrary" factor, as one

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<sup>9</sup> See e.g. Anna Grear, 'Theorising the Rainbow? The Puzzle of the Public-Private Divide' (2003) *Res Publica* 169; Julia Black, 'Constitutionalising Self-Regulation' (1996) 59 *M.L.R.* 24.

<sup>10</sup> Elliott [2012] *NZLR* 75.

<sup>11</sup> [1987] *Q.B.* 815; [1987] 1 *All E.R.* 564.

<sup>12</sup> *Datafin* [1987] *Q.B.* 815, at 824 (Donaldson *M.R.*).

<sup>13</sup> *Datafin* [1987] *Q.B.* 815, at 847 (Lloyd *L.J.*).

<sup>14</sup> Christopher Forsyth, 'The scope of judicial review: "public duty" not "source of power"' [1987] *P.L.* 356, at 362.

<sup>15</sup> Murray Hunt, 'Constitutionalism and the Contractualisation of Government in the United Kingdom', in Michael Taggart (ed), *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) p 21, at p 29.

<sup>16</sup> Sir William Wade, 'New vistas of judicial review' (1987) 103 *L.Q.R.* 323, at 325-326.

<sup>17</sup> R.A.W. Rhodes, 'The Hollowing Out of the State: The Changing Nature of the Public Service in Britain' (1994) 65 *Political Quarterly* 138.

<sup>18</sup> Peter Cane, 'Accountability and the Public/Private Distinction', in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Oxford: Hart Publishing, 2003) p 247, at pp 253-254.

author very recently described it,<sup>19</sup> the modern focus shifting to the nature of the power that it is felt should be amenable to review. Along these lines, Lloyd L.J. emphasised in *Datafin* that the City Panel “wielded enormous power” and had “a giant’s strength”;<sup>20</sup> and Donaldson M.R. that the law needed to check that power, for the benefit of those “oppressed” by the Panel’s conduct, in the event that the Panel were to go “off the rails”.<sup>21</sup>

The idea that source can be cast aside in this way demands close scrutiny. Not only does it overlook the theoretical importance of source of power, but problems also arise with attempting to extend judicial review to the activities of non-state bodies that exercise only *de facto* power, i.e. liberty to do as they wish within the confines of the law. While some of these concerns are reflected to a certain extent in Elliott’s work, in my view his attachment to source of power is not strong enough. There are reasons for disagreeing even with his thesis, as I explain.

Overall, then, I am critical not just of Campbell’s thesis but also of the broader underlying idea that source of power has had its day. My argument proceeds in three steps. Part A examines the normative choice to be made between nature and source of power, using Campbell’s model and Elliott’s arguments as a springboard for discussion of the problems with eschewing or minimising source as a core criterion for amenability. I also offer some brief thoughts on the related issue of the government’s ‘third-source’ powers, explaining why Adam Perry’s recent thesis as to their constitutional basis is unpersuasive.<sup>22</sup> Parts B and C then turn to the narrower objective of dissecting the monopoly model. Part B explains the various flaws in Campbell’s normative case, Part C in his doctrinal one.

## A. ESCHEWING SOURCE OF POWER

Campbell defines monopoly power as power exercised by one body alone.<sup>23</sup> The crux of his normative case is that monopoly power ought to be exercised fairly, and must therefore be amenable to judicial review according to the broad grounds of illegality, irrationality and procedural impropriety. Individuals subject to monopoly power are vulnerable to unfair and arbitrary treatment because they are necessarily unable to find another provider to perform the function in question if they are unhappy with the treatment they receive.<sup>24</sup>

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<sup>19</sup> Eleanor Aspey, ‘The search for the true public law element: judicial review of procurement decisions’ [2016] P.L. 35, at 49. See also Sue Arrowsmith, ‘Judicial Review and the Contractual Powers of Public Authorities’ (1990) 106 L.Q.R. 277, at 288.

<sup>20</sup> *Datafin* [1987] Q.B. 815, at 845.

<sup>21</sup> *Datafin* [1987] Q.B. 815, at 827.

<sup>22</sup> Adam Perry, ‘The Crown’s Administrative Powers’ (2015) 131 L.Q.R. 652.

<sup>23</sup> Campbell (2009) 125 L.Q.R. 491, at 491.

<sup>24</sup> Campbell (2009) 125 L.Q.R. 491, at 507-511. See also e.g. David Pannick, ‘Who is subject to judicial review and in respect of what?’ [1992] P.L. 1, at 3-5.

The monopoly model therefore reduces the amenability issue to a single question: whether the power is monopolistic. In doing so it abandons all reference to the source of the power. Every monopolistic function becomes public in nature, whether performed under statute or the prerogative, or performed with no positive legal basis at all. The principles of good administration are therefore given 'horizontal' effect: they apply as much to the monopoly functions of non-state actors – self-regulators like the Jockey Club, for instance – as to the monopoly functions of organs of state such as government ministers and local authorities. This is no oversight on Campbell's part. It is a manifestation of the fashionable view, mentioned above, that private organisations may wield considerable power over individuals that requires regulation by the courts in judicial review, notwithstanding that the power lacks any statutory or prerogative source. As Campbell remarks, "there is no particular reason to suppose that... power exercised pursuant to law would be any more prone to being exercised unpredictably than... power exercised *de facto*".<sup>25</sup> Two problems arise with eschewing source of power, however, as the following sections explain.

### **(i) Source of Power Matters**

It is a mistake to think that source of power should be irrelevant to the definition of a public function. Source does matter. The academic literature is replete with examples of a power's source being sharply contrasted with its 'nature' or 'substance',<sup>26</sup> which are said to focus on the *impact* or *effect* of a power on the individual in a way that source does not. As we saw above, Wade's impression of *Datafin* was that it rendered source considerations *irrelevant* in the amenability context by focussing the courts on the nature of the power. But bright-line distinctions like these are liable to mislead, by giving the simplistic impression of 'nature good, source bad'. As we will see below, the reality is subtler: that power from certain sources can be said to have a particular public quality about it that power from other sources does not.<sup>27</sup>

I am not the only author to doubt that source should be irrelevant. Elliott argues that the amenability question requires the balancing of three interlocking considerations as to the purpose of judicial review: (a) *ensuring compliance with the rule of law*, in that "those exercising legal powers must not be permitted to exceed the limits of those powers"; (b) the *uniqueness of the government's position*, in that it "is uniquely devoid of any legitimate self-interests"; and (c) *securing the public interest in good*

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<sup>25</sup> Campbell (2009) 125 L.Q.R. 491, at 513.

<sup>26</sup> See e.g. Gerdy Jurgens and Frank Van Ommeren, 'The public-private divide in English and Dutch law: a multi-functional and context-dependant divide' [2012] C.L.J. 172, at 184; Aspey [2016] P.L. 35, at 51; Michael Beloff, 'Pitch, pool, rink,... court? Judicial review in the sporting world' [1989] P.L. 95, at 108.

<sup>27</sup> For a similar remark, see Nicholas Bamforth, 'The scope of judicial review: still uncertain' [1993] P.L. 239, at 241.

*governance*, in that “the public is entitled to expect that governmental decisions will accord with standards of good administration”.<sup>28</sup> Elliott concedes that there is no “magic bullet”<sup>29</sup> for determining amenability and that his suggestions do not necessarily supply “easy answers”,<sup>30</sup> but nevertheless believes them to provide a “clearly articulated framework of principle” for confronting the relevant issues.<sup>31</sup>

Elliott’s considerations (a) and (b) – rule of law, and government uniqueness – clearly imply a focus on source of power, because they drive at identifying and reviewing the kind of powers that pertain to government rather than anyone else. He acknowledges that (a) and (b) overlap: “the unique powerfulness of government follows from the extent of its legal powers, control of which is required under the principle of legality”.<sup>32</sup> But his focus is not on source of power alone: consideration (b) is said to justify reviewing government ‘third-source’ power,<sup>33</sup> discussed below, which allows the Crown to engage in certain forms of activity without having to show a positive legal basis in statute or the prerogative; and consideration (c), securing the public interest in good governance, is said to provide for horizontal effect of the principles of good administration against the public functions of private defendants, when a focus on considerations (a) and (b) alone would lead to an “under-inclusive” scope of review.<sup>34</sup> Elliott’s thesis has much to commend to it, but despite the common ground between us his approach is ultimately unconvincing.

To show why, it is necessary to think about why source of power is normatively significant. For Elliott, it is because considerations (a) and (b) form two of three core considerations as to the underlying purpose of judicial review. That is why he believes them to be relevant to the amenability question: the courts are said to be unable to answer that question without “a clear vision of the purposes of judicial review”.<sup>35</sup> But it seems to me that this downplays the normative position. In my view the source of power is important for the more obvious reason that it provides us with a settled and workable blueprint for the meaning of publicness, which is now a staple feature of the law in this area. English law differs materially from Scots judicial review, for instance, where the reviewability of a given function “does not depend upon any distinction between public law and private law”, the Scottish courts’ concern being the broader one of policing the decision-making of “any person or body to whom a jurisdiction, power or authority has been delegated or entrusted by statute, agreement or any other

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<sup>28</sup> Elliott [2012] NZLR 75, at 78-80.

<sup>29</sup> Elliott [2012] NZLR 75, at 83.

<sup>30</sup> Elliott [2012] NZLR 75, at 110.

<sup>31</sup> Elliott [2012] NZLR 75, at 110.

<sup>32</sup> Elliott [2012] NZLR 75, at 79.

<sup>33</sup> Elliott [2012] NZLR 75, at 80; 93-97.

<sup>34</sup> Elliott [2012] NZLR 75, at 87.

<sup>35</sup> Elliott [2012] NZLR 75, at 75.

instrument.”<sup>36</sup> But in English law the public-private distinction is firmly entrenched in the case-law, which couches the scope of judicial review in terms of public functions, elements and duties, as various rulings including but also predating *Datafin* make clear.<sup>37</sup> It is also reflected in the Civil Procedure Rules, which define a claim for judicial review as a claim to review an enactment “or decision, action or failure to act in relation to the exercise of a public function”;<sup>38</sup> and by the procedural exclusivity rule, which prevents litigants from abusing the process of the court by pursuing the wrong public-private procedure for their claim.<sup>39</sup> Commentators may question the point of employing a public-private distinction in the English amenability context,<sup>40</sup> and their criticisms may be powerful, but it is evident that at least some thought must be given to the conceptual question of what a *public* function is. This is what the law requires. With respect to Elliott, the question cannot be answered simply by asking the instrumental question of what judicial review is for.

Publicness is a slippery concept, however, as Elliott acknowledges.<sup>41</sup> Very few functions will be universally agreed to be public or private by their nature alone.<sup>42</sup> At the heart of the issue lies the essentially political matter of which functions the state should perform, of the proper role of the state.<sup>43</sup> To have the greatest chance of persuading, the definition of publicness must therefore be derived, as far as possible, from *settled* considerations about the nature and role of the state. After all, it is the existence of a state, as distinct from the individual, that gives rise to a certain ineradicable distinction between public and private,<sup>44</sup> however intractable the more abstract question of the ‘correct’ meaning of a public function may be.

In my view it is possible to arrive at a source-based distinction between public and private functions with reference to these considerations alone, without needing to rely on ideas about the underlying purpose of judicial review. This is important for reasons of clarity in the amenability test. Judicial review may be said to have any number of different purposes or justifications, which makes for inevitable difficulties when attempting to determine the amenability issue reliably. This is especially problematic

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<sup>36</sup> *West v Secretary of State for Scotland* 1992 S.L.T. 636, at 650.

<sup>37</sup> E.g. *Malloch v Aberdeen Corporation (No. 1)* [1971] 1 W.L.R. 1578, at 1596 (Lord Wilberforce); [1973] 1 All E.R. 304; *Law v National Greyhound Racing Club* [1983] 1 W.L.R. 1302, at 1307 (Lawton L.J.); [1983] 3 All E.R. 300; *R v East Berkshire Health Authority, ex p. Walsh* [1985] Q.B. 152, at 164 (Donaldson M.R.); [1984] 3 All E.R. 425.

<sup>38</sup> Part 54.1(2)(a)(ii).

<sup>39</sup> *O’Reilly v Mackman* [1983] 2 A.C. 237; [1982] 3 All E.R. 1124.

<sup>40</sup> E.g. Carol Harlow, “Public” and “Private” Law: Definition Without Distinction’ (1980) 43 M.L.R. 241.

<sup>41</sup> Elliott [2012] NZLR 75, at 76-77; Mark Elliott, “Public” and “Private”: Defining the Scope of the Human Rights Act’ [2007] C.L.J. 485, at 487.

<sup>42</sup> Peter Cane, ‘Self Regulation and Judicial Review’ [1987] C.J.Q. 324, at 337.

<sup>43</sup> Nicholas Bamforth, ‘The Public Law-Private Law Distinction: A Comparative and Philosophical Approach’, in Peter Leyland and Terry Woods, *Administrative Law Facing the Future: Old Constraints & New Horizons* (London: Blackstone Press, 1997) p 136, at p 152; Janet McLean, ‘Public Function Tests: Bringing Back the State?’, in David Dyzenhaus et al, *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Oxford: Hart Publishing, 2009) p 185, at p 185.

<sup>44</sup> For recent discussions as to the nature and role of the state, see Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge: Cambridge University Press, 2012); Nick Barber, *The Constitutional State* (Oxford: Oxford University Press, 2010).

when those purposes are simply to be weighed together in a multi-factorial assessment or balancing exercise, as Elliott contends. Although he limits his balancing exercise to the three core considerations (a) to (c), he fails to explain why a potentially infinite number of other considerations could not also come into play. He disagrees, for instance, that the *sole* purpose of judicial review is to protect against abuse of power, or abuse of monopoly power,<sup>45</sup> but it is not apparent why these considerations could not still feature in his balancing exercise as two of multiple *different* purposes.<sup>46</sup> Indeed, ‘red-light’ theorists would attach considerable weight to the purpose of preventing abuse of power, arguing that Elliott’s relatively ‘green-light’ focus on securing the public interest in good governance – consideration (c) – misses the point.<sup>47</sup>

Elliott is right to attach weight to the uniqueness of the state, and to observe that this factor is closely tied to the principle of legality. My issue with his thesis is not that considerations (a) and (b) feature in his arguments, but rather with his *reason* for believing them to be important. It is not necessarily because they are two of three core purposes of judicial review, but because source of power provides a blueprint for publicness that can be derived from settled constitutional foundations about the nature and role of the state.

The starting point for this proposition is that the individual and the state operate in fundamentally different ways – necessarily so, given their differing constitutional positions. Individuals enjoy the liberty to do whatever is not unlawful, as Laws J. recognised in *R v Somerset County Council, ex p. Fewings*.<sup>48</sup> Individuals are also equal before the law, meaning that any unwanted inroads they make into the legally-protected interests of others will be unlawful. Hence the importance to private dealings of the law of contract, for instance,<sup>49</sup> which elevates agreements with the necessary features to the status of a set of legally-enforceable rights and duties that would otherwise not exist.

Whereas individuals are equal before the law, however, the individual and the state are in a relationship of necessary “juridical inequality”.<sup>50</sup> The state is “obliged (and, therefore, empowered) to pursue and promote the public interest even at significant expense to the freedom of private agents to pursue their own projects and purposes.”<sup>51</sup> The state’s position gives it considerable power – to tax, imprison, and so on – but the state also claims the *authority* to wield that power, as emphasised by

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<sup>45</sup> Elliott [2012] NZLR 75, at 76-78.

<sup>46</sup> Elliott even uses this consideration in one aspect of his analysis, at 99.

<sup>47</sup> For discussion see Carol Harlow and Richard Rawlings, *Law and Administration* 3<sup>rd</sup> edn (Cambridge: Cambridge University Press, 2009) Ch. 1.

<sup>48</sup> [1995] 1 All E.R. 513; 92 L.G.R. 674.

<sup>49</sup> The same could be said of trusts, which I discuss no further: in the present context it is contractual power that receives by far the greater academic and judicial attention.

<sup>50</sup> The term is Peter Cane’s, ‘Tort Law and Public Functions’, in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford: Oxford University Press, 2014), p 148.

<sup>51</sup> Cane, ‘Tort Law and Public Functions’, at p 149.



theorists like H.L.A. Hart<sup>52</sup> and Leslie Green.<sup>53</sup> Precisely how it makes good this claim to authority is a complex theoretical issue that it is unnecessary to explore any further here, but it is nevertheless clear that the state must at least use its power for the public benefit rather than for its own ends. Any state unwilling to observe the basic requirement of *servicing* rather than *owning* its subjects would lack legitimacy, having power but no authority.

Two consequences follow. The first is that the state is unique in lacking any interests of its own. Whereas individuals may pursue their own ends, including selfishly if they wish, it is clear that the state may not.<sup>54</sup> Dawn Oliver remarks that organs of state “are regarded as being under duties to act *only* in the public interest as they perceive it to be”;<sup>55</sup> Laws J. explains that the state has “no rights of its own, no axe to grind beyond its public responsibility”.<sup>56</sup> This is the thrust of Elliott’s consideration (b), albeit that he refers to the uniqueness of the position of “government” rather than the state. The second consequence is that the state lacks the same liberty enjoyed by individuals to do whatever is not unlawful. Whereas individuals enjoy residual freedom (i.e. *de facto* power) to do as they wish, the basic rule for the state is that “any action to be taken must be justified by positive law”.<sup>57</sup> This is reflected in Elliott’s consideration (a), that the principle of legality requires the courts to police the boundaries of legal power in judicial review.

The upshot is that the *state* must act with specific legal authority, whereas individuals, being free to do whatever is not unlawful, go about their business using *de facto* and contractual power. A blueprint for publicness therefore emerges: that statutory and prerogative power are public, bearing the hallmark of state activity;<sup>58</sup> and that *de facto* and contractual power, bearing the hallmark of individual activity, are private.

Elliott’s alternative focus on the *purpose* of judicial review gives rise to difficulties. Perhaps because it is difficult to pinpoint the exact purposes and justifications of judicial review with any real confidence, Elliott treats source of power not as giving rise to hard-edged rules about amenability but rather as one of three core considerations, to be balanced against the others. Thus, consideration (c), securing the public interest in good governance, becomes relevant as a countervailing consideration when a purely source-based focus is thought to be too narrow.<sup>59</sup> It is consideration (c) that is said to tell in favour of reviewing non-statutory power exercised by bodies that are not institutionally part of the state, examples

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<sup>52</sup> H.L.A. Hart, *The Concept of Law* 2<sup>nd</sup> edn (Oxford: Oxford University Press, 1994).

<sup>53</sup> Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1988).

<sup>54</sup> Cane, ‘Tort Law and Public Functions’, at p 149.

<sup>55</sup> See also Dawn Oliver, ‘The frontiers of the State: public authorities and public functions under the Human Rights Act’ [2000] P.L. 476, at 483.

<sup>56</sup> *Fewings* [1995] 1 All E.R. 513, at 524.

<sup>57</sup> *Fewings* [1995] 1 All E.R. 513, at 524.

<sup>58</sup> For similar remarks see Dawn Oliver, ‘Functions of a public nature under the Human Rights Act’ [2004] P.L. 329, at 345.

<sup>59</sup> Elliott [2012] NZLR 75, at 87.

being the City Panel in *Datafin* and private organisations that provide contracted-out services on the state's behalf.<sup>60</sup>

Consideration (c) is desperately imprecise, however. There is something in saying that good governance is one of judicial review's various abstract purposes, but quite how it is supposed to assist in hard cases by steering the courts towards a decision about whether or not to review the functions of organisations like the City Panel and government contractors, is unclear. The idea that there is a sufficiently settled meaning of "good governance", or even of "securing the public interest", is highly doubtful. Elliott's explanation of the term – that "governmental decisions will accord with the standards of good administration"<sup>61</sup> – simply begs the question whether a given decision/function is governmental or not, when the defendant is neither an organ of the state nor acting pursuant to legal powers that have been positively conferred on it. He argues that consideration (c) is useful because it "supplies the normative basis for the content of many of the controls enforced via judicial review",<sup>62</sup> but the claim is difficult to assess for the simple reason that the content of consideration (c) is so unclear. We should also be able to do better than a multi-factorial approach in which the different considerations are simply balanced as mere principles, their relative weight falling to be determined on an apparently case-by-case basis by individual judges. Elliott's thesis is helpful for attempting to limit this multi-factorial assessment to three core principles, but a great deal of room would seem to remain for judicial guesswork to dictate the outcome.

A better approach would therefore be a harder-edged one that does away with the idea of treating source of power simply as a principle, taking it instead as the basis of a *rule* to apply about when judicial review will and will not lie.<sup>63</sup> Elliott disagrees, arguing that a principles-based approach is in keeping with (and possibly also mandated by)<sup>64</sup> the notion that amenability "is a matter of degree", forming "part of a broader analysis that also acknowledges the inaptness of a wholly rigid distinction between public and private law".<sup>65</sup> But although overlaps between the substantive principles of public and private law exist,<sup>66</sup> his apparent conclusion – that they render a principles-based approach to amenability irresistible – simply does not follow. There are overlaps between other areas of law that are otherwise distinguished along bright lines. The fact that a duty to take reasonable care finds expression not just in the law of negligence but can also be a term of a contract, or can form the basis of the *actus*

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<sup>60</sup> Elliott [2012] NZLR 75, at 83-85; 105-110.

<sup>61</sup> Elliott [2012] NZLR 75, at 80.

<sup>62</sup> Elliott [2012] NZLR 75, at 80.

<sup>63</sup> On this distinction see Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), at pp 22-28.

<sup>64</sup> Elliott [2012] NZLR 75, at 92.

<sup>65</sup> Elliott [2012] NZLR 75, at 82.

<sup>66</sup> See notably Dawn Oliver, *Common Values and the Public-Private Divide* (London: Butterworths, 1999).

*reus* for gross negligence manslaughter, does not mean that the distinctions between tort, contract and criminal law suddenly disintegrate into questions of degree.

This is not to suggest however that source of power is the *only* criterion in the public-function test. Like Elliott,<sup>67</sup> I question whether the exercise of statutory power should always be sufficient to trigger judicial review.<sup>68</sup> Tentatively, I would suggest adding a second criterion: that the legal power in question is a power to *act in the public interest* rather than simply in the interests of the power-holder.<sup>69</sup> This criterion plays into the meaning of publicness because it reflects the ‘other-regarding’ purpose of the state as distinct from the individual, as described above.<sup>70</sup> It would also explain three things. First, it would explain why there has been no apparent criticism of the decision to review the use by a psychiatric hospital of statutory powers to detain and treat inpatients against their will.<sup>71</sup> Although a non-state organisation, the hospital is clearly exercising powers that can only be used “in the interests of [the detainee’s] own health or safety or with a view to the protection of other persons”,<sup>72</sup> and never in the interests of the hospital alone. Second, it would explain why there is no apparent call for judicial review to apply when individuals make use of statutory causes of action enabling them to sue others in harassment, for example. Not only is this better described along Hohfeldian lines as the vindication of a statutory right than the exercise of a statutory power,<sup>73</sup> but it is also clear that the purpose is for protecting the claimant’s own interests, and not – at least primarily, anyway – for any public-interest purpose. Third, it would explain the difficulty with determining whether decisions by the state to contract with other bodies, and on what terms,<sup>74</sup> should be amenable to review.<sup>75</sup> (This is of course distinct from the issue of reviewing the exercise of the contractual power itself, which in my view is ruled out because contractual power has a private source). It is a question that will depend heavily on the perceived justification for allowing the state to engage in behaviour that is typical of individuals. On one view it could be said that all state contracting powers ultimately exist for the public interest and therefore belong in judicial review. As Anne Davies argues, “The government does not cease to be the

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<sup>67</sup> Elliott [2012] NZLR 75, at 84.

<sup>68</sup> See also Paul Craig, ‘Public Law Control over Private Power’, in Taggart, *The Province of Administrative Law*, p 196, at p 198; Jack Beatson, ‘Public and Private in English Administrative Law’ (1987) 103 L.Q.R. 34, at 47.

<sup>69</sup> Oliver has made similar remarks in the HRA context: [2004] P.L. 329, at 345.

<sup>70</sup> The test is therefore relatively simple, not to be confused with the complex public-choice question of whether the act is *actually* in the public interest.

<sup>71</sup> See *R (A) v Partnerships in Care Ltd.* [2002] EWHC 529 (Admin); [2002] 1 W.L.R. 2610.

<sup>72</sup> Mental Health Act 1983, ss.2(2)(b), 3(2)(c).

<sup>73</sup> On which see W.N. Hohfeld, ‘Some Fundamental Legal Concepts as Applied in Judicial Reasoning’ (1913-14) 23 Yale L.J. 16, at 30.

<sup>74</sup> For recent challenge to the terms of a central government tendering process, see *R (London Borough of Enfield) v Secretary of State for Transport* [2016] EWCA Civ 480.

<sup>75</sup> For discussion of the complex case-law, see A.C.L. Davies, *The Public Law of Government Contracts* (Oxford: Oxford University Press, 2008); Stephen Bailey, ‘Judicial Review of Contracting Decisions’ [2007] P.L. 444; Aspey [2016] P.L. 35.

government simply because it is placing a contract”.<sup>76</sup> But on another view – perhaps the neoliberal view that fetishizes deregulation and choice as a means of improving decision-making – it could be said that it is *more conducive to the state’s ultimate public-interest role* to allow it some latitude to act ‘privately’;<sup>77</sup> to be able to make commercial decisions ostensibly in its own interests, unencumbered by the substantive principles of judicial review and amenable only to the ‘ordinary’ common law of contract, tort and so on.<sup>78</sup> The issue clearly has deep political-philosophical roots, but framing it in this way may at least help to understand why it is so tricky to answer.

Not only may there be other components to the source-based test, but there is also a case for saying that a broad-brush approach to the notion of legal power may be appropriate if considerations of fairness require it.<sup>79</sup> As in any area of law, context will play an important role in the interpretation of legal doctrine. In the contracting-out setting, for instance, it may be possible to argue that statutory power is being exercised when a private contractor delivers a service on behalf of a state ‘delegator’ – a central or local government body – that the delegator would otherwise be statutorily required or empowered to deliver itself.<sup>80</sup> It may also be possible to argue that this power is conferred for the public interest rather than the interests of the contractor alone, because it is conferred pursuant to the delegator’s statutory powers and duties to ensure the service-user is provided for. Once again, the arguments in this and the previous paragraph are tentative; the precise content of a source-based conception of a public function remains an issue for future work, as I have said. For present purposes, my point is that we do not necessarily need to conceive of the amenability test in terms of the balancing of mere principles. If there is a reason to take source of power seriously in determining the meaning of a public function, as argued here and as Elliott seems to agree, then principled application of a source-based *rule* would appear to yield a clearer, more structured solution to the amenability issue.

Returning then to the principal argument in this section, Campbell’s monopoly model is deficient because it overlooks the normative significance of source of power. While Elliott’s approach does make it a factor, I have argued that its importance is still underplayed. In the sections below I consider and answer some potential counter-arguments to my points: (a) the third-source powers argument; (b) the argument from scope of review; and (c) the doctrinal argument.

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<sup>76</sup> Davies, *The Public Law of Government Contracts*, at p 63. See also Arrowsmith (1990) 106 L.Q.R. 277, at 283.

<sup>77</sup> In this regard it has been suggested that “the classic areas in which judicial review will be available in the context of commercial activities of public bodies... [are the limited ones of] fraud, corruption, bad faith etc.”: *R (Menai Collect) v Department for Constitutional Affairs* [2006] EWHC 724, at [42] (McCombe J.). See also *R (Gamesa Energy UK) v National Assembly for Wales* [2006] EWHC 2167 (Admin), at [67] (Gibbs J.).

<sup>78</sup> Parliament not uncommonly allows local authorities broad discretion to transact e.g. for “a commercial purpose” (as in s.1(4)(b), Localism Act 2011) or in “any manner they wish” (s.123(1), Local Government Act 1972).

<sup>79</sup> For now I reserve my opinion on whether it should be read to encompass “soft” law, recently discussed by Greg Weeks, *Soft Law and Public Authorities* (Oxford: Hart Publishing, 2016).

<sup>80</sup> As in *Y.L. v Birmingham City Council* [2007] UKHL 27; [2008] 1 A.C. 95.

### *Third-Source Powers*

I mentioned third-source powers briefly above. They allow the Crown to engage in certain kinds of activity, such as forming contracts and issuing passports, without demonstrating any statutory or prerogative basis for its actions.<sup>81</sup> In this sense the Crown therefore enjoys a similar freedom to individuals, to do as it pleases within the confines of the law.

The constitutional basis and extent of third-source powers is unclear, but two competing conceptions have been proffered. Adam Perry argues that there are two different ‘third’ sources; he therefore prefers the label “administrative powers” to third-source powers. He argues that while some third-source powers can be seen as powers to do “whatever a natural person has a common law power to do”,<sup>82</sup> most are better explained as *non-legal* powers that are socially recognised as being available. He therefore disagrees with Bruce Harris’s alternative explanation, that third-source powers are residual freedoms to do whatever the law does not already prohibit.<sup>83</sup> Perry criticises what he sees as Harris’s false assumption that residual *freedoms* can translate into *powers*, arguing that “The Crown is permitted [free] to do some things it has no power to do... [such as] solving the Middle East crisis in a day, flying to Jupiter, [and] repealing all the laws of France”.<sup>84</sup> Perry also takes issue with the idea that third-source powers must be seen as having a *legal* basis, hence his “social recognition” justification for most of them.

Space precludes anything more than brief discussion of this complex issue, but I raise it because both accounts might be thought to present difficulties for my argument that the law should follow a source-based amenability test. If third-source powers really are residual freedoms similar to those enjoyed by individuals (Harris’s account), or if at least some of them are not *legal* powers (Perry’s), then the basis for regarding them as functions with a public source might seem unclear.<sup>85</sup>

There are two responses to this point. First, neither author’s account of the constitutional basis for third-source power seems right. Perry’s “social recognition” account entails that some of the Crown’s powers are “outside the law”,<sup>86</sup> which Perry admits is an “unusual and serious threat to the rule of law”.<sup>87</sup> Of the two accounts, Harris’s therefore seems preferable – although both are open to question for drawing analogies with the position of the individual, an approach that has been forcefully criticised

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<sup>81</sup> As recognised in e.g. *R (New London College) v Secretary of State for the Home Department* [2013] UKSC 51; [2013] 1 W.L.R. 2358.

<sup>82</sup> Perry (2015) 131 L.Q.R. 652, at 658.

<sup>83</sup> Bruce Harris, ‘The “Third Source” of Authority for Government Action’ (1992) 108 L.Q.R. 626; ‘The “Third Source” of Authority for Government Action Revisited’ (2007) 123 L.Q.R. 225.

<sup>84</sup> Perry (2015) 131 L.Q.R. 652, at 656.

<sup>85</sup> Elliott [2012] NZLR 75, at 83.

<sup>86</sup> Perry (2015) 131 L.Q.R. 652, at 653.

<sup>87</sup> Perry (2015) 131 L.Q.R. 652, at 670.

elsewhere.<sup>88</sup> Harris's "residual freedom" explanation also presents constitutional problems of its own, because it provides that the Crown is free to act without legal authority when other organs of state are not. The idea that this difference in position can be justified by reference to the Crown's status as a corporation sole has been doubted,<sup>89</sup> including by Harris himself.<sup>90</sup>

The second response is that it is wrong to assume, which both Elliott and Perry seem to,<sup>91</sup> that third-source powers must be amenable to judicial review. The answer surely hinges on the issue of precisely what it is that third-source power allows the Crown to do. Like the related issue of the constitutional basis for such powers, this is also matter of some debate that is not fully resolved by analogising with the legal position of private individuals – as Lord Sumption suggested when he questioned whether third-source power could justify "public or governmental action, as opposed to purely managerial acts of a kind that any natural person could do, such as making contracts, acquiring or disposing of property, hiring and firing staff and the like".<sup>92</sup> With the Harris-Perry focus on the individual in mind, it is arguable that third-source power should only be subject to the ordinary common law, because individuals would not be amenable to judicial review when engaging in the same activities. This argument would of course be precluded by the rule of law where the government is using a power that allows it to override the individual's common-law rights, as statutory and prerogative power may do. Since the ordinary common law is necessarily useless to the individual in the face of such a power, judicial review is the only means of ensuring that the government is subject to the law. But there is no reason why the rule of law should require judicial review when the government is exercising no greater legal power than the individual enjoys. The requirement that government acts under law can surely be satisfied by applying the ordinary common law alone. There may of course be other arguments for believing the review of third-source power to be desirable, but this simply returns us to the vexed issue of how to weigh these arguments up; of what, precisely, are the underlying purposes of judicial review. As Elliott's thesis recognises, the answer to this question may be that there are numerous purposes whose relative importance is a matter of debate rather than anything more concrete.

Elliott's attempt to justify judicial review of third-source power on the basis of the need to "take account of institutional as well as legal considerations when determining questions of amenability",<sup>93</sup> is unpersuasive. It defeats the focus on the function to say that the activity should be reviewable merely

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<sup>88</sup> John Howell, 'What the Crown May Do' [2010] J.R. 36.

<sup>89</sup> Howell [2010] J.R. 36, at [24]-[27].

<sup>90</sup> Harris (2007) 123 L.Q.R. 225, at 239.

<sup>91</sup> Elliott [2012] NZLR 75, at 84, 94; Perry (2015) 131 L.Q.R. 652, at 665. The view is reflected in e.g. *Shrewsbury and Atcham Borough Council v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148; [2008] 3 All E.R. 548, at [74] (Richards L.J.).

<sup>92</sup> *New London College* [2013] UKSC 51, at [28].

<sup>93</sup> Elliott [2012] NZLR 75, at 94.

because the state performs it. Nor is the problem solved by noting that a given act may be more harmful when done by the state than by the individual,<sup>94</sup> true as the observation may be. It is also difficult to see where Elliott's argument ends. If all government third-source powers belong in judicial review, then why not all other forms of government power – contractual power, for instance – too? Indeed, it is for institutional reasons that Sue Arrowsmith advocates treating government contractual power as straightforwardly reviewable: “It is the public nature of the body which is significant and not the nature of the function”.<sup>95</sup> Elliott does not expressly address the issue but cautions against “improperly elevat[ing] institutional above functional considerations”, emphasising that judicial review should extend beyond the institutions of the state, to the exercise of *de facto* governmental functions by non-state bodies as well.<sup>96</sup> The ultimate amenability question, he says, is whether the defendant's act “engages the normative criteria underpinning judicial review to an extent sufficient to render such review constitutionally appropriate”.<sup>97</sup> But this is precisely the difficulty with Elliott's central thesis: how to balance the various considerations – what constitutes a “sufficient extent” to which those criteria are engaged, or an “improper” elevation of institutional above functional considerations – is necessarily unclear. The critic is left feeling that Elliott is able to balance these factors to whatever end he desires.

### *The Argument from Scope*

A second counter-argument is that my source-based focus is unfair for being under-inclusive; that my conception of a public function fails to do its job if judicial review only reaches into the private sphere to the extent of the *statutory* powers of bodies that are not institutionally part of the state. We have already seen that Elliott is keen to justify judicial review of contracted-out services, for example,<sup>98</sup> and that in his tripartite list of principles he includes consideration (c) (securing the public interest in good governance) to guard against what could otherwise be seen as an under-inclusive amenability test. Some authors would even go one step further and argue that judicial review should apply to *any* bodies – whether institutionally public or private – who wield power that has the potential to impact on the rights and interests of those who are subject to it.<sup>99</sup> We are reminded of their Lordships' concerns in *Datafin*, that the City Panel wielded enormous power and could oppress its subjects by going off the rails.

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<sup>94</sup> As does Howell [2010] J.R. 36, at [97].

<sup>95</sup> Arrowsmith (1990) 106 L.Q.R. 277, at 283.

<sup>96</sup> Elliott [2012] NZLR 75, at 94.

<sup>97</sup> Elliott [2012] NZLR 75, at 94.

<sup>98</sup> As is Paul Craig, ‘Contracting Out, the Human Rights Act and the Scope of Judicial Review’ (2002) 118 L.Q.R. 551.

<sup>99</sup> John Laws, ‘Public law and employment law: abuse of power’ [1997] P.L. 455, at 464; Gordon Borrie, ‘The regulation of public and private power’ [1989] P.L. 552, at 558-559; Lord Woolf, ‘Public law – private law: why the divide? – a personal view’ [1986] P.L. 220, at 224-225; Hunt, ‘Constitutionalism and the Contractualisation of Government in the United Kingdom’, at pp 32-33.

This counter-argument is an important one. At least in conversation it tends to be the first port of call for lawyers who seek to challenge particular conceptions of amenability that they feel to be too broad or narrow, armed with examples of what they regard to be rank unfairness generated by a given test. The argument that the meaning of a public function should be sensitive to the demands of fairness is not without force given that the common law does not operate in a vacuum. Nevertheless, it is important to be aware of the subjectivity that necessarily underlies arguments as to the normatively 'correct' or 'fairest' scope of judicial review. While there would be little dissent from the view that the *state* should be required to use its power fairly, the question becomes much thornier and more contestable where private defendants are concerned. In this context, courts asking whether a function should be subjected to judicial review are essentially asking whether one private individual should be made to act fairly for the benefit of another or others. In judicial review the question is also a peculiarly general, abstract one – which manifestations of private bodies' power should be exercised fairly? – rather than the more specific, private-law one of which acts should generate liability in discrete contexts like negligence, nuisance and breach of contract.

It will therefore be difficult for mere appeals to fairness to demonstrate that a particular approach to amenability must be wrong. There is scarcely a single amenability formulation that could please everybody. While Campbell and other authors feel that the courts should subject monopoly industry self-regulators to judicial review,<sup>100</sup> for example, it is doubtful that it is self-evidently 'fairer' for this to happen. The matter is a deeply complex one with no obvious answer. It calls for careful consideration of the regulators' own interests, the interests of third parties like their employees, wider factors relating to the economy of the particular industries in which the regulators operate, and so on. It is a classically "polycentric" matter,<sup>101</sup> in Lon Fuller's words,<sup>102</sup> doubtfully resolvable by technocratic or judicial-style reasoning alone.<sup>103</sup> Polycentricity need not preclude review, of course,<sup>104</sup> but there is a strong case against assuming that the requirements of fairness in this context can be easily, still less instinctively, discerned. It is also no answer to argue that the common law should be on guard with such bodies because judicial review is concerned to prevent abuse of power, and the claimant may have no other remedy. This wrongly assumes not just that abuse of power is the only relevant consideration, but also that private-law doctrines such as contract and tort may justifiably fail to remedy the perceived injustice

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<sup>100</sup> E.g. Jack Anderson, 'An Accident of History: Why the Decisions of Sports Governing Bodies are not Amenable to Judicial Review' (2006) 35 *Comm. L. World. Rev.* 173; Eileen Kelly, 'Judicial review of sports' bodies decisions: comparable common law perspectives' [2011] *I.S.L.R.* 71.

<sup>101</sup> Nigel Fleming, 'Judicial Review of Regulators', in Christopher Forsyth et al (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford: Oxford University Press, 2010) p 332, at p 341.

<sup>102</sup> Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harv. L. Rev.* 353.

<sup>103</sup> See also Dawn Oliver, 'Towards the Horizontal Effect of Administrative Justice Principles', in Michael Adler (ed), *Administrative Justice in Context* (Oxford: Hart Publishing, 2010) p 229, at p 230.

<sup>104</sup> Paul Craig, 'Political Constitutionalism and Judicial Review', in Forsyth et al, *Effective Judicial Review*, p 19, at p 39.



faced by the claimant when judicial review may not. Quite why judicial review rather than any other area of law should have to bear this burden is unclear, as is the reason why Parliament cannot be left some space to remedy the injustice by enacting new legislation. When the underlying issues are complex and better suited to democratic than judicial resolution, this may even be the preferable option. Hoffmann L.J. once remarked along similar lines that it was improper to “patch up the remedies available against domestic bodies by pretending that they are organs of government.”<sup>105</sup> As Coulson J. recently put it, “the administrative court [*sic.*] is not there simply to fill the gaps left by statute or the common law”.<sup>106</sup>

It is also important to appreciate that not even an approach that is capable of working what are accepted to be unfair results *must* be written off. Fairness, of course, is not the only relevant consideration in the present context. It must be balanced against the requirements of certainty and predictability. Even the thinnest conceptions of the rule of law require the law to guide individuals’ conduct effectively.<sup>107</sup> In any event, a better alternative to abandoning an ‘unfair’ approach might be to give that approach a broad-brush interpretation (as I suggested above, in relation to contracted-out functions). Particularly under the Human Rights Act 1998,<sup>108</sup> but outwith that context as well,<sup>109</sup> the courts have shown a keen ability to interpret the law creatively where important rights and interests are at stake. The idea of broadly construing rather than abandoning a source-based approach would also seem particularly attractive when what is being championed as its replacement is the inherently vaguer alternative of asking simply whether the ‘power’ or ‘impact’ of the function is such as to render the function amenable to review. Formulations like these have been criticised by authors, including Elliott,<sup>110</sup> who rightly doubt the courts’ capacity to develop and apply them reliably. Julia Black believes such formulations “[do] too much, by [assimilating] all forms of power under one rubric and [applying] the same principles to them”.<sup>111</sup> Paul Craig argues that they render the public-function test a mere “conclusory label” that “cannot guide our reasoning in advance”.<sup>112</sup> John Allison remarks that such formulations move lawyers “from the unknown to the more unknown”, requiring judges to elaborate a genealogy of power along Foucauldian or Galbraithian lines.<sup>113</sup> Arguments against a particular

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<sup>105</sup> *R v Disciplinary Committee of the Jockey Club, ex p. Aga Khan* [1993] 1 W.L.R. 909, at 933; [1993] 2 All E.R. 853.

<sup>106</sup> *T.H. v Chapter of Worcester Cathedral* [2016] EWHC 1117 (Admin), at [76].

<sup>107</sup> See e.g. Joseph Raz, ‘The Rule of Law and its Virtue’ (1977) 93 L.Q.R. 195, at 202.

<sup>108</sup> Both under the interpretative obligation (s.3) and the common-law horizontal effect of the ECHR (ss.6(1) and 6(3)(a)).

<sup>109</sup> As in e.g. *Anisimic Ltd. v Foreign Compensation Commission* [1969] 2 A.C. 147; [1969] 1 All E.R. 208; *R v Home Secretary, ex p. Simms* [2000] 2 A.C. 115; [1999] 3 All E.R. 400; *R (Evans) v Attorney-General* [2015] UKSC 21; [2015] A.C. 1787.

<sup>110</sup> Elliott [2012] NZLR 75, at 76.

<sup>111</sup> Black (1996) 59 M.L.R. 24, at 29.

<sup>112</sup> Paul Craig, ‘Public Law Control over Private Power’, at p 200.

<sup>113</sup> John Allison, ‘Theoretical and Institutional Underpinnings of a Separate Administrative Law’, in Taggart, *The Province of Administrative Law*, p 71, at pp 87-88.

approach that over-focus on the *scope* of review are therefore unable to demonstrate much, and are not a convincing reason – at least on their own – for returning to the drawing board.

### *The Doctrinal Argument*

Finally, it might be argued that my focus on source of power is unsustainable in the light of the apparent decision to usher in a novel, nature-based approach in *Datafin*. Space precludes a detailed analysis of the case-law here, but the short response is that the argument over-states the effect of *Datafin* and subsequent cases. It is far from clear that an approach based on the nature of the power has taken hold, at least fully.<sup>114</sup> Perhaps because Lloyd L.J. suggested in *Datafin* that the nature of the power only becomes relevant between the extremes of statutory power (reviewable) and contractual power (unreviewable),<sup>115</sup> the courts remain quite some way from abandoning source of power altogether. It is tolerably clear that the exercise of statutory power by private bodies will be amenable to review – at least when the power is a public-interest power of the sort exercised by private hospitals, discussed above. The courts have also been historically reluctant to review exercises of contractual power (even by obviously public bodies such as local authorities),<sup>116</sup> a position they appear to maintain even post-*Datafin*.<sup>117</sup> Not only is the position maintained, but some judges strongly believe it to be correct. Brooke L.J. referred to its logic as “unassailable” in *R (West) v Lloyd’s of London*.<sup>118</sup> In *R v Football Association, ex p. Football League Ltd.*, Rose J. described it as an “inescapable” and “not...unwelcome” conclusion that the F.A.’s monopoly regulatory functions were private, rooted as they were in the contractual agreement of the F.A.’s members.<sup>119</sup> The idea that we are forced to abandon a source-based focus is certainly not beyond question, either on the theoretical or doctrinal planes.

### *Summary*

The source of the power is far from irrelevant, yielding important indications as to its public-private status. Campbell’s model is flawed for overlooking this crucial point. This is not to say that a simple distinction between statutory/prerogative and *de facto*/contractual power is a panacea that constitutes the sum-total of the public-function definition, but Elliott’s suggestion that we are forced to abandon the

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<sup>114</sup> See Hunt, ‘Constitutionalism and the Contractualisation of Government in the United Kingdom’.

<sup>115</sup> *Datafin* [1987] Q.B. 815, at 847.

<sup>116</sup> See e.g. *R v East Berkshire Health Authority, ex p. Walsh* [1985] Q.B. 152; [1984] 3 All E.R. 425; *R v Post Office, ex p. Byrne* [1975] I.C.R. 221. cf *R v Secretary of State for the Home Department, ex p. Benwell* [1985] Q.B. 554; [1984] 3 All E.R. 854.

<sup>117</sup> As is evident in particular from the ill-fated challenges to the contractual regulatory functions of the Jockey Club: *Aga Khan* [1993] 1 W.L.R. 909; *R v Jockey Club, ex p. Massingberd-Mundy* [1993] 2 All E.R. 207; (1990) 2 Admin. L.R. 609. cf *R v Jockey Club, ex p. RAM Racecourses Ltd.* [1993] 2 All ER 225; (1991) 5 Admin. L.R. 265.

<sup>118</sup> [2004] EWCA Civ 506; [2004] 3 All E.R. 251, at [30].

<sup>119</sup> [1993] 2 All E.R. 833, at 838-839; (1992) 4 Admin. L.R. 623.

search for a harder-edged amenability test in favour of a more subjective and open-ended principles-based approach, is unconvincing.

## (ii) *De Facto* Power and Remedies in Judicial Review

By abandoning source of power, Campbell's model draws no distinction between *de facto* and other forms of monopoly power such as statutory and prerogative monopoly power. If monopolistic, all *de facto* power presumptively becomes public and amenable to review. I say 'presumptively', because Campbell attempts to argue that some *de facto* monopoly power such as parental power will nevertheless be unreviewable.<sup>120</sup> In doing so he exposes a further flaw in his thesis that I discuss in Part B. For now, however, let us confine ourselves to his default position that there is no distinction between the different sources of monopoly power in amenability terms, and that *de facto* monopoly power exercised by private bodies is all public and at least *prima facie* amenable to review. The difficulty with this position lies in the consequences of a finding of unlawfulness. In judicial review the typical remedy awarded to the claimant is a quashing order, which renders the unlawful decision invalid and of no legal effect.<sup>121</sup> Two particular problems arise.

First, quashing the behaviour may be futile in practice. Because bodies that are not institutionally part of the state are free to act as they wish within the confines of the law, as seen above, they are permitted to engage in all manner of damaging activities towards others that a quashing order will be unable to remedy. If for instance a private defendant uses its monopoly *de facto* power to drive a competitor into bankruptcy, or a monopoly sports regulator decides to release damning information about an athlete to the outside world, the damage has already been done by the time the case reaches court. Nullifying the defendant's act is pointless. Hence why other areas of law that have developed to regulate *non*-state defendants take a different approach. Private-law causes of action such as contract and tort tend to provide for damages as the typical remedy, in order that the consequences of the unlawful act may be compensated;<sup>122</sup> and criminal law seeks to punish and deter unlawful behaviour by meting out fines, prison sentences and the like. It is far from clear that *judicial review* should be the law's choice tool for responding to the abuse of monopoly *de facto* power.<sup>123</sup>

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<sup>120</sup> Campbell (2009) 125 L.Q.R. 491, at 515-517.

<sup>121</sup> The idea that unlawful behaviour should be *invalid* has been criticised before as not always suiting the circumstances of the case: by e.g. Peter Cane, 'Do banks dare lend to local authorities?' (1994) 110 L.Q.R. 514.

<sup>122</sup> In contract law, specific performance and injunctions having the same effect will only be available where damages would be an inadequate remedy: *South African Territories Ltd. v Wallington* [1898] A.C. 309; *Sky Petroleum v V.I.P. Petroleum Ltd.* [1974] 1 W.L.R. 576; [1974] 2 All E.R. 400.

<sup>123</sup> The point is not of course that judicial review should never apply to bodies capable of inflicting irreversible damage. The state may readily do so.

The second problem is the effect on the defendant, which seems unusually draconian compared to other areas of law. Even when a quashing order *is* of use in the sense that it can undo the defendant's behaviour by rendering it invalid, it would seem to make a significant inroad into the defendant's autonomy. Being invalid, the unlawful act is not just unlawful but is of *no legal effect*. This is in stark contrast to both private and criminal law, where consequences – damages, a criminal conviction etc. – follow from an unlawful act, but the validity of the act is left untouched.<sup>124</sup>

By its end-game of *invalidating* unlawful acts, judicial review denies defendants something that these other areas of law would seem to allow in practice: namely, the choice of breaking the law and paying the price for their behaviour. A strange kind of choice this may seem, but it may be enormously beneficial to non-state bodies and individuals in practical terms. They differ fundamentally from the state in having interests of their own, of course; and it is natural that they would want to weigh up risks and make rational, autonomous choices about how to act. Businesses who wish to commit 'efficient breach' by reneging on one contract and paying damages in order to do business elsewhere; lazy professionals who would rather risk disciplinary action than bother themselves to do competent work; murderers who would rather serve a jail sentence than pass up the opportunity to dispatch their enemies – all believe they have something to gain from acting unlawfully and facing whatever penalty applies. The point is not that such behaviour is laudable or should be lawful, but rather that remedying the unlawfulness by stripping the behaviour of any legal effect is a relatively extreme move, even if it can be achieved in practice. The problem is a general one with private defendants exercising *de facto* power, monopoly power included.

Two solutions might be suggested to this problem, neither of which is satisfactory. The first is to withhold a quashing order if the effects on the defendant are thought to be too severe. There is no *right* to a remedy in judicial review. Remedial discretion makes for uncertainty, however. It is no substitute for squarely confronting the underlying issue that judicial review seems remedially unsuited to private defendants exercising *de facto* power when compared to other areas of law. If this is the true position then litigants, claimants included, are better informed of this before proceedings begin. It also tends to offend against the rule-of-law requirement of equality before the law for the courts to acknowledge that one private individual has acted unlawfully towards another, but nevertheless refuse to remedy that unlawfulness. This is not to say it never happens,<sup>125</sup> but rather that it will be something that courts and claimants alike will want to avoid. Indeed, rule-of-law concerns have been raised in relation to the recent procedural reforms that require relief to be withheld in judicial review if "highly likely that the

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<sup>124</sup> Void contracts are a notable exception, however.

<sup>125</sup> It did in e.g. *Stevenage Borough F.C. Ltd. v Football League Ltd.* (1997) 9 Admin. L.R. 109 (not a judicial review case), but the reasons were the claimant's conduct and the effect that issuing a remedy would have on third parties.

outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.”<sup>126</sup>

The second potential solution is therefore to issue another remedy in place of a quashing order. Damages are unavailable in judicial review for a breach of the principles of good administration,<sup>127</sup> but declarations, injunctions and mandatory and prohibiting orders may be issued.<sup>128</sup> Problems also arise here, however. Declarations would serve little purpose. As mere (albeit binding) statements of the parties’ rights, there is no means of enforcement. Defendants are free to ignore them. Declarations may be a powerful remedy where the defendant exercises statutory or prerogative power,<sup>129</sup> because a declaration of unlawfulness will indicate that the defendant’s behaviour is *ultra vires* the defendant’s powers and therefore liable to be struck down if it continues. This is required by parliamentary sovereignty and the rule of law, especially where the defendant purports to use its power to override the claimant’s common-law rights. Declarations may also be useful in relation to contractual power, because a declaration of unlawfulness will indicate that there is no contractual right to do what has been done. But with private defendants’ *de facto* power, the position necessarily differs and the constitutional impetus to quash the unlawful act disappears. And if the courts *do* quash it, then we simply return to the first problem, of quashing acts that are carried out pursuant to *de facto* power.<sup>130</sup>

This leaves the specific remedies of injunctions and mandatory and prohibiting orders, all of which require the defendant either to do, or to refrain from doing, a particular act. Again, however, problems arise with making any of these the typical remedy in judicial review. None of them provide for the invalidation of the defendant’s behaviour in the way a quashing order does, but in practice the result is nevertheless similar because the defendant is forced by the court to act lawfully in the end. Liability in contempt of court and hence fines – in more serious cases,<sup>131</sup> sequestration of assets and jail – are used by the court not just to punish the disobedience but to secure practical compliance with the order.<sup>132</sup>

Once again, I am not suggesting that unlawful behaviour of the sort I describe is laudable or must be dealt with leniently. Nor am I overlooking the obvious fact that criminal law may make severe inroads into the autonomy of defendants who receive stiff sentences for committing serious crimes. The point is

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<sup>126</sup> Senior Courts Act (‘SCA’), s.31(2A), added by the Criminal Justice and Courts Act 2015, s.84. See Bingham Centre for the Rule of Law, JUSTICE and the Public Law Project, *Introduction to the Criminal Justice and Courts Act 2015, Part 4* (London, 2015), at [1.20].

<sup>127</sup> SCA, s.31(4).

<sup>128</sup> SCA, s.31(1)-(2).

<sup>129</sup> *O’Reilly* [1983] 2 A.C. 237, at 274 (Lord Diplock).

<sup>130</sup> The argument would apply equally to a declaration that had the same effect as a quashing order in these circumstances.

<sup>131</sup> For discussion see *Arlidge, Eady & Smith On Contempt* (London: Sweet & Maxwell, 2011), at [12-19] – [12-24].

<sup>132</sup> These are said to be the dual objectives in the contempt context: *Robinson v Robinson* [2001] EWCA Civ 2098, at [11] (Ward L.J.); *Crystalmews v Metterick* [2006] EWHC 3087, at [8] (Lawrence Collins J.).

subtler: that the remedial scheme in judicial review is geared towards abuse of power by the state, and by private defendants exercising statutory powers, and poses problems when extended to private defendants' *de facto* power. When considered alongside the theoretical significance of source of power, it becomes clear that regulating such power in judicial review is by no means something we are driven to accept in the way Campbell and other authors seem to suggest.

## B. MONOPOLY POWER: THE NORMATIVE CASE

In this Part I turn to two further flaws in Campbell's normative case for the monopoly power model: first, that it focuses simply on the degree of power; and second, that his attempts to bolster the model using the rule of law are unpersuasive.

### (i) Degree of Power

The monopoly power model's sole concern is whether or not the power is monopolistic. Its focus is therefore entirely on the *degree* of power; on *how much* power the body exercises. Only monopolistic functions will be amenable to judicial review.

The focus on degree of power can generate arbitrary results in practice, however. Those familiar with the film *Forrest Gump* will recall that the protagonist's fledgling shrimping company acquired a monopoly overnight when a hurricane sank his competitors' boats. The circumstances were entirely beyond the company's control, yet under Campbell's model its good fortune would render it amenable to review. To some this may be unproblematic – if monopoly power requires regulation in judicial review, then so be it – but the example also unmask a deeper conceptual problem. It demonstrates that monopolies can be created in a number of ways: by one's own efforts in acquiring the monopoly, by the efforts of another, by mere accident, by statute, by prerogative, and so on. But Campbell claims that monopoly power is *public* in nature, and therefore qualitatively different to all the other forms of power that he necessarily regards as private. He makes no attempt to explain why this is so; to explain what is distinctively *public* about monopoly power. The entirety of his normative case rests on the argument that monopoly power should be exercised fairly and therefore subjected to judicial review. But this is a different argument. It explains why monopoly power should be regulated according to the substantive principles of good administration, not why it is *public* in nature.

In fact, the monopoly model says rather odd things about the nature of public power. First, in focussing on the degree of power alone, it ignores the obvious point that the state is more than simply a

monopoly actor. As discussed above, the state also claims the *authority* to use its power. Second, the monopoly model also fails to appreciate that quintessentially public functions may not be monopolistic anyway. Take phone-tapping, for example, which few would have difficulty regarding as a public function and thus amenable to judicial review, at least when done by the state.<sup>133</sup> Under the Regulation of Investigatory Powers Act 2000, it can be carried out by a range of bodies including the Metropolitan Police and G.C.H.Q.<sup>134</sup> But if multiple bodies happen to tap the same individual's phone, the implication is that the function becomes private under Campbell's model because neither would perform a monopoly function towards that individual. The example speaks once more to the model's potential to generate arbitrary results in practice, but it also emphasises something more obvious: that monopoly power fails to capture publicness in the way Campbell contends.

How might Campbell respond to these points? One line of argument might be that my concern with crafting a neat conceptual definition of publicness misses the point. What really matters, Campbell might say, is that judicial review extends to the *right* functions; that the *right* kind of power is subjected to the substantive principles of good administration. Whether those functions are public – whether anything at all is public – is scarcely the point. This is certainly how he puts his normative case: monopoly powers should be regarded as public because they ought to be exercised fairly.

Two responses may be made, however. First, the argument is vulnerable to the point made in Part A: that the 'correct' scope of review is inherently difficult to determine. Appeals to the 'correct' or 'fairest' scope of review tend to beat the air, exposing Campbell to the criticism that a public-private approach built upon more normatively settled foundations would persuade where his cannot. Second, in any event it is important not to run away with the idea that 'publicness' is somehow an empty conceptual shell into which any chosen content can simply be poured. Both Campbell's and Elliott's theses are open to criticism for overlooking this point. Campbell asks simply how far judicial review should extend; Elliott asks simply what judicial review is for. Neither of them attempt to say anything about what publicness means. It is true of course that the question of which functions are public is slippery, but this does not mean that nothing reliable can be said about it at all. Indeed, I managed to arrive at a source-based distinction between public and private functions by relying on constitutional fundamentals with which few would disagree: that in liberal societies the individual is free to do whatever is not unlawful; that the state is not; and hence that the state, unlike the individual, must demonstrate a legal basis for its actions. The abstract meaning of a public function may be difficult to determine, but this is no excuse

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<sup>133</sup> cf *Malone v Metropolitan Police Commissioner (No. 2)* [1979] Ch. 344; [1979] 2 All E.R. 620, impugned in *Malone v UK* (1984) 7 E.H.R.R. 14.

<sup>134</sup> Sections 7(1)-(2).

for ignoring the issue altogether. It may also help us to arrive at a relatively clear, workable amenability test for the reasons expressed in Part A.

## (ii) Monopoly Power and the Rule of Law

The second significant flaw in Campbell's normative case is his attempt to rely on the rule of law.<sup>135</sup> The argument is that the rule of law "underpins judicial review" and "may operate with regard to power that would not in any conventional sense be described as governmental",<sup>136</sup> thus requiring the subjection of monopoly power to judicial review. Campbell is at pains to stress that neither "formalist" nor "substantive" conceptions of the rule of law limit their focus to power "exercised pursuant to law."<sup>137</sup>

It will be immediately apparent that the argument is circular, seemingly relying on the correctness of the very point Campbell sets out to establish: that *monopoly* power is the kind of power that the law should be concerned to keep in check. Independently of his earlier normative arguments in favour of subjecting monopoly power to judicial review, there is no attempt to explain why monopoly power is or should be the rule of law's central concern. But even if we take Campbell's word for it on that point, it still gets him nowhere in terms of his overall argument. His thesis is not just that the *law* should regulate monopoly power, but more specifically that monopoly power should be regulated in *judicial review*. The whole argument, of course, is directed towards persuading readers that monopoly powers are public functions to which the principles of good administration should apply. Monopoly power may of course be regulated through judicial review, but so may it be regulated through legislation, or the private law.<sup>138</sup> Why the rule of law is supposed to prefer judicial review is unclear. Indeed, it has recently been argued that the "rule of law and private law are not strangers",<sup>139</sup> private law being said to play an important role in safeguarding the rule of law's values.<sup>140</sup> Campbell recognises that the law has been historically concerned to guard against the abuse of monopoly power exercised by a variety of bodies including private persons such as innkeepers, wharfingers and so on.<sup>141</sup> But it has achieved this in a variety of ways, not simply through judicial review or through its historical predecessor, the High Court's jurisdiction to issue the prerogative orders of certiorari, mandamus and prohibition. What Campbell needs is a *rule-of-law* reason to prefer judicial review to any other area of law as a means of regulating

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<sup>135</sup> Campbell (2009) 125 L.Q.R. 491, at 511-515.

<sup>136</sup> Campbell (2009) 125 L.Q.R. 491, at 511.

<sup>137</sup> Campbell (2009) 125 L.Q.R. 491, at 513.

<sup>138</sup> Campbell (2009) 125 L.Q.R. 491, at 504-505.

<sup>139</sup> William Lucy, 'The Rule of Law and Private Law', in Lisa Austin and Dennis Klimchuk (eds), *Private Law and the Rule of Law* (Oxford: Oxford University Press, 2014) p 41, at p 66.

<sup>140</sup> See also Trevor Allan, 'The Rule of Law as the Rule of Private Law', in *Private Law and the Rule of Law*, p 41 at p 67.

<sup>141</sup> Campbell (2009) 125 L.Q.R. 491, at 504-506. For analysis of the historical case-law, see Paul Craig, 'Constitutions, property and regulation' [1991] P.L. 538.



monopoly power, but no such reason is provided. It will also be clear from the discussion in Part A that there are distinct problems with attempting to regulate *de facto* non-state power in judicial review anyway. I put the case no higher here, but private law may be better suited to regulating such power for these reasons alone.

Given Campbell's rule-of-law argument it is also worth considering what he would make of cases like *Nagle v Feilden*,<sup>142</sup> *Mullins v McFarlane*<sup>143</sup> and *Bradley v Jockey Club*,<sup>144</sup> where the courts use private-law doctrine to check the monopoly power exercised by the self-appointed regulator of the horseracing industry. If the rule of law really does require monopoly power to be regulated specifically in judicial review, then presumably Campbell sees both cases as flying in the face of a bedrock constitutional principle; as serious usurpations of judicial review by the private law. It is a logical consequence of his argument that the rule of law requires the regulation of monopoly power in judicial review rather than by any other legal means, but nowhere is the point addressed.

### C. MONOPOLY POWER: THE DOCTRINAL CASE

Campbell's normative case for the monopoly model is therefore flawed, both on its own terms and for its eschewal of the source of the power as a factor in the public-function definition. This Part explores his doctrinal case, which I argue is also weak.

Campbell admits that the monopoly model "has received little express support",<sup>145</sup> but claims that it accords with the courts' decisions to review statutory power and prerogative power, and also the *non*-statutory regulatory power that has been subjected to review in cases like *Datafin* and *R v Advertising Standards Authority Ltd., ex p Vernons Organisations Ltd.*<sup>146</sup> Sensibly, his claim is not that the model explains every decided case, but rather that it explains the bulk of the case-law.<sup>147</sup> Even so, however, significant flaws in the model can be seen: first, when examining the cases in which the courts *do* review a given function; and second, when examining the cases in which they do *not*.

#### (i) Decisions to Review

As to the first set of cases, it is clear that Campbell's model is not borne out by the case-law in the manner he claims. It is unsurprising that the model tends to accord with the review of statutory and

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<sup>142</sup> [1966] 2 Q.B. 633; [1966] 1 All E.R. 689.

<sup>143</sup> [2006] EWHC 986; [2006] L.L.R. 437.

<sup>144</sup> [2005] EWCA Civ 1056; [2006] L.L.R. 1.

<sup>145</sup> Campbell (2009) 125 L.Q.R. 491, at 511-515, 495.

<sup>146</sup> [1992] 1 W.L.R. 1289; [1993] 2 All E.R. 202. See Campbell (2009) 125 L.Q.R. 491, at 496-504.

<sup>147</sup> Campbell (2009) 125 L.Q.R. 491, at 495.

prerogative powers, because these powers will usually be monopolistic in the sense that they belong only to a single body.<sup>148</sup> But it does not follow that the monopolistic nature of these functions provides the *reason* for review. As Elliott rightly observes, the argument “confuses empirical observation with normative justification”.<sup>149</sup> Indeed, it is difficult to believe that the courts would subscribe to the monopoly model given the various normative flaws that are apparent in it.

It should also be borne in mind that statutory and prerogative powers are not necessarily monopolistic in the sense that *only* one person can exercise them. Campbell is right to observe that prerogative powers are vested in the Crown,<sup>150</sup> but he overlooks that they can be exercised by any central government department on the Crown’s behalf. In terms of statutory power, moreover, a sovereign Parliament can provide for as many bodies as it wishes to perform the same activity. Examples of power-sharing can be seen in s.4 of the Police Act 1964, which provided for the power to equip police forces with weapons to be exercised by the Home Secretary as well as the forces themselves;<sup>151</sup> and the Local Government Act 2000, which permits local authorities to “co-operate with, facilitate or co-ordinate the activities of, any person” in the promotion of economic, social and environmental wellbeing.<sup>152</sup>

Campbell also encounters difficulty with third-source power (what he calls “broad-sense” prerogative power),<sup>153</sup> which was discussed above. In that discussion I argued that third-source power does not necessarily need to be subjected to review, because the answer depends on the unresolved question of the constitutional basis of such power, and what it allows the Crown to do. But Campbell seems to think it should be reviewable, and that under his model it *is*, and so it is pertinent to examine his claim. In my view the claim is flawed, because third-source power is also not necessarily monopolistic. Like prerogative powers, third-source powers are held by the Crown and may be exercised by multiple ministries on the Crown’s behalf. There is no reason why the third-source power to form contracts, for instance, may not be exercised by the Home Office or Foreign and Commonwealth Office as much as by any other central government department.<sup>154</sup>

Campbell acknowledges this problem but responds that it fails to undermine his model, because so far the courts have only subjected monopolistic third-source powers to judicial review. None of the

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<sup>148</sup> As Campbell recognises: (2009) 125 L.Q.R. 491, at 496.

<sup>149</sup> Elliott [2012] NZLR 75, at 79.

<sup>150</sup> Campbell (2009) 125 L.Q.R. 491, at 499.

<sup>151</sup> *R v Secretary of State for the Home Department, ex p. Northumbria Police Authority* [1989] Q.B. 26; [1988] 1 All E.R. 556.

<sup>152</sup> Section 2(4)(d).

<sup>153</sup> Campbell (2009) 125 L.Q.R. 491, at 499.

<sup>154</sup> In any event judicial review claims cannot be brought against the Crown as an abstract entity: it “cannot conduct litigation except in the name of an authorised government department or, in the case of judicial review, in the name of a minister.”: *M. v Home Office* [1994] 1 A.C. 377, at 424 (Lord Woolf); [1993] 3 All E.R. 537.

decided cases involved powers that were exercised by multiple bodies, he says.<sup>155</sup> The cases he proffers in support of this point are *G.C.H.Q.*<sup>156</sup> and *R v Criminal Injuries Compensation Board, ex p. Lain*.<sup>157</sup> In each, he says, the function in question – respectively, providing employment in the signals intelligence sector and dispensing compensation to crime victims – was performed by the defendant and nobody else at the relevant time. But even if his account of the background to these cases is accurate on the facts as they stood at the time the cases were decided, the arguments are “strained”, as Elliott observes.<sup>158</sup> The reader is left with the uneasy feeling that Campbell’s model simply tracks the case-law to date, relying on the simple fortuity that the courts may not yet have had the chance to review a non-monopolistic third-source power, or that a power that may have been exercisable by multiple bodies was in practice monopolistic because it only happened to be exercised by a single body. If in future the courts decide to review beyond either of these contours, Campbell’s model will be unable to account for the decision. Campbell would doubtless be confident that this would never happen, or that any decision on the courts’ part to extend judicial review in this way would be wrong: if his model is accurate, the courts should decline to review the exercise of non-monopolistic third-source power precisely because it is non-monopolistic. But this would be a question-begging response, for taking both his normative and doctrinal cases to be correct. The correctness of those cases is the very issue in question.

## **(ii) Refusals to Review**

The greater part of the weakness in Campbell’s doctrinal claim is exposed by considering those cases in which the courts do *not* review a given power. There are countless examples of situations in which the courts refuse to review power that is evidently monopolistic. One such case, *R (Holmcroft Properties) v K.P.M.G.*, was decided only last year. *Holmcroft* concerned the power of accountancy firm K.P.M.G., as an independent reviewer, to approve the offers of compensation for mis-selling made by Barclays Bank to its customers. K.P.M.G. was the only body performing the function in question – under Campbell’s definition, it was exercising a monopoly power – but the Administrative Court held that its duties did “not have sufficient public law flavour to render it amenable to judicial review”.<sup>159</sup> Significantly, the courts are notably reluctant to review the power exercised by monopoly regulators such as the

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<sup>155</sup> Campbell (2009) 125 L.Q.R. 491, at 499-501.

<sup>156</sup> *Council of Civil Service Unions v Minister for Civil Service* [1985] A.C. 374.

<sup>157</sup> [1967] 2 Q.B. 864; [1967] 2 All E.R. 770.

<sup>158</sup> Elliott [2012] NZLR 75, at 77.

<sup>159</sup> *Holmcroft* [2016] EWHC 323 (Admin), at [38].

Jockey Club, at least where the power has a contractual basis.<sup>160</sup> The same is true of the Chief Rabbi's disciplinary powers, as demonstrated by *R v Chief Rabbi of the United Hebrew Congregations of Great Britain, ex p. Wachmann*.<sup>161</sup>

Campbell's answer to this doctrinal dilemma is twofold.<sup>162</sup> First, he argues that cases refusing to recognise monopoly power as public are wrongly decided. He takes issue with the courts' typical justification, namely that the monopoly functions in cases like *Wachmann* are private because the claimant has voluntarily assumed the defendant's power over them, for instance by willingly operating in a particular industry under a particular regulator's jurisdiction. As Farquharson L.J. stated in relation to the monopoly power of the Jockey Club, for example, "nobody is obliged to race his horses in this country".<sup>163</sup> Campbell believes such a justification to be unpersuasive because *statutory* jurisdictions can also be voluntarily assumed, yet statutory power nevertheless tends to be amenable to review. I would agree that the courts' justification is inadequate: a better justification would be that the powers in question, being contractual, were private because they lacked a public *source*. But Campbell's insistence that the results in these cases are wrong is problematic, because it involves simply writing off an established line of case-law. His doctrinal case therefore begins to crack.

Campbell's second answer to the dilemma is more troublesome still. He argues that some of the *results* in these cases can nevertheless be salvaged and "reconceptualised"<sup>164</sup> as instances of non-justiciability: the courts are right to regard the functions of religious leaders, for example, as beyond the reach of judicial review. Even though it wrongly classified the Chief Rabbi's function as private rather than public, Campbell argues that *Wachmann*, for example, was therefore rightly decided on the facts.

The argument is fraught with difficulty, however. First, it is not the case that religious functions are non-justiciable *per se*. In *R v Bury Park Imam, ex p. Ali*,<sup>165</sup> which Campbell omits to mention, the Court of Appeal upheld Auld J.'s ruling that an Imam exercised only private functions when compiling a list of the eligible voters in his mosque's forthcoming executive committee election. The judgment was put on the basis that the Imam's power derived from the consensual submission of his subjects, which, again, I would agree with Campbell is an unpersuasive justification. But their Lordships were nevertheless clear that the religious nature of the Imam's functions would not be enough on its own to preclude review. Roch L.J., with whom Balcombe and McCowan L.JJ. agreed, stated that the religious element "would not have led me to reject this appeal, had I been persuaded that the Imam was exercising a public law function."

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<sup>160</sup> See the cases at fn 117.

<sup>161</sup> [1992] 1 W.L.R. 1036; [1993] 2 All E.R. 249.

<sup>162</sup> Campbell (2009) 125 L.Q.R. 491, at 503-504.

<sup>163</sup> *Aga Khan* [1993] 1 W.L.R. 909, at 928.

<sup>164</sup> Campbell (2009) 125 L.Q.R. 491, at 504.

<sup>165</sup> [1994] C.O.D. 142.

Second, the non-justiciability argument exposes a stark tension between Campbell's normative and doctrinal cases. If normative arguments so strongly compel the conclusion that monopoly power must be subjected to judicial review, then Campbell's casual acquiescence in the idea that certain monopoly functions naturally lie beyond the courts' control is difficult to understand. Having set out his normative case in forceful terms, and having attempted to root that case in something as constitutionally fundamental as the rule of law, he then appears to beat a hasty retreat for doctrinal purposes, stressing that regulating monopoly power is not the be-all and end-all:

"It does not follow... that judicial review must always be available in respect of the exercise of monopoly power. The argument that review be available in respect of monopoly power is weighty, but is not incapable of being outweighed. While the subjection of decisions to the principles of good administration – and, thereby, to the requirements of the rule of law – is one concern of English public law, it is not the only concern."<sup>166</sup>

It would seem that normative reason has suddenly given way to simple impressionistic concerns as to how far the net of judicial review should be cast. This is by no means surprising. As argued in Part B, it is difficult to escape the black hole of subjectivity if we begin from the starting point of trying to identify the 'correct' scope of judicial review. Indeed, this element of impressionism is reflected in the arguments Campbell makes about cutting down the scope of the monopoly model, which he admits is capable of generating *prima facie* counterintuitive results, for example when it implies that the monopoly functions exercised by parents towards their children are public.<sup>167</sup> The other weighty concerns that he believes to prevail over the need to subject monopoly power to judicial review include upholding "important constitutional value[s]" such as "maintaining the separation between Church and State", or safeguarding the autonomy of the family unit.<sup>168</sup>

The result is that parental and religious monopoly functions may be excluded from the scope of review without doing the monopoly model any harm, or so we are told. Yet there is scarcely any attempt to justify these views. In the case of parental functions, Campbell's thinking rests on the mere assumption that "no one would think that decisions made by a parent with regard to its child should be subject to judicial review".<sup>169</sup> He simply asserts without more that there are no constitutional issues in play with sports regulators.<sup>170</sup> But even if correct – and I doubt that it is self-evidently right for the courts

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<sup>166</sup> Campbell (2009) 125 L.Q.R. 491, at 516.

<sup>167</sup> Campbell (2009) 125 L.Q.R. 491, at 515-516.

<sup>168</sup> Campbell (2009) 125 L.Q.R. 491, at 515-516.

<sup>169</sup> Campbell (2009) 125 L.Q.R. 491, at 515.

<sup>170</sup> Campbell (2009) 125 L.Q.R. 491, at 516-517.

to subject monopoly regulators to judicial review, as explained above – these statements remain descriptive ones that say nothing by way of justification for the position. Quite how we are supposed to identify the important constitutional values of the sort Campbell mentions remains a mystery, as does the means of determining whether these values are sufficiently important to trump what he claims is otherwise a strong normative case in favour of judicially reviewing monopoly power.

#### **D. CONCLUSION**

In the face of the flaws identified in the monopoly model, there would seem to be two choices: either embrace the model, warts and all, or consider the possibility that an alternative model may be more plausible in both normative and doctrinal terms. As I have argued, we should give serious thought to whether this alternative model might be based on source of power, unfashionable as that idea may seem. This conclusion arises partly from Campbell's failure to establish his case, but also from the difficulties I have identified with the underlying view that source of power has had its day. Neither theoretically nor doctrinally is this view convincingly established. Elliott's reminder that source of power should feature in the amenability test is welcome, but does not go far enough. Rather than committing to source of power as a reliable indicator of publicness, his thesis falters by balancing it against other considerations in a multi-factorial and ultimately subjective assessment. Source of power deserves more attention and prominence than that. My intention has not been to advance a developed case for an alternative source-based model, as I have said. The extent of the doctrinal support for a source-based model – in particular whether it can accommodate *Datafin*, which appeared to usher in a novel nature-based test – remains to be explored in future work. But I hope to have contributed to the debate by explaining why the fashionable view of amenability is mistaken and why, counter-intuitively, last season's clothes may be desirable once again.